Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 25 November 2020[1]

Case C-361/19

De Ruiter vof
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 agricultural policy – Direct payments – Regulation (EU) No 1306/2013 – Article 97(1) – Article 99(1) – Implementing Regulation (EU) No 809/2014 – Article 73(4)(a) – Reductions and exclusions in the event of non-compliance with the cross-compliance rules – Determination of the year to be taken into account in order to calculate the percentage reduction – Calculation of the reduction – Imputation of the reduction – Year of the occurrence of non-compliance – Year of the finding of non-compliance – Judgment in *Teglgaard and Fløjstrupgård* (C-239/17, EU:C:2018:597))

I. Introduction

1. This case follows on from the judgment of the Court in *Teglgaard and Fløjstrupgård*.[2]

2. In that judgment, the Court was called upon to determine whether, under the legislation at issue in that case, reductions of direct payments due to farmers because of non-compliance with the cross-compliance rules[3] were to be calculated on the basis of the payments granted in the calendar year in which that non-compliance had *occurred* or those in the year in which that non-compliance had been *found*.[4] The Court held that the year of the *occurrence* of non-compliance was to be used as the basis for that calculation.[5]

3. At the time the *Teglgaard* judgment was delivered, the rules at issue in that case had already been repealed and replaced by new legislation, which amended the wording of the provisions concerned. It is that new legislation that is to be interpreted in the present case, in which the question that arises is the same as the question addressed in the *Teglgaard* judgment, but in the context of the new

1 Original language: French.

2 Judgment of 25 July 2018 (C-239/17, 'the *Teglgaard* judgment', EU:C:2018:597).

3 Regarding the cross-compliance system, see points 39 to 41 of this Opinion.

4 *Teglgaard* judgment, paragraph 34.

5 *Teglgaard* judgment, paragraph 59.

legislation: does the latter intend the basis for calculating reductions of direct payments to be the year of the *occurrence* or the year of the *finding* of non-compliance? The provisions to be interpreted are Article 97(1) and Article 99(1) of Regulation (EU) No 1306/2013,[6] and Article 73(4)(a) of Implementing Regulation (EU) No 809/2014.[7]

4. In the present case, the Court is therefore called upon, in essence, to determine whether the legislature intended, by the new legislation, to amend the year on the basis of which reductions are to be calculated that was laid down in the earlier legislation.

5. At the end of my analysis, I shall propose that the Court should answer that question in the negative, to the effect that the year of the *occurrence* should always be used as the basis for calculation.

6. The request for a preliminary ruling in which that question is raised was referred by the College van Beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry, Netherlands) in proceedings between a farmer and the Minister van Landbouw, Natuur en Voedselkwaliteit ((Minister for Agriculture, Nature and Food Quality, 'the Minister') concerning a reduction of the amount of direct payments due to the farmer, which the Minister had imposed on the farmer as a result of two instances of non-compliance with the cross-compliance rules.

II. Legal context

A. European Union law applicable in the Teglgaard case (former legal context)

7. The cross-compliance system was introduced by Regulation (EC) No 1782/2003[8] and set out in detail in Implementing Regulation (EC) No 796/2004[9] (Section 1). Subsequently, those regulations were repealed and replaced by Regulation (EC) No 73/2009[10] and Implementing Regulation (EC) No 1122/2009[11] (Section 2), respectively. It was those regulations that were at issue in the *Teglgaard* judgment.

6 Regulation of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ 2013 L 347, p. 549).

7 Commission Implementing Regulation of 17 July 2014 laying down rules for the application of Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to the integrated administration and control system, rural development measures and cross compliance (OJ 2014 L 227, p. 69).

8 Council Regulation of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ 2003 L 270, p. 1).

9 Commission Regulation of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system provided for in Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers (OJ 2004 L 141, p. 18).

10 Council Regulation of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003 (OJ 2009 L 30, p. 16).

11 Commission Regulation of 30 November 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 73/2009 as regards cross-compliance, modulation and the integrated administration and control system, under the direct support schemes for farmers provided for that Regulation, as well as for the implementation of Council Regulation (EC) No 1234/2007 as regards cross-compliance under the support scheme provided for the wine sector (OJ 2009 L 316, p. 65).

1. Regulation No 1782/2003 and Implementing Regulation No 796/2004

8. In essence, the French-language version of Article 6(1) of Regulation No 1782/2003 provided that, in the event of non-compliance with the cross-compliance rules, the total amount of direct payments to be granted in the calendar year in which the non-compliance is found ('l'année civile au cours de laquelle le non-respect est constaté') is to be reduced.[12] However, almost all other language versions of that provision referred to 'the year in which the non-compliance occurred'.[13]

9. With effect from 2008, Regulation (EC) No 146/2008[14] amended Article 6(1) of Regulation No 1782/2003 to read as follows:

'Where the statutory management requirements or good agricultural and environmental conditions are not complied with at any time in a given calendar year (hereinafter "the calendar year concerned"), and the non-compliance in question is the result of an act or omission directly attributable to the farmer who submitted the aid application in the calendar year concerned, the total amount of direct payments to be granted … to that farmer shall be reduced or cancelled …'

10. The first subparagraph of Article 66(1) of Implementing Regulation No 796/2004 provided:

'1. … where a non-compliance determined results from the negligence of the farmer, a reduction shall be applied on the overall amount of direct payments that has been, or has to be, granted to the farmer concerned following aid applications he has submitted or will still submit in the course of the calendar year of the finding. …'

2. Regulation No 73/2009 and Implementing Regulation No 1122/2009

11. With effect from 19 January 2009, Article 6(1) of Regulation No 1782/2003, as amended by Regulation No 146/2008, was replaced by Article 23(1) of Regulation No 73/2009 and, with effect from 30 November 2009, Article 66(1) of Implementing Regulation No 796/2004 was replaced by Article 70(8)(a) of Implementing Regulation No 1122/2009.

