Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

2 July 2015 *

(References for a preliminary ruling — Agriculture — Common agricultural policy — Single payment scheme — Regulation (EC) No 73/2009 — Article 34(2)(a) — Concept of 'area eligible for aid' — Concept of 'agricultural area' — Area forming restored cover layer of a landfill site in after-care — Use for agricultural activities — Lawfulness)

In Case C-422/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Schleswig-Holsteinisches Oberverwaltungsgericht (Germany), made by decision of 15 July 2013, received at the Court on 25 July 2013, in the proceedings

Landesamt für Landwirtschaft, Umwelt und ländliche Räume des Landes Schleswig-Holstein

v

Uta Wree,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, S. Rodin, A. Borg Barthet (Rapporteur), E. Levits, and F. Biltgen, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Landesamt für Landwirtschaft, Umwelt und ländliche Räume des Landes Schleswig-Holstein, by W. Ewer, and A. Behnsen, Rechtsanwälte,

— Ms Wree, by A. Kröner, Rechtsanwältin,

— the Danish Government, by C. Thorning and R. Holdgaard, acting as Agents,

— the European Commission, by H. Kranenborg and G. von Rintelen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 July 2014

* Language of the case: German.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 34(2)(a) of Council Regulation (EC) No 73/2009 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, corrigendum OJ 2010 L 43, p. 7).

2 The request has been made in proceedings between the Landesamt für Landwirtschaft, Umwelt und ländliche Räume des Landes Schleswig-Holstein (Regional Office for Agriculture, Environment and Rural Areas of the *Land* Schleswig-Holstein) ('the Landesamt') and Ms Wree concerning the issue whether areas which form restored cover layers of two landfill sites in the closure phase, in one case, and in after-care, in the other, are to be taken into account as eligible areas for the aid in question.

Legal context

Union law

Regulation No 73/2009

3 Regulation No 73/2009 repealed and replaced 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 and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 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, corrigendum OJ 2004, L 94, p. 70), as from 1 January 2009.

4 Recital 7 in the preamble to Regulation No 73/2009 states:

'Regulation … No 1782/2003 recognised the positive environmental effect of permanent pasture. The measures in that Regulation aimed at encouraging the maintenance of existing permanent pasture to ensure against mass conversion to arable land should be maintained.'

5 Article 2 of Regulation No 73/2009 contains the following definitions:

'…

(c) "agricultural activity" means the production, rearing or growing of agricultural products including harvesting, milking, breeding animals and keeping animals for farming purposes, or maintaining the land in good agricultural and environmental condition as established in Article 6;

…

(h) "agricultural area" means any area taken up by arable land, permanent pasture or permanent crops.'

6 Article 34 of Regulation No 73/2009 provides:

‘1. Support under the single payment scheme shall be granted to farmers upon activation of a payment entitlement per eligible hectare. Activated payment entitlements shall give a right to the payment of the amounts fixed therein.

2. For the purposes of this Title, “eligible hectare” shall mean:

(a) any agricultural area of the holding, and any area planted with short rotation coppice (CN code ex 0602 90 41) that is used for an agricultural activity or, where the area is used as well for non-agricultural activities, predominantly used for agricultural activities ...

…’

Regulation (EC) No 1120/2009

7 Article 2 of Commission Regulation (EC) No 1120/2009 of 29 October 2009 laying down detailed rules for the implementation of the single payment scheme provided for in Title III of Regulation) No 73/2009 (OJ 2009 L 316, p. 1), provided:

‘For the purposes of Title III of Regulation … No 73/2009 and of this Regulation, the following definitions shall apply:

(a) “arable land” means land cultivated for crop production or maintained in good agricultural and environmental condition in accordance with Article 6 of Regulation … No 73/2009 ...

…

(c) “Permanent pasture” means land used to grow grasses or other herbaceous forage naturally (self-seeded) or through cultivation (sown) and that has not been included in the crop rotation of the holding for five years or longer, excluding areas set aside …; … to this end, “grasses or other herbaceous forage” means all herbaceous plants traditionally found in natural pastures or normally included in mixtures of seeds for pastures or meadows in the Member State (whether or not used for grazing animals) …

…’

8 Under Article 9 of Regulation No 1120/2009:

‘For the purposes of Article 34(2)(a) of Regulation … No 73/2009, where an agricultural area of a holding is used as well for non-agricultural activities that area shall be considered as being used predominantly for agricultural activities, if the agricultural activity can be exercised without being significantly hampered by the intensity, nature, duration and timing of the non-agricultural activity.

