Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 26 June 2019[1]

Case C-386/18

Coöperatieve Producenorganisatie in Beheersgroep Texel UA
v
Minister van Landbouw, Natuur en Voedselkwaliteit

(Request for a preliminary ruling from the College van Beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry, Netherlands))

(Reference for a preliminary ruling – Common fisheries policy (CFP) – Regulation (EU) No 508/2014 – European Maritime and Fisheries Fund (EMFF) – Production and marketing plans – Article 66(1) – Financial support for the preparation and implementation of such plans – Lack of any provision in national law for subsidy applications to be made – Right to financial support conferred by the regulation – Direct effect – Conditions of eligibility of expenditure – Specific rules – Member States' discretion to determine the amount of financial support)

I. Introduction

1. Does a producer organisation, the activity of which consists in taking measures to promote rational fishing practices and better conditions of sale for fishery products, have a right to co-funding from the government of a Member State in respect of the preparation and implementation of its production and marketing plan?

2. That, in essence, is the question raised by the referring court, which has before it the refusal of an application made by Coöperatieve Producentenorganisatie in Beheersgroep Texel UA ('PO Texel') by the Minister van Landbouw, Natuur en Voedselkwaliteit (Minister for Agriculture, Nature and Food Quality; 'the Minister'), on the ground that, at the time when it was submitted by the producer organisation (PO Texel), which was before 2006, national law did not make any provision for such applications to be made.

3. The Court is thus asked to rule, *first*, on whether it is compatible with EU law for national measures not to provide for co-financing of expenditure incurred in 2014 out of European funds. If such measures are contrary to EU law, it will be necessary for the Court, *second*, to determine whether the relevant provisions of EU law can provide the legal basis for granting the financial support sought by PO Texel.

1 Original language: French.

II. Legal background

A. European Union law

1. The CMO Regulation

4. Recital 7 of Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000 ('the CMO regulation'),[2] states:

'Fishery producer organisations and aquaculture producer organisations ("producer organisations") are the key to achieving the objectives of the [Common Fisheries Policy, ("the CFP")[3]] and of the CMO. It is therefore necessary to enhance their responsibilities and to provide the necessary financial support to allow them to play a more meaningful role in the day-to-day management of fisheries, whilst respecting the framework defined by objectives of the CFP. …'

5. Article 28 of the CMO regulation, entitled 'Production and marketing plan', provides:

'1. Each producer organisation shall submit a production and marketing plan for, at least, its main marketed species to its competent national authorities for approval. …

…

3. The competent national authorities shall approve the production and marketing plan. Once the plan is approved, the producer organisation shall immediately implement it.

…

5. The producer organisation shall prepare an annual report of its activities under the production and marketing plan and shall submit it to its competent national authorities for approval.

6. Producer organisations may receive financial support for the preparation and implementation of production and marketing plans in accordance with a future Union legal act establishing the conditions for the financial support for maritime and fisheries policy for the period 2014–2020.

…'

2 OJ 2013 L 354, p. 1.

3 See Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ 2013 L 354, p. 22; 'the CFP regulation'), particularly Article 35(1) and (3) relating to the CMO.

2. The CSC Regulation

6. The fourth paragraph of Article 1 of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 ('the CSC regulation'),[4] provides:

'The rules set out in this Regulation shall apply without prejudice to … the specific provisions provided for in the following Regulations:

…

(6) a future Union legal act establishing the conditions for the financial support for maritime and fisheries policy for the programming period 2014-2020 (the "EMFF Regulation").'

7. Point 14 of Article 2 of the CSC regulation defines a 'completed operation' as 'an operation that has been physically completed or fully implemented and in respect of which all related payments have been made by beneficiaries and the corresponding public contribution has been paid to the beneficiaries'.

8. Under the heading 'Eligibility [of expenditure]', Article 65(1), (2) and (6) of that regulation states:

'1. The eligibility of expenditure shall be determined on the basis of national rules, except where specific rules are laid down in, or on the basis of, this Regulation or the Fund-specific rules.

2. Expenditure shall be eligible for a contribution from the [European Structural and Investment Funds (ESI Funds)[5]] if it has been incurred by a beneficiary and paid between the date of submission of the programme to the [European] Commission or from 1 January 2014, whichever is earlier, and 31 December 2023. …

…

6. Operations shall not be selected for support by the ESI Funds where they have been physically completed or fully implemented before the application for funding under the programme is submitted by the beneficiary to the managing authority, irrespective of whether all related payments have been made by the beneficiary.'

3. The EMFF Regulation

9. Article 66 of Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council ('the EMFF regulation'),[6] headed 'Production and marketing plans', provides:

'1. The EMFF shall support the preparation and implementation of production and marketing plans referred to in Article 28 of [the CMO regulation].

