

Case C-373/20

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:

6 August 2020

Referring court:

Wojewódzki Sąd Administracyjny w Szczecinie (Regional Administrative Court, Szczecin, Poland)

Date of the decision to refer:

18 June 2020

Applicant:

A.M.

Defendant:

Dyrektor Z. Oddziału Regionalnego Agencji Restrukturyzacji i Modernizacji Rolnictwa

Subject matter of the proceedings before the referring court

Action before the referring court, in which the farmer A.M. has alleged infringement of Article 2(c) of [Commission] Regulation [(EC)] No 1120/2009 through the misinterpretation thereof resulting in a finding that a part of his lands do not constitute permanent pasture as a result of the crop rotation occurring on that part of his lands and the incorrect finding that the fact of the flooding of the land is irrelevant in the case, whereas demonstrating periodic flooding is essential for establishing whether there has been crop rotation and interruption of agricultural use and, accordingly, whether agri-environmental payments should be granted and, if so, in what amounts.

Subject matter and legal basis of the question referred for a preliminary ruling

The subject matter of the question referred for a preliminary ruling is the interpretation of the definition of ‘permanent pasture’ set out in Article 2(c) of Commission Regulation (EC) No 1120/2009 and the financial consequences of the interpretation of that term used by the national authorities in the context of making agri-environmental payments to a farmer and the interruption of the continuity of the five-year period for the implementation of an agri-environmental programme. That question has been submitted on the basis of Article 267 of the Treaty on the Functioning of the European Union.

Question referred

Is the national authorities’ interpretation of the definition of ‘permanent pasture’ – set out in Article 2(c) 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 (OJ 2009 L 316, p. 1) – as meaning that the natural periodic flooding of meadows and pastures situated in a special environmental protection zone (Natura 2000 Area; Ińsko Landscape Park) makes those areas of land subject to ‘crop rotation’, resulting in an interruption of the period of five years (or more) of not being subject to that ‘crop rotation’, with the result that it also constitutes a ground for withdrawing or reducing agri-environmental payments to the farmer, as well as further financial consequences connected with the interruption of the continuity of the five-year period for the implementation of an agri-environmental programme, correct?

Provisions of EU law relied on

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 (OJ 2009 L 316, p. 1) – Article 2(c)

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) – Article 2

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 (OJ 2009 L 30, p. 16) – Article 6, Article 146(2)

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) – recitals 3 and 4

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 (OJ 2011 L 25, p. 8) – Article 7(1)

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) – Article 4(1)(h) as amended by Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017

Provisions of national law relied on

Ustawa z dnia 7 marca 2007 r. o wspieraniu rozwoju obszarów wiejskich z udziałem środków Europejskiego Funduszu Rolnego na rzecz Rozwoju Obszarów Wiejskich w ramach Programu Rozwoju Obszarów Wiejskich na lata 2007-2013 (Law of 7 March 2007 on support for rural development involving funds provided by the European Agricultural Fund for Rural Development under the 2007-2013 Rural Development Programme) – Article 5(1)(14), Article 18a

Rozporządzenie Ministra Rolnictwa i Rozwoju Wsi z dnia 13 marca 2013 r. w sprawie szczegółowych warunków i trybu przyznawania pomocy finansowej w ramach działania „Program rolnośrodowiskowy” objętego Programem Rozwoju Obszarów Wiejskich na lata 2007-2013 (Regulation of the Minister for Agriculture and Agricultural Development of 13 March 2013 concerning the detailed conditions and procedure for the grant of financial aid within the framework of the ‘Agri-Environmental Programme’ included in the 2007-2013 Rural Development Programme) – §§1, 2, 4, 38

Rozporządzenie nr 14/2005 Wojewody Zachodniopomorskiego z dnia 27 lipca 2005 r. w sprawie Ińskiego Parku Krajobrazowego (Regulation No 14/2005 of the

Governor of West Pomerania Province of 27 July 2005 concerning Ińsko Landscape Park) – §3.1

Rozporządzenie nr 36/2005 Wojewody Zachodniopomorskiego z dnia 10 listopada 2005 r. w sprawie planu ochrony Ińskiego Parku Krajobrazowego (Regulation No 36/2005 of the Governor of West Pomerania Province of 10 November 2005 concerning the Ińsko Landscape Park protection plan) – §2.1, §3.1, §4

Succinct presentation of the facts, the main proceedings, and the essential arguments of the parties