12. The first subparagraph of Article 23(1) of Regulation No 73/2009 provided:

'1. Where the statutory management requirements or good agricultural and environmental conditions are not complied with at any time in a given calendar year (hereinafter referred to as "the calendar year concerned"), and the non-compliance in question is the result of an act or omission directly attributable to the farmer who submitted the aid application in the calendar year concerned, the total amount of direct payments granted or to be granted … shall be reduced …'

13. Article 70(8)(a) of Implementing Regulation No 1122/2009 provided:

'8. For the application of reductions, the percentage of the reduction shall be applied to the …:

(a) the overall amount of direct payments that has been, or has to be, granted to the farmer concerned following aid applications he has submitted or will submit in the course of the calendar year of the finding …'

12 The French-language version of that provision reads: 'Lorsque les exigences réglementaires en matière de gestion ou les bonnes conditions agricoles et environnementales ne sont pas respectées en raison d'un acte ou d'une omission directement imputable à l'agriculteur concerné, le montant total des paiements directs à octroyer au titre de l'année civile au cours de laquelle le non-respect est constaté, est réduit'.

13 See *Teglgaard* judgment, paragraph 36.

14 Council Regulation of 14 February 2008 amending Regulation No 1782/2003 (OJ 2008 L 46, p. 1) (Article 1(1)(a)).

B. European Union law applicable to the dispute in the main proceedings

14. With effect from 17 December 2013, the provisions concerning compliance with the cross-compliance rules laid down in Regulation No 73/2009 were replaced by those laid down in Regulation No 1306/2013[15] (Section 1) and, with effect from 17 July 2014, the provisions laid down in Implementing Regulation No 1122/2009 were replaced by those laid down in Implementing Regulation No 809/2014 (Section 2). It is those regulations, forming part of the reform of the common agricultural policy (CAP), which are to be interpreted in the present case.

1. Regulation No 1306/2013

15. Recital 53 of Regulation No 1306/2013 is worded as follows:

'[Regulation No 1782/2003], which was replaced by Regulation [No 73/2009], established the principle that the full payment to beneficiaries of some supports under the CAP should be linked to compliance with rules relating to land management, agricultural production and agricultural activity. …'

16. Recital 57 of that regulation provides:

'The cross-compliance system implies certain administrative constraints for both beneficiaries and national administrations since record keeping has to be ensured, checks have to be carried out and where necessary penalties have to be applied. Those penalties should be proportionate, effective and dissuasive. Such penalties should be without prejudice to other penalties laid down under Union or national law. For the sake of consistency, it is appropriate to merge the relevant Union provisions into one single legal instrument. …'

17. Article 91(1) of that regulation provides:

'1. Where a beneficiary referred to in Article 92 does not comply with the rules on cross-compliance as laid down in Article 93, an administrative penalty shall be imposed on that beneficiary.'

18. Article 97 of the same regulation, entitled 'Application of the administrative penalty', provides in the first subparagraph of paragraph 1:

'1. The administrative penalty provided for in Article 91 shall be imposed where the rules on cross-compliance are not complied with at any time in a given calendar year ("the calendar year concerned"), and where the non-compliance in question is directly attributable to the beneficiary who submitted the aid application or the payment claim in the calendar year concerned.'

19. Article 99 of Regulation No 1306/2013, entitled 'Calculation of the administrative penalty', provides in paragraph 1:

'1. The administrative penalty provided for in Article 91 shall be applied by means of reduction or exclusion of the total amount of the payments listed in Article 92 granted or to be granted to the beneficiary concerned in respect of aid applications he has submitted or will submit in the course of the calendar year of the finding.

15 I should point out that, whilst the provisions concerning compliance with the cross-compliance rules laid down in Regulation No 73/2009 were replaced by those laid down in Regulation No 1306/2013, the provisions of Regulation No 73/2009 were formally repealed by 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).

For the calculation of those reductions and exclusions, account shall be taken of the severity, extent, permanence and reoccurrence of the non-compliance found as well as of the criteria set out in paragraphs 2, 3 and 4.'

2. Implementing Regulation No 809/2014

20. Chapter III of Title V of Implementing Regulation No 809/2014 is entitled 'Calculation and application of administrative penalties'. Article 73 in that chapter, entitled 'General principles', provides in paragraph 4(a):

'4. The administrative penalty shall be applied to the total amount of the [direct] payments … granted or to be granted to that beneficiary:

(a) following aid applications or payments claims he has submitted or will submit in the course of the year of the finding; …'

III. The dispute in the main proceedings, the question referred and the proceedings before the Court

21. The applicant in the main proceedings is a farmer. In 2016, following an inspection on the applicant's farm, the Nederlandse Voedsel- en Warenautoriteit (Netherlands Food and Consumer Product Safety Authority; 'NVWA') found two non-compliances with the cross-compliance rules: one in the area of health, which took place in 2015, and one in the area of animal welfare, which took place in 2016.

22. On 16 February 2017, after an exchange of correspondence with the applicant, the NVWA issued a decision imposing on the applicant a reduction of 5% of the direct payments to be granted to him for 2016, on grounds of non-compliance with the cross-compliance rules.

23. The applicant lodged an objection to that decision, which the Minister rejected as unfounded by decision of 30 June 2017. The applicant then lodged an appeal with the referring court against that decision.

