

Case C-736/19**Request for a preliminary ruling****Date lodged:**

7 October 2019

Referring court:

Augstākā tiesa (Senāts) (Senate of the Supreme Court, Latvia)

Date of the decision to refer:

30 September 2019

Appellant on a point of law:

ZS Plaukti

Other party in the appeal on a point of law:

Lauku atbalsta dienests (Rural Support Service)

[...]

Administratīvo lietu departaments

(Administrative law division)

Latvijas Republikas Senāts (Senate of the Supreme Court of the Republic of Latvia, Latvia)**DECISION**

[...] 30 September 2019

[...] [composition of the court]

on the basis of written submissions, [this court] examined the appeal on a point of law brought by the agricultural holding Plaukti [...] against the judgment delivered on 22 December 2016 by the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia) in proceedings originating in an action brought by that agricultural holding [...] seeking annulment of the decision issued on 3 September 2015 [...] by the Lauku atbalsta dienests (Rural Support Service, Latvia) and the adoption of a favourable administrative decision.

Description of the facts

Facts

[1] On 13 May 2014, the appellant on a point of law, the agricultural holding Plaukti [...], submitted an area payment claim for 2014 to the Rural Support Service declaring, inter alia, an area of 18.26 ha (a field, referred to as field No 5, with an area of 14.88 ha and a field, referred to as field No 6, with an area of 3.38 ha) for the grant of aid, first, consisting of a single payment of area aid and, secondly, under the ‘Maintenance of pasture biodiversity’ sub-measure of the ‘Agri-environmental payments’ measure.

[2] On 31 July 2014, the Rural Support Service carried out a partial on-the-spot check to verify compliance with the rules relating to mowing in field No 5 and field No 6. The check found that the fields had been mown before 1 August 2014, which infringed the rules for the grant of the maintenance of pasture biodiversity aid.

By decision of 27 June 2015, the Rural Support Service [...] refused maintenance of pasture biodiversity aid for the applicant for 2014 in its entirety in respect of the 18.26 ha and also excluded the applicant from receiving maintenance of pasture biodiversity aid for an amount corresponding to the difference between the area declared in the payment claim and the area determined, and set that amount at EUR 2 245.98, to be deducted in the following three calendar years (‘the three-year penalty’), and imposed on it a 1% reduction in the amount of the aid on grounds of failure to comply with the good agricultural and environmental condition requirements. The applicant applied for an administrative review of that decision. The administrative review concluded with a decision of 3 September 2015 by the director of the Rural Support Service [...] confirming the service’s initial decision.

[3] The appellant on a point of law brought an action before the administrative court, seeking annulment of that decision and the adoption of a favourable administrative decision ordering the grant of the maintenance of pasture biodiversity aid for 2014 in respect of 18.26 ha.

[4] After examining the case on appeal, the Administratīvā apgabaltiesa (Regional Administrative Court) dismissed the appeal by a judgment of 22 December 2016. That judgment, which in part shared the grounds of the judgment of the first instance court, was based on the arguments set out below.

[4.1] It is of crucial importance whether the area for which the maintenance of pasture biodiversity aid was claimed had been mown before 1 August, as the Rural Support Service claims it had. If it is found that the permanent grassland was mown before 1 August or after 15 September of the current year, the farmer is not entitled to the payment. The foregoing is established by Article 18.2.1 of Ministru kabineta 2013. gada 12. marta noteikumi Nr. 139 ‘Kārtība, kādā tiek piešķirts valsts un Eiropas Savienības atbalsts lauksaimniecībai tiešā atbalsta

shēmu ietvaros' (Council of Ministers Decree No 139 of 12 March 2013 concerning the procedure for granting State and European Union aid for agriculture within the framework of direct aid schemes, 'Decree No 139') and point 3 of Annex 9, Part 4.3 ('Maintenance of pasture biodiversity') to Ministru kabineta 2010. gada 23. marta noteikumi Nr. 295 'Noteikumi par valsts un Eiropas Savienības lauku attīstības atbalsta piešķiršanu, administrēšanu un uzraudzību vides un lauku ainavas uzlabošanai' (Council of Ministers Decree No 295 of 23 March 2010 relating to the grant, administration and supervision of State and European Union aid to rural development for the purposes of improving the environment and the countryside, 'Decree No 295').

Furthermore, if the applicant for that aid fails to comply with that requirement and the difference between the area declared in the payment claim and the area determined is more than 50%, the three-year penalty will be imposed on that applicant. The foregoing is established in the third subparagraph of Article 16(5) of Commission Regulation (EU) No 65/2011 of 27 January 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1698/2005, as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures ('Regulation No 65/2011').

