

Case C-294/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

10 April 2019

Referring court:

Curtea de Apel Constanța (Romania)

Date of the decision to refer:

27 March 2019

Appellant/defendant at first instance:

Agenția de Plăți și Intervenție pentru Agricultură — Centrul Județean Tulcea

Respondent/applicant at first instance:

SC Piscicola Tulcea SA

Subject matter of the main proceedings

Appeal against the civil judgment of 1 February 2018 given by the Tribunalul Tulcea (Regional Court, Tulcea, Romania), by which it upheld the action brought by the applicant at first instance concerning the annulment of refusal decisions and reports on findings of irregularities and determining the credit entries for the 2007-2014 marketing years, and decisions given in relation to administrative complaints raised, and ordered the annulment of the contested acts.

Subject matter and legal basis of the request for a preliminary ruling

Pursuant to Article 267 TFEU, the Curtea de Apel Constanța (Court of Appeal, Constanța, Romania) seeks an interpretation of Articles 2 and 34(2) of Council Regulation (EC) No 73/2009 of 19 January 2009 and of Article 2 of Commission Regulation (EC) No 1120/2009 of 29 October 2009.

Question referred

Must Articles 2 and 34(2) of Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers 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, and Article 2 of Commission Regulation (EC) No 1120/2009 of 29 October 2009 laying down detailed rules for the implementation of the single payment scheme provided for in Title III of Council Regulation (EC) No 73/2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, be interpreted as precluding national legislation which, in the conditions obtaining in the main proceedings, excludes a farmer from payment of the entitlements on the ground that the aquaculture facilities used as arable land do not constitute an ‘agricultural area’ for the purposes of Article 2 of Regulation (EC) No 1120/2009 since they are not regarded as eligible land under Article 34(2) of Regulation (EC) No 73/2009?

Provisions of EU law invoked

Articles 2(c) and (h), 34(1) and 34(2)(a) of Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers 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

Article 2(a) of Commission Regulation (EC) No 1120/2009 of 29 October 2009 laying down detailed rules for the implementation of the single payment scheme provided for in Title III of Council Regulation (EC) No 73/2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers.

Provisions of national law invoked

Ordonanță de urgență a Guvernului nr. 125/2006 pentru aprobarea schemelor de plăți directe și plăți naționale directe complementare, care se acordă în agricultură începând cu anul 2007, și pentru modificarea articolului 2 din Legea nr. 36/1991 privind societățile agricole și alte forme de asociere în agricultură, publicată în Monitorul Oficial al României, Partea I, nr. 1043 din 29 decembrie 2006, cu modificările și completările ulterioare (aduse prin Legea nr. 139/2007 și Ordonanța Guvernului nr. 16/2009), aplicabilă pentru anii 2007-2014 (Government Emergency Decree No 125/2006 approving the scheme of direct payments and complementary national direct payments granted for agriculture as from 2007 and amending Article 2 of Law No 36/1991 on agricultural companies and other forms of association in agriculture, published in the *Official Journal of Romania*, Part I, No 1043, of 29 December 2006, as subsequently amended and

supplemented (by Law No 139/2007 and Government Decree No 16/2009), applicable for the years 2007 to 2014).

Article 5

(1) the single area payment scheme shall consist of the grant of an equal amount per hectare, payable once a year, unconnected with total production.

(2) The source of funding for the payments made under the single area payment scheme shall be guaranteed by the European Agricultural Guarantee Fund (EAGF).

(3) The eligible agricultural area may have the following categories of use:

(a) arable land — land cultivated for the production of cereals, for the production of grain, leguminous vegetable plants, industrial plants, potatoes, sugar beet, forage roots and brassicas, fresh vegetables, melons and strawberries, flowers and ornamental plants, fodder plants, seed plants and seedlings for sale, other plants on arable land, including land for cultivation under greenhouses and photovoltaic greenhouses, and land which is fallow, but kept in good agricultural and environmental condition.