24. The referring court considers that the Minister is justified in imposing the reduction on the applicant.

25. In that regard, the referring court observes, first of all, that the first non-compliance took place in 2015, whereas the other took place in 2016. The finding of the non-compliances took place in 2016. With regard to the first non-compliance, the *year of the occurrence* does not therefore coincide with the *year of the finding*.

26. The referring court then notes that for each of the non-compliances the NVWA imposed a reduction of 3% of the amount of the aid, on the basis of Article 39(1) of Delegated Regulation (EU) No 640/2014.[16] Since both non-compliances were found in the same year, 2016, and relate to different areas of cross-compliance, the NVWA added the reductions together and set the combined amount at

16 Commission Delegated Regulation of 11 March 2014 supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to the integrated administration and control system and conditions for refusal or withdrawal of payments and administrative penalties applicable to direct payments, rural development support and cross compliance (OJ 2014 L 181, p. 48).

the 5% maximum laid down in Article 74 of Implementing Regulation No 809/2014. The NVWA thus calculated the reduction of the direct payments on the basis of the year in which the non-compliances were *found* (2016), and not the years in which the two non-compliances *occurred* (2015 and 2016, respectively).

27. The referring court holds that that method of calculating the reduction complies with Article 99(1) of Regulation No 1306/2013 and Article 73(4)(a) of Implementing Regulation No 809/2014. It considers that those provisions make clear that the reduction of direct payments due to non-compliance with the cross-compliance rules must be calculated on the basis of the direct payments granted in the *year of the finding* of non-compliance.

28. However, the referring court has doubts about the compatibility of those provisions with certain general principles of EU law in so far as, where the year of the occurrence of non-compliance with the cross-compliance rules is not the same as the year of the finding of non-compliance, the reduction is calculated on the basis of the *year of the finding*. In particular, the referring court questions whether, in the light of the grounds of the *Teglgaard* judgment, those provisions of EU law should be considered to be contrary to the principles of equal treatment, proportionality and legal certainty.

29. It is in those circumstances that the referring court, by decision of 23 April 2019, received at the Court on 3 May 2019, decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Are Article 99(1) of Regulation [No 1306/2013] and Article 73(4)(a) of [Regulation No 809/2014] valid, in so far as, in those provisions, the year of the finding of non-compliance is decisive for the determination of the year for which the cross-compliance reduction is calculated, in a situation where the year of the non-compliance with the cross-compliance rules is not the same as the year of the finding of non-compliance?'

30. Written observations were lodged by the Netherlands, Danish and German Governments, the European Parliament, the Council of the European Union and the European Commission. In addition, those interested parties and the Swedish Government replied to the written questions from the Court of 27 April 2020.

IV. Analysis

A. Preliminary observations on the question referred

31. By its question, as it is formulated, the referring court asks the Court about the *validity* of Article 99(1) of Regulation No 1306/2013 and Article 73(4)(a) of Implementing Regulation No 809/2014, and not about the *interpretation* of those provisions. It considers that it is clear from those provisions that the reduction of payments must be calculated on the basis of the payments granted in the *year of the finding* of non-compliance with the cross-compliance rules. [17]

32. I do not agree with the premiss, concerning the interpretation of Article 99(1) of Regulation No 1306/2013 and Article 73(4)(a) of Implementing Regulation No 809/2014, on which the question referred is based.

33. In my view, those provisions do not make clear, at first sight, whether that legislation refers to the *year of the occurrence* or the *year of the finding* as the basis for calculating reductions. It is therefore necessary, first of all, to answer that question in the context of the present case.

17 See point 27 of this Opinion.

34. In order to do so it is necessary to interpret not only the provisions to which the question referred relates but also Article 97(1) of Regulation No 1306/2013. In fact, the question arises whether the calculation of reductions is not governed more by Article 97(1) of Regulation No 1306/2013 than by Article 99(1) of that regulation and by Article 73(4)(a) of Implementing Regulation No 809/2014.

35. That being said, I consider, as I shall explain below, that the provisions concerned refer to the *year of the occurrence* as the basis for the calculation of the reductions, which means that the question of the validity of the provisions raised by the referring court does not arise.

36. Therefore, the only question that must be answered in the present case is the one concerning the interpretation of the provisions concerned in order to determine the year which must be chosen as the basis for calculating the reduction of direct payments.

37. In the light of the above, in order to give the referring court an answer which will be of use to it, the question referred should be reformulated as follows:[18] are Article 97(1) and Article 99(1) of Regulation No 1306/2013 and Article 73(4)(a) of Implementing Regulation No 809/2014 to be interpreted as meaning that reductions of direct payments due to non-compliance with the cross-compliance rules are to be calculated on the basis of the payments granted in the calendar year in which that non-compliance *occurred* or on the basis of the payments granted in the year in which that non-compliance is *found*?

38. In order to answer that question, I consider it appropriate, first of all, to recall certain aspects of the system of reductions for non-compliance with the cross-compliance rules (Part B). I shall then recall relevant points from the *Teglgaard* judgment (Part C) before proceeding to interpret the provisions applying in the case in the main proceedings (Part D).

B. System of reductions for non-compliance with the cross-compliance rules

39. In the field of the CAP, in order to be entitled to direct payments, farmers must meet the eligibility criteria. While they are in receipt of such aid, they are also subject to the cross-compliance rules,[19] non-compliance with which is penalised by reductions, as a percentage, of the total amount of the aid.

40. Reduction of direct payments due to non-compliance with the cross-compliance rules takes place in two stages: the *calculation* of the reduction and then the *imputation* of the reduction.