- 1 In 2009 the farmer A.M. began the implementation of the five-year 2009-2013 agri-environmental programme within the framework of Package 2 (organic farming, Option 2.3 – permanent pasture, declared surface area: 45.37 ha) and Package 3 (extensive permanent pasture, Option 3.1.2 – extensive management of meadows and pastures in Natura 2000 areas, declared surface area: 20 ha).
- 2 Between 2009 and 2011 that farmer received payments for the declared surface areas. In 2012 the authority of first instance (Kierownik Biura Powiatu P. Agencji Restrukturyzacji i Modernizacji Rolnictwa) (P., Head of the Local Office of the Agency for Restructuring and Modernisation of Agriculture) – on the basis of the farmer’s application, which reduced the declared surface areas for the payments by 9.83 ha having regard to the long-standing flooding of those areas making it impossible to mow the meadows and pastures within the required timeframes – in a (final) decision issued concerning the grant of agri-environmental payments for 2012, declared that the acreage qualifying for the payments was 35.51 ha for Option 2.3 and 17.18 ha for Option 3.1.2. The farmer received payments in reduced amounts. In 2013, in respect of which the dispute has arisen in the present case, the farmer submitted an application for agri-environmental payments, declaring the surface areas in packages as for the years 2009 to 2011, indicating that the exclusion of 9.83 ha from the surface areas in 2012 should not have an effect on the declaration in 2013, because the exclusion was not his fault, as he had mowed the meadows and pastures sooner than required, that is, in October 2012, which was confirmed by an inspection by the authority of first instance on 15 October 2012.
- 3 The administrative authorities of first and second instance have issued six decisions in the matter, and in addition the case has already been decided twice by the Wojewódzki Sąd Administracyjny w Szczecinie (Regional Administrative Court, Szczecin, Poland). The case has currently come before that court for a third time. In the sixth decision issued in the case, the authority of first instance took the view that, in relation to the 9.83 ha, there was an interruption of the continuity of use of the land as permanent pasture, and although it is possible to restore it to agricultural production within a relatively short period, nevertheless that land cannot be regarded as permanent pasture until it has been used for a period of not

less than five years to grow grasses or other herbaceous forage naturally (self-seeded) or through cultivation (sown) without crop rotation. That authority therefore considered that the farmer had applied crop rotation, which was the result of the flooding of the areas of land included in the permanent pasture. For his part, the authority of second instance (Dyrektor Z. Oddziału Regionalnego Agencji Restrukturyzacji i Modernizacji Rolnictwa) (Z., Director of the Regional Office of the Agency for Restructuring and Modernisation of Agriculture) approved the assessment of the authority of first instance as to the interruption of the continuity of use and the application of crop rotation to the permanent pasture, caused by the flooding and, regardless of that assessment, additionally expressed the view that in 2012 the farmer had failed to notify the authority of first instance, within a period of 10 working days from the date on which he would have been in a position to do so, of the occurrence of a case of 'force majeure', as referred to in Article 47(2) of Commission Regulation (EC) No 1974/2006, whereby land which was even only periodically flooded was not used agriculturally in 2012.

- 4 As a result of that assessment the authorities found that in terms of Option 3.1.2 the surface area determined amounted to 17.19 ha as compared to the declared 20 ha, as a result of which – on the basis of the first subparagraph of Article 16(5) of Commission Regulation (EU) No 65/2011 – it was necessary to grant the farmer payments for acreage reduced by twice the difference found in the implementation of Option 3.1.2, and in terms of Option 2.3 – on the basis of the second subparagraph of Article 16(5) of that regulation – it was necessary to refuse to grant payments.

Succinct presentation of the reasons for the reference

- 5 The referring court is faced with the need to decide whether the periodic flooding declared in the application for agri-environmental payments of plots of land which are situated in a special environmental protection zone (Natura 2000, Ińsko Landscape Park, the natural habitats listed in 14 categories in Annex I to Council Directive 92/43/EEC) and for that very reason are subject to natural periodic flooding, which is caused, inter alia, by constraints in the field of drainage and water retention resulting from Rozporządzenie nr 36/2005 Wojewody Zachodniopomorskiego z dnia 10 listopada 2005 r. w sprawie planu ochrony Ińskiego Parku Krajobrazowego (Regulation No 36/2005 of the Governor of West Pomerania Province of 10 November 2005 concerning the Ińsko Landscape Park protection plan), constitutes the introduction of 'crop rotation' to agricultural crops and, as a result, makes it impossible to recognise the areas of land subjected to crop rotation as 'permanent pasture' within the meaning of Article 2(c) of Commission Regulation (EC) No 1120/2009, which also results in the withdrawal or reduction of agri-environmental payments to the farmer, and also has further financial consequences connected with the interruption of the continuity of the five-year period for the implementation of the agri-environmental programme and the need for repayment, in whole or in part, of payments collected, including for the years 2009 to 2012. The grounds for demanding repayment, in whole or in

