JUDGMENT OF THE COURT (First Chamber)

2 December 2010 *

In Case C-153/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgericht Schwerin (Germany), made by decision of 3 February 2009, received at the Court on 4 May 2009, in the proceedings

Agrargut Bäbelin GmbH & Co. KG

v

Amt für Landwirtschaft Bützow,

THE COURT (First Chamber),

composed of A. Tizz-ano, President of the Chamber, J.-J. Kasel, A. Borg Barthet (Rapporteur), E. Levits and M. Safjan, Judges,

* Language of the case: German.

Advocate General: J. Mazák,
Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

— Agrargut Bäbelin GmbH & Co. KG, by J. Booth, Rechtsanwalt,

— the Greek Government, by I. Chalkias and K. Marinou, acting as Agents,

— the European Commission, by G. von Rintelen and F. Clotuche-Duvieusart, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 September 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 54(6) of 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), as amended by Council Regulation (EC) No 319/2006 of 20 February 2006 (OJ 2006 L 58, p. 32) ('Regulation No 1782/2003') and Articles 50(4) and 51(1) of 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 Regulation (EC) No 1782/2003 (OJ 2004 L 141, p. 18), as amended by Commission Regulation (EC) No 659/2006 of 27 April 2006 (OJ 2006 L 116, p. 20) ('Regulation No 796/2004').

2 The reference has been made in the course of proceedings between Agrargut Bäbelin GmbH & Co. KG ('Agrargut') and the Amt für Landwirtschaft Bützow (Office for Agriculture, Bützow; 'the Amt') concerning determination of the amount of aid to be granted to Agrargut under the single payment scheme for the year 2006.

Legal context

Regulation No 1782/2003

3 As part of the reform of the common agricultural policy, the Council of the European Union adopted Regulation No 1782/2003, which establishes common rules in respect of direct payments for support schemes under that common agricultural policy and for certain support schemes for farmers.

4 Regulation No 1782/2003 establishes, inter alia, an income support scheme for farmers. Under the second indent of Article 1 of that regulation the scheme is referred to as the 'single payment scheme'. Title III of the regulation deals with the scheme in question.

5 According to recital 32 in the preamble to that regulation:

'In order to maintain the supply control benefits of set-aside, while reinforcing its environmental benefits under the new system of support, the set-aside conditions for arable land should be maintained.'

6 Article 36(1) of that regulation states:

'Aid under the single payment scheme shall be paid in respect of payment entitlements as defined in Chapter 3, accompanied by an equal number of eligible hectares as defined in Article 44(2).'

7 Under the terms of Article 44(1) and (2), first subparagraph, of Regulation No 1782/2003:

'1. Any payment entitlement accompanied by an eligible hectare shall give right to the payment of the amount fixed by the payment entitlement.

2. "Eligible hectare" shall mean any agricultural area of the holding taken up by arable land and permanent pasture except areas under permanent crops, forests or used for non-agricultural activities.'

8 Article 46(2), first subparagraph, of that regulation is worded as follows:

'Payment entitlements may be transferred by sale or any other definitive transfer with or without land. In contrast, lease or similar types of transactions shall be allowed only if the payment entitlements transferred are accompanied by the transfer of an equivalent number of eligible hectares.'

9 Title III of Regulation No 1782/2003 includes a Chapter 4, Section 2 of which is headed 'Set-aside entitlements'. Under Article 57 of that regulation the other provisions of Title III apply to these entitlements, save as otherwise provided for in that section.

10 Article 53 of Regulation No 1782/2003, entitled 'Determination of the set-aside entitlements', provides:

'1. By way of derogation from Articles 37 and 43 of this Regulation, where in the reference period a farmer was subject to the obligation to set aside part of the land of his holding pursuant to Article 6(1) of Regulation (EC) No 1251/1999, the three-year average amount corresponding to the compulsory set-aside payment calculated and adjusted according to Annex VII and the three-year average number of compulsory

set-aside hectares shall not be included in the determination of the entitlements referred to in Article 43 of this Regulation.

2. In the case referred to in paragraph 1, the farmer shall receive an entitlement per hectare (hereinafter referred to as "set-aside entitlement") which is calculated by dividing the three-year set-aside average amount by the three-year average number of hectares set-aside, as referred to in paragraph 1.

The total number of set-aside entitlements shall be equal to the average number of compulsory set-aside hectares.'