4 OJ 2013 L 347, p. 320.

5 See recital 2 of the CSC regulation.

6 OJ 2014 L 149, p. 1.

2. Expenditure related to production and marketing plans shall be eligible for support from the EMFF only after approval by the competent authorities in the Member State of the annual report referred to in Article 28(5) of [the CMO regulation].

3. Support granted per producer organisation per year under this Article shall not exceed 3% of the average annual value of the production placed on the market by that producer organisation during the preceding three calendar years. For any newly recognised producer organisation, that support shall not exceed 3% of the average annual value of the production placed on the market by the members of that organisation during the preceding three calendar years.

4. The Member State concerned may grant an advance of 50% of the financial support after approval of the production and marketing plan in accordance with Article 28(3) of [the CMO regulation].

5. The support referred to in paragraph 1 shall only be granted to producer organisations and associations of producers organisations.'

B. Netherlands law

10. Under Article 4:23(1) of the wet houdende algemene regels van bestuursrecht (Algemene wet bestuursrecht) (Law laying down general rules of administrative law),[7] of 4 June 1992, an administrative body may grant a subsidy only pursuant to a statutory provision specifying the activities in respect of which it may be granted.

11. On 1 July 2015, the regeling van de Staatssecretaris van Economische Zaken, nr. WJZ/15083650, houdende vaststelling van subsidie-instrumenten in het kader van de Europese structuur- en investeringsfondsen op het terrein van Economische Zaken (Regeling Europese EZ-subsidies) (Order of the Secretary of State for Economic Affairs establishing subsidy instruments in connection with European Structural and Investment Funds in the field of Economic Affairs (European EA economic subsidies order))[8] of 28 June 2015, came into force in the Netherlands.

12. Under Article 2.2 of that order, the activities referred to in the EMFF regulation are eligible to be subsidised, where an application is made.

13. Under Article 2.3(1) of the order, the Minister may grant a subsidy only where he or she has made provision for a subsidy application to be lodged, also setting a subsidy threshold and a time limit for lodging the application.

14. By the regeling van de Staatssecretaris van Economische Zaken, nr. WJZ/16105576, houdende wijziging van de Regeling Europese EZ-subsidies en de Regeling openstelling EZ-subsidies 2016 in verband met de subsidiemodule inzake productie- en afzetprogramma's en andere wijzigingen in het kader van het Europees Fonds voor Maritieme Zaken en Visserij (Order of the Secretary of State for Economic Affairs amending the order on European EA subsidies and the order opening the 2016 round of European EA subsidies as regards the subsidy module relating to production and marketing plans and making further amendments with regard to the European Maritime and Fisheries Fund)[9] of 25 August 2016, the Kingdom of the Netherlands made provision for the subsidy module relating to production and marketing plans for the period from 29 August to 16 September 2016.

7 Stb. 1992, No 315; 'the General administrative law'.

8 Stcrt. 2015, No 18094.

9 Stcrt. 2016, No 43926.

15. The referring court states that 'that subsidy module is based on Article 66 of the [EMFF regulation] and does not relate to the implementation of a production and marketing plan, but only to its preparation'.

III. The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

16. By decision of 9 July 2014, the Minister, in accordance with Article 28(3) of the CMO regulation, approved PO Texel's 2014 production and marketing plan, which PO Texel immediately implemented.

17. In October 2014, the Kingdom of the Netherlands lodged an operational programme with the Commission in relation to the period from 1 January 2014 to 31 December 2020,[10] the final version of which, dated 11 December 2014, was approved on 25 February 2015.[11]

18. On 19 May 2015, PO Texel submitted an application to the Minister for financial support in respect of the expenditure incurred in preparing and implementing its 2014 production and marketing plan, pursuant to Article 66 of the EMFF regulation, and in respect of the expenditure relating to marketing measures it had taken, pursuant to Article 68 of that regulation.

19. By decision of 10 July 2015, the Minister rejected PO Texel's application, on the grounds that:

– at the time of PO Texel's subsidy application, on 19 May 2015, the Kingdom of the Netherlands had not made provision for subsidy applications to be made in respect of the preparation and implementation of production and marketing plans, pursuant to Article 66 of the EMFF regulation, or in respect of marketing measures for fishery and aquaculture products taken by producer organisations, pursuant to Article 68 of that regulation; and

– it was only after it had drawn up its production and marketing plan and after, following approval by the Minister, it had implemented it, that PO Texel submitted its subsidy application.

20. By decision of 13 November 2015, the Minister rejected PO Texel's appeal as unfounded.

21. In support of the action it has brought against that decision before the College van Beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry, Netherlands), PO Texel claims that it is eligible for financial support from the EMFF, under Articles 66 and 68 of the EMFF regulation, in respect both of the expenses incurred in preparing and implementing the production and marketing plan for 2014 and of those relating to the marketing measures which it took. PO Texel submits, first, that under Article 28(1) of the CMO regulation, it was required to draw up and submit a production and marketing plan. Second, it submits that, during the 2014 financial year, it spent the sum of EUR 100 824 in market trend costs. It states in that regard that it entered into a cooperation agreement with processors of type III and IV plaice, with a view to identifying commercial outlets for that species of fish.

