Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

5 June 2014*

(Agriculture — Common agricultural policy — Single payment scheme — Regulation (EC) No 73/2009 — Articles 34, 36 and 137 — Payment entitlements — Basis of calculation — Premiums paid in respect of cattle and land held by the farmer during the reference period — Modification of the method for determining the area of agricultural parcels — Reduction in the hectares eligible for aid — Application by the farmer for a reduction in the number and an increase in the unit value of his payment entitlements — Regulation (EC) No 796/2004 — Article 73a(2a) — Lawfulness)

In Case C-105/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the College van Beroep voor het bedrijfsleven (Netherlands), made by decision of 27 February 2013, received at the Court on 4 March 2013, in the proceedings

P.J. Vonk Noordegraaf

v

Staatssecretaris van Economische Zaken,

THE COURT (First Chamber),

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

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

— the Netherlands Government, by M. Bulterman and B. Koopman, 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 6 February 2014,

gives the following

* Language of the case: Dutch.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 34, 36 and 137 of Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes 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, and corrigendum OJ 2010 L 43, p. 7).

2 The request has been made in proceedings between Mr Vonk Noordegraaf and the Staatssecretaris van Economische Zaken (State Secretary for Economic Affairs; 'the Staatssecretaris'), concerning a modification in payment entitlements following an alteration in the method for determining the areas that are eligible for aid.

Legal context

Regulation (EC) No 1782/2003

3 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, and corrigendum OJ 2004 L 94, p. 70) has established, inter alia, an income support scheme for farmers 'decoupled' from production. That scheme, referred to in the second indent of Article 1 of that regulation as the 'single payment scheme', combines a number of existing direct payments received by a farmer from various supports schemes in existence until then.

4 For the purposes of the implementation of the single payment scheme, the Member States could opt for the 'historical' model or the 'regional' model.

5 Under the 'historical' model, farmers who, during a reference period comprising the calendar years 2000 to 2002, benefited from a payment under at least one of the aid schemes referred to in Annex VI to Regulation No 1782/2003 were entitled to 'payment entitlements' calculated on the basis of a reference amount obtained, for each farmer, from the yearly average for that period of the total amount of payments granted under those schemes.

6 Article 43 of that regulation, entitled 'Determination of the payment entitlements', provided:

'1. Without prejudice to Article 48, a farmer shall receive a payment entitlement per hectare which is calculated by dividing the reference amount by the three-year average number of all hectares which in the reference period gave right to direct payments listed in Annex VI.

The total number of payment entitlements shall be equal to the above mentioned average number of hectares.

…

2. The number of hectares referred to in paragraph 1 shall further include:

…

(b) all forage area in the reference period.

3. For the purpose of paragraph 2(b) of this Article, "forage area" shall mean the area of the holding that was available throughout the calendar year, in accordance with Article 5 of Commission Regulation (EC) No 2419/2001 …, for rearing animals including areas in shared use and areas which were subject to mixed cultivation. The forage area shall not include:

— buildings, woods, ponds, paths,

— areas used for other crops eligible for Community aid or for permanent crops or horticultural crops,

— areas qualifying for the support system laid down for the producers of certain arable crops, used for the aid scheme for dried fodder or subject to a national or Community set-aside scheme.

…'

Regulation No 73/2009

7 Regulation No 73/2009 repealed and replaced Regulation No 1782/2003 with effect from 1 January 2009. Recital 49 in the preamble thereto states the following:

'In the initial allocation of payment entitlements by Member States, some errors led to particularly high payments to farmers. This non-compliance is normally the subject of financial correction until such time as corrective measures are taken. However, taking into account the time that has elapsed since the payment entitlements were first allocated, the necessary correction would lead to disproportionate legal and administrative constraints for Member States. In the interest of legal certainty, the allocation of such payments should therefore be regularised.'

8 Article 2(h) of Regulation No 73/2009 provides that "agricultural area" means any area taken up by arable land, permanent pasture or permanent crops'.

9 Article 14 of that regulation provides:

'Each Member State shall set up and operate an integrated administration and control system (hereinafter referred to as the "integrated system").

…'

10 Under Article 33(1) of Regulation No 73/2009:

'Support under the single payment scheme shall be available to farmers if they:

(a) hold payment entitlements which they have obtained in accordance with Regulation (EC) No 1782/2003;

…'

11 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 …'

12 Article 36 of the regulation provides:

'The payment entitlements per hectare shall not be modified, save as otherwise provided for in this Regulation.

