Anonymised version

Case C-216/19

Request for a preliminary ruling

Date lodged:

11 March 2019

Referring court:

Verwaltungsgericht Berlin (Germany)

Date of the decision to refer:

28 February 2019

Applicant:

WQ

Defendant:

Land Berlin

[...]

VERWALTUNGSGERICHT BERLIN

ORDER

In the administrative-law case

WQ,

[...]

applicant,

v

Land Berlin,

[...]

defendant,

[...]

the 26th Chamber of the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) […]

[...] **[Or. 2]**

made the following order on 28 February 2019:

The proceedings are stayed.

The following questions, which are relevant for the decision in the main proceedings and concern the interpretation of Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 (OJ 2013 L 347, p. 608) ('Regulation No 1307/2013') shall be referred to the Court of Justice of the European Union [...] for a preliminary ruling under Article 267 TFEU:

1 Does the owner of eligible hectares have those hectares at his disposal within the meaning of the first sentence of Article 24(2) of Regulation No 1307/2013 if no third party has a right of use in respect of the eligible hectares, and, in particular, no right of use derived from the owner, or is the area at the disposal of a third party or at no one's disposal if a third party is actually using that area for agricultural purposes without any right of use?

2 Is the phrase 'any area which gave a right to payments in 2008 under the single payment scheme or the single area payment scheme laid down, respectively, in Titles III and IVA of Regulation (EC) No 1782/2003' in Article 32(2)(b) of Regulation No 1307/2013 to be interpreted as meaning that the area must in 2008 have satisfied the conditions laid down in Titles III and IVA of Regulation (EC) No 1782/2003 for a right to payments under the single payment scheme or the single area payment scheme?

3 If the answer to Question 2 is in the negative: Is the phrase 'any area which gave a right to payments in 2008 under the single payment scheme or the single area payment scheme laid down, respectively, in Titles III and IVA of Regulation (EC) No 1782/2003' in Article 32(2)(b) of Regulation No 1307/2013 to be interpreted as meaning that, in order for an area that is afforested in accordance with

Article 31 of Regulation (EC) No 1257/1999 to be classified as eligible hectares within the meaning of Article 32(2)(b)(ii) of Regulation (EC) No 1307/2013, it is necessary that a set-aside entitlement or other payment entitlement within the meaning of Article 44(1) or Article 54(1) of Regulation (EC) No 1782/2003 has been granted in respect of that area?

4 If the answer to Question 3 is in the negative: Is the phrase 'any area which gave a right to payments in 2008 under the single payment scheme or the single area payment scheme laid down, respectively, in Titles III and IVA of Regulation (EC) No 1782/2003' in Article 32(2)(b) of Regulation No 1307/2013 to be interpreted as meaning that, in order for an area that is afforested in accordance with Article 31 of Regulation (EC) No 1257/1999 to be classified as eligible hectares within the meaning of Article 32(2)(b)(ii) of Regulation (EC) No 1307/2013, it is necessary that in 2008 the farmer made an application under Article 22(1) and/or Article 34(1) of Regulation (EC) No 1782/2003 and satisfied the other conditions for a direct payment under Titles III or IVA? **[Or. 3]**

Grounds

1 The parties' dispute concerns the first grant of certain payment entitlements under Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009.

2 By notice of 18 December 2006 the Amt für Landwirtschaft und Forsten (Agriculture and Forestry Office), which was the competent authority at the time, granted the applicant direct payments under Title III of Regulation (EC) No 1782/2003, but did not take into account, for the purposes of activating payment entitlements, the applicant's afforested areas classed as set-aside areas, which form, inter alia, the subject of this case. The applicant asserts that the authorities informed him, in the context of his application for the year 2007, that he was not entitled to aid in respect of the afforested areas. In subsequent applications, in particular in his application for the year 2008, he no longer referred to those afforested areas. The applicant submitted no further applications in respect of those areas under Regulation (EC) No 1782/2003.

