Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

12 September 2013*

(Common agricultural policy — EAFRD — Regulation (EU) No 65/2011 — Support for rural development — Support for the creation and development of micro-enterprises — Concept of 'artificially created conditions' — Abuses — Evidence)

In Case C-434/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Bulgaria), made by decision of 14 September 2012, received at the Court on 26 September 2012, in the proceedings

Slancheva sila EOOD

v

Izpalnitelen direktor na Darzhaven fond 'Zemedelie' Razplashtatelna agentsia,

THE COURT (Sixth Chamber),

composed of M. Berger, President of the Chamber, E. Levits (Rapporteur) and J.-J. Kasel, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

— Izpalnitelen direktor na Darzhaven fond 'Zemedelie' Razplashtatelna agentsia, by R. Porozhanov and D. Petrova, avocats,

— the Bulgarian Government, by E. Petranova and D. Drambozova, acting as Agents,

— the European Commission, by S. Petrova and G. von Rintelen, acting as Agents,

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

gives the following

* Language of the case: Bulgarian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(8) of Commission Regulation (EU) No 65/2011 of 27 January 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1698/2005, as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures (OJ 2011 L 25, p. 8).

2 The request has been made in proceedings between the company Slancheva sila EOOD ('Slancheva sila') and the Izpalnitelen direktor na Darzhaven fond 'Zemedelie' Razplashtatelna agentsia (Executive Director of the State Fund for Agriculture – Paying Agency; 'the DFZ-RA') concerning the latter's rejection of the application for financing under the European Agricultural Fund for Rural Development (EAFRD) for a photovoltaic park project.

Legal context

European Union law

3 Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2005 L 277, p. 1) lays down the intervention rules of that fund. The provisions for application of that regulation are set out in Regulation No 65/2011.

4 With regard to the aid scheme for Axis 3, concerning the quality of life in rural areas and diversification of the rural economy, Article 52(a)(ii) of Regulation No 1698/2005 provides:

'[S]upport for the creation and development of micro-enterprises with a view to promoting entrepreneurship and developing the economic fabric.'

5 Article 4(8) of Regulation No 65/2005 provides:

'Without prejudice to specific provisions, no payments shall be made to beneficiaries for whom it is established that they artificially created the conditions required for obtaining such payments with a view to obtaining an advantage contrary to the objectives of the support scheme.'

Bulgarian law

6 Paragraph 2 of Regulation No 29 of 11 August 2008 on the conditions and arrangements for grant of non-reimbursable financial aid under the aid scheme 'support for the creation and development of micro-enterprises' of the rural development programme for the period from 2007 to 2013 (DV No 76, 29 August 2008), in the version of 20 July 2010 as applicable to the period material to the main proceedings, states:

'Projects which contribute to achieving the objectives of the measure shall be promoted. The objectives of the measure are:

1. to promote growth and the creation of new jobs in micro-enterprises for non-agricultural activities in rural areas;

2. to promote entrepreneurship in rural areas;

3. to promote the development of integrated tourism in rural areas.'

7 Paragraph 4(2)(10) of that regulation provides that no assistance is to be given for the installation and sale of energy from renewable sources produced by an electric power plant with a capacity in excess of 1 megawatt.

8 Paragraph 6 of Regulation No 29 states:

‘…

2. Financial aid to projects for the installation and sale of energy from renewable sources represents 80% of the approved expenditure but may not exceed the equivalent in BGN of EUR 200 000.

…’

9 Paragraph 7(2) of Regulation No 29 provides:

‘Financial aid shall not be granted to applicants/beneficiaries who are found to be functionally dependent and/or who have artificially created the conditions required for obtaining aid, with a view to obtaining an advantage contrary to the objectives of the measure.’

10 Points 30 and 31 of the additional provisions to Regulation No 29 state:

‘30. An “artificially created condition” is any condition found within the meaning of Paragraph 4(8) of [Regulation No 65/2011] ...

31. “Functional dependence” is the artificial division of production and technical processes into different projects or the established use of a common infrastructure, funded by the Rural Development Programme, with a view to obtaining an advantage contrary to the objectives of the Rural Development Programme measure.’

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

11 On 13 May 2009, Slancheva sila submitted an application for funding to the DFZ-RA in accordance with the aid scheme “Support for the creation and development of micro-enterprises”, in the Rural Development Programme, for a project concerning the construction of a photovoltaic power plant.

