JUDGMENT OF THE COURT (Fifth Chamber)

22 October 2009 *

In Case C-449/08,

REFERENCE for a preliminary ruling under Article 234 EC from the College van Beroep voor het bedrijfsleven (Netherlands), made by decision of 8 October 2008, received at the Court on 13 October 2008, in the proceedings

G. Elbertsen

v

Minister van Landbouw, Natuur en Voedselkwaliteit,

THE COURT (Fifth Chamber),

composed of E. Levits, President of the Chamber, acting as President of the Fifth Chamber, A. Borg Barthet (Rapporteur) and M. Ilešič, Judges,

* Language of the case: Dutch.

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Netherlands Government, by C. Wissels and M. de Mol, acting as Agents,

— the German Government, by M. Lumma and J. Möller, acting as Agents,

— the Commission of the European Communities, by F. Clotuche-Duvieusart and B. Burggraaf, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 42(4) 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).

2 The reference has been made in the course of proceedings between Mr Elbertsen and the Minister van Landbouw, Natuur en Voedselkwaliteit (Minister for Agriculture, Nature and Food Quality; 'the Minister') concerning the allocation of single payment entitlements from the national reserve.

Legal context

Community legislation

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 lays down common rules for direct support schemes under the 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 Article 33 of Regulation No 1782/2003 sets out the situations in which farmers can have access to the single payment scheme. It states, inter alia:

'Eligibility

1. Farmers shall have access to the single payment scheme if:

(a) they have been granted a payment in the reference period referred to in Article 38 under at least one of the support schemes referred to in Annex VI,

…'

6 Article 37(1) of the regulation provides:

'The reference amount shall be the three-year average of the total amounts of payments, which a farmer was granted under the support schemes referred to in Annex VI, calculated and adjusted according to Annex VII, in each calendar year of the reference period referred to in Article 38.'

7 The reference period referred to in Articles 33(1) and 37(1) of Regulation No 1782/2003 is defined in Article 38 of that regulation. It comprises the calendar years 2000 to 2002.

8 Article 42(1) and (4) of Regulation No 1782/2003 states:

'1. Member States shall, after any possible reduction under Article 41(2), proceed to a linear percentage reduction of the reference amounts in order to constitute a national reserve. This reduction shall not be higher than 3%.

…

4. Member States shall use the national reserve for the purpose of establishing, according to objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions, reference amounts for farmers finding themselves in a special situation, to be defined by the Commission in accordance with the procedure referred to in Article 144(2).'

Regulation (EC) No 795/2004

9 According to recital 9 in the preamble to Commission Regulation (EC) No 795/2004 of 21 April 2004 laying down detailed rules for the implementation of the single payment scheme provided for in Regulation No 1782/2003 (OJ 2004 L 141, p. 1), as amended by Commission Regulation (EC) No 1974/2004 of 29 October 2004 (OJ 2004 L 345, p. 85; 'Regulation No 795/2004'):

'In order to facilitate the administration of the national reserve, it is appropriate to provide for management of the national reserve at regional level except in cases referred to in Article 42(3) of Regulation (EC) No 1782/2003, where applicable, and in Article 42(4) of that Regulation, where Member States are obliged to allocate payment entitlements.'

10 Recital 13 in the preamble to Regulation No 795/2004 states:

'Article 42(4) of Regulation (EC) No 1782/2003 allows the Commission to define the special situations which shall give right to the establishment of reference amounts for certain farmers finding themselves in situations which prevented them, in full or

partially, from receiving direct payments in the reference period. It is therefore appropriate to list those special situations by providing for rules in order to avoid cumulating the benefit from the different allocation of payment entitlements on the same farmer without prejudice to the possibility for the Commission to add further cases where the case may be. Moreover, Member States should be given the flexibility to establish the reference amount to be allocated.'

11 According to Article 18(1) of Regulation No 795/2004:

'For the purposes of Article 42(4) of Regulation (EC) No 1782/2003, "farmers in a special situation" shall mean the farmers referred to in Articles 19 to 23a of this Regulation.'

12 Article 21(1) of Regulation No 795/2004 provides:

'A farmer who made investments in production capacity or purchased land in accordance with the conditions laid down in paragraphs 2 to 6, by 15 May 2004 at the latest, shall receive payment entitlements calculated by dividing a reference amount, established by the Member State, in accordance with objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortion, by a number of hectares not higher than the number of hectares he purchased.'