3 On 6 May 2014, the applicant purchased plots of land located in Gräningen from the company BWG Bodenverwertungs- und -verwaltungs GmbH. According to the second sentence of paragraph 2 of Clause 5(1) of the contract of sale, the areas being sold were ('are') not subject to a lease. On 19 December 2014, the applicant was entered in the land register as the owner of the agricultural areas. On 10 July 2015, a third party planted crops on the areas in question.

4 On 8 May 2015, the applicant submitted an application for agricultural subsidies for the year 2015. He stated that the use of plots 120, 135 and 136 was as 'farmland not used for production'. The third party that had planted crops on the areas in the communal district of Gräningen (plots 135 and 136) had also submitted an application for agricultural subsidies in respect of those areas for the year 2015, which was refused without contest. In addition, in respect of part of plot 120 located in the communal district of Bernau, which was being used by the applicant himself, there was a second application submitted by Stadtgüter Berlin Nord KG. That entity was granted the corresponding payment entitlements.

5 By notice from the Landesamt für Ländliche Entwicklung, Landwirtschaft und Flurneuordnung (State Office for Rural Development, Agriculture and Farmland Reorganisation) of 17 December 2015, the defendant awarded the applicant 150.86 payment entitlements. The defendant refused to award subsidies in respect of the areas in the [**Or. 4**] communal district of Gräningen that had been planted with crops by a third party, the area in the communal district of Bernau that was the subject of two applications, and the afforested areas classed as set-aside areas. The applicant brought an administrative appeal against that decision, which the defendant dismissed by a reply to the administrative appeal from the Landesamt für Ländliche Entwicklung, Landwirtschaft und Flurneuordnung of 15 September 2016. In that reply the defendant stated that the agricultural areas in question were being farmed by a third party, who also applied to be awarded payment entitlements. Therefore, those areas were not in fact at the applicant's disposal. For that to be the case, the applicant would actually have had to use those areas. The legislature specifically does not focus on any classification or use under civil law. With regard to the afforested areas, no application was made in respect of them for the year 2008, which is a prerequisite for the grant of payment entitlements.

6 The applicant brought an action on 11 October 2016. He submits that the agricultural areas unlawfully cultivated by a third party were at his disposal. The defendant was wrong to take into account the matter of whether aid had been actually applied for and granted for the afforested areas classed as set-aside areas. Rather, according to the drafting history of the provision, it is sufficient that the areas were eligible for aid. That is apparent from recital 26 of Regulation No 1307/2013. In a draft of Regulation No 73/2009, which was repealed by Regulation No 1307/2013, eligible hectares are defined as 'any areas which have been eligible in 2007 and which for the duration of the relevant scheme are afforested pursuant to Article 31 of Council Regulation (EC) No 1257/1999 or to Article 43 of Regulation (EC) No 1698/2005'. In the absence of political discussion in that regard, nothing should have changed in terms of content. It is only linguistic considerations, rather than those relating to content, which gave rise to the version agreed upon subsequently.

7 The applicant claims that the Verwaltungsgericht Berlin (Administrative Court, Berlin) should:

order the defendant to set aside in part the notice of 17 December 2015 taking the form of the reply to the administrative appeal of 15 September 2016 and award the applicant 47.46 additional payment entitlements.

8 The defendant claims that the Verwaltungsgericht Berlin (Administrative Court, Berlin) should:

dismiss the action.

9 [Explanations of proceedings] [...] [**Or. 5**]

10 [Explanations of proceedings] [...]

11 The outcome of the hearing is that the action relating to the agricultural areas in Gräningen and Bernau is well founded provided that those areas are at the disposal of the applicant as owner, within the meaning of the first sentence of Article 24(2) of Regulation No 1307/2013, and the applicant has not surrendered them to another, despite them being cultivated by a third party without permission from the applicant and despite that third party going so far as to apply for payment entitlements in respect of those areas.

12 The referring court considers that, within the meaning of the provision in question, the agricultural area is at the disposal of the owner, whose enjoyment thereof is hindered in no way by third-party rights.