[4.2] From an assessment of the evidence in the case file, it may be concluded that the fields for which the maintenance of pasture biodiversity aid was claimed were mown before 1 August 2014.

As a result, the Rural Support Service was justified in refusing to pay the applicant the maintenance of pasture biodiversity aid for the entire area of 18.26 ha. In addition, given that it has been established in the case that the difference between the area declared in the payment claim and the area determined is more than 50% (it is in fact 100%), the three-year penalty was correctly imposed on the applicant, in accordance with the third subparagraph of Article 16(5) of Regulation No 65/2011.

[4.3] A 1% reduction in the amount of the aid was applied to the applicant on grounds of failure to comply with the good agricultural and environmental condition requirements.

The rules governing the application of reductions in the amount of aid and the requirements affecting how the deductions are fixed are set out in 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 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 ('Regulation No 1122/2009').

In accordance with Article 54(1)(c) of Regulation No 1122/2009 and Article 24(1) 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 ('Regulation No 73/2009'), where a non-compliance has been established, it is necessary to assess the severity, extent, permanence and repetition of that non-compliance.

The Rural Support Service's administrative decision contains neither a detailed assessment nor a detailed analysis of those criteria. Nevertheless, as can be seen from the explanations and documents that the service has provided, it has developed methodological guidelines for assessing those criteria in the event of non-compliance. Indeed, in all cases where there is found to be an infringement by the aid beneficiary, the service fixes the amount of the reduction in the aid taking into account all the criteria referred to above.

When fixing the 1% reduction in the amount of the aid granted to the applicant, the service did evaluate the criteria, that is to say, the importance, magnitude and repetition of the non-compliance were given a score of one point each, totalling three points. There is no obvious error in that assessment.

[5] The applicant brought an appeal on a point of law against the judgment of the Administratīvā apgabaltiesa (Regional Administrative Court). In its notice of appeal, it states that the Rural Support Service did not identify the actual area in respect of which it had observed the infringement, which it should have done. It therefore infringed the principles of protection of the rights of the individual, legality and protection of legitimate expectations. Because the actual area in respect of which the infringement was observed was not identified, there is an error in the assessment of the scope and importance of that infringement.

The applicant argues that when the Rural Support Service determines the area covered by the aid, this is not subject to any review or examination, and is based solely [...] on the subjective opinion of the service's agent on whether the entire area in question was mown at the same time, which is not corroborated by any other evidence.

Legal basis

Applicable legal rules

EU law

[6] Article 11(1), Article 36(a)(iv) and Article 39(3) of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) ('Regulation No 1698/2005').

Article 18(1)(a) and the third subparagraph of Article 16(5) of Regulation No 65/2011.

Article 4(1), (5) and (6) of and Annexes II and III to Regulation No 73/2009.

Article 71(1) of Regulation No 1122/2009.

Latvian law

[7] Decree No 295 (in force until 28 March 2015 and available at <https://likumi.lv>):

Article 1: This decree lays down the provisions for the grant, administration and supervision of State and European Union aid to rural development for the measures intended to improve the environment and the countryside, in accordance with Regulation No 1698/2005.

Article 38: The applicant shall be entitled to receive aid for agricultural land under an eligible crop referred to in Annex 2 to this decree and designated as high natural value pasture, provided it complies with the following requirements:

...

38.3. to maintain effectively the high natural value pasture areas under pasture and mow them every calendar year, providing a given number of cattle which, expressed in livestock units of cattle, represents a density of livestock of between 0.4 and 0.9 units per hectare, or to mow those areas at least once during the period between 1 August and 15 September; to collect and remove the mown grass, or to chop it.

...

Annex 9, Part 4.3 ('Maintenance of pasture biodiversity'), point 3:

If the aid applicant has not mown the area declared between 1 August and 15 September, after the first infringement no payment will be made to the applicant for the area in question for the current year. If the infringement is repeated, all the commitments will be suspended and the applicant in question will repay to the Rural Support Service the full amount of the aid received up to that time in respect of the area in question.

[8] Decree No 139 (in force until 28 March 2015 and available at <https://likumi.lv>):

Article 1: This decree lays down the provisions governing the grant of national and EU aid for agriculture in the context of the direct support schemes in accordance with Regulation No 73/2009.

Article 18: If a farmer simultaneously, for a particular area, claims payment of aid under Article 2.1 of this decree (single area payment) and under the ‘Agri-environment payments’ support measure in accordance with the provisions for the grant, administration and supervision of State and European Union aid to rural development for the measures intended to improve the environment and the countryside:

...

