Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

1 June 2016*

(Common agricultural policy — Direct payments — Additional criteria for ecological focus area with short rotation coppice — Article 45(8) of the Delegated Regulation (EU) No 639/2014 — Article 46(9)(a) of Regulation (EU) No 1307/2013 — Misuse of power — Legal certainty — Non-discrimination — Legitimate expectations — Right to property — Obligation to state reasons)

In Case T-662/14,

Hungary, represented by M. Fehér and G. Koós, acting as Agents,

applicant,

v

European Commission, represented by H. Kranenborg, A. Sipos and G. von Rintelen, acting as Agents,

defendant,

ACTION for annulment of that part of the first sentence of Article 45(8) of Commission Delegated Regulation (EU) No 639/2014 of 11 March 2014 supplementing Regulation (EU) No 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and amending Annex X to that regulation (OJ 2014 L 181, p. 1), which is worded: 'by selecting from the list established pursuant to Article 4(2)(c) of Regulation (EU) No 1307/2013 the species that are most suitable from an ecological perspective, thereby excluding species that are clearly not indigenous',

THE GENERAL COURT (Fourth Chamber),

composed of M. Prek, President, I. Labucka and V. Kreuschitz (Rapporteur), Judges,

Registrar: S. Bukšek Tomac, Administrator,

having regard to the written procedure and further to the hearing on 2 December 2015,

gives the following

* Language of the case: Hungarian.

Judgment[1]

Background to the dispute

1 Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 (OJ 2013 L 347, p. 608) ('the Basic Regulation'), lays down a new legal framework for direct support in the context of the common agricultural policy (CAP).

2 One of the objectives of the CAP, as redefined by the Basic Regulation, is the enhancement of environmental performance through a mandatory 'greening' component of direct payments which will support agricultural practices beneficial for the climate and the environment applicable throughout the European Union. For that purpose, Member States should use part of their national ceilings for direct payments in order to grant, on top of the basic payment, an annual payment for compulsory practices to be followed by farmers addressing, as a priority, both climate and environment policy goals. One of these practices, which should apply to the whole eligible area of the holding, consists in the establishment of ecological focus areas (recital 37 of the Basic Regulation). Those areas should be established, in particular, in order to safeguard and improve biodiversity on farms (recital 44 of the Basic Regulation).

3 The Basic Regulation thus provides that, where the arable land of a holding covers more than 15 hectares, the farmer is to ensure that, from 1 January 2015, an area corresponding to at least 5% of the arable land of the holding declared by the farmer is ecological focus area (Article 46(1) of the Basic Regulation).

4 The areas that can be considered to be ecological focus area by the Member States include areas with short rotation coppice with no use of mineral fertiliser or plant protection products (Article 46(2)(g) of the Basic Regulation).

5 In order to ensure that ecological focus areas are established in an efficient and coherent way, the Basic Regulation provides that the power to adopt certain acts should be delegated to the Commission in respect of laying down further criteria for the qualification of areas as ecological focus areas (recital 45 of the Basic Regulation). Thus, Article 46(9)(a) of the Basic Regulation provides that the Commission is empowered to lay down further criteria for determining which types of areas referred to in paragraph 2 of that article, including areas with short rotation coppice as referred to above, may be considered ecological focus area.

6 On the basis of those powers conferred, the Commission adopted Delegated Regulation (EU) No 639/2014 of 11 March 2014 supplementing the Basic Regulation (OJ 2014 L 181, p. 1) ('the Delegated Regulation').

7 In the Delegated Regulation, the Commission defined the additional criteria for certain types of ecological focus area. For areas with short rotation coppice with no use of mineral fertiliser and/or plant protection products, the Commission stated that Member States were to establish a list of species that can be used for this purpose, by selecting from the list established pursuant to Article 4(2)(c) of the Basic Regulation the species that are most suitable from an ecological perspective, thereby excluding species that are clearly not indigenous (Article 45(8) of the Delegated Regulation).

1 — Only the paragraphs of this judgment which the Court considers it appropriate to publish are reproduced here.

8 Following publication of the Delegated Regulation, Hungary brought an action before the General Court seeking annulment of Article 45(8) of that regulation in so far as it provides that, for short rotation coppice, only the species that are most suitable from an ecological perspective may be selected, thereby excluding species that are clearly not indigenous ('the contested limitation').

Procedure and forms of order sought

9 By application lodged at the Registry of the General Court on 15 September 2014, Hungary brought the present action.

10 Hungary claims that the Court should:

— annul the part of the first sentence of Article 45(8) of the Delegated Regulation inasmuch as it states: 'by selecting from the list established pursuant to Article 4(2)(c) of Regulation (EU) No 1307/2013 the species that are most suitable from an ecological perspective, thereby excluding species that are clearly not indigenous';

— order the Commission to pay the applicant's costs.