National legislation

13 Article 16 of the Regulation on CAP Income Support 2006 (Regeling GLB-inkomenssteun 2006; 'the Regeling') provides, in particular:

'1. The following alone shall qualify for the allocation of payment entitlements from the national reserve:

…

(c) farmers who made investments in production capacity or purchased land pursuant to Article 21 of Regulation No 795/2004, if it is shown to the Minister's satisfaction that, by 15 May 2004 at the latest and in accordance with Article 21 of Regulation No 795/2004, they:

— invested in livestock buildings or rented such buildings for at least six years;

— purchased land or leased it for at least six years;

— purchased animals for which they were able to obtain a direct payment as referred to in Annex VI to Regulation No 1782/2003;

…

(d) farmers who leased or purchased land in accordance with Article 22 of Regulation No 795/2004, if it is shown to the Minister's satisfaction that they leased or purchased that land by 15 May 2004 at the latest;

…

2. Farmers within the terms of paragraph 1(b) to (d) shall qualify for single payment entitlements from the national reserve only if:

(a) as a result of investing in production capacity or acquiring possession of, purchasing or leasing eligible land within the meaning of Article 44(2) of Regulation No 1782/2003, they have, in the following calendar year, more:

(i) livestock buildings,

(ii) animals for which they were able to obtain a direct payment as referred to in Annex VI to Regulation No 1782/2003,

…

than the production capacity or land available in the reference period;

(b) on the basis of that additional production capacity or land, they received more direct payments as calculated pursuant to Article 17; and

(c) that additional production capacity or land does not yet confer a right to the allocation of payment entitlements or reference amounts based on the reference period.

3. An application for the determination of payment entitlements from the national reserve shall be made in accordance with Article 11.'

14 According to Article 17(1) and (2) of the Regeling:

'1. The additional reference amounts for farmers within the terms of Article 16(2) shall be calculated by the following method:

(a) The increase, in respect of the reference period, in the year after and as a result of the investment in production capacity concerned, or the possession, purchase or lease of land, in the amount of direct payments received under the support schemes referred to in Annex VI to Regulation No 1782/2003 shall be calculated and adjusted in accordance with the method described in Annex VII to Regulation No 1782/2003;

(b) the result of the calculation referred to in subparagraph (a) shall be reduced by EUR 500, which shall be shared proportionally among the various additional amounts received under the support schemes referred to in that subparagraph;

(c) the additional amounts calculated in accordance with subparagraph (b) shall be multiplied by a percentage to be determined by the Minister. He shall publish that percentage in the *Staatscourant* (Netherlands Official Journal).

2. In derogation from paragraph 1 and Article 16(2), the calculation of the additional reference amount shall be based, at the request of the farmer, on the second year following the investment in production capacity or the possession, purchase or lease of land, but on 2005 at the latest, if he demonstrates to the Minister's satisfaction that he was unable in the first year thereafter to make full use of the production capacity or land concerned.

…'

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

15 Mr Elbertsen, a farmer in the Netherlands, kept 4 sheep on his holding in 2000, 3 in 2001 and 11 in 2002. He did not receive any direct payments in respect of that period.

16 On 20 December 2002, he acquired a long lease of a 1.29 hectare plot of pastureland and, in the course of the following year, he converted a building previously used for storage into a livestock building.

17 In the period from 2003 to 2005, Mr Elbertsen kept 20 sheep, which enabled him to obtain a ewe premium for each of those years, resulting in a total amount of EUR 440.40.

18 On 6 September 2005, Mr Elbertsen made an application for payment entitlements from the national reserve on the basis of the investments made in livestock building capacity, ewes and land.

19 By letter of 13 October 2006, the Minister responded that, although he satisfied the conditions for obtaining payment entitlements from the national reserve by reason of those investments, the calculated additional direct payments were below the threshold of EUR 500 set under national law and, therefore, he could not be allocated any payment entitlements from the national reserve.

20 By decision of 15 December 2006, the Minister set the amount of the payment entitlements to be allocated to Mr Elbertsen at EUR 0.

21 Following Mr Elbertsen's appeal, the Minister confirmed his decision not to allocate any payment entitlements to him from the national reserve by decision of 24 April 2007.

22 By letter of 1 May 2007, Mr Elbertsen brought an action before the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry) against the decision of 24 April 2007.

23 In his action, he submits that the national legislation pursuant to which the threshold of EUR 500 is applied results in unequal treatment to the detriment of small farmers and is, therefore, contrary to Article 42 of Regulation No 1782/2003 and Article 21 of Regulation No 795/2004. Moreover, he states that no threshold had been set when he made his investments, with the result that Article 17(1)(b) of the Regeling is contrary to the principles of legal certainty and protection of legitimate expectations. Lastly, Mr Elbertsen maintains that Regulation No 795/2004 confers on him payment entitlements from the national reserve, and precludes the application of a calculation rule laid down by a Member State to establish the reference amount that has the effect of depriving him altogether of the right to obtain such payment entitlements.

