Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

19 December 2013*

(Reference for a preliminary ruling — Regulation (EC) No 2200/96 — Regulation (EC) No 1432/2003 — Agriculture — Common organisation of markets — Fruit and vegetables — Producer organisations — Conditions for recognition by national authorities — Provision of technical resources required for storage, packing and marketing of produce — Whether organisation obliged, in the event of delegation of its tasks to third party companies, to exercise control over those companies)

In Case C-500/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) (United Kingdom), made by decision of 16 September 2011, received at the Court on 23 September 2011, in the proceedings

The Queen, on the application of:

Fruition Po Ltd

v

Minister for Sustainable Farming and Food and Animal Health,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arestis (Rapporteur), J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: N. Wahl,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 21 February 2013,

after considering the observations submitted on behalf of:

— Fruition Po Limited, by P. Cusick, Solicitor, and H. Mercer, Barrister,

— the United Kingdom Government, by J. Beeko and L. Seeboruth, acting as Agents, and G. Peretz, Barrister,

— the Netherlands Government, by C.S. Schillemans and C. Wissels, acting as Agents,

— the European Commission, by B. Schima and N. Donnelly, acting as Agents,

* Language of the case: English.

after hearing the Opinion of the Advocate General at the sitting on 23 April 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 11 of Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables (OJ 1996 L 297, p. 1), as amended by Council Regulation (EC) No 2699/2000 of 4 December 2000 (OJ 2000 L 311, p. 9) ('Regulation No 2200/96'), and Article 6(2) of Commission Regulation (EC) No 1432/2003 of 11 August 2003 laying down detailed rules for the application of Regulation No 2200/96 regarding the conditions for recognition of producer organisations and preliminary recognition of producer groups (OJ 2003 L 203, p. 18).

2 The request has been made in proceedings between Fruition Po Ltd ('Fruition') and the Minister for Sustainable Farming and Food and Animal Health ('the Minister'), concerning a decision whereby the latter withdrew recognition of the former's status as producer organisation granted to it on the basis of Regulation No 2200/96.

Legal context

3 The provisions of European Union law applicable to the facts of the main proceedings were to be found in Regulation No 2200/96 and Regulation No 1432/2003. Regulation No 2200/96 was repealed and replaced by Council Regulation (EC) No 361/2008 of 14 April 2008 amending Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ 2007 L 121 p. 1). Regulation No 1432/2003, for its part, was repealed and replaced by Commission Regulation (EC) No 1580/2007 of 21 December 2007 laying down implementing rules of Council Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1182/2007 in the fruit and vegetable sector (OJ 2007 L 350, p. 1), which itself was repealed and replaced by Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors (OJ 2011 L 157, p. 1).

4 Article 11 of Regulation No 2200/96 provided:

'1. For the purposes of this Regulation, "producer organisation" means any legal entity:

(a) which is formed on the own initiative of growers of the following categories of product listed in Article 1(2):

(i) fruit and vegetables;

(ii) fruit;

(iii) vegetables;

(iv) products intended for processing;

(v) citrus fruit;

(vi) nuts;

(vii) mushrooms;

(b) which has in particular the aim of:

(1) ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity;

(2) promoting concentration of supply and the placing on the market of the products produced by its members;

(3) reducing production costs and stabilising producer prices;

(4) promoting the use of cultivation practices, production techniques and environmentally sound waste-management practices in particular to protect the quality of water, soil and landscape and preserve and/or encourage biodiversity;

(c) the rules of association of which require its producer members, in particular, to:

(1) apply the rules adopted by the producer organisation relating to production reporting, production, marketing and protection of the environment;

(2) belong to only one of the producer organisations referred to in point (a) in respect of a given holdings production of one of the categories of product listed in point (a);

(3) market their entire production concerned through the producer organisation.

