Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

7 July 2016 *

(Reference for a preliminary ruling — Common agricultural policy — Regulation (EC) No 1698/2005 — Regulation (EU) No 65/2011 — Financing by the EAFRD — Support for rural development — Rules on eligibility of operations and expenditure — Temporal condition — Complete exclusion — Reduction of the aid)

In Case C-111/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upravno sodišče (Administrative Court, Slovenia), made by decision of 10 February 2015, received at the Court on 4 March 2015, in the proceedings

Občina Gorje

v

Republika Slovenija,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, F. Biltgen, A. Borg Barthet, E. Levits (Rapporteur) and M. Berger, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 28 January 2016,

after considering the observations submitted on behalf of:

— the Občina Gorje, by A. Mužina, odvetnik,

— the Slovenian Government, by V. Klemenc, acting as Agent, and B. Jovin Hrastnik, Legal Adviser,

— the Polish Government, by B. Majczyna, acting as Agent,

— the United Kingdom Government, by S. Simmons, acting as Agent, and G. Facenna QC,

— the European Commission, by J. Aquilina and B. Rous Demiri, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 April 2016,

* Language of the case: Slovene.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 71 of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2005 L 277, p. 1).

2 The request has been made in proceedings between the Občina Gorje (commune of Gorje, Slovenia) and Republika Slovenija (Republic of Slovenia) concerning the refusal to pay to that commune aid under a rural development programme co-financed by the European Agricultural Fund for Rural Development (EAFRD).

Legal context

European Union law

3 Recital 61 of Regulation No 1698/2005 was worded as follows:

'In accordance with the principle of subsidiarity and subject to exceptions, there should be national rules on the eligibility of expenditure.'

4 Under Article 71 of that regulation:

'1. Without prejudice to Article 39(1) of Regulation (EC) No 1290/2005, expenditure shall be eligible for a EAFRD contribution if the relevant aid is actually paid by the paying agency between 1 January 2007 and 31 December 2015. Co-financed operations should not be completed before the eligibility starting date.

A new expenditure added at the moment of the modification of a programme referred to in Article 19, shall be eligible from the date of the reception by the Commission of the request for modification of the programme.

2. Expenditure shall be eligible for a EAFRD contribution only where incurred for operations decided on by the Managing Authority of the programme in question or under its responsibility, in accordance with the selection criteria fixed by the competent body.

3. The rules on eligibility of expenditure shall be set at national level, subject to the special conditions laid down by this Regulation for certain rural development measures.

…'

5 Article 74(1) of that regulation provided:

'Member States shall adopt all the legislative, statutory and administrative provisions ... in order to ensure that the [European Union's] financial interests are effectively protected.'

6 Regulation No 1698/2005 was covered by two successive implementing regulations: Commission Regulation (EC) No 1975/2006 of 7 December 2006 (OJ 2006 L 368, p. 74), and then Commission Regulation (EU) No 65/2011 of 27 January 2011 (OJ 2011 L 25, p. 8), which repealed the earlier implementing regulation.

7 Article 30 of Regulation No 65/2011 provides:

‘1. Payments shall be calculated on the basis of what is found to be eligible during the administrative checks.

The Member State shall examine the payment claim received from the beneficiary, and establish the amounts that are eligible for support. It shall establish:

(a) the amount that is payable to the beneficiary based solely on the payment claim;

(b) the amount that is payable to the beneficiary after an examination of the eligibility of the payment claim.

If the amount established pursuant to point (a) exceeds the amount established pursuant to point (b) by more than 3%, a reduction shall be applied to the amount established pursuant to point (b). The amount of the reduction shall be the difference between those two amounts.

However, no reduction shall be applied if the beneficiary can demonstrate that he/she is not at fault for the inclusion of the ineligible amount.

2. Where a beneficiary is found to have intentionally made a false declaration, the operation in question shall be excluded from support from the EAFRD and any amounts already paid for that operation shall be recovered. Moreover, the beneficiary shall be excluded from receiving support under the same measure for the calendar year of finding and for the following calendar year.

…’

8 Under Article 34 of that regulation:

‘1. Regulation (EC) No 1975/2006 is repealed with effect from 1 January 2011.

However, it shall continue to apply in respect of payment claims submitted before 1 January 2011.