Article 7

(1) To receive payments under the single area payment schemes, applicants must be registered in the Registrul fermierilor (Register of Farmers), managed by the Agenția de Plăți și Intervenție pentru Agricultură (Agency for payments and measures for agriculture) (APIA), must submit an application for payment within the time-limit, and must satisfy the following general conditions:

(a) agricultural land with an area of at least 1 ha must be used and the area of the agricultural parcel area must be at least 0.3 ha ...;

...

(f) the necessary documents demonstrating the right of use must be submitted and it must be possible to demonstrate that the land in respect of which the application has been submitted is used;

...

(3) The single area payment schemes provided for in Article 2(a), (b), (d) and (e) shall apply to areas registered in the Sistemul de identificare a parcelelor agricole (system for identifying agricultural parcels) which constitutes the reference for conducting checks and making payments.

(4) An application by farmers to change the areas registered in the system for identifying agricultural parcels may be submitted at the [APIA] up to the latest date for submitting applications for payment. Applications submitted after that

date will be processed in the course of the following year. Requested amendments shall be processed only after they have been checked by the [APIA].

(5) The documents demonstrating the right of use and documents showing the use of the agricultural land shall be established by act of the Minister for Agriculture, Forests and [Rural] Development and the application shall be submitted to representatives of the Agency for payments and measures for agriculture.

...

Legea nr. 18/1991 — Legea fondului funciar, republicată în Monitorul Oficial al României, Partea I, nr. 1 din 5 ianuarie 1998, cu modificările și completările ulterioare (forma în vigoare la data de 15 mai 2014, data cererii de plată depusă de reclamantă pentru campania 2014) (Law No 18/1991 — law on land ownership, republished in the *Official Journal of Romania*, Part I, No 1 of 5 January 1998, as subsequently amended and supplemented) (version in force on 15 May 2014, the date of the application for payment submitted by the applicant at first instance in respect of the 2014 marketing year):

Article 2

Depending on its use, land is:

(a) agricultural land, that it is to say, productive agricultural land — arable land, vineyards, orchards, vine and tree nurseries, hops and mulberry plantations, pasture, grassland, greenhouses, photovoltaic greenhouses, seedbeds and similar, land with coppice vegetation where it does not form part of silvicultural operations (silvicultural undertakings), afforested pasture, land occupied by agriculture and livestock constructions and facilities, aquaculture and soil improvement facilities, roads of the rural road network, farm/agricultural roads and those connecting estates (drumuri tehnologice și de exploatare agricolă), platforms and storage areas necessary for agricultural production, and non-productive land which can be given over to, and used for, agricultural production;

...

(c) permanently submerged land, that is to say: the lower riverbed of water courses, the basins of lakes at maximum levels of flooding, the bottom of inland maritime waters and the territorial sea;

...

Normele tehnice pentru introducerea cadastrului general, aprobate prin Ordinul ministrului administrației publice nr. 534/2001 publicat în Monitorul Oficial al României, Partea I, nr. 744 din 21 noiembrie 2001 (technical standards for the introduction of the general land register, approved by order of the Minister for

Public Administration No 534/2001, published in the *Official Journal of Romania*, Part I, No 744 of 21 November 2001).

7. The criteria for subdividing land by use

...

7.2. Agricultural land

7.2.1. The following shall belong to the category of agricultural land: arable land, vineyards, orchards, vine and tree nurseries, hops and mulberry plantations, pasture, grassland, greenhouses, photovoltaic greenhouses, seedbeds, land with coppice vegetation where it does not form part of silvicultural operations (silvicultural undertakings), afforested pasture, land occupied by constructions for agriculture and livestock and soil improvement, aquaculture facilities, roads of the rural road network, farm/agricultural roads and roads for storage.

...

8. Criteria for classifying and identifying categories of use of land and constructions

8.1. General provisions

8.1.1. The category of land use, individually identified by a code, shall constitute one of the attributes of the parcel. Showing the use category, together with the other attributes, in the technical part of the general land register is necessary for both drawing up the land register and establishing the tax charges to be borne by the property. Sub-categories of use shall not be recorded in the general land register.

8.1.2. Each of the five land uses can have predominant categories of use which occupy most of the area and categories of use which occupy a smaller percentage.

...