18.2. Without prejudice to the requirements laid down in Article 15.4 of this decree, it will be necessary, in relation to both permanent grassland and pasture sown on arable land:

18.2.1. at least once a year, to mow and either collect or chop the grass (in the period between 1 August and 15 September of the current calendar year), or to use the land effectively for pasture and to mow, where the farmer applies for aid under the ‘Maintenance of pasture biodiversity’ sub-measure or the ‘Establishment of buffer strips’ sub-measure.

Article 19: Where the farmer fails to comply with any of the good agricultural and environmental condition requirements referred to in Articles 15 and 18 of this decree the amount of the aid referred to in Article 2 of this decree (with the exception of Article 2.6) will be reduced in accordance with Articles 70 to 72 of Regulation No 1122/2009.

Reasons for the doubts in relation to the interpretation of the EU legislation

9. In the present case, it is necessary to examine whether it is justifiable to impose three penalties on the applicant for mowing the area of 18.26 ha covered by its claim for maintenance of pasture biodiversity aid before 1 August, that is to say:

(1) refusing the 2014 payment in relation to the area for which it claimed the maintenance of pasture biodiversity aid, in accordance with Article 18(1)(a) of Regulation No 65/2011 and Annex 9, Part 4.3, point 3 to Decree No 295;

(2) also excluding the applicant from receiving an amount of the maintenance of pasture biodiversity aid corresponding to the difference between the area declared in the payment claim and the area determined, imposing an obligation to deduct an amount equivalent to the maintenance of pasture biodiversity aid granted for 2014 in the following three calendar years (the three-year penalty), in accordance with the third subparagraph of Article 16(5) of Regulation No 65/2011;

(3) reducing all the aid payments to the applicant by 1%, in accordance with Article 71(1) of Regulation No 1122/2009, on grounds of non-compliance with the good agricultural and environmental condition requirements.

[10] Maintenance of pasture biodiversity is an agri-environmental support measure that is one of the axis 2 support measures in Regulation No 1698/2005

(Article 36(a)(iv)). Within that axis of support (as a whole), the support is intended to improve the natural agricultural landscape, by supporting land management.

According to Article 11(1) of Regulation No 1698/2005, each Member State is to submit a national strategy plan indicating the priorities of the action of the European Agricultural Fund for Rural Development (EAFRD) and of the Member State concerned. The Member States can therefore establish specific support sub-measures, provided they comply with the guidelines in Regulation No 1698/2005.

Article 39(3) of Regulation No 1698/2005 provides that agri-environment payments cover only those commitments going beyond the relevant mandatory standards established in Articles 4 and 5 of and Annexes III and IV to Regulation No 1782/2003 (pursuant to Articles 5 and 6 of and Annexes II and III to Regulation No 73/2009).

In respect of the penalties to be imposed, regard must be had to Articles 16 to 18 of Regulation No 65/2011, which govern reductions and exclusions for specific infringements.

According to Article 1 of Decree No 295, that decree lays down the provisions for the grant, administration and supervision of State and European Union aid to rural development for the measures intended to improve the environment and the countryside, in accordance with Regulation No 1698/2005. That decree therefore specifies how Regulation No 1698/2005, and its implementing legislation, Regulation No 65/2011, are to be applied in specific situations, in particular as regards the punitive penalties to be imposed.

Article 38 of Decree No 295 stipulates the requirements with which the aid applicant must comply in order to receive maintenance of pasture biodiversity aid. Under Article 38.3 of the decree, the applicant will effectively use the high natural value pasture areas under pasture and mow them every calendar year, or will mow those areas at least once during the period between 1 August and 15 September. Limited mowing (or limited use under pasture) of high natural value pasture is therefore one of the requirements of the specific maintenance of pasture biodiversity measure with which aid applicants must comply.

Annex 9 to Decree No 295 lists the types of non-compliances in detail and lays down a specific penalty for each non-compliance. The first table in Annex 9 to Decree No 295 contains a list (description) of non-compliances of a general nature and the penalties to be imposed. The subsequent tables in Annex 9 to Decree No 295, for their part, group infringements depending on the specific type of measure or sub-measure. The aforementioned legislation therefore contains a detailed list of types of non-compliances and the amount of the penalty established for each infringement.

According to Article 18(1)(a) of Regulation No 65/2011, the aid claimed is to be reduced or refused where the applicant fails to comply with commitments going

beyond the mandatory requirements. The maintenance of pasture biodiversity aid is to be paid in return for a commitment going beyond the mandatory requirements relating to good agricultural and environmental condition. The requirement under Article 38.3 of Decree No 295 is a commitment going beyond the minimum requirements, partly because other legislative provisions do not include such restrictions in relation to the farming of pasture.