11 Pursuant to Article 54 of Regulation No 1782/2003, entitled 'Use of set-aside entitlements':

'1. Any set-aside entitlement accompanied by a hectare eligible for set-aside entitlement shall give right to the payment of the amount fixed by the set-aside entitlement.

2. By way of derogation from Article 44(2), "hectare eligible for set-aside entitlement" shall mean any agricultural area of the holding taken up by arable land, except areas which at the date provided for the area aid applications for 2003 were under permanent crops, forests or used for non-agricultural activities or under permanent pasture. …

…

3. Farmers shall set aside from production the hectares eligible for set-aside entitlements.

…

5. Member States may, on terms to be determined in accordance with the procedure referred to in Article 144(2), derogate from the first subparagraph of paragraph 2 of this Article, provided that they take action to prevent any significant increase in the total agricultural area eligible to set-aside entitlements.

6. By way of derogation from Articles 36(1) and 44(1), set-aside entitlements shall be claimed before any other entitlement.

7. The set-aside obligation shall continue to apply in respect of the set-aside entitlements which are transferred.'

12 Article 56 of Regulation No 1782/2003, entitled 'Use of the set aside land', provides in paragraph 1:

'The land set aside shall be maintained in good agricultural and environmental condition as established under Article 5.

Without prejudice to Article 55, it shall not be used for agricultural purposes and shall not produce any crop for commercial purposes.'

13 Regulation No 1782/2003 includes, in Chapter 5 of Title III, a Section 1, headed 'Regional implementation', which provides for the possibility for Member States to apply the single payment scheme at regional level.

14 Article 63(1) and (2) of that regulation, which forms part of Section 1, provides:

'1. In case of application of Article 59, entitlements established under this section may only be transferred or used within the same region or between regions where the entitlements per hectare are the same.

2. In case of application of Article 59, by way of derogation from Article 53, any farmer in the region concerned shall receive set-aside entitlements.

The number of set-aside entitlements is established by multiplying a farmer's eligible land within the meaning of Article 54(2), declared in the first year of application of the single payment scheme, with a set-aside rate.

The set-aside rate is calculated by multiplying the basic rate of compulsory set-aside of 10 % by the proportion, in the region concerned, between the land for which arable

crops area payments referred to in Annex VI have been granted in the reference period and the eligible land within the meaning of Article 54(2) in the reference period.

The value of the set-aside entitlements shall be the regional value for payment entitlements as established according to Article 59(2) or, as the case may be, Article 59(3), first subparagraph.

…'

Regulation No 796/2004

15 Pursuant to recital 59 in the preamble to Regulation No 796/2004:

'… in accordance with Article 54(6) of Regulation (EC) No 1782/2003, set-aside entitlements have to be activated before any other entitlements. Provisions have to be made in this context with regard to two situations. Firstly, area declared as being set-aside for the purpose of activating set-aside entitlements and being found not to be set-aside in reality, has to be deducted from the overall area declared for the purpose of the Single Payment scheme as area not determined. Secondly, the same should be the case, on a fictional basis, in respect of the area corresponding to set-aside entitlements which are not being activated if, at the same time, other entitlements are being activated along with the corresponding area.'

16 Under point (22) of Article 2 of Regulation No 796/2004:

'For the purposes of this Regulation, the following definitions shall apply:

…

(22) "Area determined": shall mean the area for which all conditions laid down in the rules for granting the aid have been met; in the case of the single payment scheme, the area declared may be deemed as being determined only if it is actually being accompanied by a corresponding number of payment entitlements.'

17 Regulation No 796/2004 lays down, in Title IV of Part II, concerning the integrated administration and control system, rules governing the calculation of the aid under Regulation No 1782/2003, as well as reductions and exclusions of that aid.

18 Article 50(4) of that regulation provides:

'Without prejudice to reductions and exclusions in accordance with Articles 51 and 53, with regard to applications for aid under the single payment scheme, the following shall apply in respect of set-aside entitlements for the purpose of the definition of "area determined" in Article 2 point (22):

(a) if a farmer does not declare all his area for the purposes of activating the set-aside entitlements at his disposal but declares, at the same time, a corresponding

area for the activation of other entitlements, that area shall be considered as having been declared as [set-aside] and not determined for the purposes of the crop group referred to in Article 49(1)(a);

(b) if [an] area declared as [a] set-aside [area] is found not to be set-aside, that area shall be considered as not being determined.'