…’

Slovenian law

9 The Zakon o kmetijstvu (Law on agriculture, Uradni list RS, št. 45/2008, 57/2012, 90/2012, ‘the ZKme-1’) sets out general provisions concerning rural development.

10 Under Article 10 of the ZKme-1:

‘The Government shall adopt, in accordance with the programming documents, provisions for implementing agricultural policy measures.’

11 Article 12 of that law states:

‘For the purposes of implementing rural development measures, the Government shall determine:

— the type of measures, the conditions, the beneficiaries, the criteria and the procedures for the introduction and implementation of each rural development measure;

— the financial resources for each rural development measure.’

12 As regards decisions on eligibility for funding, Article 53(1) of the ZKme-1 provides:

'The competent authority shall adopt a decision on eligibility for funding addressed to those parties whose applications satisfy the conditions laid down in the legislation and in the invitation to tender, and resources shall be granted to that end.'

13 As regards claims for payment of funding, Article 56(4) of the ZKme-1 is worded as follows:

'The authority shall reject, by decision, any claim that does not satisfy the requirements laid down in the legislation, the invitation to tender or the decision on eligibility for funding.'

14 On the basis of the ZKme-1, the Slovenian Government adopted the Uredba o ukrepih 1., 3. in 4. osi Programa razvoja podeželja Republike Slovenije za obdobje 2007-2013 v letih 2010-2013 (Decree on measures implementing axes 1, 3 and 4 of the Rural Development Programme for the period 2007-2013, Uradni list RS, št. 40/2010, 85/2010, 'the RDP Decree').

15 Under Article 79(4) of the RDP Decree:

'Only expenditure incurred as from the date of adoption of the decision on eligibility for funding up to the completion of the investment project or at the latest 30 June 2015 shall constitute eligible investment expenditure. The beneficiary's entering into an obligation in relation to any funding allocated (concluding a contract of any kind or ordering materials, equipment, services or works) shall be deemed to constitute the first expenditure.'

16 The Ministry of Agriculture, Forestry and Food of the Republic of Slovenia issued an invitation to tender, pursuant to the RDP Decree, in respect of measure 322 'Village renewal and development' ('the invitation to tender').

17 Under the heading 'Conditions of eligibility that must be satisfied when submitting the application under the invitation to tender', Chapter IV/1 of that invitation to tender provides as follows at point 1 of the 'Investment' section:

'Investment may not be commenced before the adoption of the decision on eligibility for funding.'

18 Point 3 of Chapter VI of the invitation to tender provides:

'In accordance with Article 79 of the RDP Decree, investment expenditure shall be eligible for aid where incurred as from the date of adoption of the decision on eligibility for funding up to the completion of the investment project or at the latest 30 June 2015.'

19 Points 4 and 5 of Chapter VI of the invitation to tender state:

'(4) Any general expenses, such as those arising from the preparation of the application, the cost of obtaining the documentation relating to building work, the drawing-up of payment claims, incurred after 1 January 2007 up to the submission of the last claim for payment of funding shall also be eligible for aid. The applicant may not, before the expenditure eligibility starting date, begin works or enter into any obligation in relation to any funding allocated.

(5) The beneficiary's entering into any obligation in relation to any funding allocated (concluding a contract, ordering materials, equipment, services or works) shall be deemed to constitute the first expenditure in accordance with Article 79 of the RDP Decree. The applicant may begin the process of selecting a service provider in accordance with the Law on public procurement, but may not conclude the contract with the selected service provider before the decision on eligibility for funding is adopted.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

20 The Agencija Republike Slovenije za kmetijske trge in razvoj podeželja (Agency of the Republic of Slovenia for Agricultural Markets and Rural Development, 'the Agency') published an invitation to tender with a view to granting financial support for village renewal and development measures within the framework of the Republic of Slovenia's rural development programme for the years 2007 to 2013.

21 On 19 August 2010, the commune of Gorje submitted an application for support under that invitation to tender, in order to obtain EAFRD co-financing for a project for the refurbishment of a building of which it is the co-proprietor.

22 Prior to submitting its application for support, it had organised a procedure for the award of a public contract, at the end of which a works provider was selected. On 12 July 2010, the commune of Gorje signed two contracts with that provider, both containing a condition precedent as regards execution under which those contracts would only produce effects if the project of the commune of Gorje was eligible for the rural development programme funded.