Member States shall establish criteria for the implementation of the first subparagraph on their territory.’

Regulation (EC) No 1122/2009

9 Under the third paragraph of Article 58 of Commission Regulation (EC) No 1122/2009 30 November 2009 laying down detailed rules for the implementation of Regulation No 73/2009 as regards cross-compliance, modulation and the integrated administration and control system, under the direct support schemes for farmers provided for by 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), where the difference between the area declared by a farmer and the area for which all conditions laid down in the rules for granting the aid have been met is more than 50% of the latter area, no aid is to be granted and the farmer is to be penalised up to an amount equal to the amount which corresponds to the difference between those two areas.

Directive No 1999/31/EC

10 Article 1(1) of Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste (OJ 1999 L 182, p.1) provides:

'With a view to meeting the requirements of [Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39)], and in particular Articles 3 and 4 thereof, the aim of this Directive is, by way of stringent operational and technical requirements on the waste and landfills, to provide for measures, procedures and guidance to prevent or reduce as far as possible negative effects on the environment, in particular the pollution of surface water, groundwater, soil and air, and on the global environment, including the greenhouse effect, as well as any resulting risk to human health, from landfilling of waste, during the whole life-cycle of the landfill.'

11 Article 13 of Directive 1999/31 provides:

'Member States shall take measures in order that, in accordance, where appropriate, with the permit:

…

(c) after a landfill has been definitely closed, the operator shall be responsible for its maintenance, monitoring and control in the after-care phase for as long as may be required by the competent authority, taking into account the time during which the landfill could present hazards.

The operator shall notify the competent authority of any significant adverse environmental effects revealed by the control procedures and shall follow the decision of the competent authority on the nature and timing of the corrective measures to be taken.

(d) for as long as the competent authority considers that a landfill is likely to cause a hazard to the environment and without prejudice to any Community or national legislation as regards liability of the waste holder, the operator of the site shall be responsible for monitoring and analysing landfill gas and leachate from the site and the groundwater regime in the vicinity of the site in accordance with Annex III.'

National law

12 It is apparent from the order for reference that, under Paragraph 3(10) of the Law to promote life-cycle management and ensure the environmentally-sustainable disposal of waste (Gesetz zur Förderung der Kreislaufwirtschaft und Sicherung der umweltverträglichen Beseitigung von Abfällen), landfills are ground installations or disposal facilities. That, in any event, is true for as long as the sites have yet to be released from after-care obligations or there are security requirements to be observed.

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

13 Ms Wree is a vet and runs a sheep farm. She breeds sheep and rears lambs for slaughter, among other things.

14 Her flocks graze on a number of restored areas situated in the districts of North Frisia (Germany) and Schleswig-Flensburg (Germany).

15 That grazing land includes the restored areas laid over the cover layers of the Ahrenshöft landfill site in the district of North Frisia and the Schleswig-Haferteich landfill site in the district of Schleswig-Flensburg. Both of those above-ground landfills have come to the end of their waste-deposit phase. The Ahrenshöft landfill site is currently still in the closure phase and is due to be released into after-care shortly, whilst the Schleswig-Haferteich landfill site is already in after-care.

16 Between Ms Wree and each of the landfill operators concerned, there are contractual agreements entitling her to graze her sheep (free of charge) on the green areas on those sites.

17 The contractual agreement entered into by Ms Wree and the operator of the Ahrenshöft landfill site is known as an 'Agricultural lease relating to individual areas'. Under the first and second sentences of Paragraph 7 of that agreement, '[t]he purpose of this lease is to prevent bush encroachment of the area. The lessee is required to prevent damage to the grassland in consultation and cooperation with the lessor'.

18 Paragraph 19(1) of that agreement provides as follows:

'The lessor or a person appointed by him shall have the right to enter and inspect the leased areas at any time.'

19 Since 2007, contractual agreements have also been concluded between Ms Wree and the operator of the Schleswig-Haferteich landfill site.

