JUDGMENT OF THE COURT (Sixth Chamber)
27 November 1997 *

In Case C-356/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Schleswig-Holsteinisches Oberverwaltungsgericht (Germany) for a preliminary ruling in the proceedings pending before that court between

Matthias Witt

and

Amt für Land- und Wasserwirtschaft

on the interpretation of the first subparagraph of Article 3(1) of Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops (OJ 1992 L 181, p. 12),

THE COURT (Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, R. Schintgen, G. F. Mancini (Rapporteur), J. L. Murray and G. Hirsch, Judges,

* Language of the case: German.

Advocate General: P. Leger,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Witt, by H. A. Marquardt, Rechtsanwalt, Oldenburg,

— the German Government, by E. Röder, Ministerialrat in the Federal Ministry of the Economy, and B. Kloke, Oberregierungsrat in the same ministry, acting as Agents,

— the Commission of the European Communities, by K.-D. Borchardt, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,
after hearing the oral observations of Mr Witt, the German Government and the Commission at the hearing on 15 May 1997,

after hearing the Opinion of the Advocate General at the sitting on 26 June 1997,

gives the following

Judgment

1 By order of 27 October 1995, received at the Court on 21 November 1997, the Schleswig-Holsteinisches Oberverwaltungsgericht (Higher Administrative Court

for Schleswig-Holstein) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of the first subparagraph of Article 3(1) of Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops (OJ 1992 L 181, p. 12, hereinafter 'the Regulation').

2 Those questions were raised in the course of a dispute between Mr Witt and the Amt für Land- und Wasserwirtschaft (Office for Agriculture and Water Management) concerning the amount of the compensatory payments due to him as a producer of arable crops.

Community legislation

3 Article 2(1) of Regulation No 1765/92 provides that Community producers of arable crops may apply for a compensatory payment under the conditions set out in Title I of the Regulation.

4 Article 2(2) is worded as follows:

'The compensatory payment shall be fixed on a per hectare basis and regionally differentiated.

The compensatory payment is granted for the area which is down to arable crops or subject to set-aside in accordance with Article 7 of this Regulation and which does not exceed a regional base area. This is established as the average number of hectares within it down to arable crops or where appropriate fallowed in conformity with a publicly funded scheme during 1989, 1990 and 1991. A region in this sense should be understood to mean a Member State or a region within the Member State, at the option of the Member State concerned.

Where an area is not the subject of an application for aid under this Regulation but is used to justify an application for aid under Regulation (EEC) No 805/68 the said area shall be subtracted from the regional base area for the period in question.'

5 Article 2(3) provides that, instead of a system of regional base areas, a Member State may apply an individual base area system for all of its territory.

6 Under the first subparagraph of Article 2(5) the compensatory payment is to be granted under a general scheme open to all producers or a simplified scheme open to small producers. The second subparagraph provides that producers applying for the compensatory payment under the general scheme are to be subject to an obligation to set aside part of the land of their holding from production and to receive compensation for this obligation.

7 Article 2(6) of the Regulation provides:

'In the case of a regional base area, and when the sum of the individual areas for which aid is claimed under the arable producers' scheme, including the set-aside provided for under that scheme, and set-aside provided for under Council Regulation (EEC) No 2328/91 of 15 July 1991 on improving the efficiency of agricultural structures [OJ 1991 L 218, p. 1], is in excess of the regional base area, the following will be applied in the region in question:

— during the same marketing year, the eligible area per farmer will be reduced proportionately for all the aids granted under this Title,

— in the following marketing year, producers in the general scheme will be required to make, without compensation, a special set-aside. The percentage rate for special set-aside shall be equal to the percentage by which the regional base has been exceeded. This shall be additional to the set-aside requirement given in Article 7.'

8 Under the first subparagraph of Article 3(1) each Member State is to establish a regionalization plan setting out the criteria for the establishment of separate production regions. The criteria used must be appropriate and objective, must provide the necessary flexibility for the recognition of distinctive homogeneous zones which are of a minimum size and must allow for specific characteristics that influence yields, such as soil fertility, including when appropriate due differentiation between irrigated and non-irrigated areas. These regions must not cross the boundaries of the regional base areas mentioned in Article (2).