23 By decision of 19 October 2010, the Agency selected the project of the commune of Gorje and granted it co-financing of EUR 128200.52 under that programme.

24 Following the submission, on 1 June 2011, by the commune of Gorje of the payment claim in respect of the sum granted to it, the Agency carried out an on-the-spot check of the building to be refurbished. It thus found, based on the record of works, that the demolition work on the roof of the building had begun on 16 August 2010.

25 However, both the ZKme-1 and the invitation to tender stipulated that only expenditure incurred after the adoption of the decision granting the funding would be eligible for co-financing by the EAFRD.

26 Consequently, by decision of 3 November 2011, the Agency refused to pay any of the aid allocated to the refurbishment operation at issue in the main proceedings.

27 The commune of Gorje brought an action for annulment of the decision of 3 November 2011 before the referring court. Having upheld that commune's application, the Upravno sodišče (Administrative Court, Slovenia) referred the dispute back to the Agency for reconsideration.

28 By decision of 25 April 2013, the Agency refused to pay the aid granted by the decision of 19 October 2010 for a second time. The commune of Gorje has once again challenged that refusal before the referring court.

29 In essence, the commune of Gorje claims, first, that the conditions of eligibility applied by the Agency are stricter than those laid down in Regulation No 1698/2005. Second, it claims that only those works executed on the initiative of the co-proprietor of the building to be refurbished began prior to the submission of the application for support, the commune of Gorje having entered into commitments only on the condition that the aid at issue would be granted.

30 The referring court therefore raises the question of the compatibility of the national provisions in so far as they lay down stricter temporal conditions of eligibility than those under Regulation No 1698/2005. Furthermore, it wishes to know whether that regulation allows national authorities to reject the application for co-financing in its entirety in the event certain expenditure is ineligible, or whether such a penalty is too severe.

31 In those circumstances, the Upravno sodišče (Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Regulation No 1698/2005, in particular Article 71(3) thereof, pursuant to which the rules on eligibility of expenditure are to be set at national level, subject to the special conditions laid down by that regulation for certain rural development measures, be interpreted as precluding the national legislation set out in Article 79(4) of [the RDP Decree] and in point 3 of Chapter VI of the invitation to tender, pursuant to which only expenses incurred after the date of adoption of the decision on the right to obtain funding (until the end of the investment period or, at the latest, 30 June 2015) constitute eligible investment expenditure?

(2) If the answer to the first question is in the negative, must Regulation No 1698/2005, in particular Article 71(3) thereof, be interpreted as precluding the national legislation set out in Article 56(4) of the [ZKme-1], in accordance with which any claim that does not meet the requirements of Article 79(4) of the RDP Decree on eligible investment expenditure incurred after the date of adoption of the decision [on the right to obtain funding] must be rejected in its entirety?'

Consideration of the questions referred

The first question

32 By its first question, the referring court wishes to know whether Article 71 of Regulation No 1698/2005 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which expenditure is eligible for a EAFRD contribution to the co-financing of a rural development operation selected by the Managing Authority of the rural development programme in question or under its responsibility only where it is incurred after the adoption of the decision granting such support.

33 That court considers, in particular, that the national legislation at issue in the dispute before it lays down substantially more restrictive conditions as regards the co-financing of rural development measures than Regulation No 1698/2005, and that it may, therefore, infringe the provisions of that regulation.

34 In this connection, it must be recalled that, although, by virtue of the very nature of regulations and of their function in the system of sources of EU law, the provisions of regulations generally have immediate effect in the national legal systems, without the need for the national authorities to adopt implementing measures, some of their provisions may nevertheless require, for their application, the adoption of implementing measures by the Member States (judgment of 25 October 2012 in *Ketelä*, C-592/11, EU:C:2012:673, paragraph 35; order of 16 January 2014 in *Dél-Zempléni Nektár Leader Nonprofit*, C-24/13, EU:C:2014:40, paragraph 14; and judgment of 15 May 2014 in *Szatmári Malom*, C-135/13, EU:C:2014:327, paragraph 54).