11 The Commission contends that the Court should:

— dismiss the action;

— order Hungary to pay the costs.

12 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure. The parties presented oral argument and replied to the oral questions of the Court at the hearing on 2 December 2015.

Substance

13 Hungary considers in essence that, in adopting the contested limitation, the Commission, first, exceeded its powers and restricted unduly the Member States' discretion; second, took account of criteria that are contrary to the Basic Regulation; third, misused its power; fourth, infringed the principle of legal certainty; fifth, infringed the principle of non-discrimination; sixth, infringed the principle of the protection of legitimate expectations; seventh, infringed the principle of the protection of the right of ownership; and, eighth, infringed the obligation to state reasons.

The Commission's exceeding its powers and the undue restriction on the Member State's discretion

14 Hungary submits, in essence, that the very fact of the Commission's imposing the contested limitation is unlawful because in so doing it exceeded the powers conferred on it by the Basic Regulation and rendered moot the Member States' power to choose tree species which may constitute short rotation coppice meeting the criteria to be an ecological focus area. In Hungary's submission, the apparently broad wording of the powers conferred on the Commission arises from the fact that the areas in respect of which it is empowered to define the criteria are particularly heterogeneous. This does not necessarily give the Commission broad discretion. The selection of tree species liable to be used is for the Member States to decide in their discretion, as conferred by Article 4(1)(k) and (2)(c) of the Basic Regulation and recital 55 of the Delegated Regulation. That power and discretion preclude the Commission from exercising its powers as it did in this case. The contested limitation renders the Member States' discretion meaningless. The Commission denies that, in adopting the contested limitation, it exceeded the powers conferred on it by the Basic Regulation.

15 In the light of those complaints, it should be noted that Article 4(1)(k) of the Basic Regulation defines 'short rotation coppice' as 'areas planted with tree species of CN code 0602 90 41 to be defined by Member States that consist of woody, perennial crops, the rootstock or stools of which remain in the ground after harvesting, with new shoots emerging in the following season' and provides for 'a maximum harvest cycle to be determined by the Member States'. Moreover, Article 4(2)(c) of the Basic Regulation provides that the Member States are to 'define the tree species qualifying for short rotation coppice and determine the maximum harvest cycle in respect of those tree species, as referred to in point (k) of paragraph 1 [of Article 4 of the Basic Regulation]'.

16 Article 46(9)(a) of the Basic Regulation, moreover, confers on the Commission the power to adopt delegated acts laying down further criteria for the types of areas referred to in Article 46(2) thereof to qualify as ecological focus area. Under the latter provision, Member States are to decide, by 1 August 2014, that one or more of the areas listed therein are to be considered to be ecological focus area. That list includes areas with short rotation coppice with no use of mineral fertiliser and/or plant protection products. Thus, Article 46(9)(a) of the Basic Regulation confers on the Commission the power to lay down criteria for determining which areas with short rotation coppice with no use of mineral fertiliser and/or plant protection products will be considered to be ecological focus area.

17 Recital 45 of the Basic Regulation, which sets out the grounds for conferring the powers it does on the Commission, states that, '[i]n order to ensure that ecological focus areas are established in an efficient and coherent way, while taking into account Member States' specific characteristics, the power to adopt certain acts should be delegated to the Commission in respect of laying down further criteria for the qualification of areas as ecological focus areas; recognising other types of ecological focus areas; establishing conversion and weighting factors for certain types of ecological focus area; establishing rules for the implementation, by Member States, of a part of the ecological focus area at regional level; laying down rules for collective implementation of the obligation to keep ecological focus areas by holdings in close proximity; establishing the framework for the criteria, to be defined by Member States, for identifying such close proximity; and establishing the methods of determination of the ratio of forest to agricultural land'.

18 Under Article 46(9)(a) of the Basic Regulation, the Commission adopted the contested limitation, which imposes an additional criterion in order for an area to qualify as ecological focus area. The contested limitation excludes non-indigenous species of short rotation coppice on an area intended as ecological focus area. Thus, under Article 46(2)(g) of the Basic Regulation and the contested limitation, an area with short rotation coppice qualifies as ecological focus area on the condition that there has been no use of mineral fertiliser or treatment with plant protection products and the coppice is made up of indigenous species.