part, of the agri-environmental payments paid out, including for preceding years, are provisions of EU and national law, that is, Article 18(2) of Commission Regulation (EC) No 65/2011, which applies in the area, as can be seen from the title of that act, which governs the detailed rules for the implementation of Council Regulation (EC) No 1698/2005 as regards the implementation of control procedures. In Article 6(1)(a) of Commission Regulation (EC) No 65/2011 it was clearly stated that the provisions of that regulation applied to support granted in accordance with Article 36 of Council Regulation (EC) [No] 1698/2005, that is, also to agri-environmental payments. Further concrete expression is given to that rule in provisions of national law, that is, in § 39 et seq. of Rozporządzenie Ministra Rolnictwa i Rozwoju Wsi z dnia 13 marca 2013 r. w sprawie szczegółowych warunków i trybu przyznawania pomocy finansowej w ramach działania „Program rolnośrodowiskowy” objętego Programem Rozwoju Obszarów Wiejskich na lata 2007-2013 (Regulation of the Minister for Agriculture and Agricultural Development of 13 March 2013 concerning the detailed conditions and procedure for the grant of financial aid within the framework of the ‘Agri-Environmental Programme’ included in the 2007-2013 Rural Development Programme).

- 6 On the other hand, the issue of the non-declaration by the farmer of the occurrence of ‘force majeure’ caused by flooding is irrelevant for resolving the dispute concerning the payments for 2013, because it concerns circumstances relevant to the accounts for 2012.
- 7 Before a decision can be issued in the case, in order to clarify doubts as to the interpretation of Article 2(c) of Commission Regulation (EC) No 1120/2009 the referring court considers it necessary to refer a question to the Court of Justice of the European Union for a preliminary ruling, because it cannot clarify the fundamental issue, that is, whether permanent pasture loses its nature and purpose through being subjected to crop rotation, interpreted in the way the national authorities interpret that concept, that is, through flooding.
- 8 After 2013, the definition of the term ‘permanent pasture’ used in Article 2(c) of Commission Regulation (EC) No 1120/2009 underwent further modifications, namely under Article 4(1)(h) of Regulation (EU) No 1307/2013 of the European Parliament and of the Council, which was subsequently amended by Regulation (EU) 2017/2393 of the European Parliament and of the Council. Those amendments of the definition of ‘permanent pasture’ do not, however, remove the referring court’s doubts and do not clarify the issue of crop rotation, especially since, following the last of those amendments – according to the choice of the Member State – ploughing may or may not have an effect on the occurrence of crop rotation. Those amendments thus do not have an effect on the interpretation of that definition as worded in 2013.
- 9 The Court has dealt many times in its case-law with the issue of the interpretation of the definition of ‘permanent pasture’, inter alia in the judgment [of 11 November 2010, *Grootes* (C-152/09, EU:C:2010:671)], in which it assessed

the existence of a causal link between the change of use of an area from arable land to permanent pastureland and participation in an agri-environmental measure, and in the judgments [of 15 May 2019, *Greece v Commission* (C-341/17 P, EU:C:2019:409), and of 13 February 2020, *Greece v Commission* (C-252/18 P, EU:C:2020:95)], in which it assessed whether the decisive criterion for designating an agricultural area as permanent pasture is the kind of vegetation (the presence of ligneous plants or of shrubs), or the actual use of that area for agricultural activity which is typical of permanent pasture. Therefore, those rulings do not help to clarify the doubts of the referring court.