The Commission, in accordance with the procedure referred to in Article 141(2), shall lay down detailed rules for the modification, from 2010, of payment entitlements, in particular in the case of fractions of entitlements.'

13 Under Article 137 of Regulation No 73/2009:

'1. Payment entitlements allocated to farmers before 1 January 2009 shall be deemed legal and regular as from 1 January 2010.

2. Paragraph 1 shall not apply to payment entitlements allocated to farmers on the basis of factually incorrect applications except in cases where the error could not reasonably have been detected by the farmer.

3. Paragraph 1 of this Article shall not prejudice the Commission's power to take decisions referred to in Article 31 of Regulation (EC) No 1290/2005 in relation to expenditure incurred for payments granted in respect of any calendar year up to 2009 included.'

Regulation (EC) No 796/2004

14 Pursuant to Article 73a 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 Council Regulations (EC) No 1782/2003 and (EC) No 73/2009, as well as for the implementation of cross-compliance provided for in Council Regulation (EC) No 479/2008 (OJ 2004 L 141, p. 18, and corrigenda OJ 2005 L 37, p. 22, and OJ 2006 L 144, p. 30), as amended by Commission Regulation (EC) No 380/2009 of 8 May 2009 (OJ 2009 L 116, p. 9; 'Regulation No 796/2004'):

'1. Where, after payment entitlements have been allocated to farmers in accordance with Regulation (EC) No 795/2004, it is established that certain payment entitlements have been allocated unduly, the farmer concerned shall give up the unduly allocated entitlements to the national reserve referred to in Article 42 of Regulation (EC) No 1782/2003.

…

The entitlements allocated unduly shall be deemed not to have been allocated *ab initio*.

2. Where, after payment entitlements have been allocated to farmers in accordance with Regulation (EC) No 795/2004, it is established that the value of the payment entitlements is too high, that value shall be adjusted accordingly. That adjustment shall also be carried out in respect of payment entitlements which have, meanwhile, been transferred to other farmers. The value of the reduction shall be allocated to the national reserve referred to in Article 42 of Regulation (EC) No 1782/2003.

The payment entitlements shall be deemed as having been allocated *ab initio* at the value resulting from the adjustment.

2a. Where, for the purpose of the application of paragraphs 1 and 2 it is established that the number of the entitlements allocated to a farmer in accordance with Regulation (EC) 795/2004 is incorrect, and where the undue allocation has no impact on the total value of the entitlements the farmer received, the Member State shall recalculate the payment entitlements and where appropriate correct the type of the entitlements allocated to the farmer. However, this shall not apply if the errors could reasonably have been detected by the farmers.'

15 Paragraph (2a) of Article 73a of Regulation No 796/2004 was inserted by Commission Regulation (EC) No 972/2007 of 20 August 2007 (OJ 2007 L 216, p. 3), recital 19 in the preamble to which reads as follows:

'In certain cases [undue] allocations of entitlements did not affect the total value, but only the number of the entitlements of the farmer. In these cases, the Member States should correct the allocation or where appropriate the type of entitlements, without reducing the value hereof. The provision should only apply if the farmer could not have detected the error.'

Regulation (EC) No 1122/2009

16 Under Article 81 of Commission Regulation (EC) No 1122/2009 of 30 November 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 73/2009 as regards cross-compliance, modulation and the integrated administration and control system, under the direct support schemes for farmers provided for in 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, and corrigendum OJ 2013 L 246, p. 3):

'1. Without prejudice of Article 137 of Regulation (EC) No 73/2009, where, after payment entitlements have been allocated to farmers in accordance with Regulation (EC) No 795/2004 or Regulation (EC) No 1120/2009 it is established that certain payment entitlements have been allocated unduly, the farmer concerned shall give up the unduly allocated entitlements to the national reserve referred to in Article 41 of Regulation (EC) No 73/2009.

…

2. Without prejudice of Article 137 of Regulation (EC) No 73/2009, where, after payment entitlements have been allocated to farmers in accordance with Regulation (EC) No 795/2004 or Regulation (EC) No 1120/2009 it is established that the value of the payment entitlements is too high, that value shall be adjusted accordingly. That adjustment shall also be carried out in respect of payment entitlements which have, meanwhile, been transferred to other farmers. The value of the reduction shall be allocated to the national reserve referred to in Article 41 of Regulation (EC) No 73/2009.