…

(4) provide the information requested by the producer organisation for statistical purposes, in particular on growing areas, quantities cropped, yields and direct sales;

(5) to pay the financial contributions provided for in its rules of association for the establishment and replenishment of the operational fund provided for in Article 15;

(d) the rules of association of which provide for:

(1) procedures for determining, adopting and amending the rules referred to in point (c)(1);

(2) the imposition on members of financial contributions needed to finance the producer organisation;

(3) rules enabling the producer members democratically to scrutinise their organisation and its decisions;

(4) penalties for infringement of obligations under the rules of association, particularly non-payment of financial contributions, or of the rules laid down by the producer organisation;

(5) rules on the admission of new members, particularly a minimum membership period;

(6) the accounting and budgetary rules necessary for the operation of the organisation;

(e) which has been recognised by the Member State concerned pursuant to paragraph 2.

2. Member States shall recognise as producer organisations for the purposes of this Regulation all producer groups applying for such recognition, on condition that:

(a) they meet the requirements laid down in paragraph 1 and provide the relevant evidence, including proof that they have a minimum number of members and cover a minimum volume of marketable production, to be determined in accordance with the procedure laid down in Article 46;

(b) there is sufficient evidence that they can carry out their activities properly, both over time and in terms of effectiveness;

(c) they effectively enable their members to obtain technical assistance in using environmentally sound cultivation practices;

(d) they effectively provide their members with the technical means for storing, packaging and marketing their produce and ensure proper commercial and budgetary management of their activities.

…'

5 Article 15 of Regulation No 2200/96 governed the conditions for the granting of Community financial assistance to producer organisations setting up an operational fund. Article 48 of that regulation empowered the European Commission to adopt the detailed rules for the application of that regulation. In that regard, the Commission regulation applicable to the facts in the main proceedings was Regulation No 1432/2003.

6 Article 6 of Regulation No 1432/2003 provided:

'1. Member States shall satisfy themselves that producer organisations have at their disposal the staff, infrastructure and equipment necessary to achieve the aims laid down in Article 11 of Regulation … No 2200/96 and ensure their essential functioning, in particular:

— the knowledge of their members' production,

— sorting, storing and packaging the production of their members,

— commercial and budgetary management,

— centralised book keeping and a system of invoicing.

2. Member States shall determine the conditions on which a producer organisation may entrust to third parties the performance of the tasks set out in Article 11 of Regulation … No 2200/96.'

7 In that regard, it must be observed that the United Kingdom of Great Britain and Northern Ireland did not adopt provisions determining the conditions on which a producer organisation might entrust to third parties the performance of the tasks defined in Article 11 of Regulation No 2200/96.

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

8 In late 2003 Fruition applied to the competent British authorities for recognition as a producer organisation in the 'All fruits' category. In its application for recognition as a producer organisation, the information provided by Fruition on its structure, its decision-making processes and its resources included the following:

'[Fruition] has no parent company or subsidiaries but it has a marketing agreement with Northcourt Group Ltd ["Northcourt"], a company whose membership is very similar (but not the same as) [Fruition]. [Northcourt] uses Worldwide Fruit ("WWF") (in which it has a 20% share) as its marketing agent. WWF employs Marketing, Technical, QA, Computer, Planning and Admin staff who provide services to [Fruition].

…

Ongoing policy decisions are taken by the Board of Directors who are nominated by and elected from the membership. … Members' voting rights are based upon their throughput with [Fruition] but are limited in the cases of any single member to a maximum of 10% of the total.

…

Storage, packing and marketing plans are formulated by WWF personnel and agreed by [Northcourt] and [Fruition]. Storage and packing for the 100+ members takes place in [approximately] 30 major storage and 10 major packhouse locations, all owned by individual members …

…

[Fruition] owns no land or buildings – all storage and packing is carried out on members' premises … Some storage improvement and packhouse equipment has been provided by [Fruition] on these locations …'

9 Further to that application for recognition, the competent United Kingdom authorities carried out an on-site inspection of Fruition. They also drew up an inspection report which described the existence of a marketing agreement entered into with Northcourt in order to use the services of WWF and which reported that Fruition had only two directly employed staff, the Company Secretary and his personal assistant, both of whom worked part-time.