- 10 In the judgment [of 14 October 2010, *Landkreis Bad Dürkheim* (C-61/09, EU:C:2010:606)], in which the issue of the taking into account of certain areas for the allocation of payment entitlements to a farmer in the context of the single payment scheme was in dispute, the Court found that: ‘Article 44(2) of Council Regulation (EC) [No] 1782/2003 ... must be interpreted as not precluding an area from being eligible for aid where, while it is admittedly also used for agricultural purposes, the overriding objective is landscape management and nature conservation. In addition, the fact that the farmer is subject to the instructions of the nature conservation authority does not deprive an activity which meets the definition referred to in Article 2(c) of that regulation of its agricultural character’. The Court recalled in that ruling – referring to the judgment [of 16 July 2009, *Horvath* (C-428/07, EU:C:2009:458)] – that environmental protection, one of the essential objectives of the European Union, must be regarded as forming part of the common agricultural policy (paragraph 39), and that it would be illogical if an agricultural area ceased to be eligible for support where it is used for nature and landscape conservation (paragraph 40), and therefore considered that the fact that an area has an overriding nature and landscape conservation objective does not deprive it of its agricultural character for the purposes of Article 44(2) of Regulation No 1782/2003 where, as in that case, the land is actually being used as arable land or pasture (paragraph 41).
- 11 Only in the judgment [of 2 October 2014, *Grund* (C-47/13, EU:C:2014:2248)], has the Court of Justice, resolving the doubts of the national court in a matter of direct payments, addressed the issue of the effect of the ploughing of land and the sowing therein of a variety of herbaceous forage other than that which was previously cultivated there on the classification of that land as permanent pasture and raised – in interpreting the definition of ‘permanent pasture’ set out in Article 2(c) of Commission Regulation (EC) No 1120/2009 of 29 October 2009 – the issue of crop rotation. In that ruling the Court found that the succession of various kinds of herbaceous forage does not constitute crop rotation, and therefore does not exclude the classification of the land concerned as permanent pasture.
- 12 The issue of crop rotation was addressed a little more broadly by Advocate General Sharpston in her Opinion of 30 April 2014 in [*Grund* (C-47/13, EU:C:2014:293)] (see, in particular, points 43 and 46 and footnote 25 of that Opinion). The line of argument put forward by the Advocate General relating to the meaning of the term ‘crop rotation’, although useful from a cognitive point of

view, does not, however, clarify the issue of whether the flooding of meadows and pastures situated in areas covered by special legal protection means that there is crop rotation and as a result that the areas of land concerned are deprived of the features of permanent pasture.

- 13 In the case-law of the Polish administrative courts, the definition of ‘permanent pasture’ set out in Article 2(c) of Commission Regulation (EC) No 1120/2009, reproduced in a provision of national law, that is, in § 4(2) of Rozporządzenie Ministra Rolnictwa i Rozwoju Wsi z dnia 13 marca 2013 r. (Regulation of the Minister for Agriculture and Agricultural Development of 13 March 2013), has been addressed many times, but usually in the context of the occurrence of cases of ‘force majeure’ and the need for notification of the occurrence of such a case within the time limit. However, the issue that has arisen in the case pending before the referring court has not been addressed in the existing case-law of the national courts. That issue has also not been resolved in the existing case-law of the Court of Justice. Furthermore, the referring court is not aware that a court or tribunal of another Member State of the European Union has referred a question to the Court of Justice for a preliminary ruling concerning an issue identical to the issue of the application of EU law in the case at hand. As a result, the referring court has decided that there is a need to refer a question for a preliminary ruling in the present case.
- 14 According to the referring court, a proper interpretation of the definition of ‘permanent pasture’ set out in Article 2(c) of Commission Regulation (EC) No 1120/2009 is necessary in order to give a decision in this case. A proper interpretation will enable the referring court to resolve the issue of whether the periodic flooding of meadows and pastures situated in specially protected natural areas constitutes crop rotation and deprives such areas of land of the features of permanent pasture and, as a result, excludes such areas of land from the agri-environmental payments for 2013 (and gives rise to a need for repayment of payments received for the years 2009 to 2012 in separate proceedings).
- 15 According to the referring court, a circumstance such as the periodic flooding of meadows and pastures situated in areas specially protected by law on the basis of their natural values (which causes the periods for mowing or grazing to be postponed beyond the periods established in the provisions of national law cited and the fulfilment of those requirements by the farmer to take place at a later date) should not be classified as the introduction of crop rotation by the farmer. Additional justification for that position is provided in the Opinion of Advocate General Mazák of 11 May 2010 in [*Landkreis Bad Dürkheim* (C-61/09, EU:C:2010:265)] (see point 20 of that Opinion).
- 16 The referring court also submits for consideration by the Court of Justice the appointment in the case of one or more experts for the purpose of determining the purpose and most important features of crop rotation for the purposes of agronomy, and whether the periodic flooding of meadows and pastures situated in

areas specially protected by law on the basis of their natural values is included in that purpose or those important features.

WORKING DOCUMENT