Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

24 May 2012 *

(Agriculture — European Agricultural Guidance and Guarantee Fund — Regulations (EC) Nos 1257/1999 and 817/2004 — Financial support for agri-environmental production methods — Checks — Beneficiary of agricultural aid — Fact of having prevented an on-the-spot check from being carried out — National legislation requiring the repayment of all aid paid over several years — Whether compatible)

In Case C-188/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Landesgericht für Zivilrechtssachen Wien (Austria), made by decision of 12 April 2011, received at the Court on 20 April 2011, in the proceedings

Peter Hehenberger

v

Republik Österreich,

THE COURT (Seventh Chamber),

composed of J. Malenovský (President of the Chamber), E. Juhász and G. Arestis (Rapporteur), Judges,

Advocate General: J. Mazák,

Registrar: A. Calot Escobar,

having regard to the written procedure and further to the hearing on 8 March 2012,

after considering the observations submitted on behalf of:

— Mr Hehenberger, by K.F. Lughofer, Rechtsanwalt,

— the Austrian Government, by A. Posch, S. Schmid, G. Holley and D. Müller, acting as Agents,

— the Greek Government, by I.K. Chalkias and A.E. Vasilopoulou, acting as Agents,

— the European Commission, by G. von Rintelen and B. Schima, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (OJ 1999 L 160, p. 80), read in conjunction with Commission Regulation (EC) No 817/2004 of 29 April 2004 laying down detailed rules for the application of Regulation No 1257/1999 (OJ 2004 L 153, p. 30).

2 The reference was made in proceedings between Mr Hehenberger, a farmer, and Republik Österreich, concerning the repayment of agri-environmental aid granted to him by the Austrian authorities in respect of a number of years, pursuant to Regulation No 1257/1999.

Legal context

European Union law

3 In Chapter VI of Regulation No 1257/1999, entitled 'Agri-environment', Article 22 provides:

'Support for agricultural production methods designed to protect the environment and to maintain the countryside (agri-environment) shall contribute to achieving the Community's policy objectives regarding agriculture and the environment.

Such support shall promote:

— ways of using agricultural land which are compatible with the protection and improvement of the environment, the landscape and its features, natural resources, the soil and genetic diversity,

— an environmentally-favourable extensification of farming and management of low-intensity pasture systems,

— the conservation of high nature-value farmed environments which are under threat,

— the upkeep of the landscape and historical features on agricultural land,

— the use of environmental planning in farming practice.'

4 Article 23 of Regulation No 1257/1999 provides:

'1. Support shall be granted to farmers who give agri-environmental commitments for at least five years. Where necessary, a longer period shall be determined for particular types of commitments in view of their environmental effects.

2. Agri-environmental commitments shall involve more than the application of usual good farming practice.

They shall provide for services which are not provided for by other support measures, such as market support or compensatory allowances.'

5 Article 24 of that regulation is worded as follows:

‘1. Support in respect of an agri-environmental commitment shall be granted annually and be calculated on the basis of:

— income foregone,

— additional costs resulting from the commitment given, and

— the need to provide an incentive.

The cost of any non-remunerative capital works necessary for the fulfilment of the commitments may also be taken into account in calculating the level of annual support.

2. Maximum amounts per year eligible for Community support are laid down in the Annex. These amounts shall be based on that area of the holding to which agri-environmental commitments apply.’

6 In Chapter II of Regulation No 817/2004, Article 67 of Section 6, which is entitled ‘Applications, checks and penalties’, provides:

‘1. Initial applications to join a scheme and subsequent applications for payment shall be checked in a manner which ensures effective verification of compliance with the conditions for granting support.

The Member States shall define suitable methods and means for verifying each support measure as well as the persons who shall be subject to checks.

Wherever appropriate, Member States shall make use of the integrated administration and control system introduced by Regulation (EC) No 1782/2003.

2. Verification shall consist of administrative and on-the-spot checks.’

7 Under Article 69 of Regulation No 817/2004:

‘On-the-spot checks shall be made in accordance with Title III of Regulation (EC) No 2419/2001. They shall cover at least 5% of beneficiaries each year and all the different types of rural development measures set out in the programming documents. …

On-the-spot checks shall be spread over the year on the basis of an analysis of the risks presented by each rural development measure. For investment support measures under Chapters I, VII, VIII and IX of Title II of Regulation (EC) No 1257/1999, Member States may provide that on-the-spot checks concern only those projects in the process of completion.