35 Furthermore, it is established that Member States may adopt implementing measures for a regulation provided that they do not thereby obstruct its direct applicability or conceal its nature as an act of EU law; that they specify that they are acting in exercise of a discretion conferred on them under that regulation; and that they adhere to the parameters laid down thereunder (judgments of 25 October 2012 in *Ketelä*, C-592/11, EU:C:2012:673, paragraph 36, and 15 May 2014 in *Szatmári Malom*, C-135/13, EU:C:2014:327, paragraph 55).

36 It is by referring to the relevant provisions of the regulation concerned, interpreted in the light of the objectives of that regulation, that it may be determined whether they prohibit, require or allow Member States to adopt certain implementing measures and, particularly in the latter case, whether the measure concerned comes within the scope of the discretion that each Member State is recognised as having (judgment of 25 October 2012 in *Ketelä*, C-592/11, EU:C:2012:673, paragraph 37).

37 First, as regards the relevant provisions of the regulation in question, it should be observed that under Article 71(3) of that regulation, the rules on eligibility of expenditure are, as a general rule, to be set at national level, subject to the special conditions laid down in that regulation for certain rural development measures (see, inter alia, judgment of 15 May 2014 in *Szatmári Malom*, C-135/13, EU:C:2014:327, paragraph 27).

38 Article 71(1) and (2) of Regulation No 1698/2005 provides that 'co-financed operations should not be completed before the eligibility starting date', namely 1 January 2007, and that expenditure is eligible only where incurred for operations selected by the Managing Authority of the rural development programme in question or under its responsibility.

39 It follows from the foregoing that, in so far as Article 71(3) confers on the Member States the power in principle to set the rules on eligibility of expenditure, the Member States are justified in laying down a condition of eligibility as regards expenditure, inter alia linked to that expenditure being incurred after the approval of the application for support.

40 That interpretation is supported by the fact that such a condition contributes to implementing the principle of allocating expenditure to a particular operation, as laid down in Article 71(2) of Regulation No 1698/2005.

41 Second, as regards the objective of Regulation No 1698/2005, it should be observed that, as set out in recital 5 thereof, its objective is to support rural development. Accordingly, a condition limiting the eligibility of expenditure relating to a co-financed operation only to expenditure incurred after the decision granting support is consistent with that objective since it ensures, as the Advocate General stated in point 50 of his Opinion, a more efficient allocation of EAFRD funds. First, such a condition enables better targeting of the allocation of funds, by reducing the risks linked to changes in circumstances that may occur between the date of implementing expenditure and that of the adoption of the decision granting [support]. Second, such a condition serves to reduce the risk of funds being allocated to investments for which public funding is not necessary, those investments being already in progress, or even completed, before the grant of the support.

42 Furthermore, it must be noted that, under Article 74(1) of Regulation No 1698/2005, the Member States are to adopt all the legislative, statutory and administrative provisions to ensure that the EU's financial interests are effectively protected. However, where support is paid under the EAFRD for expenditure incurred before the very adoption of the decision granting [support], verification of the relevance of such expenditure might therefore be made more difficult, with the result that the efficiency of such protection may be weakened.

43 Third, it is not apparent from the order for reference that the national legislation at issue in the main proceedings obstructs the direct applicability of Regulation No 1698/2005 or conceals its EU law nature. On the contrary, Article 12 of the ZKme-1 provides that it is for the purposes of implementing rural development measures that the government is to determine the type of measures, the conditions, the beneficiaries, the criteria and the procedures for the introduction and implementation of each rural development measure. In any event, it is for the referring court to carry out the necessary verifications in that regard.

44 In the light of the foregoing considerations, it must be held that, subject to those verifications, in stipulating that it is only expenditure in respect of an operation selected with a view to EAFRD co-financing incurred after the adoption of the decision granting the support that is eligible for that co-financing, the Republic of Slovenia did not exceed the discretion conferred on it by Regulation No 1698/2005.

45 It follows that Article 71 of Regulation No 1698/2005 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which expenditure is eligible for a EAFRD contribution to the co-financing of an operation selected by the Managing Authority of the rural development programme in question or under its responsibility only where it is incurred after the adoption of the decision granting such support.