8.2. Criteria for identifying the categories of land use

8.2.1. Arable land (A). This category includes land which is ploughed every year or once every several years (2 to 6 years) and used to grow annual or perennial plants, such as: cereals, grain legumes, oil, textile and industrial plants, medicinal and aromatic plants, fodder plants, vegetables, etc. The category of arable use includes the following: arable land as such, cultivated grasslands, vegetable gardens, rice fields, greenhouses, photovoltaic greenhouses and seedbeds, strawberry crops, other perennial crops.

...

8.2.7. Land with water and water with reed vegetation. This category includes permanently submerged land and temporarily submerged land which, once the water has receded, can have no other use.

Succinct presentation of the facts and the main proceedings

- 1 The applicant at first instance is a legal person incorporated under Romanian law whose main subject of activity in the period 2007-2014 consisted of freshwater aquaculture and whose secondary activities also included the growing of cereals (exclusively rice), leguminous plants and oilseed-producing plants. Since 2014, the main activity has been the growing of cereals (exclusively rice), leguminous plants and oilseed-producing plants, and the secondary activities have also included freshwater fisheries, marine aquaculture, and the processing and canning of fish, crustaceans and molluscs.
- 2 Pursuant to five concession contracts concluded in 2004, 2005 and 2010 with the Consiliul Judeţean Tulcea (Tulcea Provincial Council), the applicant at first instance uses a total area of 1 888 ha of land situated in the Rezervaţia Biosferei Delta Dunării — Amenajările piscicole Rusca şi Litcov (Danube Delta Biosphere Reserve — Rusca and Litcov aquaculture facilities).
- 3 The concession contracts state that their subject is the right of the concessionaire to use the land ‘for the purposes of aquaculture’, but in the 2004 and 2005 addenda to the contracts the parties agreed to amend the initial price of the concession in the light of the fact that ‘in connection with the programmes of aquaculture crop rotation required by aquaculture technology or outside of those programmes, the land within the aquaculture facility is being used as agricultural land’. Similarly, by a 2010 addendum the parties agreed that, ‘in order to achieve the object of the concession contract, the concessionaire shall carry out aquaculture crop rotation activities to mineralise the soil and other activities required, in accordance with the standards for aquaculture technology, in respect of an area of 570 ha’.
- 4 By order (dispoziţie) of 22 March 2005 and authorisation of 22 March 2005 of the President of the Consiliul Judeţean Tulcea, the applicant at first instance was authorised to carry on agricultural cultivation activities at the Rusca facility.
- 5 The inspection reports drawn up in 2008 and 2009 by the Consiliul Judeţean Tulcea certify that the land covered by the concession, in so far as it is not unproductive or unused due to excess moisture, is used exclusively for agriculture, with no areas being used for aquaculture.
- 6 In the 2007-2014 marketing years, the applicant at first instance submitted payment applications for area support schemes for those years, in respect of areas ranging from 899.12 ha to 1 500.49 ha, applying for support under the SAPS (Schema de plată unică pe suprafaţă — single area payment scheme) and the PNDC1 (Schema de plată naţională directă complementară — complementary

direct national payment scheme) (crops on arable land) in 2007 and for SAPS, PNDC1 (crops on arable land) and ZSD (zonă semnificativ defavorizată — significantly disadvantaged area) in the years 2008 to 2014.