10 In December 2003 the United Kingdom authorities, on the basis of Regulation No 2200/96, granted Fruition recognition as a producer organisation. Subsequently, Fruition was able to obtain the Community assistance which it had sought, which was managed by the competent United Kingdom authorities and allocated only to producers grouped together within producer organisations.

11 In 2004 and 2005 the United Kingdom authorities drew up two further inspection reports stating that the Fruition producer organisation was performing satisfactorily.

12 By decision of 10 July 2006 the Minister withdrew producer organisation status from Fruition, on the grounds that the functions which ought to have been its responsibility had been almost entirely outsourced and, further, that Fruition had not supplied sufficient evidence that it exercised control over these outsourced functions. That decision followed a Commission audit which concluded that a

number of United Kingdom producer organisations, including Fruition, did not meet the recognition criteria laid down in Regulation No 2200/96. In particular, as regards Fruition, the Commission came, in essence, to the following conclusion:

'The 101 members of [Fruition] own nearly 100% of [Northcourt]. This company owned 50% of [WWF]. The other 50% is held by a company owned by farmers in New Zealand. There is no agreement between [Fruition] and that company.

WWF markets nearly 100 per cent of [Fruition's] produce. WWF is also responsible for the organisation of the movement, sorting, packing, and quality assurance of produce, including overall production control on behalf of [Fruition]. Technical services and invoicing are also carried out by WWF. Around 150 000 [Pounds Sterling (GBP)] is charged to [Fruition] for the above services by WWF. It is clear that WWF is at the heart of the whole organisation and performs all the activities that a [producer organisation] should normally carry out.

The Commission services are of the opinion that [Fruition] did not meet the recognition criteria because the activities of the producer organisation are carried out by WWF without being entrusted by Fruition to do so. As well as this issue, there remains a problem in respect of the structure, i.e. the producer members of Fruition do not have a majority vote on decisions concerning WWF, which is in contradiction with Article 11(1)(d)(3) of Regulation (EC) No 2200/96.'

13 By letter of 7 April 2008 the Minister confirmed the withdrawal decision of 10 July 2006, thereby rejecting the appeal brought against that decision by Fruition within the internal administrative procedure applicable in the United Kingdom.

14 On 2 July 2008 an application for judicial review of that decision was brought by Fruition before the referring court. In support of its application, Fruition denies that Regulation No 2200/96 imposes a requirement that a producer organisation should exercise control over the activities which it has outsourced and, accordingly, maintains that it satisfies, in the main proceedings, the recognition criteria laid down by that regulation.

15 After hearing parties and after considering the evidence adduced, the referring court made the following findings of fact.

16 As regards the contractual relationship between Fruition and Northcourt, the referring court found that there was a draft marketing agreement dating from 2004, which never entered into force, which was intended to enable a producer organisation meeting the conditions of Regulation No 2200/96 to be operated, under the exclusive control of Northcourt. In the absence of a formal written agreement, the referring court concluded that the contractual link between Fruition and Northcourt had to be determined by examination of the transactions entered into by those two entities. The referring court found also that there was no formal written agreement between Fruition and WWF.

17 As regards the relationship of Northcourt and WWF, the referring court found that in 2000 an agreement had been entered into which enabled the latter company to control the former in the same way as the draft 2004 agreement envisaged the control of Fruition by Northcourt.

18 The referring court was further able to observe that Northcourt was, in practice, obliged to follow Fruition's instructions, since the members of Fruition owned 93% of Northcourt's share capital and all its directors were members of Fruition. The referring court also found that Northcourt controlled, in its turn, the decisions of WWF, since it was common ground that, on the date of the decision to withdraw recognition, Northcourt owned 50% of WWF's share capital, and no longer 20% as stated in Fruition's application for recognition, and that decisions had to be adopted unanimously. Further, the referring court found that there was no evidence that Northcourt or WWF had agreed, as a matter of

contract, that Fruition should give them instructions, such a declared intention not being apparent, in its opinion, in any written agreement or in any of the accounts given in any of the papers before the referring court.