41. In order to calculate the reduction, the choice of the *year of the occurrence* or the *year of the finding* as the basis for the calculation may have a significant impact on the extent of the reduction. The factual circumstances, such as the number of hectares farmed, in the light of which direct payments are granted, can vary greatly from one year to the next. As a result, where the finding of non-compliance with cross-compliance rules is not made in the same year as it occurs, by using the

18 I note that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. With this in mind, the Court of Justice may have to reformulate the questions referred to it or to examine whether a question relating to the validity of a provision of EU law is based on a correct reading of the provision in question. See judgment of 17 July 1997, *Krüger* (C-334/95, EU:C:1997:378, paragraphs 22 and 23).

19 The cross-compliance rules link the full payment of direct aid to compliance with rules relating to agricultural land, agricultural production and agricultural activity, which serve to incorporate in the common market organisations basic standards for the environment, food safety, animal health and welfare and good agricultural and environmental condition. If those basic standards are not met, Member States should withdraw direct aid in whole or in part. The cross-compliance rules therefore require farmers to comply, during each year of operation, with the statutory management requirements and good agricultural and environmental conditions, which form the cross-compliance rules (see *Teglgaard* judgment, paragraphs 40 to 42).

year of the finding as the basis for the calculation the amount of the payments to which the reduction applies may be higher than the amount of the payments in the year of occurrence in the event of an increase in the number of hectares or, on the contrary, not as high in the event of a reduction in the number of hectares. [20]

42. It is that situation, in which the amount of the direct payments differs between the year of the occurrence and the year of the finding, which was at issue in the *Teglgaard* judgment. [21]

C. Relevant points from the Teglgaard judgment

43. The *Teglgaard* judgment has relevance for the present case in two particular respects.

44. *First*, the question the Court was called upon to interpret was similar to that in the present case, namely, the choice between using the *year of the occurrence* and the *year of the finding* of non-compliance as the basis for calculating reductions of direct payments.

45. In particular, it was a matter of interpreting Article 6(1) of Regulation No 1782/2003. The wording of that provision was not clear due to divergences between the different language versions of it. In essence, the French version of the provisions stated that the relevant year for the reduction of payments was the *year of the finding* of non-compliance. However, almost all other language versions of that provision stated that the relevant year for that reduction was the *year of the occurrence*. [22]

46. Faced with those two possible interpretations, the Court chose *the year of the occurrence*. In doing so, its choice was based, inter alia, on the purpose of the cross-compliance rules and also on the principles of proportionality, equal treatment and legal certainty.

47. Accordingly, it held, first of all, that only use of the year of the occurrence as the basis for calculation was appropriate for ensuring attainment of the objective of the cross-compliance rules in all cases.

48. In that regard, it stated that the purpose of Regulation No 1782/2003 as regards compliance with the cross-compliance rules was to *link* the payment of direct aid to compliance with statutory management requirements and good agricultural and environmental conditions, which form the cross-compliance rules. If those requirements were not met, Member States were to impose reductions on the amount of direct payments. According to the Court, the full significance of compliance with those rules was clear only if the penalty for their infringement led to a reduction in direct payments to be granted in the calendar year in which that infringement had taken place. Indeed, only such a correspondence was likely to maintain the *link* between the farmer's behaviour which gave rise to the penalty and that penalty, because the factual circumstances on the basis of which those payments were granted could vary from one year to the next. [23]

49. Next, it held that only use of the year of the occurrence as the base for calculation was appropriate for ensuring compliance with the principle of proportionality in all cases. Indeed, the taking into account of the year of a finding of non-compliance with the cross-compliance rules to calculate the reduction of direct payments could not ensure a link between the farmer's behaviour leading to that

20 See also, to that effect, the *Teglgaard* judgment, paragraphs 48 and 53. For a specific example, see points 72 to 76 of this Opinion. However, where the year in which the infringement is committed and the year in which it is found are the same, it is not necessary to choose between the year of the occurrence and the year of the finding.

21 In the present case, the order for reference does not state whether the material circumstances relating to the situation of the farmer concerned changed between the year of the occurrence (2015) and the year of the finding (2016) as regards the case of non-compliance with the cross-compliance rules in the area of health.

22 *Teglgaard* judgment, paragraph 36.

23 *Teglgaard* judgment, paragraphs 40 to 43.

reduction and the reduction itself. However, observance of the principle of proportionality was still ensured where the reduction of the direct payments was calculated on the amount of direct payments granted or to be granted in the calendar year in which the non-compliance with the cross-compliance rules occurred, since such a link is maintained. [24]

50. Lastly, use of the year of the occurrence was such as to guarantee the principles of equal treatment and legal certainty. Indeed, the choice of that year as the basis for calculation enabled removal of the risk that the amount of payments to which the reduction was applied would be higher or lower than that of the year of the finding of non-compliance with the cross-compliance rules, which was such as to ensure equal treatment among farmers and also to enable the farmer concerned to predict the financial consequences he would have to bear due to non-compliance with the cross-compliance rules. [25]

51. *Secondly*, in the *Teglgaard* judgment, the Court interpreted all the provisions relating to calculation of reductions which preceded the regulations at issue in the present case. Although the wording of the earlier provisions had been amended over time, [26] the Court interpreted them in the same way. In that regard, the Court drew a clear distinction between the *calculation* and the *imputation* of reductions. According to the Court, all the earlier provisions must be interpreted as meaning that it is necessary to *calculate* reductions on the basis of the payments granted or to be granted in the year in which that non-compliance *occurred*, whilst reductions of direct payments calculated in that way must be *imputed* to the payments granted or to be granted in the calendar year in which the non-compliance with the cross-compliance rules was *found*. [27]

52. As I stated in my introduction to this Opinion, the question which arises in the present case is whether that interpretation applies in respect of the new legislation also, or whether the legislature intended to amend the year on the basis of which reductions are to be calculated.