Checks shall cover all the commitments and obligations of a beneficiary which can be checked at the time of the visit.’

8 Article 71(2) of Regulation No 817/2004 provides:

‘In the event of undue payment, the beneficiary under a rural development measure shall be under an obligation to repay the amount concerned in accordance with Article 49 of Regulation (EC) No 2419/2001.’

9 Article 73 of Regulation No 817/2004 provides:

‘Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.’

10 In Commission Regulation (EC) No 2419/2001 of 11 December 2001 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes established by Council Regulation (EEC) No 3508/92 (OJ 2001 L 327, p. 11), Article 17 of Title III, which is entitled ‘Checks’, provides:

‘1. On-the-spot checks shall be unannounced. However, provided that the purpose of the check is not jeopardised, advance notice limited to the strict minimum necessary may be given. Such notice shall, except in duly justified cases, not exceed 48 hours.

2. Where appropriate, on-the-spot checks provided for in this Regulation, as well as any other checks provided for in Community rules, shall be carried out at the same time.

3. The application or applications concerned shall be rejected if the farmer or his representative prevents an on-the-spot check from being carried out.’

11 Regulation No 2419/2001 was repealed by Commission Regulation (EC) No 796/2004 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 of 29 September 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). Regulation No 796/2004 provides that it is to apply to aid applications relating to marketing years or premium periods commencing on 1 January 2005 and that references to Regulation No 2419/2001 are to be construed as references to Regulation No 796/2004.

12 Article 23(2) of Regulation No 796/2004, which replaced Article 17(3) of Regulation No 2419/2001, is worded as follows:

‘The applications for aid concerned shall be rejected if the farmer or his representative prevents an on-the-spot check from being carried out.’

National legislation

13 In accordance with Regulation No 1257/1999, the competent Austrian ministry adopted the Special Directive on the Austrian aid programme for extensive agriculture, compatible with the requirements of the protection of the environment and the maintenance or the countryside (‘ÖPUL 2000’). ÖPUL 2000 contains a number of agri-environmental measures, for the purposes of Regulation No 1257/1999, which are to be chosen by the beneficiary at the time of the initial application for support and which, if he implements them in Austrian territory, enable him to receive area-based aid co-financed by the European Union.

14 ÖPUL 2000, to which a great number of annexes are attached, is composed of (i) a general part relating, inter alia, to the conditions for the grant of support which are common to the various parts of the support programme, to the payment of aid, to the checking system and to the repayment of aid in cases of non-compliance with the conditions in accordance with which it was granted and (ii) a part devoted to the specific conditions governing the allocation of support. Under Austrian law, ÖPUL 2000 does not have the status of abstract and general legislation but, when a contract is concluded, its provisions are taken into consideration by way of clauses with contractual force.

15 In particular, Paragraph 1.4.4 of ÖPUL 2000, which is based on Article 23 of Regulation No 1257/1999, provides that the initial application for support is to place the applicant under an obligation, in respect of the measures applied for, to farm or care for the areas covered by the application in accordance with the eligibility conditions for five years and to comply, during that period, with all the other conditions for eligibility.

16 Paragraph 1.9 of ÖPUL 2000 established a system of checks which authorises the inspecting authorities to enter any farmland and to require the aid applicant to permit the checks planned.

17 In accordance with Paragraph 1.10 of ÖPUL 2000, the aid applicant is required to repay any support granted — or, as the case may be, he loses his right to payment of support which has been allocated, but not yet disbursed — where the commitments entered into have not been met, where the conditions laid down in ÖPUL 2000 or in the undertaking have not been fulfilled, or where the aid applicant has not allowed the inspecting authorities to enter all the land farmed. Paragraph 1.10 of ÖPUL 2000 also places the applicant under an obligation, in the event of failure to comply with the five-year commitment, to repay any aid already received during the commitment period.

The dispute in the main proceedings and the question referred

18 By application of 11 September 2000, Mr Hehenberger had applied, for the first time, to the Austrian paying body acting on behalf of the Republik Österreich, for agri-environmental support under ÖPUL 2000.