9 Under Article 3(2), the Member States are to give details for each production region of the areas and yields of cereals, oilseeds, and protein crops produced in that region during the five-year period 1986/87 to 1990/91. Average cereal and where possible oilseed yields are to be calculated separately for each region, excluding the year with the highest and the year with the lowest yield during that period.

10 In accordance with Article 3(3), Member States are to submit their regionalization plans to the Commission by 1 August 1992 together with all available supporting information.

11 Article 3(4) of the Regulation provides that the Commission is to examine the regionalization plans submitted by the Member States and to ensure that each plan is based on appropriate, objective criteria and is consistent with available historical information. The Commission may object to plans which are not compatible

with the aforementioned relevant criteria, in particular with the average yield of the Member State. In that case the plans are to be subject to adjustment by the Member State concerned after consultation with the Commission.

12 Article 4(1) of the Regulation provides that the compensatory payment for cereals is to be calculated by multiplying the basic amount per tonne by the average cereal yield determined in the regionalization plan for the region concerned. The basic amounts for the marketing years between 1993 and 1996 are laid down in Article 4(2).

13 Article 5(1) of the Regulation lays down the method for calculating the compensatory payments per hectare for oilseeds.

14 Finally, Article 7(1) provides that the set-aside requirement for each producer applying for compensatory payments under the general scheme is to be fixed as follows:

'— in the case of a regional base area, as a proportion of his area down to the arable crops concerned and for which a claim is made, and left in set-aside, pursuant to this Regulation,

— in the case of an individual base area, as a percentage reduction of his relevant base area.'

National legislation

15 Article 3(1) of the Verordnung über eine Stützungsregelung für Erzeuger bestimmter landwirtschaftlicher Kulturpflanzen (Regulation concerning a support system for producers of certain arable crops) (hereinafter 'the KVO') of 3 December 1992 (BGBl I 1991) defines each *Land* as a regional base area.

16 In accordance with Article 3(2) of the KVO the harvest production regions for the 1993/94 marketing year are listed in the Annex to the KVO. According to that annex the *Land* Schleswig-Holstein is a production region with an average cereal yield of 6.81 tonnes per hectare. Moreover, in Schleswig-Holstein the base area and production region are identical.

The main proceedings

17 Mr Witt is a farmer in the *Land* Schleswig-Holstein. He applied to the Amt für Land- und Wasserwirtschaft for compensatory payments in respect of cereals, oilseeds, protein crops and set-aside land.

18 By decision of 18 November 1993 the Amt für Land- und Wasserwirtschaft awarded Mr Witt compensatory payments of DM 73 323.93 for the 1993/94 marketing year.

19 Mr Witt's objection to that decision was rejected by decision of 4 March 1994. On 5 April 1994 he brought an action before the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court for Schleswig-Holstein), claiming that under the Regulation he was directly entitled to an additional compensatory payment of DM 11 961. In accordance with Article 3(1) of the Regulation, he argued, each Member State was required to draw up a regionalization plan, under which the criteria for establishing separate production regions had to take account of specific characteristics influencing yields, such as soil fertility. Those objectives had not been properly implemented by the KVO. Thus the regionalization plan for Schleswig-Holstein as a whole failed to take into account differences in soil fertility between its various natural areas (Marsch, Geest, Ostholsteinisches Hügelland). Regionalization was rational only if it was sensitive to zones having different characteristics influencing yields. It would therefore have been proper to base the division into production regions on natural areas or to carry out a division as between favoured and less favoured zones.