19 Nor did the Commission exceed its powers in adopting the contested limitation. Under Article 46(9)(a) of the Basic Regulation, it laid down a new criterion for determining which types of areas referred to in Article 46(2) of the Basic Regulation could be considered ecological focus area. Neither Article 46(9)(a) of the Basic Regulation nor the other provisions in that regulation provide that that criterion could not relate to the species which could be planted. Furthermore, for the reasons set out in paragraph 31 et seq. below, the contested limitation contributes towards the establishment of the ecological focus area in an efficient and coherent manner, having regard to the objective of safeguarding the biodiversity of those areas.

20 Nor, in adopting the contested limitation, did the Commission infringe the Member States' powers and discretion for defining the tree species that may be planted in order to create short rotation coppice.

21 The Basic Regulation, in particular Article 4(1)(k) and (2)(c), does not give Member States exclusive power to select which tree species may be used to establish ecological focus area. As rightly pointed out by the Commission in its written pleadings, although the Member States may draw up a list of the tree species applicable to plantations of short rotation coppice, only those tree species meeting the

conditions laid down in the Basic Regulation and the additional criteria laid down by the Commission in the exercise of its powers may be taken into account for qualifying ecological focus area as agricultural land.

22 Nor does the contested limitation reduce the Member States' discretion to a purely symbolic level or make it meaningless in practice. Hungary has not disputed the Commission's finding that the notifications given by the Member States under Article 46(8) of the Basic Regulation that they had designated indigenous tree species to create areas with short rotation coppice qualifying as ecological focus area. It is apparent from those notifications that 18 Member States and regions and 2 other Member States selected a total of 19 tree species for establishing ecological focus area with short rotation coppice. The Member States thus gave notice of species meeting both the requirements under the Basic Regulation and the requirement imposed under the contested limitation. The Commission further stated that, in almost 75% of the Member States, including Hungary, there were tree species that could be used to establish short rotation coppice that could qualify as ecological focus area. Thus, in the notification given pursuant to Article 46(8) of the Basic Regulation, Hungary designated five tree species used for short rotation coppice, namely the poplar, willow, alder, ash and maple.

23 Nor has Hungary sufficiently substantiated its argument that the Member States' discretion has been rendered meaningless because no indigenous tree species is economically profitable. Hungary does not explain on what basis it believes profitability is a factor to be taken into account in laying down new criteria for determining ecological focus area, especially since, for short rotation coppice, Article 46(2) of the Basic Regulation provides that the equivalent of 5% of land used to meet ecological obligations must not be situated on arable land. Moreover, and in any event, Hungary has not adduced any evidence demonstrating that the cultivation of indigenous tree species for short rotation coppice was not economically profitable.

24 The foregoing assessments are not called into question by Hungary's reliance on recital 55 of the Delegated Regulation. That recital states that '[t]he limited use of inputs needed for the cultivation of short rotation coppice results in indirect benefits for biodiversity' and that '[f]or that purpose, Member States should lay down the conditions that apply to this type of ecological focus area, by specifying the list of tree species that may be used and the rules as regards the use of inputs'. Thus, the main focus of that recital is inputs. It cannot prevail over Article 46(9)(a) of the Basic Regulation or Article 45(8) of the Delegated Regulation, which contains the contested limitation. Hungary acknowledges this point implicitly in its application, where it states that 'unlike the articles themselves, the recitals do not have binding legal effect'. Lastly, inasmuch as that recital recognises some power for the Member States, it should be noted that, for the reasons set out in paragraph 21 above, it does not preclude the Commission from adopting the contested limitation. Therefore, that recital has no bearing on the assessments set out above.

25 For all the foregoing reasons, it is appropriate to reject Hungary's assertions to the effect that, in adopting the contested limitation, the Commission exceeded its powers and restricted unduly the Member States' discretion.

The taking into account of the species that are most suitable from an ecological perspective and the exclusion of non-indigenous species

26 Hungary takes the view that, in inserting the restrictive condition requiring the use of the 'species that are most suitable from an ecological perspective', the Commission adopted a position that is not recognised by the Basic Regulation and is hardly compatible with the spirit of that regulation. Hungary also disputes the position that only indigenous species are the most suitable from an ecological perspective. An exclusion of non-indigenous species can be acceptable only if the areas directly affecting biodiversity are ecologically useful. This is, of course, scientifically inaccurate and

incompatible with the Basic Regulation. An exclusion of non-indigenous species on the basis of the criterion of the 'species that are most suitable from an ecological perspective' is vitiated by a manifest error of assessment.