Article 18(1) of Regulation No 65/2011 does not determine the infringements for which the amount of the support paid should be reduced and those for which payment should be refused. Decree No 295, in Table 4.3 in Annex 9, therefore specifies precisely the possible types of infringement and the liability for failure to comply with those requirements in relation to maintenance of pasture biodiversity aid.

It is apparent from Table 4.3 in Annex 9 to Decree No 295 that all the infringements consisting of failure to comply with management requirements (overgrazing, failure to mow or to chop or collect grass) attract one type of penalty. In contrast, where it is found that there is no high natural value pasture or that such pasture has in fact been substantially modified (the high natural value pasture has been cultivated or ploughed or mineral fertilisers have been used on it), much more severe penalties are imposed. The specific infringement is consistently included in the group of infringements characterised by non-compliance with particular management requirements.

This court therefore has no doubt that, in a situation in which field No 5 and field No 6 were mown before 1 August, in accordance with Article 18(1)(a) of Regulation No 65/2011 it will be correct to apply Table 4.3 in point 3 of Annex 9 to Decree No 295, which establishes that the maintenance of pasture biodiversity aid for the current year will not be paid in respect of the area in question (field No 5 and field No 6).

[11] Article 16 of Regulation No 65/2011 governs reductions and exclusions relating to incorrect declarations of the size of the area under crops. The second subparagraph of Article 16(3) of that regulation provides that, if the area declared in the payment claim exceeds the area determined for that crop group, the aid is to be calculated on the basis of the area determined for that crop group.

The third subparagraph of Article 16(5), for its part, provides that, in the situation referred to in the second subparagraph of Article 16(3), the aid is to be calculated on the basis of the area determined and, if the difference is more than 50%, the beneficiary is to be excluded once again from receiving aid up to the difference between the area declared in the payment claim and the area determined.

According to the applicant's aid payment claim, field No 5 and field No 6 were declared as high natural value pasture (permanent grassland: crop group 710). The Rural Support Service has not disputed the fact that field No 5 and field No 6 were

high natural value pasture, even during the period of the check. The only infringement that the service found at the time of the check was the early mowing.

In those circumstances, this court has doubts whether the third subparagraph of Article 16(5) of Regulation No 65/2011 applies to a situation in which the applicant has failed to comply with the maintenance of pasture biodiversity aid requirements but where no change in the crop group has been found.

This court also notes that the types of infringement listed in Table 4.3 in Annex 9 to Decree No 295 include infringements such as the fact that none of the crop group declared (high natural value pasture) exists in the fields in question or the crop group has been modified (for example, where the pasture has been cultivated or ploughed). In those situations, Table 4.3 in Annex 9 to Decree No 295 provides that all the commitments are to be suspended and the aid applicant is to repay to the Rural Support Service the full amount of the aid received up to that time in respect of the area in question. At the hearing held before this court on 28 August 2019, the service stated that in such situations two further penalties can appropriately be imposed: the one provided for in Decree No 295, in Table 4.3 in Annex 9, and the one under the third subparagraph of Article 16(5) of Regulation No 65/2011.

This court also doubts whether, where it is found that the area declared for the crop group does not correspond to the area determined (that is to say, to the area under crops determined in the on-the-spot check), the penalty under Table 4.3 in Annex 9 to Decree No 295 and the one under the third subparagraph of Article 16(5) of Regulation No 65/2011 can justifiably be imposed simultaneously. Those doubts are based on a concern that imposing two penalties for a single infringement may breach the principle of proportionality. If each of the penalties were understood as fully penalising the infringement committed the principle of proportionality would be breached.

[12] The Rural Support Service found, in accordance with Article 4(1) of Regulation No 73/2009 and as a result of the applicant's activities, that it had failed to comply with the good agricultural and environmental condition requirements. That non-compliance is based on the fact that Article 18.2.1 of Decree No 139 provides that, where support has been claimed under the 'Agri-environment payments' measure, one of the good agricultural and environmental condition requirements is that the pasture may only be mown after 1 August.

The 1% reduction in the amount of the aid granted to the applicant, applied in accordance with Article 71(1) of Regulation No 1122/2009, was based on that non-compliance.