The payment entitlements shall be deemed as having been allocated *ab initio* at the value resulting from the adjustment.

3. Where, for the purpose of the application of paragraphs 1 and 2 it is established that the number of the entitlements allocated to a farmer … is incorrect, and where the undue allocation has no impact on the total value of the entitlements the farmer received, the Member State shall recalculate the payment entitlements and where appropriate correct the type of the entitlements allocated to the farmer.

However, this shall not apply if the errors could reasonably have been detected by the farmers.'

17 Article 86(1) of Regulation No 1122/2009 provides:

'Regulation (EC) No 796/2004 is repealed with effect from 1 January 2010.

However, it shall continue to apply in respect of aid applications relating to marketing years or premium periods which start before 1 January 2010.'

The dispute in the main proceedings and the question referred

18 By decision of 18 July 2006, the Staatssecretaris, by application of Article 43 of Regulation No 1782/2003, established the number and value of the payment entitlements allocated to Mr Vonk Noordegraaf.

19 To that end, the average value of the total amounts of the premiums paid to him for his cattle for the period 2000 to 2002 was divided by the average number, calculated for the same period, of all the hectares at his disposal, the result thus obtained being his 'payment entitlement per hectare'.

20 According to the referring court, the average number of hectares at Mr Vonk Noordegraaf's disposal during that period was therefore fixed at 10.76 hectares.

21 In 2009, Mr Vonk Noordegraaf held 9.79 payment entitlements and, in his application for a single payment in respect of that year, he declared an area of 10.76 hectares.

22 None the less, by decision of 30 June 2010, the Staatssecretaris determined the number of hectares as being less than that declared by Mr Vonk Noordegraaf in his application. In 2009, the Netherlands authorities, following comments made by the Commission, modified the method for determining the area of agricultural parcels in the Netherlands. The Staatssecretaris thus decided to use, with effect from 2009, a register of the parcels taking account of their 'net area', that is to say, the arable land, henceforth excluding ineligible parts such as ditches, banks and paths.

23 That decision resulted in a reduction in the amount of aid paid to Mr Vonk Noordegraaf under the single payment scheme for 2009 as against the previous years.

24 Mr Vonk Noordegraaf therefore challenged the decision of 30 June 2010 before the Staatssecretaris which, by decision of 29 October 2010, declared his claim well founded in part.

25 Mr Vonk Noordegraaf appealed against that decision and, by a revised decision of 19 May 2011 ('the decision of 19 May 2011'), the Staatssecretaris fixed, for 2009, the determined area of Mr Vonk Noordegraaf's parcels at 8.34 hectares.

26 The parties to the main proceedings agree on that area and on the fact that the reduction in it compared to that used in the previous years is the result solely of the modification in the method for determining the area of those parcels.

27 Before the referring court, Mr Vonk Noordegraaf claims, however, that the introduction of the new parcel identification system has led to reduction in the agricultural area which he can now claim to activate his payment entitlements. In consequence, he seeks to have the number and value of his payment entitlements recalculated on the basis of the number of hectares fixed by the decision of 19 May 2011.

28 In those circumstances, the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry) decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Can it be said to constitute a correct application of Regulation (EC) No 73/2009, with particular reference to Articles 34, 36 and 137, if a farmer with payment entitlements acquired on the basis of non-area-related production, allocated to the area in his possession, does not have a significant proportion of those entitlements paid out to him despite the fact that he declared the eligible area of the hectares which remained unchanged in his possession in good faith in accordance with the measuring method used by the Member State at the time of the activation of the payment entitlements under Article 34 of Regulation No 73/2009, but subsequently rejected by the Commission, for the sole reason that the eligible area determined for purposes of the payment turns out to be smaller as the result of a changed measuring method?'

The question referred for a preliminary ruling

29 By its question, the referring court asks, in essence, whether EU law is to be interpreted as meaning that a farmer's payment entitlements must be recalculated when, in the initial determination of his payment entitlements, that farmer's reference amount was divided by too high a number of hectares because of the method for determining the area of agricultural parcels used at that time in the Member State concerned.

30 First of all, it must be borne in mind that following the integration pursuant to Regulation No 1782/2003 of the former support schemes into the single payment scheme, the value of each farmer's payment entitlements was calculated, in the Member States which opted for the 'historical' model, on the basis of the level of aid which the farmer concerned received during a reference period corresponding to the years 2000 to 2002.