27 When account is taken of the species that are most suitable from an ecological perspective in order to define an area with short rotation coppice as ecological focus area, it must be borne in mind that, in matters concerning the CAP, the EU institutions enjoy a broad discretion regarding definition of the objectives to be pursued and choice of the appropriate means of action. It follows that review by the EU Courts as to the substance is limited to verifying whether the exercise by the institutions of their powers is vitiated by a manifest error of appraisal, whether there has been a misuse of powers, or whether the institutions have manifestly exceeded the limits of their discretion (see judgment of 9 September 2011 in *France* v *Commission*, T-257/07, EU:T:2011:444, paragraphs 84 and 85 and the case-law cited).

28 Moreover, recital 44 of the Basic Regulation states:

'Ecological focus areas should be established, in particular, in order to safeguard and improve biodiversity on farms. The ecological focus area should therefore consist of areas directly affecting biodiversity such as land lying fallow, landscape features, terraces, buffer strips, afforested areas and agro-forestry areas, or indirectly affecting biodiversity through a reduced use of inputs on the farm, such as areas covered by catch crops and winter green cover. …'

29 Thus, ecological focus areas should be established in order to safeguard and improve biodiversity on farms.

30 In taking into account species it considers to be the most suitable from an ecological perspective, that is to say, the most suitable species in terms of respect for balance in the natural environment and respect for the ecosystem of the area in question, the Commission chose a criterion that contributes towards the safeguarding of biodiversity. The safeguarding of the balance of the area's natural environment in the choice of species contributes towards the safeguarding of the farm's biodiversity by impeding alterations to it. The Commission thus did not make a manifest error of assessment in taking into account the species that are most suitable from an ecological perspective for defining ecological focus area within the meaning of the Basic Regulation. Taking that criterion into account is not contrary to the Basic Regulation or to its spirit.

31 Inasmuch as Hungary disagrees that only indigenous species are the most suitable species from an ecological perspective, it should be observed that the Commission could, without making a manifest error of assessment, consider that the planting of tree species which are clearly not indigenous as short rotation coppice did not guarantee that that coppice would safeguard or improve the biodiversity of the farm areas on which it was planted. As indicated in paragraph 28 above, the objective pursued through having ecological focus area is to safeguard or improve the biodiversity of farming areas. The safeguarding of biodiversity in those areas implies the safeguarding of their natural environment. The fact that the Commission required coppice made up of indigenous species will contribute towards the safeguarding of that environment and, therefore, of the biodiversity of the areas in question. A species in considered to be indigenous when it grows naturally in a region without having been imported. By contrast, the planting of species which are clearly not indigenous does not necessarily contribute towards the safeguarding of the natural environment or the ecosystem of agricultural land, and Hungary has not adduced any evidence whatsoever establishing that, in the present case, non-indigenous tree species will safeguard and improve biodiversity on farms. Accordingly, the Commission could, without making a manifest error of assessment and without infringing the Basic Regulation, restrict the planting of tree species on ecological focus area with short rotation coppice to indigenous species.

32 Hungary further considers that, in focusing on areas that directly affect biodiversity in the adoption of the contested limitation, the Commission disregarded the second approach, referred to in recital 44 of the Basic Regulation, by which biodiversity can also be favoured through the use of areas directly affecting it, although it does not explain clearly the reasons for that choice in the recitals of the Delegated Regulation or in its statement in defence. The Commission disputes those arguments.

33 It is apparent from recital 44 of the Basic Regulation (see paragraph 28 above) that ecological focus area must be made up of areas directly or indirectly affecting biodiversity, without there being any hierarchy among the two options.

34 In the present case, the contested limitation is aimed at establishing ecological focus area on the basis of their direct effect on biodiversity, as it requires the use of indigenous species for establishing ecological focus area with short rotation coppice.

35 That choice by the Commission cannot be regarded as being contrary to the spirit of the Basic Regulation, as that regulation provides for the possibility of taking measures directly affecting biodiversity. In the exercise of its discretion, the Commission could opt for a measure directly affecting biodiversity. Nor was it necessary to provide any particular explanation for a limitation having an indirect effect, as (i) there is no hierarchy between the two options, and (ii) in the present case there were, in the Member States, in particular Hungary, indigenous tree species that could make up short rotation coppice (see paragraph 22 above). Therefore, Hungary's complaint alleging that the Commission chose a criterion directly favouring biodiversity must be rejected.

36 In the light of all the foregoing considerations, Hungary's complaints to the effect that the limitation in dispute is based on an unsuitable criterion and is vitiated by a manifest error of assessment must be dismissed. …

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders Hungary to pay the costs.

Prek Labucka Kreuschitz

Delivered in open court in Luxembourg on 1 June 2016.

[Signatures]