19 In the context of that application, Mr Hehenberger made a statement by which he undertook in accordance with Paragraph 1.4.4 of ÖPUL 2000 to implement, for a period of 5 years from 1 January 2001, certain agri-environmental measures referred to in ÖPUL 2000. By signing that commitment, in which express reference was made to ÖPUL 2000, Mr Hehenberger also undertook to comply with ÖPUL 2000, which accordingly formed an integral part of each aid agreement concluded with that body. Subsequently, that five-year commitment was extended by one year until 31 December 2006.

20 On the basis of that commitment and the aid applications made each year by Mr Hehenberger, the Austrian paying body paid the agri-environmental support concerned for the years from 2001 to 2005. The annual application for the 2005 aid was lodged on 22 April 2005.

21 The competent inspecting authorities had planned an on-the-spot check, to be carried out in accordance with Paragraph 1.9 of ÖPUL 2000 on 12 September 2005, in order to measure and identify the fields concerned. However, Mr Hehenberger denied access to that land, thus preventing the check from being carried out.

22 By letter of 9 October 2006, the Austrian paying body informed Mr Hehenberger that the 2006 agri-environmental support under ÖPUL 2000 would not be paid to him because the grant of that aid for an additional year required compliance with the five-year commitment under ÖPUL 2000.

23 By letter of 27 February 2007, the Austrian paying body claimed that Mr Hehenberger had made it impossible to carry out the on-the-spot check on 12 September 2005. As a consequence, in accordance with Paragraph 1.10 of ÖPUL 2000, that body required repayment of all the aid which had been paid to Mr Hehenberger under ÖPUL 2000 for the years 2001 to 2005, that being the commitment period in respect of which he had earlier entered into an undertaking.

24 Mr Hehenberger has accordingly challenged the repayment claim before the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna). He argues essentially that it is disproportionate to require, by way of penalty, repayment of the financial support granted over a number of years. Republik Österreich contends that the action should be dismissed.

25 According to the referring court, it is common ground that Mr Hehenberger refused access to the land concerned, thereby preventing the on-the-spot check from being carried out. That court accordingly considers that, in the light of ÖPUL 2000 and the aid agreements concluded on the basis of that special directive by the parties to the dispute before it, the action should be dismissed, given that Republik Österreich was authorised to require repayment in the circumstances.

26 The referring court harbours doubts, however, as to the interpretation of Regulation No 1257/1999, read in conjunction with Regulation No 817/2004. In particular, that court is uncertain whether the penalty laid down in Paragraph 1.10 of ÖPUL 2000, which is particularly severe, is compatible with the objectives of Regulation No 1257/1999, which relate essentially to the conservation of farm land, the protection of the countryside and proper farming practices.

27 In those circumstances, the Landesgericht für Zivilrechtssachen Wien decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Regulation … No 1257/1999 … read in conjunction with Regulation … No 817/2004, preclude the laying down of rules by the provider of support requiring repayment by the beneficiary, in the event that an on-the-spot check (area measurement) is prevented, of all support already given in the context of an agri-environmental measure during the commitment period, even if it has been awarded and disbursed for a number of years?'

Consideration of the question referred

28 By its question, the referring court asks essentially whether Regulation No 1257/1999, read in conjunction with Regulation No 817/2004, precludes national legislation which provides that, where a farmer who is the beneficiary of financial support prevents an on-the-spot check of the land concerned, all the aid already granted during the commitment period to that farmer in relation to an agri-environmental measure must be repaid, even where it has already been paid in respect of a number of years.

29 First of all, it should be observed that neither Regulation No 1257/1999 nor Regulation No 817/2004 contain any provision which expressly precludes such national legislation.

30 Articles 22 to 24 of Regulation No 1257/1999 set out the general conditions for the grant of support for farming practices designed, in particular, to maintain the countryside. It follows from those provisions that agri-environmental measures are characterised by the five-year commitment given by the farmers concerned to practise a form of agriculture which respects the environment. In return for the agri-environmental commitments for a minimum of five years, financial support is allocated annually by the States according to the loss of revenue incurred or the resulting additional costs (Case C-241/07 *JK Otsa Talu* [2009] ECR I-4323, paragraph 36).