31 Every eligible farmer was thus granted a certain number of payment entitlements per hectare, the number and value of which were obtained by dividing the average of the payments he had received during that reference period by the average number, calculated over the same period, of hectares entitling him to those payments or, in accordance with the provisions of Article 43(2)(b) of Regulation No 1782/2003, by the average number of hectares available for rearing animals.

32 In accordance with the provisions of Article 34 of Regulation No 73/2009, the aid is paid to farmers upon activation of a payment entitlement per eligible hectare, since only activated payment entitlements give a right to the payment of the amounts fixed therein.

33 In the main proceedings, Mr Vonk Noordegraaf was allocated, during 2006, payment entitlements calculated on the basis of the premiums paid to him in respect of his cattle during the reference period and the parcels which were at his disposal during that period.

34 However, following a change during 2009 in the method for determining the area of agricultural parcels in the Netherlands, the area of Mr Vonk Noordegraaf's parcels was revised downwards by the Netherlands authorities, which meant that the number of hectares eligible for aid which he had been able to claim until then for the activation of his payment entitlements became lower than the number of payment entitlements which he held.

35 Since he can no longer receive aid to the full amount of his payment entitlements, Mr Vonk Noordegraaf is applying to the Netherlands authorities to increase the unit value thereof, while proportionately reducing their number so that the total value of his payment rights remains unchanged.

36 In other words, Mr Vonk Noordegraaf requests the competent authority to recalculate the number and value of his payment entitlements, taking as its basis the net area of his parcels as determined in the decision of 19 May 2011.

37 In that regard, it must be borne in mind, first of all, that Article 36 of Regulation No 73/2009 provides that the payment entitlements per hectare are not to be modified, save as otherwise provided for in that regulation.

38 Since every activated payment entitlement gives a right to payment of the amount fixed therein, a change in that amount would lead to a reduction or an increase in the amount of aid paid to the farmer concerned. As is apparent from recital 29 in the preamble to Regulation No 1782/2009, one of the objectives of the single payment scheme is to enable each farmer to continue to receive a level of aid equivalent to the amounts paid to him during the reference period.

39 That is exactly what Mr Vonk Noordegraaf is claiming in his action against the Staatssecretaris.

40 However, it is clear that there is no provision of Regulation No 73/2009 which provides expressly for the possibility of modifying the payment entitlements of a farmer who is in a similar situation to Mr Vonk Noordegraaf.

41 Nevertheless, in execution of the implementing powers conferred on it under Article 36(2) of that regulation, the Commission adopted Regulation No 796/2004, Article 73a(2a) of which provides that where the entitlements allocated to a farmer were allocated unduly but that allocation has no impact on the total value of the entitlements the farmer received, the payment entitlements are to be recalculated, provided that the errors could not reasonably have been detected by the farmer.

42 In the main proceedings, it is not in dispute that the total value of the payment entitlements allocated to Mr Vonk Noordegraaf corresponds to the average of the aid received by him before the introduction of the single payment scheme.

43 However, the Netherlands Government submits that, since it was drawn up in accordance with the rules and requirements in force at the date of its adoption, the decision of 18 July 2006, by which the Staatssecretaris fixed the number and value of the payment entitlements granted to Mr Vonk Noordegraaf, is not incorrect.

44 In that regard, firstly, it must be recalled that Mr Vonk Noordegraaf was initially granted a number of payment entitlements calculated on the basis of the 'gross' area of the parcels which he had during the reference period, which accorded with the method used at the time by the Netherlands authorities.

45 Next, in the context of the adoption of the decision of 30 June 2010, the Netherlands authorities re-measured Mr Vonk Noordegraaf's parcels. On that occasion, they excluded certain features of the landscape, such as banks, ditches and paths in order to obtain the 'net' area of the parcels in question.

46 Next, it must be noted that, in accordance with Article 43(3) of Regulation No 1782/2003, forage areas do not include, inter alia, ponds and paths. In addition, it is apparent from reading *a contrario* Article 30(2) of Regulation No 796/2004 that the features of the landscape such as hedges, ditches and walls cannot, in principle, be included in the areas that are eligible for aid.

47 Thus, features of the landscape such as banks, paths and ditches cannot, in principle, be taken into consideration in the determination of the areas that are eligible for aid.