19 Article 51(1) of Regulation No 796/2004 provides:

'If, in respect of a crop group, the area declared for the purposes of any area-related aid schemes, except those for starch potato, seed and tobacco as provided for in Chapters 6, 9 and 10c respectively of Title IV of Regulation (EC) No 1782/2003, exceeds the area determined in accordance with Article 50(3), (4) and (5) of this Regulation, the aid shall be calculated on the basis of the area determined reduced by twice the difference found if that difference is more than either 3 % or two hectares, but no more than 20 % of the area determined.

If the difference is more than 20 % of the area determined, no area-linked aid shall be granted for the crop group concerned.'

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

20 In 2006 Agrargut had at its disposal 12.10 payment entitlements and 59.57 payment entitlements based on set-aside. In addition, it held 11.90 hectares of pasture and 36.10 hectares of arable land.

21 In its application for the award of a single payment for 2006, Agrargut declared set-aside entitlements and payment entitlements relating to 36.10 hectares of set-aside land and to 11.90 hectares of pasture.

22 The Amt rejected that application by a notice of 8 January 2007. It also dismissed, by notice of 15 August 2007, the objection brought by Agrargut against that rejection notice.

23 The Amt held that, pursuant to the obligation under Article 54(6) of Regulation No 1782/2003, Agrargut was required to claim its set-aside entitlements first. As it had failed to claim all of these entitlements, while at the same time declaring an area of 11.90 hectares to activate its payment entitlements, the Amt held that, under Article 50(4)(a) of Regulation No 796/2004, this area fell to be considered as having been declared as set-aside and as having not been determined within the meaning of point (22) of Article 2 of that regulation. As a result, it applied the sanctions set out in Article 51(1) of Regulation No 796/2004.

24 On 19 September 2007, Agrargut instituted proceedings before the Verwaltungsgericht Schwerin against the decision of the Amt. It submits that only those hectares eligible for set-aside, within the meaning of Article 54 of Regulation No 1782/2003, are covered by the obligation to claim set-aside entitlements before any other entitlement. This, it argues, is apparent from the wording, spirit and purpose of Article 50(4)(a) of Regulation No 796/2004.

25 Agrargut further submits that the application of the system of sanctions set out in Regulations No 1782/2003 and No 796/2004 presupposes fault on the part of the applicant, which is not the case in the present instance. It also claims that the provisions in question are not sufficiently clear and comprehensible.

26 The Amt submits that the obligation set out in Article 54(6) of Regulation No 1782/2003 must be interpreted in the light of recital 32 in the preamble to that regulation. This requires, in particular, that care be taken to ensure that all of the set-aside payment entitlements granted in 2005 are activated and, consequently, that the corresponding areas are actually set aside. This objective is also served by the sanction provided for in Article 51 of Regulation No 796/2004. A farmer who has more set-aside entitlements than hectares eligible for set-aside entitlements would thus have every interest in transferring such rights or, failing that, in abstaining from simultaneously declaring other payment entitlements.

27 In this context, the national court notes that the set-aside entitlements can be activated only in respect of areas that are eligible for set-aside. In that regard, it raises the question as to whether a farmer who has declared all the area at his disposal that is eligible for set-aside entitlements has thereby declared 'all his area' within the meaning of Article 50(4)(a) of Regulation No 796/2004.

28 That court notes, furthermore, that the provisions of Article 50(4) of Regulation No 796/2004 were clarified by Commission Regulation (EC) No 2025/2006 of 22 December 2006 amending Regulation No 796/2004 (OJ 2006 L 384, p. 81). In those circumstances it asks whether, in the light of the principle of protection of legitimate expectations, the sanction provided for under Article 51 of Regulation No 796/2004 should indeed be applied in circumstances such as those in the main proceedings.

29 It is in those circumstances that the Verwaltungsgericht Schwerin decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is a farmer prevented from activating payment entitlements based on permanent pasture before activating all payment entitlements based on set-aside, even if he does not hold any other (arable) areas eligible for set-aside?

2. If the first question should be answered in the affirmative:

Do the sanctions under Article 51 of Regulation (EC) No 796/2004 also apply to a farmer who before 29 December 2006 (in the absence of areas eligible for set-aside) infringes the obligation first to activate completely payment entitlements based on set-aside?’

Findings of the Court

The first question

30 By its first question, the referring court is essentially asking whether Article 54(6) of Regulation No 1782/2003 must be interpreted as meaning that a farmer may apply

for aid under the payment entitlements at his disposal, including in conjunction with areas that are not eligible for set-aside, only if he has first activated all of his set-aside entitlements.