- 7 In support of each application submitted for the years 2007 to 2014, documents were attached showing the right to use/utilise the areas in respect of which support had been applied for, namely the concession contracts and the addenda and the certificate issued by the municipality of the territorial administrative unit within whose territory the land is situate, stating that the land is entered in the Registrul agricol (agricultural register) of the municipality as agricultural land and, in addition, in respect of the 2013 marketing year, a notification from the Direcția pentru Agricultură Tulcea (Tulcea Directorate for Agriculture) relating to the opinion on the temporary change of use category in respect of 570 hectares of the Amenajarea Piscicolă Litcov (Litcov aquaculture facility) from aquaculture facility to arable land which the applicant at first instance uses under concession contract no 400/07.12.2010, and an application to the defendant at first instance for a change of land use category to arable land in relation to the Amenajarea Piscicole Litcov, and, in respect of the 2014 marketing year, a notification from the Consiliul Județean Tulcea stating that the land occupied by the aquaculture facilities whose use had been changed does not come within the scope of its administration and that the aquaculture facilities had merely planned agricultural crop rotations in accordance with the specific technology of each facility.
- 8 In respect of each of the marketing years in the period 2007 to 2014, the defendant at first instance gave decisions in the subsequent year granting payments under the area schemes.
- 9 In 2009 an on-the-spot was carried out by the defendant at first instance and the irregularities found related to the incorrect declaration in 2007 of an uncultivated parcel of an insignificant area (80.56 ha). In respect of the marketing years in the period 2010 to 2014 there was a visual check prior to the approval of the payment application which established that the application was complete and valid.
- 10 In respect of the 2015 marketing year the defendant at first instance rejected the payment application since national law (Article III of Law No 122/2014) provided that ‘as from 15 September 2014 no further agricultural subsidies shall be granted for land related to former aquaculture facilities located in the Rezervația Biosferei Delta Dunării’.
- 11 At first instance the Tribunalul refused the application by the applicant at first instance for annulment of the decision to refuse to grant direct payments for 2015, whereas the Curtea de Apel Constanța (Court of Appeal, Constanța), by final decision of 31 October 2016, granted the application submitted by the applicant at first instance and ordered the defendant at first instance to adopt a decision granting payments under the area support schemes for the 2015 marketing year, also pointing out, inter alia, the definitions given to the concepts of ‘agricultural activity’, ‘agricultural products’ and ‘arable land’ in Regulation No 1307/2013.

- 12 Over the period from 27 October 2015 to 13 April 2016, the APIA — Direcția Antifraudă și Control Intern (Anti-Fraud and Internal Control Directorate) — carried out a documentary inspection at the defendant at first instance concerning the detailed rules for granting the area financial support, in the 2007-2014 marketing years, to the applicant at first instance, following a request made by the Direcția Națională Anticorupție (National Anti-Corruption Directorate). The inspection body's conclusion was that the applicant at first instance did not meet the eligibility conditions for obtaining direct payments since the documents submitted show the agricultural use of the land, but not also the change of the use category of the aquaculture facilities on productive agricultural land/arable land (with the exception of the provisional opinion of the 2013 marketing year in respect of the Litcov aquaculture facility). Land coming within the category 'aquaculture facilities' is not eligible for area payments since, under national law, it does not come within the category 'productive agricultural land'.
- 13 As a result of that inspection, the defendant at first instance re-examined the payment applications submitted for the 2007-2014 marketing years and, on 20 May 2016, issued decisions refusing the applications for payment under the area support schemes in respect of each marketing year by which it established the amounts of payment due. On 23 December 2016, in respect of each marketing year of the period from 2007 to 2014, reports on findings of irregularities and determining the credit entries were issued which found that the applicant at first instance had received sums to which it was not entitled in the relevant marketing years and set the value of the credit entry.
- 14 The administrative complaints filed by the applicant at first instance against the refusal decisions and the reports on findings of irregularities and determining the credit entries were rejected.
- 15 In the written application registered at first instance with the Tribunalul Tulcea on 15 March 2017, the applicant at first instance submits that the refusal decisions and the reports on findings of irregularities and determining the credit entries issued for the marketing years in the period 2007 to 2014, and the decisions adopted in relation to the administrative complaints filed, should be annulled.
- 16 In support of its action, the applicant at first instance raised three pleas based on (i) Article 80(3) of Regulation No 1122/2009, under which the applicant at first instance cannot be required to repay any payments if the error was made by the competent authority, (ii) the limitation period, under Article 80(3) of Regulation (EC) No 1122/2009, on the right to request recovery, since the decisions ordering recovery were issued more than 12 months after payment had been made, and, (iii) fulfilment of all of the eligibility conditions laid down by OUG [Ordonanță de urgență a Guvernului] No 125/2006 and the direct application of EU law on this matter.
- 17 As regards this last plea, the applicant at first instance stated that it satisfied the requirement relating to use of agricultural land laid down in Article 7(1) of OUG

No 125/2006, and that, since it uses that land to obtain agricultural products, that land came within the category of arable land defined in Article 5(3) (a) of OUG No 125/2006.