20 The Amt für Land- und Wasserwirtschaft sought dismissal of Mr Witt's claim. It contended, first, that the Commission had raised no objection to the German regionalization plan. Then, it contended, the various high yields in Schleswig-Holstein would not have been altered if there had been further subdivision in the manner suggested by the plaintiff. Only determination of yields on an individual basis would have been equitable. Finally, the Amt für Land- und Wasserwirtschaft pointed to the wide discretion enjoyed by the Member States in elaborating the framework for the award of subsidies and to the fact that detailed studies had finally shown it to be impossible from a legal point of view to demarcate as between natural areas.

21 By judgment of 6 October 1994 the Schleswig-Holsteinisches Verwaltungsgericht dismissed the action essentially on the ground that there was no basis in law for the claim to an additional compensatory payment of DM 11 961 made by Mr Witt. On 18 November 1994 Mr Witt appealed against that judgment to the Schleswig-Holsteinisches Oberverwaltungsgericht.

The preliminary questions

22 Taking the view that the solution of the dispute in the main proceedings depended on the interpretation of the first subparagraph of Article 3(1) of the Regulation, the national court stayed the proceedings before it and referred the following questions to the Court for a preliminary ruling:

'(1) Does the first subparagraph of Article 3(1) of Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops authorize a Member State to establish separate production regions without indicating the relevant "criteria" applied in that connection?

(2) If Question 1 above is answered in the affirmative, is a Member State which, pursuant to the third sentence of the second subparagraph of Article 2(2) of Regulation No 1765/92, has not designated its whole territory as a regional base area but merely different parts of it, as the Federal Republic of Germany has done, entitled as a matter of principle, under the first subparagraph of Article 3(1) of the Regulation, also to establish the whole territory of a specific regional base area as a production region with a uniform average cereal yield? In the situation described, in which cases do the "specific characteristics that influence yields such as soil fertility" require regional base areas to be further subdivided into individual production regions with differing average cereal yields?'

The first question

23 In its first question the national court essentially seeks to ascertain whether the first subparagraph of Article 3(1) of the Regulation requires the Member States, in establishing production regions, to indicate the criteria used in the provisions implementing the Regulation.

24 Mr Witt maintains in that connection that, although the Member States enjoy a certain margin of discretion when implementing the Regulation, they are not entitled to ignore decisive criteria such as, for example, soil fertility.

25 On the other hand, the German Government takes the view that there is nothing in the first subparagraph of Article 3(1) of the Regulation to say whether or how the Member States must state, in national legislation implementing the Regulation, the substantive reasons for the way in which production regions have been defined.

26 In the Commission's view, the delegation to the Member States of power to establish production regions necessarily involves allowing the competent authorities of those States a considerable margin of discretion. In any event, in the present case the Federal Republic of Germany applied an objective criterion, namely the territory of Schleswig-Holstein.

27 In that connection, it must be observed that, whilst under the first subparagraph of Article 3(1) of the Regulation each Member State must establish a regionalization plan to serve as the basis for calculating compensatory payments, indicating the criteria used in establishing the various production regions, it is clear from Article 3(3) that the addressee of the regionalization plan is the Commission and that the purpose is to enable the Commission to ensure that each plan is based on appropriate, objective criteria and is consistent with available historical information.

28 It appears from the Commission's observations that the German regionalization plan was forwarded to it on 4 August 1992 by the Federal Minister for Food, Agriculture and Forestry, together with 37 explanatory pages provided by the *Länder* in accordance with Article 3(3) of the Regulation. Upon examination of the plan the Commission satisfied itself that it met the requirements of Article 3(1) and, in particular, that it was based on appropriate and objective criteria.

29 Moreover, as the Advocate General noted at point 44 of his Opinion, there is no provision in the Regulation requiring the Member States to state, in the national provisions implementing the Regulation, the criteria used in establishing the regionalization plan.

30 That being so, the reply to the first question must be that the first subparagraph of Article 3(1) of the Regulation does not require the Member States, in establishing production regions, to indicate the criteria used in the provisions implementing the Regulation.