53. In order to answer that question, I think it would be useful to begin by interpreting the provisions laid down in the basic regulation, namely, Article 97(1) and Article 99(1) of Regulation No 1306/2013 (Section D), before moving on to interpret Implementing Regulation No 809/2014 (Section E). Indeed, since it is an implementing regulation adopted on the basis of an enabling provision in Regulation No 1306/2013, Implementing Regulation No 809/2014 must be interpreted in accordance with Regulation No 1306/2013 and may not derogate from the provisions of that regulation, to which it is subordinate. [28]

D. Interpretation of Regulation No 1306/2013

54. For the interpretation of Regulation No 1306/2013, Article 23(1) of Regulation No 73/2009 is of particular interest, since it is that provision of the basic regulation preceding Regulation No 1306/2013 which the Court has interpreted as referring to the *year of the occurrence* as the basis for calculating the reduction. [29] The question which arises is therefore which provision of Regulation No 1306/2013 replaced Article 23(1) of Regulation No 73/2009.

24 *Teglgaard* judgment, paragraphs 40 to 43 and 49 to 51.

25 *Teglgaard* judgment, paragraphs 48, 52 and 53.

26 These are, first, Article 6(1) of Regulation No 1782/2003, Article 6(1) of that regulation as amended by Regulation No 146/2008, and Article 66(1) of Implementing Regulation No 796/2004 and, secondly, Article 23(1) of Regulation No 73/2009 and Article 70(4) and (8)(a) of Implementing Regulation No 1122/2009. Those provisions are cited in Section II.A of this Opinion.

27 See the *Teglgaard* judgment, paragraphs 34 to 59.

28 See, to that effect the, *Teglgaard* judgment, paragraph 45 and the case-law cited.

29 See the *Teglgaard* judgment, paragraphs 55 and 56.

55. In that regard, I note first of all that Regulation No 1306/2013 does not contain one provision which is the same as that of Article 23(1) of Regulation No 73/2009 but two provisions, namely, Article 97(1) and Article 99(1), both of which, at first sight, have similar wording to that of Article 23(1) of Regulation No 73/2009. [30]

56. Next, I note that each of those two provisions refers to a particular but different year: Article 99(1) of Regulation No 1306/2013 refers to the *year of the finding*, whilst Article 97(1) refers to the calendar year in which the beneficiary must comply with the cross-compliance rules, which corresponds to the *year of the occurrence*. [31] The question which arises is therefore *which* of those provisions concerns the calculation of reductions and, more generally, whether the legislature intended to amend the use of the *year of the occurrence* as the basis for calculation, as was provided for in the earlier regulations.

57. The interested parties put forward in essence two differing opinions on this point.

58. On the one hand, the Netherlands and German Governments and the Commission consider that the legislature intended, by the new legislation, to amend the year on the basis of which reductions are to be calculated. They consider that the former Article 23(1) of Regulation No 73/2009, concerning calculation, was replaced by Article 99(1) of Regulation No 1306/2013. Since the latter provision refers to the *year of the finding*, a reduction must be calculated on the basis of that year.

59. On the other hand, the Danish Government, the Parliament and the Council take the view that the new legislation is in essence the same as the earlier legislation, and that the legislature did not intend to amend the relevant year for the calculation of reductions. They consider in essence that Article 99(1) of Regulation No 1306/2013 governs not the *calculation* of the reduction, but its *imputation*. It therefore follows from that provision, which refers to the *year of the finding*, that the reduction must be *imputed* to payments granted in that year. However, as regards *calculation* of the reduction, the Danish Government considers that it is Article 97(1) of Regulation No 1306/2013 which replaced the former Article 23(1) of Regulation No 73/2009, and that it is therefore necessary to calculate the reduction on the basis of the *year of the occurrence*, as provided in the former provision. [32]

60. I agree with the latter interpretation for the following reasons in particular. First, it is apparent from a correlation table that it is indeed Article 97(1) of Regulation No 1306/2013 which replaced Article 23(1) of Regulation No 73/2009 (Section 1). Secondly, only use of the *year of the occurrence* as the basis for calculation is appropriate for ensuring the attainment of the objective of Regulation No 1306/2013 concerning compliance with the cross-compliance rules and the principle of proportionality in all cases (Section 2). Thirdly, in my view, it cannot be inferred from the legislative history of Regulation No 1306/2013 that the legislature *intended* to amend the earlier rules on that point; the opposite may even have been the case (Section 3).

30 Whilst the first part of the wording of Article 23(1) of Regulation No 73/2009 is similar to that of Article 97(1) of Regulation No 1306/2013, the second part of the former provision is similar to that of Article 99(1) of Regulation No 1306/2013.

31 See, to that effect, also the *Teglgaard* judgment, paragraph 55, concerning the term 'calendar year'. To my knowledge, the provisions are the same in their different language versions on that point and are therefore clear in that regard.

32 The Parliament and the Council also take the view that calculation of the reduction must be based on the payments granted in the year of the occurrence. They have not, however, specified the provision or provisions on which they base that view.