13 When it is used in that provision, the phrase 'at his disposal' is a term with a specific meaning in law. While it is the German-law concept of the term that is intended by the defendant, it is not only under German law that the right of ownership means the comprehensive right to dispose of an object. According to the first sentence of Article 17(1) of the Charter of Fundamental Rights, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. Thus, this makes it impossible to conclude that an agricultural area is no longer at the disposal of an owner, within the meaning in question, if a third party actually uses it by cultivating it without any personal legal status derived, in particular, from the owner. The defendant's understanding, according to which the legislature specifically does not focus on any classification or use under civil law, is not shared by the referring court. The opposite is the case, on account of the use of the term 'disposal'. The administrative difficulties, as put forward by the defendant in the hearing, in cases, such as the present case, of double applications have no influence on the interpretation of the term 'at his disposal'. Moreover, it appears that such difficulties can be overcome. If a systematic land register is maintained, it is easy to establish ownership. Otherwise, an area may be at a person's disposal by virtue of an effective right of use claimed by a third party.

14 The referring court takes the view that Question 1 was not answered in the judgment of 14 October 2010, *Landkreis Bad Dürkheim* (C-61/09, EU:C:2010:606), and that it remains unanswered. This is because that judgment concerns Article 44 of Regulation (EC) No 1782/2003. The second sentence of

paragraph 2 [1] thereof uses the words ‘shall be ... at [his] disposal’ in a different context. Further, the Court of Justice stated in paragraph 66 of that judgment that no third party was to carry out any agricultural activity on the disputed areas during the relevant period. This was to prevent multiple [**Or. 6**] farmers from claiming that the relevant plots form part of their farm. However, its aim was not to prevent anyone from bringing an unfounded claim. The referring court certainly takes the view that an owner is not to be excluded on account of the unfounded claim of a third party.

15 Another outcome of the hearing was that the action relating to the afforested areas classed as set-aside areas is also well founded provided that the answer to Question 2 is in the affirmative. If at least one of Questions 3 and 4 is answered in the affirmative, the action relating to the afforested areas is unfounded.

16 In that regard, the referring court shares the defendant’s point of view that the eligibility of an area for aid under Article 32(2)(b) of Regulation No 1307/2013 is contingent on a timely application under Regulation (EC) No 1782/2003. However, the referring court assumes that the German translation is incorrect, because there is no ‘or’ between subparagraphs (a) and (b) of Article 24(2) [2] to make it clear that there are two types of eligible hectare. The referring court takes the view that it is inconsequential that Regulation (EC) No 1782/2003 contained no Title IVA.

17 The referring court does not follow the applicant’s argument, because it is evident from the mere wording ‘a right to payments’ that such payments cannot simply be equated to the eligibility of an area for aid. In order for a ‘right to payments’ to arise, more than one characteristic — in this case, a characteristic relating to an area — must be present. Regulation (EC) No 1782/2003 did not systematically grant payment entitlements to farmers for particular areas, but rather required applications for aid to be submitted. The wording of that regulation also cannot be understood as a mere linguistic improvement on the wording set out in the draft regulation ‘any areas which have been eligible in 2007’. In fact, if the same meaning had been intended, any change in the drafting would only have made it worse. Recital 26 of Regulation No 1307/2013 does not contradict the interpretation set out above. According to that interpretation also, certain afforested areas remain eligible for aid. The referring court takes the view that an objective that all afforested areas remain eligible for aid cannot be inferred from recital 26 and Article 24(2)(b) [3] of Regulation No 1307/2013.

[1] Translator’s note: the correct reference would appear to be to paragraph 3 of Article 44, rather than to paragraph 2.

[2] Translator’s note: the correct reference would appear to be to Article 32(2), rather than to Article 24(2).

[3] Translator’s note: the correct reference would appear to be to Article 32(2)(b), rather than to Article 24(2)(b).

[Explanations of proceedings] [...]

[...]