- 18 In the context of this plea, the applicant at first instance points out that, in the present dispute, it is necessary to apply, directly and as a matter of priority, EU law, and more precisely Article 34(2)(a) of Regulation (EC) No 73/2009, and to note that, on that basis, the land used by the applicant meets the definition of 'eligible hectare' set out in that regulation.
- 19 The defendant at first instance contends that the action should be dismissed, arguing, firstly, that the payments were based on an application by the applicant at first instance and not on an error by the defendant itself. The defendant at first instance stated, secondly, that the documents submitted by the applicant at first instance show the agricultural use of the land, but not also the change of the category of use thereof, which remains that of an aquaculture facility, with the result that the areas in dispute are not eligible under OUG No 125/2006 and cannot receive direct payments.
- 20 By judgment of 1 February 2018, the Tribunalul Tulcea upheld the action and ordered that the contested acts be annulled.
- 21 The Tribunalul examined solely the applicability of Article 80(3) of Regulation (EC) No 1122/2009, and held that the rules of EU law excluding the reimbursement of payments made through the fault of the authority are applicable in this case.
- 22 The Tribunalul found that it is common ground that all the payment applications made by the applicant at first instance were complete with the concession contracts and the certificate issued by the municipality of the territorial administrative unit in whose territory the land lies concerning the registration of the farmer in the Registrul Agricol of the municipality, with the area covered by the concession, and that the concession contracts expressly state that the land covered by the concession (for which support is being sought) is occupied by an aquaculture facility and that the applicant at first instance was required to use it for the purposes of aquaculture.
- 23 In that context, the non-compliance for which recovery of the amounts granted to the applicant at first instance was ordered is not due to its negligence or intentional action. On the other hand, the documents attached to the payment application provide sufficient specific factual information to verify the eligibility conditions for the granting of the aid and, furthermore, in respect of the 2008 and 2009 marketing years the administrative checks were also followed by on-the-spot checks and the conclusion was that the eligibility conditions were satisfied. If the idea were accepted that an aquaculture facility cannot be included in the category of arable land use, as the defendant at first instance maintains, it would be beyond

doubt that the payments granted to the applicant at first instance are the result of an error made by the staff of the defendant at first instance.

- 24 The view cannot be taken that the applicant at first instance should have been aware of the fact that it cannot receive direct payments for the land in dispute since the defendant itself, the authority responsible for carrying out checks on satisfaction of the eligibility requirements, considered for seven years that the applicant at first instance was entitled to receive direct payments for the area of land covered by the concession.
- 25 Furthermore, the decisions under examination are unlawful also in view of the fact that the measure refunding the amounts granted to the applicant at first instance was ordered by the defendant at first instance after the expiry of the one-year period from the date on which the payment provided for in Article 80(3) of Regulation No 1122/2009 was made.
- 26 On 29 March 2018 the Curtea de Apel Constanța — Secția a II-a civilă, de contencios administrativ și fiscal (Court of Appeal, Constanța, Second Civil Chamber for administrative and tax matters) was seised of an appeal lodged by the appellant/defendant at first instance vis-à-vis the applicant at first instance/respondent against the civil judgment of 1 February 2018 delivered by the Tribunalul Tulcea, claiming that the judgment under appeal should be varied in its entirety and that the action [at first instance] should be dismissed.

The essential arguments of the parties to the main proceedings

- 27 The defendant at first instance has contended that the referring court should refer the question set out above to the Court of Justice for a preliminary ruling.