31 It should be borne in mind at the outset that, under the terms of Article 36(1) of Regulation No 1782/2003, aid under the single payment scheme is to be paid in respect of 'payment entitlements' accompanied by an equal number of eligible hectares.

32 Furthermore, Article 54(1) of Regulation No 1782/2003 provides that any 'set-aside entitlement' accompanied by a hectare eligible for set-aside entitlement is to give right to the payment of the amount fixed by the set-aside entitlement. Article 54(2) defines 'hectare eligible for set-aside entitlement' as meaning any agricultural area of the holding taken up by arable land, except areas which, at the date provided for the area aid applications for 2003, were under permanent crops, forests or used for non-agricultural activities or under permanent pasture.

33 Accordingly, only agricultural areas taken up by arable land can be declared for the purposes of exercising set-aside entitlements. By contrast, under Article 44(2) of Regulation No 1782/2003, read in conjunction with Article 44(1), the payment entitlements may be activated in conjunction with any agricultural area taken up by arable land or under permanent pasture, excluding areas taken up by permanent crops, forests or used for non-agricultural activities.

34 In those circumstances, the national court inquires as to the scope of the obligation set out in Article 54(6) of Regulation No 1782/2003, in particular where the farmer in question has more set-aside entitlements than hectares eligible for set-aside.

35 That court asks in particular whether the obligation under which the set-aside entitlements must be claimed before any other entitlement is absolute in nature, in the sense that it relates to all of the area at the disposal of the farmer in question, or whether such an obligation is merely relative in nature, in the sense that it relates only to areas eligible for set-aside.

36 In the second hypothesis, the farmer will have fulfilled the obligation set out in Article 54(6) of Regulation No 1782/2003 once he has declared all of the area eligible for set-aside at his disposal for the purposes of using his set-aside entitlements, even if a number of his set-aside entitlements remain unused.

37 By contrast, in the first hypothesis, a farmer who has more set-aside entitlements than hectares eligible for set-aside, as is the case in the main proceedings, cannot assert any 'payment entitlement' within the meaning of Chapter 3 of Title III of Regulation No 1782/2003. If he wishes to be able to obtain the aid under those payment entitlements, the farmer concerned must first transfer a portion of his set-aside entitlements or acquire areas eligible for set-aside, in order to have an equivalent number of hectares eligible for set-aside and of set-aside entitlements.

38 In this context, it should be noted that the wording of Article 54(6) of Regulation No 1782/2003 does not, by itself, provide an answer to the question raised by the national court.

39 Nevertheless, it follows from the structure and objectives of Regulation No 1782/2003 that the obligation set out in Article 54(6) thereof is absolute in nature, as defined in paragraph 35 of this judgment.

40 In that regard, it must be recalled that one of the objectives of Regulation No 1782/2003, as stated in recital 32 in its preamble, is to maintain the set-aside conditions for arable land in order to maintain the supply control benefits of set-aside, while reinforcing the environmental benefits of set-aside. To that end, the European Union legislature has provided a set of measures designed to ensure the set-aside of agricultural areas.

41 In particular, provision is made in Articles 53 and 63(2) of Regulation No 1782/2003 to grant set-aside entitlements to farmers in order to encourage them, through financial support, to set aside some of the areas at their disposal. A farmer who wishes to obtain aid for set-aside must declare, in his single payment application, a number of hectares eligible for set-aside which is equivalent to the number of set-aside entitlements that he is claiming and, under Article 54(3) of that regulation, these areas must be actually set aside.

42 Furthermore, in order to ensure actual setting aside of all the areas intended to be set aside, which corresponds quantitatively to all the existing set-aside entitlements, Article 54(6) of Regulation No 1782/2003 requires farmers to claim their set-aside entitlements before any other entitlement. This obligation is accompanied by a sanctions

mechanism set out in Articles 50(4) and 51(1) of Regulation No 796/2004. As recital 59 in the preamble to the latter regulation states, areas corresponding to set-aside entitlements which are not being activated are to be considered as not determined if, at the same time, other entitlements are being activated along with the corresponding area.

43 However, in order to preserve the effectiveness of Article 54(6) of Regulation No 1782/2003, it is essential that set-aside entitlements should be activated before other rights, whether or not these are based on areas eligible for set-aside. Otherwise, the effective setting aside of agricultural land would be jeopardised in so far as a part of the set-aside entitlements would remain unused, either because some farmers had transferred part of the area eligible for set-aside, or because they had received by transfer — in accordance with Article 46 of that regulation, read in conjunction with Article 57 thereof or, in the case of regionalisation of the single payment scheme, in accordance with Article 63(1) of that regulation — set-aside entitlements without the corresponding land.