22. The Minister submits, in essence, that he is unable to grant PO Texel the requested subsidy because it made its application in respect of the production and marketing plans before the Netherlands legislature had introduced a procedure for such applications. In addition, at the hearing which took place before the referring court on 19 April 2017, the Minister put forward the following four arguments.

10 See Article 17 of the EMFF regulation.

11 See Commission Implementing Decision C(2015) 1278 of 25 February 2015 approving the operational programme 'Duurzaam Vissen voor de markt' [Sustainable fishing for the market] for support from the European Maritime and Fisheries Fund in the Netherlands.

23. First, the marketing and processing measures in respect of which the subsidy was applied for are financed by the EMFF, in accordance with the principle of shared management between the European Union and the Member States. Consequently, the subsidies are co-financed out of the national resources of Member States.

24. Second, the subsidy cannot be granted before the Commission has approved the operational programme which each Member State is required to produce. As regards the present case, the operational programme produced by the Kingdom of the Netherlands was approved by the Commission on 25 February 2015. The national resources, of up to 25%, are then required to be released.

25. Third, Chapter IV of Title V of the EMFF regulation, which contains Articles 66 and 68, gives a broad discretion to the Member States as regards the implementation of their operational programmes.

26. Fourth, Article 65(6) of the CSC regulation does not permit support to be granted for the implementation of operations which have already been fully implemented.

27. In those circumstances the College van Beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) (a) Does Article 66(1) of [the EMFF regulation], given that it provides that the EMFF "shall" support the preparation and implementation of production and marketing plans referred to in Article 28 of [the CMO regulation], preclude a Member State from responding to a producer organisation which has submitted an application for such a grant, by arguing that the Member State concerned had not made available, either in its operational programme approved by the European Commission or in the national rules for determining the eligibility of expenditure, the possibility of making such an application at the time of the submission of the application for a certain category of expenditure (in the present case, the costs of the preparation and implementation of production and marketing plans) or for a certain period (in the present case, the year 2014)?

(b) Is it relevant to the answer to question 1(a) that the producer organisation is obliged, under Article 28(1) of [the CMO regulation], to draw up a production and marketing plan and, after approval of the production and marketing plan by the Member State, to implement that production and marketing plan?

(2) If the answer to question 1(a) is that Article 66(1) of [the EMFF regulation] precludes a Member State from responding to a producer organisation which has submitted an application for a grant for the preparation and implementation of production and marketing plans by arguing that the Member State concerned had not made available the possibility of making such an application at the time of the submission of the application, can the grant applicant concerned then rely directly on Article 66(1) of [the EMFF regulation] as the legal basis for a claim against his or her Member State for provision of the grant in question?

(3) If the answer to question 2 is that, in the situation referred to in question 2, the grant applicant concerned can rely directly on Article 66(1) of [the EMFF regulation] as the legal basis for a claim against his or her Member State for provision of the grant in question, does Article 65(6) of [the CSC regulation] then preclude the provision of a grant for the preparation and implementation of a production and implementation plan where the grant application is submitted after the production and marketing plan has been prepared and implemented?'

28. The Netherlands Government and the Commission submitted written observations. Those parties also presented oral argument at the hearing on 10 April 2019.

IV. Analysis

29. By way of preliminary comments, in the light of the submissions made at the hearing, I would point out, on the one hand, that the referring court's questions relate in essence to the determination of whether expenditure incurred by PO Texel in 2014, in respect of the preparation and implementation of a production and marketing plan, is required to be co-financed by the Netherlands Government on the basis of Article 66(1) of the EMFF regulation.

30. I note, on the other hand, that, beyond the strict limits of the subject matter of the reference, there are other issues relating to the case itself, or to the applicable legislation, which have not been raised by the referring court, but which may nevertheless be of some interest. Those include the temporal applicability of the EMFF regulation, and the time limits imposed on producer organisations by Implementing Regulation (EU) No 1418/2013. [12]

31. As regards the temporal applicability of the EMFF regulation, it must be borne in mind that the purpose of that regulation is to supplement the CMO and CSC regulations, which lay down general conditions as regards financing by European funds. Those regulations were published in December 2013, to apply from 1 January 2014. The EMFF regulation was not published at the same time, but in May 2014, though providing that it applied from 1 January 2014. [13] It is undeniable that the retroactive nature of that regulation is inherently liable to give rise to difficulties of coordination between the various applicable provisions, particularly between those of EU law and of national law.

32. Those difficulties have been exacerbated by the time limits laid down in Article 2(1) of Implementing Regulation No 1418/2013. Under that provision, producer organisations recognised before 1 January 2014 were required to submit their first production and marketing plans to the competent authorities before the end of February 2014, that is to say, well before the EMFF regulation was published. Accordingly, in the absence of a clear and coherent legal framework, one might wonder what consequences would flow from a failure by a producer organisation to observe that time limit.