24 Since it considers that the outcome of the proceedings pending before it depends on the interpretation of the Community rules applicable, the College van Beroep voor het bedrijfsleven decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Should Article 42(4) of … Regulation … No 1782/2003 … be interpreted as permitting a Member State to establish a reference amount of EUR 0 and not to allocate entitlements to payments from the national reserve to a farmer who finds himself in a special situation as described in Article 21 of … Regulation … No 795/2004 …?

(2) If the answer to that question is in the affirmative, does Community law preclude the application of a provision such as Article 17(1)(b) of the Regeling … under which any increase in the amount of additional payments arising as a result of an investment in production capacity or a purchase of land is subject to a deduction of

EUR 500 before a reference amount is established as the basis for the allocation of entitlements to payments from the national reserve?'

The questions referred for a preliminary ruling

Question 1

25 By its first question, the referring court asks, in essence, whether Article 42(4) of Regulation No 1782/2003 is to be interpreted as giving the Member States such discretion as to permit them to establish a reference amount of EUR 0 and not to allocate any payment entitlements from the national reserve to a farmer who finds himself in a special situation as described in Article 21 of Regulation No 795/2004.

Observations submitted to the Court

26 In their written observations, the Netherlands and German Governments and the Commission submit that Article 42(4) of Regulation No 1782/2003, read in conjunction with Article 21 of Regulation No 795/2004, confers such discretion on the Member States, provided that the reference amount is established according to objective criteria and, therefore, does not prejudice the equal treatment of farmers or create market or competition distortions.

The Court's response

27 As a preliminary point, it should be borne in mind that, in the context of the single payment scheme, the Member States are required, under Article 42 of Regulation No 1782/2003, to constitute a national reserve to take account of specific situations. Under Article 42(4), the Member States are to use the national reserve for the purpose of establishing, according to objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions, reference amounts for farmers finding themselves in a special situation.

28 In that regard, it must be noted that, unlike the wording of Article 42(3) and (5) of Regulation No 1782/2003, which expressly offers the Member States the possibility of using or not using the national reserve in the situations referred to in those provisions, Article 42(4) places the Member States under an obligation to establish reference amounts for farmers finding themselves in a special situation. That is true, in particular, of farmers who made investments in production capacity or purchased land by 15 May 2004 at the latest.

29 However, it must be noted that neither Article 42(4) of Regulation No 1782/2003 nor Article 21(1) of Regulation No 795/2004 prima facie precludes a Member State from establishing a reference amount equivalent to EUR 0.

30 Under Article 21(1) of Regulation No 795/2004, payment entitlements received by farmers covered by that provision are calculated on the basis of reference amounts established by the Member State concerned. It follows from this that, while not affecting the right to have a reference amount established, the national legislation is nevertheless liable to have the effect that the calculation of payment entitlements will, in certain cases, result in an amount equivalent to EUR 0.

31 That cannot, however, be regarded as being contrary to Article 21(1) of Regulation No 795/2004 which, interpreted in the light of recital 9 in the preamble to that regulation, requires the Member States to allocate payment entitlements under Article 42(4) of Regulation No 1782/2003 to the farmers concerned.

32 As is clearly apparent from Articles 21(1) of Regulation No 795/2004 and 42(4) of Regulation No 1782/2003, the Member States have a certain latitude in determining the reference amounts to be allocated. That interpretation is confirmed, moreover, by recital 13 in the preamble to Regulation No 795/2004.

33 The fact remains, however, that the Member States must, in accordance with those provisions, act on the basis of objective criteria, not prejudice the equal treatment of farmers and not create market or competition distortions.

34 Accordingly, the answer to the first question is that Article 42(4) of Regulation No 1782/2003 must be interpreted as giving the Member States such discretion as to permit them to establish a reference amount of EUR 0 and not to allocate any payment entitlements from the national reserve to a farmer who finds himself in a special situation as described in Article 21 of Regulation No 795/2004, provided that that amount is based on objective criteria, does not prejudice the equal treatment of farmers and does not create market or competition distortions.

Question 2

35 By its second question, the referring court asks, in essence, whether Community law precludes the application of a national provision under which any increase in the amount of additional payments arising as a result of an investment in production capacity or a purchase of land is subject to a deduction of EUR 500 before a reference amount is established as the basis for the allocation of entitlements to payments from the national reserve.

Observations submitted to the Court

36 The Netherlands and German Governments and the Commission contend that Community law does not preclude the application of such a provision.

The Court's response

37 As a preliminary point, it must be borne in mind that, when implementing Community legislation, the Member States are required to comply not only with the provisions of the regulation concerned, but also with the general principles of Community law, such as the principles of equal treatment, the protection of legitimate expectations, and proportionality (see, to that effect, Case C-241/07 *JK Otsa Talu* [2009] ECR I-4323, paragraph 46).