1. The wording of Article 97(1) and Article 99(1) of Regulation No 1306/2013 and the context of those provisions as compared to the earlier regulation

61. From the outset, I note that by virtue of their wording, both Article 97(1) and Article 99(1) of Regulation No 1306/2013 could, in principle, be understood to relate to the calculation of reductions and could therefore be regarded as replacing Article 23(1) of Regulation No 73/2009. In fact, neither of them expressly mentions the year on the basis of which reductions are to be *calculated*. However, both of them use the broad term, '*apply*' reductions, which may mean *calculate* but could also mean *impute*.[33]

62. That being so, I note, however, that it is clear from the correlation table in Annex XI to Regulation No 1307/2013 that it is Article 97 of Regulation No 1306/2013 which replaced Article 23 of Regulation No 73/2009.[34]

63. I recall that the rules on cross-compliance laid down in Regulation No 73/2009 were formally repealed by Regulation No 1307/2013, whilst they were replaced by the provisions laid down in Regulation No 1306/2013.[35] Regulations Nos 1306/2013 and 1307/2013, which both form part of the reform of the CAP, are thus closely linked.[36] It is in that context that a table showing the correlations between the provisions of Regulation No 1306/2013 and the repealed provisions of Regulation No 73/2009 was annexed to Regulation No 1307/2013.[37]

64. My assumption, based on that table, is that it is Article 97(1) of Regulation No 1306/2013 which determines the year on the basis of which payment reductions are to be calculated, which leads me to raise the following question: what therefore is the purpose of Article 99(1) of Regulation No 1306/2013?

65. Like the Danish Government, the Council and the Parliament, I consider that that provision concerns the *imputation* of reductions.

66. As regards the wording, I find, first of all, great similarity between that provision and the earlier provision which concerned the *imputation* of reductions, namely Article 70(8)(a) of Implementing Regulation No 1122/2009. It seems therefore that the latter provision was introduced by the legislature into basic Regulation No 1306/2013 in the form of Article 99(1), first subparagraph.

67. Next, that interpretation is borne out by the correlation table referred to above. It is clear from that table that Article 99 of Regulation No 1306/2013 corresponds to Article 24 of former Regulation No 73/2009. I note in that regard that the latter article contains paragraphs similar to Article 99(1), second subparagraph, and Article 99(2) to (4) of Regulation No 1306/2013. It does not, however, contain a provision equivalent to Article 99(1), first subparagraph, of Regulation No 1306/2013, which lends support to the idea that that provision corresponds to Article 70(8)(a) of Implementing Regulation No 1122/2009.

33 See, to that effect, *Teglgaard* judgment, paragraphs 44 and 45, and Opinion of Advocate General Sharpston in *Teglgaard and Fløjstrupgård* (C-239/17, EU:C:2018:328, point 76). Other language versions of Article 97(1) and Article 99(1) of Regulation No 1306/2013 use a term as broad as 'appliquer': 'imposed' and 'applied' in English, 'opgelegd' in Dutch, and 'pålægges' and 'anvendes' in Danish.

34 In that regard, it is clear from paragraph 2 of Article 72 of Regulation No 1307/2013, entitled 'Repeals', that references to Regulation No 73/2009 are to be construed as references to Regulation No 1306/2013 and are to be read in accordance with the correlation table set out in Annex XI to Regulation No 1307/2013.

35 See footnote 15 to this Opinion.

36 In particular, Regulation No 1306/2013 and the provisions adopted pursuant to it are to apply in relation to the measures set out in Regulation No 1307/2013 (see recital 4 of the latter regulation).

37 See Annex XI to Regulation No 1307/2013.

68. In the light of the above, it is necessary to reject the argument put forward by the Netherlands and German Governments and by the Commission concerning the title of Article 99, 'Calculation of the administrative penalty', which does not appear in the earlier regulations. Certainly, that title might indicate that the first subparagraph of Article 99(1) of Regulation No 1306/2013 concerns the calculation of reductions and that it therefore refers to the year on the basis of which reductions are to be calculated. However, it should be pointed out, first, that the arguments set out above do not support such an interpretation. Secondly, as the Council contends, the explanation for the title of Article 99 may be that almost all of Article 99, namely the second subparagraph of Article 99(1) and Article 99(2) to (4), in fact concerns the calculation of reductions, in particular the factors to be taken into account during calculation, such as the severity, extent, permanence and reoccurrence of the non-compliance found.

2. The purpose of the cross-compliance system

69. In the *Teglgaard* judgment, the Court held that the purpose of Regulation No 1782/2003 as regards compliance with the cross-compliance rules was to *link* the payment of direct aid to compliance with rules relating to agricultural land, agricultural production and agricultural activity.[38]

70. It is common ground that that purpose was maintained in Regulation No 1306/2013, as stated in recital 53. That recital notes that the former basic regulations, Regulation No 1782/2003 and Regulation No 73/2009, established the principle that the full payment to beneficiaries should be *linked* to compliance with rules relating to land management, agricultural production and agricultural activity.

71. In my view and as the Court held in the *Teglgaard* judgment, it may be inferred from that purpose that it is the *year of the occurrence*, referred to in Article 97(1) of Regulation No 1306/2013, which must be used as the basis for the calculation of reductions. Only that year is likely to maintain in all cases the link between the farmer's behaviour and the penalty.[39] The taking into account of the *year of the finding* to calculate the reduction cannot consistently ensure that link. The same applies with regard to the principle of proportionality.[40] Furthermore, use of the *year of the occurrence* accords better with the principles of legal certainty and equal treatment.[41]

72. In order to illustrate my words with an example, I consider that the example used by Advocate General Sharpston in her Opinion in *Teglgaard* is appropriate:[42] suppose that farmers A, B and C are farming identical farms and that each is entitled to EUR 10 000 of direct aid for year 1. They each commit exactly the same breach of their cross-compliance requirements in year 1 but the breaches remain undiscovered in that year.