44 It follows that the answer to the first question is that Article 54(6) of Regulation No 1782/2003 must be interpreted as meaning that a farmer may apply for aid under the payment entitlements at his disposal, including in conjunction with areas that are not eligible for set-aside, only if he has first activated all of his set-aside entitlements.

The second question

45 By its second question the national court seeks to ascertain whether Article 51 of Regulation No 796/2004, read in conjunction with Article 50(4) of that regulation,

must be interpreted as meaning that the sanction set out in Article 51(1) is applicable to a farmer who, having failed to activate all of his set-aside entitlements, has activated payment entitlements based on permanent pasture, including where he did not have a sufficient number of eligible hectares to exercise all of his set-aside entitlements.

46 As is clear from recital 59 in the preamble to Regulation No 796/2004, Article 51(1) of that regulation, read in conjunction with Article 50(4), establishes a system of sanctions applicable to farmers who, in disregard of Article 54(6) of Regulation No 1782/2003, have claimed payment entitlements, including in conjunction with areas that are not eligible for set-aside, without first activating all of their set-aside entitlements.

47 It follows that the sanctions set out in Article 51(1) of Regulation No 796/2004 are, in principle, applicable to a farmer who, as is the case in the main proceedings, failed to activate all of his set-aside entitlements while having activated payment entitlements based on permanent pasture, even though he did not have a sufficient number of eligible hectares to exercise all of his set-aside rights.

48 However, as the national court has pointed out, it must be noted that the wording of Article 50(4)(a) of Regulation No 796/2004 is not without ambiguity. The lack of clarity in this provision is due, in particular, to the position of the adjective 'corresponding' in its wording, which introduces a degree of confusion with regard to the area classified as such.

49 Moreover, the ambiguous nature of this provision was expressly recognised by the European Union legislature when Regulation No 2025/2006 was adopted.

50 Thus, recital 5 in the preamble to Regulation No 2025/2006, after noting that Article 54(6) of Regulation No 1782/2003 provides that set-aside entitlements are to be claimed before any other entitlement, states that '[i]n order to ensure equal treatment of farmers who do not have all the required set-aside area available to claim for all their set-aside entitlements, the provisions set out in Article 50(4) of Regulation … No 796/2004 should be clarified'. To that end, the wording of Article 50(4)(a) of Regulation No 796/2004 was replaced as follows:

'if a farmer does not declare all area required for the purpose of activating the set-aside entitlements at his disposal but declares, at the same time, an area for the activation of other entitlements, an area corresponding to the non-declared set-aside entitlements shall be considered as declared as set-aside area'.

51 According to settled case-law, the principle of legal certainty requires that European Union rules should enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are so that they may take steps accordingly (see, inter alia, Case C-582/08 *Commission* v *United Kingdom* [2010] ECR I-7195, paragraph 49, and Case C-152/09 *Grootes* [2010] ECR I-11285, paragraph 43).

52 In those circumstances, and in the light of what has been mentioned in paragraph 38 of this judgment, the sanction referred to in Article 51(1) of Regulation No 796/2004 should not be applied in situations such as those described in paragraph 47 of this judgment.

53 It follows from the foregoing that Article 51 of Regulation No 796/2004, read in conjunction with Article 50(4) of that regulation, must be interpreted as meaning that, in the light of the principle of legal certainty, the sanction set out in Article 51(1) is not applicable to a farmer who, while having failed to activate all of his set-aside entitlements, on the ground that he did not have a sufficient number of hectares eligible for set-aside, activated payment entitlements based on permanent pasture.

Costs

54 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:

1. **Article 54(6) of 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, as amended by Council Regulation (EC) No 319/2006 of 20 February 2006, must be interpreted as meaning that a farmer may apply for aid under the payment entitlements at his disposal, including in conjunction with areas that are not eligible for set-aside, only if he has first activated all of his set-aside entitlements.

2. **Article 51 of 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 Regulation (EC) No 1782/2003, as amended by Commission Regulation (EC) No 659/2006 of 27 April 2006, read in conjunction with Article 50(4) of that regulation, must be interpreted as meaning that, in the light of the principle of legal certainty, the sanction set out in Article 51(1) is not applicable to a farmer who, while having failed to activate all of his set-aside entitlements, on the ground that he did not have a sufficient number of hectares eligible for set-aside, activated payment entitlements based on permanent pasture.**

[Signatures]