Succinct presentation of the reasons for the request for a preliminary ruling

- 28 Although the Tribunalul ruled solely on the applicability of Article 80(3) of Regulation No 1122/2009, the referring court considers that it is necessary also to verify the right of the respondent/applicant at first instance to benefit from area support schemes for the years 2007 to 2014, and, only if it is established that the amounts were not due because the land used was not eligible, also to verify the applicability of Article 80(3) of Regulation No 1122/2009.
- 29 Under national law, agricultural land is subdivided according to use into five broad categories: agricultural land (TDA): arable land, vineyards, orchards, vine and tree nurseries, hops and mulberry plantations, pasture, grassland, greenhouses, photovoltaic greenhouses, seedbeds, land with coppice vegetation where it does not form part of silvicultural operations (silvicultural undertakings), afforested pasture, land occupied by constructions for agriculture and livestock and soil improvement, aquaculture facilities, roads of the rural road network,

farm/agricultural roads and roads for storage; forests (TDF); permanently submerged land (TDH); urban land (TDI); special-purpose land (TDS).

- 30 Each of those five uses of the land can have predominant categories of use which occupy most of the area and categories of use which occupy a smaller percentage. For example, as regards agricultural land the predominant uses are: arable land, vineyards, orchards, pasture and grassland, but a smaller percentage is also covered by constructions, water, and so forth.
- 31 The use and category of use are characteristics of the land which form the subject matter of property advertising through entry in the land register which includes the description of the property and entries relating to property rights, personal rights and facts or legal relationships linked to the property. Changing the use or category of use requires that certain steps be taken and certain preliminary opinions be obtained, and that the appropriate information be provided concerning the change made in the land register.
- 32 The technical standards for the introduction of the general land register govern ten land-use categories, as follows: arable land (A), pastures (P), grassland (F), vineyards (V), orchards (L), woods and other afforested land, land with water and water with reed vegetation, roads (DR) and railways (CF), land occupied by constructions and courtyards (CC), and degraded and unproductive land (N).
- 33 On reading the standards it is clear that the aquaculture facility, although listed in the category of agricultural land, no longer appears to be identified by a distinctive land use in the categories listed and defined in paragraph 8.2 of those standards. However, the standards state that the use category 'land with water and water with reed vegetation' includes permanently submerged land and temporarily submerged land which cannot have another use once the water has receded.
- 34 However, in the present dispute even the respondent/applicant at first instance does not claim that the land use is entered in the land register with the use 'arable land' or with some other use category that, under national law, would confer on it the right to access the single payment schemes or that it has taken steps to change the use category to arable land. What the applicant at first instance does claim is that it is relevant that the land covered by the concession is actually used as arable land since in this respect it has the approval of the grantor of the concession to use the land for a purpose other than that originally provided for in the concession agreement.
- 35 It should be noted that national law (OUG No 125/2006) does not expressly provide that an agricultural area must be entered in the land register with the land use which qualifies it as eligible or that the entry in the land register of another use category excludes an agricultural area from eligibility, regardless of the fact that the area is actually used as, for example, agricultural land or permanent grassland. However, this is the reason why the defendant at first instance drew up the acts at issue in the present dispute.

- 36 In national case law priority has been given to the use category entered in the land register or in acts certifying the right of use and the manner in which the land is actually used has been regarded as irrelevant in cases where the actual use is at odds with the use category entered in the land register or acts certifying the right of use.
- 37 The Curtea de Apel is the final instance in the present dispute and takes the view that, in the factual context in question, it is required to submit to the Court of Justice of the European Union a request for a preliminary on the question as to the compatibility of national law with EU law with a view to clarifying whether it is necessary to take account only of the way in which land is actually used by the farmer or whether, on the contrary, it is necessary to take account of the characteristics of the areas as stated in the property advertising or documents by which the farmer demonstrates his right of use with regard to the land in respect of which a payment application has been submitted and the conformity of the land use with those characteristics.
- 38 Referring to the judgments of the Court of Justice in Cases C-422/13, *Wree*, and C-684/13, *Demmer*, according to which the actual use of the land at issue is relevant for the purposes of qualifying the areas as eligible, the referring court points out that those two judgments do not show that in such cases the actual use conflicts with the use or the category of use entered in the land register, and therefore the referring court considers that it cannot apply the theory of '*acte clair*' and that the answer to the question referred for a preliminary question cannot be deduced clearly from the case-law of the Court of Justice and, furthermore, is not beyond reasonable doubt.