19 The referring court lastly held that the link uniting, on the one hand, Fruition and, on the other, Northcourt and WWF was such that the business of those entities was conducted on a basis of consensus and that there had probably been mutual give and take. The referring court found that WWF had accepted Fruition's decisions, even where those decisions might have been regarded as contrary to its own commercial interests. In brief, given the overlap of shareholdings, where Fruition owned 93% of Northcourt shares and Northcourt owned 50% of WWF shares, the parties had, in the opinion of the referring court, proceeded on the basis of consensus, which did not of course mean that on every occasion the wishes of Fruition necessarily prevailed.

20 On the basis of those findings of fact, the referring court considered that the issue raised in the main proceedings with regard to European Union law consisted, in essence, in determining whether it is an implied requirement of Regulation No 2200/96 that a producer organisation should supply instructions to external service providers within the framework of a contractual agreement or whether it is sufficient, on the contrary, that the interlocking shareholdings of those bodies enables them to operate on the basis of consensus. The referring court saw force in the Minister's argument that there is an infringement of Article 11 of Regulation No 2200/96 where a producer organisation hands over the entire running of itself, including the control of that running, to an outside entity, but found more difficult the question to what extent and in what manner control must be maintained, and whether the interlocking shareholdings in the main proceedings satisfied the requirements of European Union law.

21 In those circumstances, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1 In circumstances where

a. a Member State was considering recognition of a body as a producer organisation under Article 11 of Council Regulation No 2200/96;

b. the body had aims and rules of association complying with the requirements of Article 11 of Regulation No 2200/96;

c. producer members of the body received all the services required to be provided to them by a producer organisation under Article 11 of Regulation No 2200/96 and

d. the body had engaged contractors to provide a substantial proportion of such services,

was Article 11 of Regulation No 2200/96 to be interpreted, consistently with the principle of legal certainty, as requiring the body to have a degree of control over the contractors?

2. If the answer to question 1 is "yes", what degree of control was Article 11 to be interpreted as requiring?

3. In particular, did the body have the degree of control, if any, required by Article 11 in circumstances where

a. the contractors were:

(1) a company 93% of the shares in which were held by members of the body; and

(2) a company 50% of the shares in which were held by the first company and whose constitution provided that decisions taken by the company should be taken on the basis of unanimity;

b. neither company was subject to a contractual obligation to comply with the body's instructions to them in relation to the activities in question; but

c. as a consequence of the shareholding structure described above, the body and the contractors operated on the basis of consensus?

4. Is it relevant to the determination of the above questions that:

a. Article 6(2) of Regulation [No 1432/03] expressly provided at the relevant time that "Member States shall determine the conditions" on which producer organisations could entrust to third parties the performance of its tasks;

b. the Member State referred to in question 1 had at the relevant time failed to determine such conditions?'

Consideration of the questions referred for a preliminary ruling

22 By its questions, which can be examined together, the referring court seeks, in essence, to ascertain whether Article 11 of Regulation No 2200/96 must be interpreted as meaning that, in order that a producer organisation which has entrusted to a third party the carrying out of the activities which are essential to its recognition under that provision can meet the conditions for recognition laid down therein, it is obliged to retain control of how those activities are carried out and, if so, to what must be the extent of the control held.

23 At the outset, it must be noted that there is no provision in Regulation No 2200/96 which precludes the outsourcing of the activities laid down in Article 11 of that regulation.

24 In that regard, it must be observed that recital 7 in the preamble to Regulation No 1432/2003 envisages the possibility of a producer organisation not being in a position to ensure directly in an efficient manner that all its activities take place and Article 6(2) of that regulation expressly envisages that a producer organisation may entrust to third parties the performance of the tasks defined in Article 11 of Regulation No 2200/96.