31 As regards the system of checks for this multi-annual support for agri-environmental farming practices, Article 67 of Regulation No 817/2004 provides that initial applications to join a scheme and subsequent applications for payment are to be checked in a manner which ensures effective verification of compliance with the conditions for granting support. Furthermore, Article 69 of that regulation states that the checks are to cover all the commitments and obligations of a beneficiary which can be checked at the time of the visit.

32 Article 69 also states that on-the-spot checks are to be made in accordance with Title III of Regulation No 2419/2001. In that title, which is entitled 'Checks', Article 17(3) of that regulation — which was replaced by Article 23(2) of Regulation No 796/2004, the legislative content of which corresponds in substance to that of Article 17(3) of Regulation No 2419/2001 — sets out the legal consequences if the

on-the-spot checks are prevented from being carried out. Accordingly, those provisions expressly provide that the applications concerned are to be rejected if the farmer or his representative prevents an on-the-spot check from being carried out.

33 In that connection, it should be observed that the Court was asked to interpret Article 23(2) of Regulation No 796/2004 in Case C-536/09 *Omejc* [2011] ECR I-5367. In paragraph 27 of that judgment, the Court underlined the importance of the checks and held that preventing them from being carried out cannot but lead to serious legal consequences, such as the rejection of the aid applications concerned.

34 Such rejection is the legal consequence of the fact that it is impossible to carry out an effective check as to whether the conditions required for the grant of the support have been complied with, as required under Article 67 of Regulation No 817/2004. As regards the agri-environmental support characterised by a multi-annual commitment, those conditions for the grant of support are not required simply for the year during which an on-the-spot check has been made, but throughout the entire commitment period in respect of which the support was granted, which means that — as laid down in Article 69 of that regulation — the on-the-spot checks connected with that support relate to all the commitments entered into. Accordingly, conduct on the part of the farmer which makes it impossible to carry out those checks prevents verification that those conditions have been complied with throughout the commitment period.

35 It follows that, as regards agri-environmental measures relating to a number of years, where the beneficiary of the agri-environmental support has prevented an on-the-spot check from being carried out, making it impossible to ascertain whether the conditions for eligibility of the aid have been complied with throughout the commitment period, the applications for agri-environmental aid concerned must be rejected in accordance with Articles 17(3) of Regulation No 2419/2001 and 23(2) of Regulation No 796/2004. For the purposes of those provisions, the applications concerned accordingly cover all the applications with respect to the conditions of eligibility, which must be complied with throughout the duration of the agri-environmental project in respect of which the beneficiary has pledged an undertaking and to which the on-the-spot checks relate.

36 In consequence, as is clear from Article 71(2) of Regulation No 817/2004, the beneficiary is under an obligation to repay all the agri-environmental aid already paid in respect of the applications which have been rejected.

37 Furthermore, it should be made clear that, where the European Union legislature lays down the conditions governing eligibility for the grant of aid, exclusion as a result of failure to comply with those conditions is not a penalty, but merely the consequence of failure to fulfil the conditions laid down by law (see, to that effect, Case C-171/03 *Toeters and Verberk* [2004] ECR I-10945, paragraph 47, and Case C-45/05 *Maatschap Schonewille-Prins* [2007] ECR I-3997, paragraph 47). By the same token, the rejection of an aid application on the grounds that it is impossible to verify the eligibility conditions because of the conduct of the farmer, who has prevented an on-the-spot check from being carried out, cannot be regarded as a penalty and, accordingly, cannot be subject to the application of Article 73 of Regulation No 817/2004.

38 In the light of all the foregoing considerations, the answer to the question referred is that Regulation No 1257/1999, read in conjunction with Regulation No 817/2004, does not preclude national rules which provide that, where a farmer who is the beneficiary of financial support prevents an on-the-spot check of the land concerned, all the support already granted during the commitment period to that farmer in relation to an agri-environmental measure must be repaid, even where it has already been paid in respect of a number of years.

Costs

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

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

Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations, read in conjunction with Commission Regulation (EC) No 817/2004 of 29 April 2004 laying down detailed rules for the application of Regulation No 1257/1999, does not preclude national rules which provide that, where a farmer who is the beneficiary of financial support prevents an on-the-spot check of the land concerned, all the support already granted during the commitment period to that farmer in relation to an agri-environmental measure must be repaid, even where it has already been paid in respect of a number of years.

[Signatures]