33. However, while those questions may be of interest, it must be borne in mind that they have not been raised by the referring court or the parties, or indeed by the Netherlands Government. I note, in that regard, that the Netherlands Government confirmed at the hearing that PO Texel's application had not been rejected on the ground that the production and marketing plan had been submitted out of time.

34. In those circumstances, my view is that the Court should follow its usual practice and limit its consideration to the questions referred for a preliminary ruling, as formulated by the referring court, so that its response addresses what is strictly necessary for the purposes of assisting that court.

35. Accordingly, I propose to begin by examining, first, parts (a) and (b) of the first question, followed by the third question. Those questions relate to the substantive conditions applicable to funding sought by a producer organisation, which are a matter of EU law and provide the basis for assessing the compatibility of the national provision at issue. Having come to the conclusion that the national provision must be disregarded, I will go on to consider the answer to be given to the second question referred, which concerns whether it is possible to apply Article 66(1) of the EMFF regulation directly.

12 Commission Implementing Regulation of 17 December 2013 concerning production and marketing plans pursuant to [the CMO Regulation] (OJ 2013 L 353, p. 40).

13 See recital 101 and Article 130 of that regulation.

A. The first question referred

36. By its first question, which is divided into two parts, the referring court asks, in essence, whether the national provision at issue is compatible with the regulations applicable to the grant of subsidies to producer organisations. More specifically, it will be necessary for the Court to rule on the interpretation of Article 66(1) of the EMFF regulation, in conjunction with that of Article 28(6) of the CMO regulation.

37. Article 28(6) of that regulation, which lays down the general framework for the action to be taken by producer organisations in relation to the CFP, provides that such organisations '*may* receive financial support for the preparation and implementation of production and marketing plans' [14] under conditions to be laid down in a future legal act – as it transpired, the EMFF regulation of 2014.

38. However, Article 66(1) of the EMFF regulation provides that 'the EMFF *shall support* the preparation and implementation of production and marketing plans referred to in Article 28 of [the CMO regulation]'. [15]

39. It can thus be seen that Article 66 of the EMFF regulation was drafted in a different way, following the entry into force of the CMO regulation, which referred to specific provisions establishing the conditions for the financial support to be provided for maritime and fisheries policy in relation to the period 2014-2020, [16] as did the CSC regulation, which referred to the EMFF regulation by name. [17]

40. At first sight, the provisions which are applicable in this area under the CSC, CMO and EMFF regulations, all of which apply from 1 January 2014, may appear contradictory. Any doubts as to the interpretation of those provisions can be dispelled, however, by considering their structure and the order in which they were published.

41. I observe, first of all, that the drafting differences result from the fact that general rules were laid down, which were supplemented a posteriori by specific rules. It is apparent from the clear wording of Article 66(1) of the EMFF regulation – which, in relation to Article 28(6) of the CMO regulation, is accordingly *lex specialis* and *lex posterior* – that the EU legislature evinced a clear intention to create a specific rule as regards the financing of production and marketing plans, which more closely circumscribes the discretion normally accorded to the Member States where the management of ESI funds is shared. [18]

42. That finding is, moreover, confirmed on examination of the various language versions of Article 66(1) of the EMFF regulation and on comparison of that provision with other articles of the same regulation.

43. As the national court has rightly pointed out, in the German, English, Italian, Dutch and Swedish versions of Article 66(1) of the EMFF regulation, it is provided that the EMFF 'shall support' the preparation and implementation of production and marketing plans. The same is true of other language versions, such as, for example, the Spanish, Czech, French, Polish and Portuguese versions. By contrast, under Article 68(1) of that regulation, the EMFF 'may support' marketing measures for fishery and aquaculture products.

14 My italics.

15 My italics.

16 See Article 28(6) of the CMO regulation.

17 See point (6) of the fourth paragraph of Article 1 of the CSC regulation.

18 See, in particular, Article 4(3) and (4) of the CSC regulation.

44. The difference in wording is not an isolated occurrence in the EMFF regulation. The same imperative wording is found for example in Article 58, Article 77(1) and Article 89(1) of the regulation, whereas a larger number of its provisions express a mere power to support, including Article 48(3), Article 54(1) and Article 67(1).

45. Clearly, those drafting differences are not merely coincidental, but reflect a genuine choice on the part of the EU legislature, relating in particular to Article 66(1) of the EMFF regulation.

46. In this regard, it may be helpful to set out the history of the preparatory legislative work that led to that regulation, which confirms that the EU legislature had a clear intention as regards that article. Although the Commission had proposed the wording 'the EMFF *may support*',[19] the European Parliament preferred to replace this with 'the EMFF *shall support*' in order to ensure that the preparation and implementation of production and marketing plans would be supported by the EMFF.[20]

47. Finally, I note that that choice of wording by the EU legislature is consistent with the system of financing which it instituted with regard to the CFP and with the objective pursued by that system.