20 On 11 May 2010, Ms Wree requested the aid to be granted as a single payment for the 2010 harvest year and, to that end, declared a total area of eligible land at 25 5098 ha, which also included the green areas on the Ahrenshöft and Schleswig-Haferteich landfill sites.

21 By a decision of 14 December 2010, the Landesamt refused the application on the ground that the areas concerned, totalling 19 7855 ha, did not exist in the land register and that the total eligible area declared by Ms Wree in fact amounted to 5 7243 ha. Consequently, in accordance inter alia with the third paragraph of Article 58 of Regulation (EC) No 1122/2009, the Landesamt decided that no aid was to be granted under the single payment scheme.

22 Ms Wree brought an administrative action against the decision of the Landesamt. She stated that she uses the land at the landfill sites as grazing land for sheep and that she levels and cuts parts of it. She also argued in support of her action that the entire surface area of the landfill sites could be used without restriction for sheep grazing.

23 By decision of 31 March 2011, the Landesamt dismissed that action as unfounded. The Landesamt based its decision on the fact that the areas for which Ms Wree had claimed payment were not productive agricultural areas within the meaning of Regulation No 73/2009, but closed landfill sites as provided for in the Ordinance on landfill sites and long-term waste storage facilities (Deponieverordnung).

24 On 15 April 2011, Ms Wree brought an action against that decision before the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein), arguing, inter alia, that the primary use of the areas forming the subject-matter of the proceedings was not principally as a closed landfill site, since that is a state rather than a use. The Landesamt, by contrast, argued that the areas at issue are used mainly for landfills in after-care and that, for the sake of the stability of the landfill site, the land could be subjected to a controlled process of pasturing for sheep

grazing. According to the Landesamt, it was essentially in order to prevent damaging biological processes affecting the stability of the landfill that the operators had made the areas in question available to Ms Wree free of charge.

25 By judgment of 19 January 2012, the Schleswig-Holsteinisches Verwaltungsgericht upheld Ms Wree's action. It held that she was entitled to the single payment for the year 2010 and that those areas were to be taken into account for the purpose of calculating the aid applied for by her.

26 The Landesamt was granted leave to appeal against that judgment by order of 3 September 2012 of the Schleswig-Holsteinisches Oberverwaltungsgericht (Higher Administrative Court, Schleswig-Holstein).

27 Before the referring court, the Landesamt argues, inter alia, that the areas of the Ahrenshöft and Schleswig-Haferteich landfill sites cannot be regarded as agricultural areas within the meaning of Article 2(h) of Regulation No 73/2009.

28 Since it considers that the outcome of the main proceedings turns on the interpretation of EU law, the Schleswig-Holsteinisches Oberverwaltungsgericht decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is there also an agricultural area within the meaning of Article 34(2)(a) of Regulation No 73/2009 of 19 January 2009 if that area, although also used for agricultural activities (grazing for sheep-farming purposes), forms the cover layer of a landfill site in after-care?'

The question referred for a preliminary ruling

29 By its question, the referring court asks, in essence, whether Article 34(2)(a) of Regulation No 73/2009 must be interpreted as meaning that an area, although also used for grazing for sheep-farming purposes, forms the cover layer of a landfill site in after-care and constitutes an agricultural area within the meaning of that provision.

30 Under that provision, any agricultural area of the holding that is used for an agricultural activity or, where the area is used as well for non-agricultural activities, predominantly used for agricultural activities, is eligible for aid.

31 The concept of 'agricultural area' is defined in Article 2(h) of Regulation No 73/2009 as 'the total area taken up by arable land, permanent pasture and permanent crops'.

32 In the dispute in the main proceedings, it is common ground that the areas at issue are used for pasture.

33 However, in order to qualify as 'permanent pasture' and therefore 'agricultural area' within the meaning of Article 2(h) of Regulation No 73/2009, such areas must meet the definition in Article 2(c) of Regulation No 1120/2009, under which an area used for 'permanent pasture' means 'land used to grow grasses or other herbaceous forage naturally (self-seeded) or through cultivation (sown) and that has not been included in the crop rotation of the holding for five years or longer, excluding areas set aside'. The provision adds 'to this end, "grasses or other herbaceous forage" means all herbaceous plants traditionally found in natural pastures or normally included in mixtures of seeds for pastures or meadows in the Member State (whether or not used for grazing animals)'.