12 Slancheva sila’s agent is Mr Mitsov, while the sole member and manager of that company is Ms Mitsova. These two persons are husband and wife.

13 The application for financing submitted by Slancheva sila contains, firstly, the rental contract for the land on which the photovoltaic power plant is to be built between Slancheva sila and the owners of the land, Mr Mitsov and Ms Mitsova. Secondly, that application contains the deed of sale of a building right between Korina Export EOOD, the sole member and manager of which is Mr Mitsov, and Slancheva sila.

14 Upon examination of Slancheva sila’s application, the DFZ-RA noted that the land concerned bordered two other pieces of land for which aid under the same programme had been requested for two projects identical to Slancheva sila’s project. Mr Mitsov and Ms Mitsova are the owners of those other two pieces of land. The building rights covering those pieces of land have also been sold by Korina Export EOOD.

15 A single company, 3 K AD, has been given the responsibility for carrying out the three projects.

16 Having regard to those circumstances and the fact that the three photovoltaic power station projects all have the same office address, the Executive Director of the DFZ-RA refused, by decision of 9 December 2011, to cofinance Slancheva sila's investment project, taking the view that it was established that there was no functional independence, that the conditions to be met for the award of the aid had been artificially created and that the intention was to obtain an advantage which did not comply with the objectives of the aid scheme.

17 In particular, the Executive Director of the DFZ-RA took the view that Slancheva sila's project was intended to circumvent the maximum financing limit for a project, namely the equivalent in Bulgarian leva of EUR 200 000.

18 Slancheva sila has applied for the annulment of the refusal decision of the DFZ-RA to the Administrativen sad Sofia-grad.

19 That court is of the view that the resolution of the dispute before it depends on the interpretation of the concept of 'artificially created … conditions' within the meaning of Article 4(8) of Regulation No 65/2011.

20 It points out that the Bulgarian administration applies a wide reading of that concept based on the following indications: the legal link between the persons concerned and the fact that they are identical and that the projects and registered office of the companies concerned are also identical.

21 None the less, the referring court states that its own practice is to apply a narrower interpretation of the concept of artificially created conditions. Under its case-law, the mere existence of common circumstances is not sufficient to show the artificial nature of the conditions for grant of aid. It requires the DFZ-RA to prove that there has been an intentional coordination between the legal persons and/or with a third party in order to obtain an advantage contrary to the objectives of the support scheme.

22 In those circumstances, the Administrativen sad Sofia-grad decided to stay the proceedings and request a preliminary ruling from the Court on the following questions:

'(1) How is the concept "artificially created conditions" to be interpreted in the light of the provision contained in Article 4(8) of Regulation No 65/2011?

(2) Is Article 4(8) of Regulation No 65/2011 to be interpreted as being incompatible with Article 7(2) of the Bulgarian Regulation No 29 …, according to which financial aid is not to be granted to applicants/beneficiaries who are found to be functionally dependent and/or who have artificially created the conditions required for obtaining aid, with a view to obtaining an advantage contrary to the objectives of the measure?

(3) Is Article 4(8) of Regulation No 65/2011 to be interpreted as being incompatible with the case-law in the Republic of Bulgaria, according to which the conditions required for obtaining an advantage contrary to the objectives of the measure have been artificially created if there is a legal connection between the applicants?

(4) Does the use by different applicants who are independent legal persons of independent neighbouring sites which were part of a single property before the application was submitted, and does the actual connection that is found to exist, for example applicants having the same agents, suppliers, executives, place of business and address, constitute "artificially created conditions"?

(5) Is it necessary to establish that there is deliberate coordination between the applicants and/or a third party with a view to obtaining an advantage for a specific applicant?

(6) What constitutes an advantage within the meaning of Article 4(8) of Regulation No 65/2011, in particular, does it include drawing up several smaller investment proposals with a view to a specific applicant receiving funding for each of them at the maximum rate of EUR 200 000 even if they were submitted by various different applicants?

(7) Is Article 4(8) of Regulation No 65/2011 to be interpreted as calling into question the case-law in the Republic of Bulgaria, according to which the provision in fact requires that the following three cumulative conditions be met: [firstly,] that there be functional dependence and/or artificially created conditions for obtaining aid, [secondly,] that this be intended to obtain an advantage, and [thirdly,] that it be contrary to the objectives of the measure?'