25 However, such outsourcing cannot in any circumstances permit producer organisations to disregard the conditions which they must meet in order to obtain recognition as such under Article 11 of Regulation No 2200/96. As is clear from that article, Member States are to recognise as producer organisations within the meaning of that regulation only those organisations which meet the conditions for recognition laid down in Article 11(1) and (2). One of those conditions is that mentioned in Article 11(2)(b), which requires organisations to provide sufficient evidence they can carry out their activities, both over time and in terms of effectiveness.

26 In making requests for recognition as producer organisations within the meaning of that regulation, those organisations give an undertaking to respect those conditions for the entire period of recognition and accept the obligation, inter alia, to carry out effectively the essential activities charged to them under Article 11 of that regulation. It is, therefore, an indispensable condition of their retaining their status as producer organisations that, once recognised, those organisations are vigilant in continuing to meet all the conditions for recognition throughout the period of recognition and, in particular, ensure the effective performance of their activities.

27 If a producer organisation could entrust to third parties the carrying out, wholly independently and without any control, of those essential activities, it would no longer be in a position continuously to be vigilant that the conditions for recognition referred to in Article 11 of Regulation No 2200/96 are met, not least the condition that requires that effective performance of those activities always be guaranteed.

28 As regards the level of control required by Regulation No 2200/96, where a producer organisation has entrusted to third parties the carrying out of activities which are essential to its recognition under Article 11 of that regulation, it must be stated that, since that organisation is obliged continuously to be vigilant that the conditions for its recognition are met, not least the condition that requires that effective performance of their activities always be guaranteed, that requirement of control cannot be satisfied unless that control enables the organisation to take action which is both timely and peremptory as regards those activities being carried out.

29 That requirement of control is satisfied where a contractual agreement enables the producer organisation concerned to continue to be responsible for carrying out the outsourced activity and for control of overall management, in such a way that it retains, ultimately, the power of control and, when necessary, the power to take timely action as regards the outsourced activity being carried out for the entire duration of the agreement.

30 In that regard, a mere practice such that decisions are adopted on the basis of consensus between the producer organisation and the third party used by it cannot guarantee that the requirement of control is satisfied.

31 However, since the examination of sometimes complex factual and legal situations is required, it is for the competent national court or tribunal to determine, in each case and taking into account all the relevant circumstances, including the nature and extent of the outsourced activities, whether the producer organisation concerned has retained the control required in Article 11 of Regulation No 2200/96.

32 Consequently, it follows from the foregoing that Article 11 of Regulation No 2200/96 must be interpreted as meaning that in order that a producer organisation which has entrusted to a third party the carrying out of the activities which are essential to its recognition under that provision can meet the conditions for recognition laid down therein, it is obliged to enter into a contractual agreement enabling it to continue to be responsible for the carrying out of those activities and for control of their overall management, in such a way that that organisation retains, ultimately, the power of control and, when necessary, the power to take timely action as regards those activities being carried out for the entire duration of the agreement. It is for the competent national court or tribunal to determine, in each case and taking into account all the relevant circumstances, including the nature and extent of the outsourced activities, whether the producer organisation concerned has retained such control.

Costs

33 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 (Second Chamber) hereby rules:

Article 11 of Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables, as amended by Council Regulation (EC) No 2699/2000 of 4 December 2000, must be interpreted as meaning that in order that a producer organisation which has entrusted to a third party the carrying out of the activities

which are essential to its recognition under that provision can meet the conditions for recognition laid down therein, it is obliged to enter into a contractual agreement enabling it to continue to be responsible for the carrying out of those activities and for control of their overall management, in such a way that that organisation retains, ultimately, the power of control and, when necessary, the power to take timely action as regards those activities being carried out for the entire duration of the agreement. It is for the competent national court or tribunal to determine, in each case and taking into account all the relevant circumstances, including the nature and extent of the outsourced activities, whether the producer organisation concerned has retained such control.

[Signatures]