34 Regarding, first of all, the question whether areas forming the cover layer of a landfill site in after-care can be categorised as 'land' within the meaning of that provision, it should be noted that Ms Wree argued in her written observations that the landfills at issue in the main proceedings are covered by a number of layers, including an upper layer comprising elements naturally present in soil, namely sand and clay.

35 In that regard and subject to verifications to be made by the referring court, if the very function of the restored cover layers of those two landfill sites was to approximate as much as possible a natural surface covered with grasses or other herbaceous forage, it should be held to be 'land' within the meaning of Regulation No 73/2009.

36 Next, the categorisation of the areas at issue as 'permanent pasture' within the meaning of Article 2(c) of Regulation No 1120/2009 depends on the actual use of the land in question, so that an area must be classified as 'agricultural' where it is used as 'permanent pasture' within the meaning of that provision (see, by analogy, judgment in *Landkreis Bad Dürkheim*, C-61/09, EU:C:2010:606, paragraph 37).

37 It follows that the provision in the lease agreement providing that Ms Wree's activities on the areas in question are also aimed at preventing or limiting bush encroachment of the area in order to avoid destruction of the cover layers of the landfill sites, is irrelevant in that regard.

38 Similarly, the fact, relied on by the Landesamt, that those areas are subject to the waste management scheme does not preclude them from being categorised as 'permanent pasture' within the meaning of that provision.

39 It follows from the considerations set out above that an area which forms the cover layer of a landfill site in after-care constitutes an agricultural area within the meaning of Article 34(2)(a) of Regulation No 73/2009 when it is actually used for permanent pasture, which it is for the referring court to verify.

40 In order to provide the referring court with a useful answer, it should be stated additionally that, in order to be eligible for aid under Article 34(2)(a) of Regulation No 73/2009, the agricultural areas at issue in the main proceedings must be used for an agricultural activity or, where the areas are used as well for non-agricultural activities, predominantly used for agricultural activities.

41 In that regard the first paragraph of Article 9 of Regulation No 1120/2009 states that if the agricultural activity can be exercised without being significantly hampered by the intensity, nature, duration and timing of the non-agricultural activity that area is to be considered as being used predominantly for agricultural activities.

42 In the present case it is common ground that Ms Wree's flocks graze on areas which form the restored cover layers of two landfill sites. That activity consists in the breeding and keeping of animals for farming purposes and therefore constitutes an 'agricultural activity' within the meaning of Article 2(c) of Regulation No 73/2009.

43 It is also for the referring court to ascertain whether and how non-agricultural activities have also been pursued on the areas at issue, it being clear that the mere contractual or legal possibility that non-agricultural activities may be pursued on the areas concerned is not by itself sufficient for a finding that those areas were actually used for non-agricultural activities. It follows that, in the present case, the fact that the lease agreement allows the lessor or a person appointed by him to have the right to enter and inspect the leased areas at any time in no way pre-determines their actual use.

44 Lastly, it must be borne in mind that, in order to be eligible for aid within the meaning of Article 34(2)(a) of Regulation No 73/2009, the agricultural areas at issue must be allocated to the relevant farmer's holding. The Court has held in that regard that this is the case where the farmer

enjoys a degree of autonomy with regard to that area sufficient for the carrying-out of his agricultural activity (see, by analogy, judgment in *Landkreis Bad Dürkheim*, C-61/09, EU:C:2010:606, paragraphs 58 and 62).

45 In the light of all the foregoing considerations, the answer to the question referred is that Article 34(2)(a) of Regulation No 73/2009 must be interpreted as meaning that an area which forms the cover layer of a landfill site in after-care constitutes an agricultural area within the meaning of that provision when it is actually used for permanent pasture.

Costs

46 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 (First Chamber) hereby rules:

Article 34(2)(a) of Council Regulation (EC) No 73/2009 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 must be interpreted as meaning that an area which forms the cover layer of a landfill site in after-care constitutes an agricultural area within the meaning of that provision when it is actually used for permanent pasture.

[Signatures]