48. In that regard, it is important to bear in mind the obligation imposed on producer organisations to submit production marketing plans[21] and to implement them immediately.[22] The referring court asks the Court to address that point in part (b) of its first question, which supplements part (a). Against such a background, it is logical for producer organisations to be able to count on financial support at that stage of their contribution to the achievement of the objectives of the new CFP, a contribution they were required to make as from 1 January 2014.

49. As to the objective pursued by financial support from the EMFF, I would point out that the various provisions relating to financial support for the preparation and implementation of production and marketing plans are justified by the major role given to producer organisations.[23] Those organisations are specifically required to take those steps so as to contribute to the implementation of the CFP, which is intended to 'ensure that fishing and aquaculture activities contribute to long-term environmental, economic, and social sustainability' and 'contribute to the Europe 2020 Strategy [[24]] for smart, sustainable and inclusive growth'.[25]

50. The importance of preparing and implementing the plans is borne out by the fact that only producer organisations can receive that particular form of support on that basis, which represents a significant difference by comparison with financing from other ESI funds,[26] and by the fact that Member States may grant an advance of 50% of the EMFF financial support upon approval of the plan.[27]

19 Proposal for a Regulation of the European Parliament and of the Council on the European Maritime and Fisheries Fund [repealing Council Regulation (EC) No 1198/2006 and Council Regulation (EC) No 861/2006 and Council Regulation (EC) No XXX/2011 on integrated maritime policy] (COM(2011) 804 final). See proposed Article 69(1).

20 See amendment 438 in the report of the PECH Committee of the European Parliament of 8 August 2013 on the amended proposal for a regulation of the European Parliament and of the Council on the European Maritime and Fisheries Fund [repealing Council Regulation (EC) No 1198/2006, Council Regulation (EC) No 861/2006 and Council Regulation (EC) No XXX/2011 on integrated maritime policy]. See, also, amendment 1893 in the draft report of the PECH Committee of the European Parliament of 17 January 2013 concerning amendments 1655-2069, the justification for which was as follows: 'The preparation and implementation of production and marketing plans must be financially supported to ensure a "level playing field" for all producer organisations throughout the European Union.'

21 See Article 28(1) of the CMO regulation.

22 See Article 28(3) of the CMO regulation.

23 See recital 7 of the CMO regulation.

24 As regards the reference to that strategy, see Article 4 of the CSC regulation and Article 6 of the EMFF regulation.

25 See recital 4 of the CFP regulation and Article 6(1) of the EMFF regulation.

26 See recital 20 and Article 66(5) of the EMFF regulation.

27 See Article 66(4) of the EMFF regulation. See, also, point 63 of this Opinion.

51. It must therefore be borne in mind that, in laying down an obligation for producer organisations to draw up production and marketing plans, the EU legislature was requiring them to make a genuine contribution to the accomplishment of a task undertaken in the general interest, which, logically, justifies an obligation for Member States to cover part of their expenditure.

52. For all of those reasons, I consider that, by virtue of Article 66(1) of the EMFF regulation, the principle of entitlement to the financing in question is clearly established. Where such a right is granted by the EU legislature, the legislature of a Member State cannot deprive the persons concerned of that right, either expressly or by omission. It follows that national legislation having that effect would be incompatible with Article 66(1) of the EMFF regulation.

53. Consequently, my proposed answer to parts (a) and (b) of the first question referred is that Article 66(1) of the EMFF regulation is to be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not provide for EMFF funding of the preparation and implementation of the production and marketing plans referred to in Article 28 of the CMO regulation, as regards expenditure incurred on and after 1 January 2014.

B. The third question referred

54. This question seeks a determination of whether the fact that the plan had already been fully implemented when the application was made for a subsidy in respect of its preparation and implementation can, notwithstanding the co-financing principle arising from Article 66(1) of the EMFF regulation, justify a refusal to grant financial support, on the basis of the exceptions contained in Article 65(6) of the CSC regulation.

55. I could give a brief answer to this question by referring, once again, to the principle that specific law takes precedence over general law.[28] Hence, the specific conditions for granting subsidies laid down by Article 66(1) of the EMFF regulation preclude the application of the general rules governing financing from other ESI Funds. However, there are arguments of a systemic nature that I would also like to put forward.

56. In the first place, producer organisations cannot logically be required to implement their plans immediately, in accordance with the EMFF regulation, then to be refused any funding on the basis of a general provision of the CSC regulation, namely Article 65(6) thereof, which provides that 'operations shall not be selected for support by the ESI Funds where they have been physically completed or fully implemented' before the application for funding, which related in the present case to one year.