Article 4(1) of Regulation No 73/2009 provides that any farmer receiving direct payments is to respect the statutory management requirements listed in Annex II and the good agricultural and environmental condition referred to in Article 6. Article 6(1) of Regulation No 73/2009 provides for its part that Member States are

to ensure that all agricultural land, especially land which is no longer used for production purposes, is maintained in good agricultural and environmental condition. Member States are to define, at national or regional level, minimum requirements for good agricultural and environmental condition on the basis of the framework established in Annex III, taking into account the specific characteristics of the areas concerned, including soil and climatic condition, existing farming systems, land use, crop rotation, farming practices, and farm structures. Member States are not to define minimum requirements which are not foreseen in that framework.

Under Article 39(3) of Regulation No 1698/2005, agri-environmental payments cover only those commitments going beyond the relevant mandatory standards established in Articles 4 and 5 of and Annexes III and IV to Regulation No 1782/2003 (Articles 5 and 6 of and Annexes II and III to Regulation No 73/2009, respectively).

This court is of the view that Article 39(3) of Regulation No 1698/2005 and Articles 4 and 6 of and Annexes II and III to Regulation No 73/2009 preclude the same requirement from simultaneously being a minimum requirement and imposing requirements greater than those minimum requirements.

Article 18.2.1 of Decree No 139 was adopted pursuant to Article 4(1) and (6) of Regulation No 73/2009. The provisions of Decree No 139 must therefore uphold the principles set out in Regulation No 73/2009.

The Rural Support Service applied the good agricultural and environmental condition requirements set out in Article 18.2.1 of Decree No 139, which reproduced the condition, established in Article 38.3 of Decree No 295, that, in the context of a maintenance of pasture biodiversity support measure, grass mowing must take place between 1 August and 15 September. Non-compliance with the mowing provisions in Article 18.2.1 of Decree No 139 and Article 38.3 of Decree No 295 must therefore be found to constitute [breach of both] a commitment that imposes requirements greater than the minimum requirements (under Article 38.3 of Decree No 295) and of a commitment that is one of the minimum requirements (under Article 18.2.1 of Decree No 139).

This court is therefore uncertain whether the requirement in Article 18.2.1 of Decree No 139 is in line with Articles 4 and 6 of Regulation No 73/2009, in the light of the requirements of Article 39(3) of Regulation No 1698/2005.

[13] In summary, this court has doubts as to the scope to be given to the interpretation and application of the third subparagraph of Article 16(5) of Regulation No 65/2011 in a situation such as that in the present case, that is to say, whether it is justifiable to impose the penalty under the third subparagraph of Article 16(5) of Regulation No 65/2011 if the applicant has failed to comply with the requirements relating to mowing the area for which a maintenance of pasture biodiversity payment was claimed, but where no change in the crop group was

found, whilst at the same time imposing the penalty under Article 18(1)(a) of Regulation No 65/2011. This court also has doubts whether the requirement in Article 18.2.1 of Decree No 139 is in line with Articles 4 and 6 of Regulation No 73/2009, in the light of the requirements of Article 39(3) of Regulation No 1698/2005, that is to say, whether the same requirement can simultaneously constitute a minimum requirement and impose requirements greater than the minimum requirements.

It is therefore [...] necessary to refer questions to the Court of Justice of the European Union for a preliminary ruling. On the basis of the foregoing, this court orders that the proceedings in the present case be stayed until the Court of Justice has ruled on those questions.

Operative part

In accordance with Article 267 of the Treaty on the Functioning of the European Union, [...] this court

hereby

Refers the following questions to the Court of Justice for a preliminary ruling:

1. Does the third subparagraph of Article 16(5) of Commission Regulation (EU) No 65/2011 of 27 January 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1698/2005, as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures apply to a situation in which the applicant has failed to comply with the requirements relating to mowing the area for which the maintenance of pasture biodiversity payments were claimed (a requirement which goes beyond the mandatory minimum requirements under Article 39(3) of Regulation No 1698/2005) but where no change in the crop group has been found?
2. Can both the penalty established in the third subparagraph of Article 16(5) of Commission Regulation (EU) No 65/2011 of 27 January 2011 and the penalty laid down in Article 18(1)(a) of Regulation No 65/2011 be imposed simultaneously for a single infringement?
3. Do Articles 4 and 6 of Council Regulation (EC) No 73/2009 of 19 January 2009, in conjunction with Article 39(3) of Council Regulation (EC) No 1698/2005 of 20 September 2005 preclude national legislation according to which the same requirement can simultaneously be a mandatory minimum requirement and impose requirements greater than the minimum mandatory requirements (requirement for an agri-environment payment)?

Stays the proceedings until the Court of Justice of the European Union makes a ruling.

[...]

WORKING DOCUMENT