The second question

31 In its second question the national court essentially asks whether the first subparagraph of Article 3(1) of the Regulation must be interpreted as meaning that a Member State which, pursuant to the third sentence of the second subparagraph of Article 2(2), has not designated its whole territory as a regional base area but merely different parts of it, is entitled to establish the whole territory of a specific regional base area as a production region, or whether in certain cases the specific characteristics that influence yields require regional base areas to be further subdivided into different production regions.

32 With regard to the first part of the question, it is clear first of all from the scheme of the Regulation and its objectives that the Member States have a wide margin of discretion in defining production regions. In the exercise of that discretion, they may, *inter alia*, in accordance with Article 2(2) of the Regulation, designate either their national territory or different parts of it as regional base area for the purpose of calculating compensatory payments.

33 Next, the Member States are obliged, under Article 3(3) and (4), to base their selection on appropriate, objective criteria, consistent with available historical information, and must ensure that their plans are compatible with the average yield in the Member State in question.

34 Finally, under the first subparagraph of Article 3(1), the production regions which they establish must not cross the boundaries of the regional base areas mentioned in Article 2(2) of the Regulation.

35 It certainly cannot be claimed, however, that the administrative criterion used to define a production region is not objective when, as in the case in the main proceedings, it renders that region coextensive with the whole territory of the regional base area. Moreover, the choice of such a designation for Schleswig-Holstein inevitably means that the production region cannot exceed the boundaries of that regional area.

36 As regards the second part of the question, namely whether the specific characteristics that influence yields require regional base areas to be further subdivided into different production regions, depending, for example, on soil fertility, the German Government maintains that it was not possible to subdivide the *Land* Schleswig-Holstein according to its natural areas on that basis, owing to the absence of legally valid criteria.

37 Mr Witt challenges that assertion and claims that there are also reliable statistics on average yields per hectare of arable crops in the various natural areas during the

reference years. At the hearing Mr Witt produced documents which, in his view, prove that assertion.

38 The Commission also considers that the calculation of historical yields depends on reliable statistical data, but observes that the average yields mentioned in the German regionalization plan corresponded to data in its possession.

39 On that point, it must be noted that, as the Commission stressed at the hearing, the criteria mentioned in Article 3(1) of the Regulation lay down the general legal framework for establishing the production regions and that, within their wide margin of discretion in that connection, the Member States may take account of other criteria, such as the administrative feasibility of a solution or the homogeneity of a region as regards all arable crops.

40 As to the availability of reliable data, it should be observed, as the Advocate General has noted at points 49 and 51 of his Opinion, that the existence of such statistics does not automatically compel the Member State to subdivide the *Land* into different production regions, because the only specific criterion laid down in Article 3(1) is that these regions must not cross the boundaries of the regional base areas mentioned in Article 2(2). Accordingly, the statistics produced by Mr Witt at the hearing are not relevant to the reply to be given to the second question submitted by the national court.

41 The first subparagraph of Article 3(1) of the Regulation must therefore be interpreted as meaning that a Member State which, under the third sentence of the second subparagraph of Article 2(2), has not designated its whole territory as a regional base area but merely different parts of it, is entitled to establish the whole

territory of a specific regional base area as a production region, and that the specific characteristics that influence yields do not require regional base areas to be further subdivided into different production regions.

Costs

42 The costs incurred by the German Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Schleswig-Holsteinisches Oberverwaltungsgericht by order of 27 October 1995, hereby rules:

1. The first subparagraph of Article 3(1) of Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops does not require the Member States, in establishing production regions, to indicate the criteria used in the provisions implementing that regulation.

2. **The first subparagraph of Article 3(1) of Regulation No 1765/92 must be interpreted as meaning that a Member State which, under the third sentence of the second subparagraph of Article 2(2) of that regulation, has not designated its whole territory as a regional base area but merely different parts of it, is entitled to establish the whole territory of a specific regional base area as a production region, and that the specific characteristics that influence yields do not require regional base areas to be further subdivided into different production regions.**

Ragnemalm Schintgen

Mancini Murray Hirsch

Delivered in open court in Luxembourg on 27 November 1997.

R. Grass H. Ragnemalm

Registrar President of the Sixth Chamber