57. In the second place, there are further arguments that can be advanced, based on the plan for a CFP supported financially by the EMFF, in the context of shared management with the Member States.[29]

58. On the one hand, the preparation and implementation of production and marketing plans are part of an overall programme for the period 2014-2020, namely the operational programme for which the Member State is responsible, once it has been approved by the Commission.[30]

59. That understanding of the implementation of the CFP justifies the ineligibility of the expenditure until the Member States have approved the producer organisation's annual activity report.[31]

28 See point 41 of this Opinion.

29 See recital 63 of the CFP Regulation and recital 12, Article 7 and Title V of the EMFF regulation.

30 See recital 24 and Articles 6(5) and 17(1) of the EMFF regulation. The criteria for selecting other operations for financing are determined under the Commission's supervision, in accordance with Article 113(a) of the EMFF regulation.

31 See Article 66(2) of the EMFF regulation.

60. It clearly follows, in my view, that the plan must not only have been *actually* but also *satisfactorily* implemented, having regard to the objectives pursued by the CFP, in order for the producer organisation to claim financial support.

61. In practical terms, therefore, a producer organisation would not have been justified in making an application for financial support on the basis of expenditure incurred in 2014 until 2015, after its annual report had been approved.

62. Consequently, if the interpretation advocated by the Netherlands Government were to be adopted, the result would be incoherent, in that funding would be entirely ineffective during the period in question.

63. Furthermore, the fact that at least a year passes between the date on which the expenses are incurred and the date on which the justification for those expenses is examined prompted the EU legislature to provide that an advance of 50% of the financial support could be granted by the Member State.[32] In such a case, it is equally possible to ask, conversely, what effect it would have on an advance so granted if all rights to funding were extinguished upon full implementation of a one-year plan.

64. All of those considerations lead me to the conclusion that, because of the specific conditions for granting EMFF subsidies in respect of multi-annual plans, there is no room for the application of the general rules on which the Netherlands Government relies, which govern financing by other European funds.

65. In those circumstances, I suggest that the Court should rule, in answer to the third question referred, that Article 65(6) of the CSC regulation is to be interpreted as not precluding the grant, on the basis of Article 66(1) of the EMFF regulation, of financial support for expenditure incurred on and after 1 January 2014, in respect of the preparation and implementation of a production and marketing plan, where the subsidy application was made after the production and marketing plan had been prepared and implemented.

66. Furthermore, having regard to the second argument put forward by the Minister in support of the affirmation of his decision to reject the subsidy application,[33] I think there is another matter which the Court could usefully clarify, so as to answer the referring court in terms which will be of assistance to it.

67. This concerns the question whether the subsidy application can relate to expenditure incurred before the operational programme drawn up by the Member State had been approved by the Commission.[34] That is the position in the present case, given that PO Texel is seeking funding in relation to 2014, whereas the operational programme was submitted by the Netherlands authorities in October 2014 and approved by the Commission on 25 February 2015.

68. It seems to me that that issue can be resolved by considering Article 65(2) of the CSC regulation, which does not refer to the date of *approval* of the operational programme, in conjunction with Article 130 of the EMFF regulation, which provides for that regulation to apply from 1 January 2014.

69. In addition, in the absence of any specific provision in the EMFF regulation, it also follows from Article 65(2) of the CSC regulation that the period during which expenditure may be supported by the EMFF starts on 1 January 2014.

32 See Article 66(4) of the EMFF regulation.

33 See point 24 of this Opinion and the latter part of section (a) of the first question.

34 As regards the obligation to draw up such a programme, see point 58 of this Opinion.

70. I therefore consider that the initial national provisions, of 25 August 2016, under which applications for financial support could be made only in respect of the *preparation* of marketing plans, and with effect only from 29 August 2016, are not compatible with Article 66(1) of the EMFF regulation, or with Article 65(2) of the CSC regulation.

71. At the conclusion of my analysis of the compatibility of the national legislation at issue with EU law, I would like to make some more general remarks as regards the spirit in which the latter should, in my view, be applied, having regard to the particular features of the tasks which producer organisations are required to perform and which are taken into account for the purposes of EMFF funding.

72. As I have already pointed out,[35] it must be borne in mind that the provisions that are relevant in the present case are the product of a legislative technique which is far from perfect. In particular, it is important not to lose sight of the fact that the EU legislature was late in adopting the EMFF regulation. In turn, moreover, the Member States were somewhat late in implementing the provisions of EU law, as a result of the EU legislation being enacted only a few days before it came into force.[36] Furthermore, not only did the European legal framework implementing the CFP impose very strict time limits, but it was not always very clear.

73. Given that background, therefore, I do not think that either the national or the European authorities should adopt an overly rigid approach to the interpretation and application of the provisions in question. I think there is good reason to apply them in a benign and reasonable manner, which would be entirely compliant with the objective pursued by the EU legislature, namely to encourage initiatives on the part of producer organisations within the context of the CFP, as implemented from 1 January 2014, rather than to discourage such initiatives.