Consideration of the questions referred

Preliminary observations

23 The questions referred concern, firstly, the conditions for application of Article 4(8) of Regulation No 65/2011 and, secondly, the interpretation of that provision in Bulgarian legislation and case-law.

24 Accordingly, initially, it is appropriate to examine together the first and fourth to seventh questions and then, next, to answer the second and third questions.

The first and fourth to seventh questions

25 By those questions, the referring court wishes, in essence, to know the conditions for application of Article 4(8) of Regulation No 65/2011.

26 As a preliminary point, it is appropriate to point out that it is apparent from the order for reference that the Bulgarian administration has refused to approve the investment project submitted by Slancheva sila under the scheme for support for the creation and development of micro-enterprises with a view to promoting entrepreneurship and developing the economic fabric on the ground that that company sought wrongfully to obtain the grant of support under the EAFRD support scheme.

27 It is settled case-law that the scope of European Union regulations must not be extended to cover abuses on the part of a trader (see, to that effect, Case C-279/05 *Vonk Dairy Products* [2007] ECR I-239, paragraph 31).

28 It is apparent from the order for reference that, formally, Slancheva sila's investment project meets the eligibility criteria required for grant of support for the creation and development of micro-enterprises under Article 52(a)(ii) of Regulation No 1698/2005 and under national legislation.

29 The Court has already held that, in those circumstances, evidence of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the European Union rules by creating artificially the conditions laid down for obtaining it (see, to that effect, Case C-515/03 *Eichsfelder Schlachtbetrieb* [2005] ECR I-7355, paragraph 39 and the case-law cited).

30 Furthermore, it is for the national court to establish the existence of those two elements, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of European Union law is not thereby undermined (see, to that effect, Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraph 54 and the case-law cited).

31 It is in that context that the concepts of 'artificial creation' of the conditions required for the grant of a payment and of 'an advantage contrary to the objectives of the support scheme' within the meaning of Article 4(8) of Regulation No 65/2011 fall to be interpreted.

32 Firstly, with regard to the objective element, it must be borne in mind that, under recital 46 in the preamble to Regulation No 1698/2005, the EAFRD support scheme for rural development seeks, in particular, to help 'to diversify farming activities towards non-agricultural activities and develop non-agricultural sectors, promote employment … and carry out investments making rural areas more attractive in order to reverse trends towards economic and social decline and depopulation of the countryside'.

33 In particular, the objective of Article 52 of Regulation No 1698/2005, on the basis of which the support for the investment project at issue in the main proceedings was applied for, is to provide support for the creation and development of micro-enterprises with a view to promoting entrepreneurship and developing the economic fabric.

34 In that context, Regulation No 29 lays down the restrictions as regards the financing by the EAFRD of investment projects relating to the installation and distribution of renewable energy which fall within the category of measures referred to in Article 52 of Regulation No 1698/2005. Thus, firstly, the maximum amount of EAFRD financing is restricted to EUR 200 000 per beneficiary. Secondly, the financing is available only for electric power plants the capacity of which is lower than or equal to 1 megawatt.

35 It follows from the order for reference that Slancheva sila's photovoltaic power plant project was not accepted for financing by the EAFRD on the ground that the competent national administration considered, in the light of the facts of the main proceedings, that that company had intended to circumvent the restrictions laid down in national legislation, by agreeing with third parties, who were themselves applicants for support under the EAFRD support scheme in question, artificially to divide a single project into three smaller projects.

36 Nevertheless, that point cannot of itself exclude the fact that the investment project submitted by Slancheva sila will contribute to the achievement of the objectives pursued in Regulation No 1698/2005.

37 In that regard, although Slancheva sila is accused of seeking to circumvent the restrictions as regards the size of eligible projects and the maximum amount of support per beneficiary, it is for the referring court to examine whether that means that the objectives referred to in Article 52(a)(ii) of Regulation No 1698/2005 cannot be achieved.

38 In that context, that court must, in particular, take into consideration the definition of a micro-enterprise, the creation and development of which are the object of the support referred to in Article 52 of Regulation No 1698/2005, as follows from Article 2(3) of the annex to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003 L 124, p. 36).

39 Secondly, as regards the subjective element, it is the responsibility of the national court to determine the real substance and significance of the disputed application for financing (Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 81).