The second question

46 By its second question, the referring court asks, in essence, whether Article 71(3) of Regulation No 1698/2005 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for the rejection in its entirety of a payment claim relating to an operation selected for EAFRD co-financing where certain expenditure incurred in respect of that operation was incurred prior to the adoption of the decision granting such support.

47 In this connection, it should be observed that, as stated in paragraphs 38 and 39 of this judgment, while Article 71(2) and (3) of Regulation No 1698/2005 provides that it is only expenditure incurred in respect of an operation selected by the Managing Authority of the rural development programme in question or under its responsibility that is eligible for a EAFRD contribution, it confers on Member States, in principle, the task of setting the rules on eligibility of expenditure.

48 Although those provisions set the framework as to the conditions of eligibility of expenditure for a EAFRD contribution that may form the subject matter of a payment claim, they do not, however, specify the consequences as regards the amount of the payment of a failure to comply with one of those conditions.

49 In those circumstances, it must be pointed out that Article 30 of Regulation No 65/2011, which is applicable to payment claims submitted as from 1 January 2011 in accordance with Article 34(1) of that regulation, relates specifically to reductions and exclusions of expenditure incurred in respect of operations eligible for EAFRD co-financing.

50 Article 30(1) of Regulation No 65/2011 provides, in essence, that the Member States are to examine the payment claim for the purpose of establishing the amounts that are eligible for support. Accordingly, if the amount payable under EAFRD co-financing based solely on the payment claim exceeds by more than 3% the amount payable after an examination of the eligibility of the payment claim, a reduction is to be applied to the latter amount corresponding to the difference between those two amounts.

51 Moreover, Article 30(2) of Regulation No 65/2011 states that any intentional false declaration by the beneficiary of the support is to entail the exclusion of the operation in question in its entirety from support from the EAFRD and the recovery of any amounts already paid for that operation.

52 In the present case, the order for reference states that certain expenditure in respect of the operation at issue in the main proceedings was incurred prior to the adoption of the decision granting support. Moreover, the referring court has stated that, under the national provisions relating to the conditions of eligibility of expenditure, namely Article 56(4) of the ZKme-1, read in conjunction with Article 79(4) of the RDP Decree, where part of the expenditure in respect of an operation selected for

EAFRD co-financing has been incurred before the adoption of the decision granting support, the payment claim relating to the entirety of the operation selected is to be rejected by the competent authority.

53 However, as the Advocate General stated in point 79 of his Opinion, the Member States cannot apply so radical a payment refusal measure to situations other than the situation provided for in Article 30(2) of Regulation No 65/2011, in which a false declaration is made intentionally by the beneficiary of the support. In all other cases, Article 30 of that regulation provides for a reduction of the amount of support, calculated in accordance with the method laid down in Article 30(1) of that regulation.

54 Such a method, consisting in excluding ineligible expenditure, in the circumstances of the main proceedings, namely the expenditure incurred prior to the adoption of the decision granting support, includes a dissuasive factor, since the amount actually payable is reduced by a substantially higher amount than that corresponding to the ineligible expenditure. In those circumstances, such a method tends to prevent 'deadweight' effects whilst conserving a proportionate character, since expenditure that is in fact eligible is not entirely excluded from support.

55 In the light of the foregoing considerations, the answer to the second question is that Article 71(3) of Regulation No 1698/2005, read in conjunction with Article 30 of Regulation No 65/2011, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for the rejection in its entirety of a payment claim relating to an operation selected for EAFRD co-financing where certain expenditure incurred in respect of that operation was incurred prior to the adoption of the decision granting such support, where the beneficiary of the support did not intentionally make a false declaration in its payment claim.

Costs

56 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 71 of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which expenditure is eligible for a European Agricultural Fund for Rural Development contribution to the co-financing of an operation selected by the Managing Authority of the rural development programme in question or under its responsibility only where it is incurred after the adoption of the decision granting such support.**

2. **Article 71(3) of Regulation No 1698/2005, read in conjunction with Article 30 of Commission Regulation (EU) No 65/2011 of 27 January 2011, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for the rejection in its entirety of a payment claim relating to an operation selected for European Agricultural Fund for Rural Development co-financing where certain expenditure incurred in respect of that operation was incurred prior to the adoption of the decision granting such support, where the beneficiary of the support did not intentionally make a false declaration in its payment claim.**

[Signatures]