C. The second question referred

74. It is necessary to consider the second question referred only in the event that the Court rules, as, for the reasons set out above, I propose it should, that a national rule of law which denies producer organisations the right to seek EMFF financial support in respect of expenditure incurred in and after 2014 must be disregarded. In the event that the Court does so rule, observations will need to be made by way of a response to that question, which seeks a determination of whether Article 66(1) of the EMFF regulation can provide a legal basis, at national level, for the grant of financial support in respect of such expenditure.

75. It is necessary, first of all, to clarify the meaning and scope of the question.

76. On the one hand, I note that the referring court has used the term ‘rechtsgrondslag’ in its request for a preliminary ruling. It has also made express reference to Article 4:23(1) of the General administrative law.[37] The view could therefore be taken that it is asking the Court whether Article 66(1) of the EMFF regulation can constitute a *sufficient legal basis* for requiring the administration to pay a subsidy, where there is no corresponding legal basis in national law, as would be required by Article 4:23(1) of the General administrative law.

35 See point 31 of this Opinion.

36 Of the four regulations that are applicable in the present case, two of which were dated 11 December 2013 and the other two 17 December 2013, the CSC regulation was published on 20 December 2013, while the other three, the CFP and CMO regulations and Implementing Regulation No 1418/2013, were published on 28 December 2013.

37 See point 10 of this Opinion.

77. On the other hand, the question of interpretation raised by the national court could equally be taken to relate, more broadly, to the direct effect of Article 66(1) of the EMFF regulation, in the sense in which that term has been used in the case-law of the Court.

78. If the question is taken in the first suggested sense, there is no particular difficulty in answering it, at least in terms of the case-law of the Court.[38] The second paragraph of Article 288 TFEU provides that a regulation 'shall be binding in its entirety and *directly applicable* in all Member States'.[39] Furthermore, it is settled case-law of the Court that it is not only the national courts, but all organs of the State, including administrative authorities, that are obliged to apply provisions of EU law, even on their own initiative, where those provisions meet the requirements for direct effect,[40] notwithstanding any contrary national provisions.[41]

79. As regards the direct effect of Article 66(1) of the EMFF regulation, which can be seen, more broadly, as the subject of the second question, it can hardly be disputed that the purpose of that article is to confer a right to financial support on producer organisations. In that regard, I note that the terms in which Article 66(1) of that regulation declares the existence of such a right, one capable of being enforced by producer organisations, are not only clear and precise, but also unconditional, in the sense that the grant of funding is not made subject to the discretion of the national or European authorities. Accordingly, in accordance with the case-law of the Court,[42] it fulfils the conditions for direct effect.

80. Thus, I do not share the Commission's view that the application for financial support can be rejected, on the basis of Article 4(4) of the CSC regulation, on the sole ground that there is no national provision laying down arrangements for the exercise of that right, or providing a basis for expenditure to be incurred. The recognition of a right conferred on individuals by EU law cannot be obstructed as a result of the time taken by a Member State to lay down a procedure making that right effective.[43]

81. It is thus clear that Article 66(1) of the EMFF regulation guarantees producer organisations a subsidy in respect of the preparation and implementation of the production and marketing plans in question. In that sense, Article 66(1) is a sufficient legal basis for the Netherlands authorities to grant such a subsidy and, equally, is a provision which can be relied on directly by a producer organisation before the administrative authorities and the national courts.

82. That interim conclusion gives rise, however, to a matter of some importance: while it may be taken as established that Article 66(1) of the EMFF regulation constitutes a legal basis for a right to measures of financial support on which producer organisations can rely before the Netherlands authorities, the practical consequences of exercising that right, in the situation under consideration, remain to be determined. In more prosaic terms, the question is what, exactly, the producer organisations can claim. Alternatively, to put it more clearly, what amount or percentage of the costs is covered by the funding to which they are entitled?

38 As to the complexities which the answer may raise at national level, see, for example, Verhoeven, M., *The Costanzo Obligation, The Obligations of National Administrative Authorities in the case of Incompatibility between National Law and European Law*, Intersentia, Utrecht, 2011, especially pp. 123-164 and pp. 217-247.

39 My italics.

40 For a recent statement of the principles relating to the direct applicability of regulations, see judgment of 30 March 2017, *Lingurár* (C-315/16, EU:C:2017:244, paragraphs 17 to 19 and the case-law cited).

41 For the wording of that principle, see judgments of 22 June 1989, *Costanzo* (103/88, EU:C:1989:256, paragraphs 30 and 31), and of 9 September 2003, *CIF* (C-198/01, EU:C:2003:430, paragraph 49), and, in relation to the application of regulations, judgments of 14 June 2012, *Association nationale d'assistance aux frontières pour les étrangers* (C-606/10, EU:C:2012:348, paragraph 75), and of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraphs 90 and 91).