38 Article 42(4) of Regulation No 1782/2003 requires that reference amounts for farmers finding themselves in a special situation be established according to objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions.

39 Article 17(1) of the Regeling provides that the reference amount is to be calculated on the basis of the increase in the amount of direct payments received as a result of an investment in production capacity or the possession, purchase or lease of land. That amount is then to be reduced by EUR 500, which is to be shared proportionally among the additional amounts of aid concerned, before being multiplied by a percentage determined by the Minister. The reference amount thus calculated constitutes the basis for establishing the value of the payment entitlements to be allocated or increased.

40 In those circumstances, it must be held that the provision at issue in the main proceedings, under which the calculation of the reference amount is subject to a reduction of EUR 500 applicable to all farmers calling on the national reserve, is a general measure which is based on objective criteria and does not infringe the principle of equal treatment or entail market or competition distortions.

41 As regards, specifically, the principle of equal treatment, it has been consistently held that this principle requires that comparable situations not be treated differently and different situations not be treated alike unless such treatment is objectively justified (Case C-313/04 *Franz Egenberger* [2006] ECR I-6331, paragraph 33 and case-law cited).

42 In this instance, all farmers calling on the national reserve are in a comparable situation. The fact that the deduction of EUR 500 is liable to have a greater impact on small holdings than on large ones is irrelevant in that regard. By contrast, in so far as they do not satisfy the conditions for being allocated single payment entitlements, farmers calling on the national reserve are not in a situation comparable to that of farmers receiving regular payments.

43 Furthermore, it must be noted that the principle of proportionality, which requires that the aim in view should be attained by exercising as little constraint as possible, does not preclude national legislation such as that at issue in the main proceedings, which is designed to avoid the implementation of the payment scheme leading to insignificant and wholly disproportionate reference amounts by comparison with the administrative costs borne by the Member State (see, to that effect, Case C-16/89 *Spronk* [1990] ECR I-3185, paragraph 28).

44 Thus, certain Community provisions grant the Member States such discretion as to permit them to impose a threshold below which applications for aid are rejected. By way of example, it is worth mentioning the power given to the Member States under Article 12(6) of Regulation No 795/2004 to set up a minimum size per holding in order for requests for the establishment of payment entitlements to be permissible, provided that the minimum size is not higher than 0.3 hectare. In addition, in accordance with Article 70 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 No 1782/2003 (OJ 2004 L 141, p. 18), the Member States may decide not to grant any aid if the amount per aid application does not exceed EUR 100. Finally, Article 4(3) of Council Regulation (EC) No 2529/2001 of 19 December 2001 on the common organisation of the market in sheepmeat and goatmeat (OJ 2001 L 341, p. 3) gave the Member States such discretion as to permit them to set between 10 and 50 the minimum number of animals in respect of which an application for a premium could be lodged.

45 As regards the principle of the protection of legitimate expectations, it must be recalled that, in the field of the common agricultural policy, economic operators are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the competent authorities in the exercise of their discretionary power will be maintained (*JK Otsa Talu*, paragraph 51). It follows from this that the making of investments in production capacity or the purchase of land does not entitle the producer concerned to entertain any legitimate expectation based on the making of those investments in order to claim a reference amount allocated precisely on account of those investments (see, to that effect, *Spronk*, paragraph 29).

46 In the light of the foregoing considerations, the answer to the second question is that Community law does not preclude the application of a national provision under which any increase in the amount of additional payments arising as a result of an investment in production capacity or a purchase of land is subject to a deduction of EUR 500 before a reference amount is established as the basis for the allocation of entitlements to payments from the national reserve.

Costs

47 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 (Fifth Chamber) hereby rules:

1. **Article 42(4) 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 must be interpreted as giving the Member States such discretion as to permit them to establish a reference amount of EUR 0 and not to allocate any payment entitlements from the national reserve to a farmer who finds himself in a special situation as described in Article 21 of Commission Regulation (EC) No 795/2004 of 21 April 2004 laying down detailed rules for the implementation of the single payment scheme provided for in Regulation No 1782/2003, as amended by Commission Regulation (EC) No 1974/2004 of 29 October 2004, provided that that amount is based on objective criteria, does not prejudice the equal treatment of farmers and does not create market or competition distortions.**

2. **Community law does not preclude the application of a national provision under which any increase in the amount of additional payments arising as a result of an investment in production capacity or a purchase of land is subject to a deduction of EUR 500 before a reference amount is established as the basis for the allocation of entitlements to payments from the national reserve.**

[Signatures]