73. In year 2, farmer A ceases farming and transfers his holding to another farmer. Farmer B continues to farm the same holding and to claim the same amount (EUR 10 000) of direct aid. Farmer C sets about increasing the size of his holding and accordingly starts to claim more direct aid.

74. In year 3, the breaches are discovered. The competent national authorities duly make 'findings' regarding the non-compliances and issue determinations reducing the direct aid for each farmer by 3% calculated on the basis of each farmer's total entitlement to direct aid in year 3.

38 See the *Teglgaard* judgment, paragraphs 40 to 43, mentioned in points 47 and 48 of this Opinion.

39 *Teglgaard* judgment, paragraphs 40 to 43.

40 See the *Teglgaard* judgment, paragraphs 49 to 51.

41 See the *Teglgaard* judgment, paragraphs 48, 52 and 53.

42 (C-239/17, EU:C:2018:328, points 90 to 94).

75. As a result, farmer A (who has no claim for direct aid in year 3, because he has ceased farming) is subject to a direct payment reduction of 3% x zero. He escapes scot free. Farmer B, who is still farming the same area as in year 1 and is entitled to EUR 10 000 of direct payments for year 3, is subject to a reduction in his direct payments of 3% x EUR 10 000, or EUR 300. The sanction imposed on him is, fortuitously, the same as it would have been had the year of the breach been taken as the year of calculation for the 3% reduction in aid. Farmer C has increased his holding very substantially indeed and is entitled to EUR 100 000 of direct payments in year 3. As a consequence, his sanction for non-compliance in year 1 is a reduction of EUR 3 000 applied to his direct payments for year 3.

76. It will be seen that the result of applying the Commission's method based on the *year of the finding* is to impose vastly different sanctions on the three farmers A, B and C (EUR 0, EUR 300 and EUR 3 000 respectively) in respect of *exactly the same breach of the cross-compliance requirements* in year 1. Such an outcome is not compatible either with the purpose of Regulation No 1306/2013, or with the principle of proportionality. [43]

77. In the light of the above, first, the Commission's argument concerning the purpose of Regulation No 1306/2013 must be rejected. Administrative penalties in the form of payment reductions should be dissuasive and effective, which is clear from recital 57 of Regulation No 1306/2013. That general objective cannot, however, bearing in mind the explanation I have just given, justify using the year of the finding in order to calculate reductions. With regard, secondly, to the argument put forward by the Netherlands, German and Swedish Governments that it is more difficult in practice to use the year of the *occurrence* as the basis for calculation rather than the year of the *finding*, the fact remains that, even if that argument is correct, such administrative or practical difficulties cannot be relied on in support of an interpretation that conflicts with the purpose of the provisions concerned. [44]

3. The legislative history of the provisions concerned

78. Regulation No 1306/2013 having been adopted *before* the *Teglgaard* judgment was delivered, the legislature had no opportunity to state expressly whether it intended to maintain or amend the year on the basis of which reductions of direct payments should be calculated that was laid down by the earlier legislation, as interpreted in the *Teglgaard* judgment. That being so, there is nothing in the legislative history of Article 97(1) and Article 99(1) of Regulation No 1306/2013 which, in my view, gives reason to consider that the legislature intended to amend the legislation on that point.

79. With regard, in the first place, to the recitals of Regulation No 1306/2013, I note that they make no mention of the method for calculating reductions. Nothing in the recitals of Regulation No 1306/2013 therefore gives reason to consider that the legislature intended to amend the earlier rules on that point. On the contrary, like the Danish Government and the Parliament, I consider that recital 57 of Regulation No 1306/2013 seems to indicate that the legislature *did not intend* to amend the earlier legislation. Thus, it appears from that recital concerning the cross-compliance system that Regulation No 1306/2013 seeks 'for the sake of consistency, … to *merge* the relevant Union provisions into one single legal instrument', [45] which implies that the legislature did not wish to amend the reduction system in the event of non-compliance with cross-compliance rules.

43 See the *Teglgaard* judgment paragraphs 43 and 49 to 51.

44 See, to that effect, judgment of 21 February 1991, *Germany* v *Commission* (C-28/89, EU:C:1991:67, paragraph 18), and Opinion of Advocate General Sharpston in *Teglgaard and Fløjstrupgård* (C-239/17, EU:C:2018:328, points 60, 82 and 83).

45 Emphasis added. I note that, before the entry into force of Regulation No 1306/2013, the provisions on penalties for non-compliance with the cross-compliance rules were laid down in Regulation No 73/2009 on direct aid to farmers. With the reform of the CAP, certain provisions common to the various types of aid were included in Regulation No 1306/2013 on the financing of the CAP, which is therefore a 'horizontal' regulation. It is in that context that the legislature included the rules on cross-compliance in Regulation No 1306/2013.

80. With regard, secondly, to the preparatory documents to Regulation No 1306/2013, I note that, even if those documents did show the intention of the legislature to amend the method for calculating reductions, such an intention would not, in my view, be decisive for the interpretation of the provisions concerned, since it is by no means clear from the legislation itself, that is to say, either in the provisions or recitals of Regulation No 1306/2013, or in the purpose of the rules concerned. [46]

81. That being so, and in any event, I, unlike the Commission, do not think that it can be inferred from the preparatory documents to Article 99 of Regulation No 1306/2013 that the legislature intended to amend the method for calculating reductions. I recall that the Commission considers that it is that provision, and not Article 97(1) of that regulation, which governs the year on the basis of which reductions of direct payments must be calculated.