48 It follows, logically, that such features of the landscape cannot be taken into consideration either for the determination of a farmer's payment entitlements, otherwise, like Mr Vonk Noordegraaf, he would hold a number of payment entitlements greater than the number of hectares which he had been able to claim in order to activate his entitlements.

49 Accordingly, where, as in the main proceedings, the competent authorities have taken those features into account in determining a farmer's agricultural parcels, the view must be taken that the number of payment entitlements granted to that farmer was 'incorrect' within the meaning of Article 73a(2a) of Regulation No 796/2004.

50 Finally, it must be presumed that a farmer in Mr Vonk Noordegraaf's situation was not able reasonably to have detected the errors in the establishment of the area of his parcels since they were the direct result of the method then used by the competent national authorities.

51 Consequently, the view must be taken that, in accordance with Article 73a(2a) of Regulation No 796/2004, a farmer's payment entitlements must be recalculated when, because of the incorrect method for determining the area of agricultural parcels used at that time in the Member State concerned, the farmer was unduly allocated a certain number of payment entitlements because his reference amount was divided by too high a number of hectares.

52 Contrary to the submissions of the Netherlands Government, that conclusion is not affected by Article 137(1) of Regulation No 73/2009, pursuant to which payment entitlements allocated to farmers before 1 January 2009 are to be deemed legal and regular as from 1 January 2010.

53 As is apparent from recital 49 in the preamble to Regulation No 73/2009, that provision seeks to enable the Member States to waive the recovery of the undue payments made to some farmers, having regard to the disproportionate legal and administrative constraints which the adoption of the corrective measures would mean. Moreover, Article 137(2) of Regulation No 73/2009 restricts the scope of paragraph (1) thereof by excluding from it the payment entitlements allocated on the basis of factually incorrect applications.

54 It follows from the foregoing that the purpose of Article 137(1) of Regulation No 73/2009 is, for reasons connected with the principle of legal certainty, to protect farmers acting in good faith who had received undue payments and not, in the future, to penalise farmers who, like Mr Vonk Noordegraaf, were granted too high a number of payment entitlements because, due to the incorrect method used to determine the area of agricultural parcels at that time in the Member State concerned, their reference amount was divided by too high a number of hectares.

55 Accordingly, it must be concluded that Article 73a(2a) of Regulation No 796/2004 does not come within the scope of Article 137(1) of Regulation No 73/2009.

56 That interpretation is supported by Regulation No 1122/2009, which repealed and replaced Regulation No 796/2004, applicable *ratione temporis* to the facts of the main proceedings, and in particular by the scheme of Article 81 thereof.

57 In Article 81(1) and (2), the EU legislature expressly stated that the rules laid down in those two provisions, namely that the unduly allocated entitlements are to be given up to the national reserve and that if it is established that the value of the payment entitlements is too high, that value is to be adjusted accordingly, apply without prejudice to the provisions of Article 137 of Regulation No 73/2009.

58 However, Article 81(3) of Regulation No 1122/2009, the wording of which corresponds to that of Article 73a(2a) of Regulation No 796/2004, does not contain any reference to Article 137 of Regulation No 73/2009, so that that provision does not fall within the scope of that article.

59 Having regard to all the foregoing considerations, the answer to the question referred is that Article 73a(2a) of Regulation No 796/2004 must be interpreted as meaning that a farmer's payment entitlements must be recalculated when, in the initial determination of his payment entitlements, that farmer's reference amount was divided by too high a number of hectares because of the method for determining the area of agricultural parcels used at that time in the Member State concerned. Article 137 of Regulation No 73/2009 does not apply to a correction under Article 73a(2a) of Regulation No 796/2004.

Costs

60 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 73a(2a) 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 Council Regulations (EC) No 1782/2003 and (EC) No 73/2009, as well as for the implementation of cross-compliance provided for in Council Regulation (EC) No 479/2008, as amended by Commission Regulation (EC) No 380/2009 of 8 May 2009, must be interpreted as meaning that a farmer's payment entitlements must be recalculated when, in the initial determination of his payment entitlements, that farmer's reference amount was divided by too high a number of hectares because of the method for determining the area of agricultural parcels used at that time in the Member State concerned. Article 137 of Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes 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 does not apply to a correction under Article 73a(2a) of Regulation No 796/2004.

[Signatures]