42 For a detailed discussion of that case-law, see my Opinion in *Klohn* (C-167/17, EU:C:2018:387, points 33 to 55).

43 A similar point emerges from the judgments of 17 May 1972, *Leonesio* (93/71, EU:C:1972:39, first subparagraph of paragraph 19, paragraph 20 and second subparagraph of paragraph 21), and of 8 February 1973, *Commission* v *Italy* (30/72, EU:C:1973:16, third subparagraph of paragraph 6 and first subparagraph of paragraph 7).

83. In order to answer that question, it is necessary to determine the extent to which Article 66(1) of the EMFF regulation makes it possible, not only to conclude – as I have concluded above – that organisations are entitled to receive a subsidy, but also to determine the amount of subsidy to be granted.

84. The amount of subsidy to be granted cannot be determined on the basis of Article 66(1) of the EMFF regulation alone. It is clear from the wording of that provision that it merely sets out a principle of funding in very general terms. Consequently, Article 66(1) must be read in conjunction with other provisions of the same regulation.

85. Thus, Article 66(2) of the EMFF regulation makes the eligibility of the expenditure subject to approval of the producer organisation's annual report by the national authority empowered to consider the subsidy application. Furthermore, certain specific rules are set out in Article 66(3) of the regulation. While that provision sets an upper limit on the amount of subsidy to be granted, it does not set a lower limit.

86. Consequently, when the provisions in question are read together, they lead inevitably to the conclusion that the administrative authorities have a measure of discretion in this regard. However, that latitude is not unlimited. As I have noted in the preceding points of this Opinion, Article 66(1) of the EMFF regulation contains a minimum guarantee, or 'core' which must always be implemented by the Member States:[44] it is not permissible for producer organisations to receive no support for the preparation and implementation of production and marketing plans.

87. Consequently, the financial support payable to producer organisations must, first, be *proportionate*, having regard to the nature and extent of the obligations imposed on producer organisations under the CFP. In other words, the aid may not be so limited in amount that it does not have the incentivising effect which it is supposed to have in relation to the activities of producer organisations. Second, for reasons of consistency and equal treatment and in order to avoid distortions in the markets concerned, the amount of aid cannot be *unrelated* to the amount subsequently determined by the authorities with respect to the rest of the 2014-2020 period.

88. That said, I do not think that the Court should go further in the present case and thus, in effect, deprive the national authorities of the discretion conferred on them by the EMFF regulation, within the limits laid down in that regulation.

89. The application by the national authorities of the principles derived from the EMFF regulation does not, however, completely escape review. The Court has held that the fact that rules of EU law leave a discretion to Member States does not preclude judicial review of the question whether the national authorities have exceeded their discretion with regard to those rules.[45]

90. Furthermore, it is also clear that an infringement of the rules laid down by that regulation could give rise, where the conditions identified in the case-law of the Court are satisfied, to an action based on non-contractual liability against the Member State concerned.[46]

44 See, by analogy with the scope of the direct effect of a directive, for example, judgment of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraph 17); of 1 July 2010, *Gassmayr* (C-194/08, EU:C:2010:386, paragraph 51); and of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 35).

45 See judgment of 24 October 1996, *Kraaijeveld and Others* (C-575/95, EU:C:1996:404, paragraph 59). See, also, judgment of 26 May 2011, *Stichting Natuur en Milieu and Others* (C-165/09 to C-167/09, EU:C:2011:348, paragraph 103).

46 See judgments of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428), and of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79).

91. Having regard to all of the foregoing considerations, the second question referred can be answered as follows: Article 66(1) of the EMFF regulation confers a right on producer organisations to demand financial support from the EMFF in respect of expenditure incurred on or after 1 January 2014 with a view to preparing a production and marketing plan. It is then for the Member State concerned to satisfy itself that the condition for granting the subsidy applied for, as laid down in Article 66(2) of that regulation, is met and to determine the amount of the co-funding, within the limits of its discretion, in accordance with Article 66(3) of that regulation.

V. Conclusion

92. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the College van Beroep voor het bedrijfsleven (Court of Appeal for Trade and Industry, Netherlands) as follows:

1. Article 66(1) of Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not provide for funding from the European Maritime and Fisheries Fund (EMFF) in respect of the preparation and implementation of the production and marketing plans referred to in Article 28 of Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000, from 1 January 2014.

2. Article 66(1) of Regulation No 508/2014 confers a right on fishery and aquaculture producer organisations to demand financial support from the EMFF in respect of expenditure incurred on and after 1 January 2014 with a view to the preparation of a production and marketing plan. It is for the Member State concerned to satisfy itself that the condition for granting the subsidy applied for, as laid down in Article 66(2) of that regulation, is met and to determine the amount of the co-funding, within the limits of its discretion, in accordance with Article 66(3) of that regulation.

3. Article 65(6) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, must be interpreted as not precluding the grant, on the basis of Article 66(1) of Regulation No 508/2014, of financial support for expenditure incurred on and after 1 January 2014 in respect of the preparation and implementation of a production and marketing plan, where the subsidy application is made after the production and marketing plan has been prepared and implemented.