82. In that regard, it is true that Article 99(1) of Regulation No 1306/2013 was amended during the legislative process, since the original version of that provision in the Commission proposal made reference to the *year of the occurrence*, [47] whereas the definitive version of that provision refers to the *year of the finding*. However, contrary to what the Commission contends, there is nothing in the preparatory documents from which to conclude that the legislature, by that amendment introduced during the trilogue meetings on the Commission proposal, [48] intended to amend the relevant year for the *calculation* of reductions as compared to the former legislation.

83. In support of its position, the Commission provided *internal* documents which give reason to consider that such was its intention when it proposed that amendment: it took the view that calculation of reductions fell within Article 99(1) of Regulation No 1306/2013, and that it was necessary to use no longer the year of the *occurrence*, but that of the *finding*, on the grounds that it was too difficult to establish the year in which the non-compliance with the cross-compliance rules occurred. [49]

84. However, I must agree with the Parliament and the Council that there is nothing in the (public) preparatory documents to Regulation No 1306/2013 to show that those two co-legislatures had been informed of that alleged reasoning and that they had agreed with it when accepting the amendment. [50] That internal document cannot therefore be used as a source of interpretation. Moreover, as the Parliament and the Council point out, the amendment proposed by the Commission could be explained by the latter's intention to ensure consistency with the content of the former provision concerning imputation, namely Article 70(8)(a) of Implementing Regulation No 1122/2009.

85. In the light of all the above considerations, I conclude that the legislature *did not* intend to amend the method for calculating reductions under Regulation No 1306/2013.

46 See also, to that effect, Opinion of Advocate General Bobek in *BV* (C-129/19, EU:C:2020:375, points 118 to 123), and in *Federatie Nederlandse Vakbeweging* (C-815/18, EU:C:2020:319, points 61 to 63).

47 Proposal for a Regulation of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy [COM(2011)628 final]. Article 99(1) of that proposal referred particularly to the 'the calendar year concerned or the years concerned'. As is explained in point 56 of this Opinion, that reference corresponds to the year of the occurrence.

48 The three co-legislators confirmed that the amendment was introduced at trilogue meetings on a proposal from the Commission.

49 That Commission internal document dated 15 May 2013 concerning Article 99(1) of the proposed regulation states that 'the current text as regards the calculation of reductions refers to the occurrence of the non-compliance. This could be difficult to establish. Therefore, if possible, [paragraph 1 of Article 99] should be amended by introducing a reference to the year of the finding'.

50 So far as I am aware, and as the Council and the Parliament have maintained, the amendment is mentioned in only two public Council documents. However, no intention on the part of the legislature to introduce an amendment can be inferred from them. In the first document, with the reference 10204/13 ADD1 and dated 7 June 2013, the comment on Article 99(1) states: 'Open – revised text in preparation. That text will provide that the reduction would be applied to claims lodged during the calendar year of the finding'. As I explained in point 61 of this Opinion, the term 'appliquer' ('applied' in English) can mean both the calculation and the *imputation* of the reduction. In the second document, with the reference 10204/13 REV and dated 14 June 2013, that comment is replaced by the wording of Article 99(1) as it was adopted, which does not make it possible to identify the legislature's reasoning either.

4. Conclusion on the interpretation of Regulation No 1306/2013

86. It follows from all the considerations set out above that Article 97(1) of Regulation No 1306/2013 must be interpreted as meaning that reductions of payments due to non-compliance with the cross-compliance rules must be *calculated* on the basis of the payments granted or to be granted in the year in which that non-compliance *occurred*, whereas Article 99(1) of that regulation must be interpreted as meaning that the reductions of direct payments thus calculated are to be *imputed* to the payments granted or to be granted in the calendar year in which that non-compliance is *found*.

E. Interpretation of Implementing Regulation No 809/2014

87. As regards Article 73(4)(a) of Implementing Regulation No 809/2014, I find that the wording of that provision is in essence the same as that of Article 99(1) of Regulation No 1306/2013. As a provision of the implementing regulation, Article 73(4)(a) of Implementing Regulation No 809/2014 must therefore be interpreted in accordance with Article 99(1) of Regulation No 1306/2013. It follows that Article 73(4)(a) of Implementing Regulation No 809/2014 must also be interpreted as meaning that reductions of direct payments are to be *imputed* to the payments granted or to be granted in the calendar year in which the non-compliance with the cross-compliance rules is *found*.[51]

V. Conclusion

88. In the light of all the above considerations, I propose that the Court should answer the question referred by the College van Beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry, Netherlands) as follows:

(1) Article 97(1) of Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 must be interpreted as meaning that reductions of direct payments due to non-compliance with the cross-compliance rules must be calculated on the basis of the payments granted or to be granted in the year in which that non-compliance occurred.

(2) Article 99(1) of Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008, and Article 73(4)(a) of Commission Implementing Regulation (EU) No 809/2014 of 17 July 2014 laying down rules for the application of Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to the integrated administration and control system, rural development measures and cross-compliance, must be interpreted as meaning that the reductions of direct payments thus calculated are to be imputed to the payments granted or to be granted in the calendar year in which the non-compliance is found.

51 The fact that the Commission, at the time of the adoption of Article 73(4)(a) of Implementing Regulation No 809/2014, was apparently of the view that Article 99(1) of Regulation No 1306/2013 related not to the imputation, but to the calculation of the reduction explains why that provision merely reproduces the content of Article 99(1) of Regulation No 1306/2013.