40 In so doing, the factual elements which can be taken into account by the referring court in order to establish the artificial nature of the creation of the conditions required to obtain an EAFRD payment include links of a legal, economic and/or personal nature between the persons involved in the investment operation concerned (see, to that effect, *Emsland-Stärke*, paragraph 58).

41 The existence of that subjective element can also be established by evidence of collusion, which may take the form of intentional coordination, between different investors applying for support under an EAFRD support scheme, in particular where the investment projects are identical and there is a geographical, economic, functional, legal and/or personal link between those projects (see, by analogy, *Vonk Dairy Products*, paragraph 33).

42 None the less, the Court has held that financing cannot be refused for a project where the investment in question may have some explanation other than the mere payment under the EAFRD support scheme (see, by analogy, *Halifax and Others*, paragraph 75).

43 Accordingly, Article 4(8) of Regulation No 65/2011 must be interpreted as meaning that the conditions for its application require both an objective and a subjective element. With regard to the first of those elements, it is for the referring court to consider the objective circumstances of the case in question which may lead to the conclusion that the objective pursued by the EAFRD support scheme cannot be achieved. With regard to the second element, it is for the referring court to consider the objective evidence which may lead to the conclusion that, by artificially creating the conditions required for obtaining such a payment under the EAFRD support scheme, the applicant for such a payment intended exclusively to obtain an advantage contrary to the objectives of that scheme. In that regard, the referring court can take as its basis not only elements such as the legal, economic and/or personal links between the persons involved in similar investment projects, but also indications showing that there was intentional coordination between those persons.

The second and third questions

44 By the second and third questions, the referring court asks, in essence, whether Article 4(8) of Regulation No 65/2011 must be interpreted as precluding, firstly, national legislation which provides for refusal of payment of support under the EAFRD support scheme, where an investment project is not functionally independent and, secondly, the case-law of national courts which recognises the artificial creation of the conditions required to obtain a payment where there is a legal link between the applicants for such a payment.

45 As follows from paragraph 29 of this judgment, the application of Article 4(8) of Regulation No 65/2011 presupposes the presence of two elements, one objective and the other subjective.

46 In that context, although it is true that the finding by the referring court of facts relating to the existence of a legal link between the applicants for support and even of a lack of functional independence between the different investment projects concerned constitute indications which could lead to the conclusion that the conditions required to obtain a payment under Article 4(8) of Regulation No 65/2011 have been artificially created, the fact remains that it is in the light of all the facts of the particular case that that assessment must be made.

47 In particular the referring court must satisfy itself that it follows from all the objective elements in the main proceedings that the chief aim of the choice of methods relating to the investment projects in question is the payment of support under the support scheme to the exclusion of all other justification in connection with the objectives of that scheme.

48 Accordingly, Article 4(8) of Regulation No 65/2011 must be interpreted as precluding the rejection of an application for payment under the EAFRD support scheme on the sole ground that an investment project in respect of which support under that scheme is sought, is not functionally independent or that there is a legal link between the applicants for such support without the other objective elements of the particular case being taken into consideration.

Costs

49 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 (Sixth Chamber) hereby rules:

1. **Article 4(8) of Commission Regulation (EU) No 65/2011 of 27 January 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1698/2005, as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures must be interpreted as meaning that the conditions for its application require both an objective and a subjective element. With regard to the first of those elements, it is for the referring court to consider the objective circumstances of the case in question which may lead to the conclusion that the objective pursued by the European Agricultural Fund for Rural Development (EAFRD) support scheme cannot be achieved. With regard to the second element, it is for the referring court to consider the objective evidence which may lead to the conclusion that, by artificially creating the conditions required for obtaining such a payment under the EAFRD support scheme, the applicant for such a payment intended exclusively to obtain an advantage contrary to the objectives of that scheme. In that regard, the referring court can take as its basis not only elements such as the legal, economic and/or personal links between the persons involved in similar investment projects, but also indications showing that there was intentional coordination between those persons.**

2. **Article 4(8) of Regulation No 65/2011 must be interpreted as precluding the rejection of an application for payment under the EAFRD support scheme on the sole ground that an investment project in respect of which support under that scheme is sought, is not functionally independent or that there is a legal link between the applicants for such support without the other objective elements of the particular case being taken into consideration.**

[Signatures]