

Case C-708/22

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:

16 November 2022

Referring court:

Tribunal Supremo (Spain)

Date of the decision to refer:

21 October 2022

Applicant:

Asociación Española de Productores de Vacuno de Carne (ASOPROVAC)

Defendant:

Administración General del Estado

Subject matter of the main proceedings

Annulment proceedings – Royal Decree 41/2021 – First final provision, paragraph 5 – Royal Decree 1075/2014 – Article 11(2) and (3) – Agricultural activity – Permanent grassland – Production – Grazing of animals belonging to the holding – Maintenance of agricultural areas

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

Request for a preliminary ruling on interpretation – Article 267 TFEU – Common Agricultural Policy (CAP) – Aid – Compatibility of a national provision with European Union law – Regulation (EU) No 1307/2013 – Articles 4 and 32(2) – Regulation (EU) No 1306/2013 – Article 60 – Artificial creation of conditions for obtaining aid – Charter of Fundamental Rights – Articles 20 and 21 – Infringement of the principles of the primacy of EU law, the hierarchy of norms, legitimate expectations and legal certainty

Questions referred for a preliminary ruling

(1) Are Articles 4 and 32(2) of Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 and Article 60 of Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 to be interpreted as precluding a national provision like Real Decreto 41/2021 (Royal Decree 41/2021) which, in order to prevent the creation of artificial conditions in relation to the grant of a concession of permanent public common pastureland to beneficiaries who do not use that pastureland, provides that grazing activity is to be permitted only if it is carried out with animals belonging to the holding?

(2) Is Article 60 of Regulation (EU) No 1306/2013, relating to the creation of artificial conditions for obtaining support, to be interpreted as precluding a national provision like Royal Decree 41/2021, which establishes a presumption that the conditions for access to support were artificially created in cases where the agricultural activity of grazing on permanent public common pastureland is carried out with animals which do not belong to the aid applicant's own holding?

(3) Is Article 4(1)(c) of Regulation (EU) No 1307/2013 to be interpreted as precluding a national provision like Real Decreto 1075/2014 (Royal Decree 1075/2014) of 19 December, pursuant to which the grazing of agricultural areas may not be classified as the maintenance of those areas in a state suitable for grazing?

(4) Is Article 4(1)(c) of Regulation (EU) No 1307/2013 to be interpreted as precluding a national provision like Royal Decree 1075/2014 of 19 December, pursuant to which persons who merely hold a non-exclusive grazing right over farmland that is not owned by them, and who assign that right to a third party so that the latter may use the pastureland to graze livestock, do not carry out an agricultural activity as provided for in Article 4(1)(c)(i)?

(5) Is Article 4(1)(b) and (c) of Regulation (EU) No 1307/2013 to be interpreted as precluding a national provision like Royal Decree 1075/2014 of 19 December, pursuant to which persons who merely hold a non-exclusive grazing right over common farmland which is not owned by them cannot be treated as managers of the pastureland to which that grazing right applies for the purposes of carrying out the maintenance of those agricultural areas in a state suitable for grazing?

Provisions of European Union law and case-law relied on

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: Articles 4 and 32(2)

Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008: Article 60

Commission Delegated Regulation (EU) No 639/2014 of 11 March 2014 supplementing Regulation (EU) No 1307/2013 and amending Annex X to that Regulation: Article 4

Regulation (EU) 2020/127 of the European Parliament and of the Council of 29 January 2020 amending Regulation (EU) No 1306/2013 as regards financial discipline as from financial year 2021 and Regulation (EU) No 1307/2013 as regards flexibility between pillars in respect of calendar year 2020

Regulation (EU) 2020/2220 of the European Parliament and of the Council of 23 December 2020 laying down certain transitional provisions for support from the European Agricultural Fund for Rural Development (EAFRD) and from the European Agricultural Guarantee Fund (EAGF) in the years 2021 and 2022 and amending Regulations (EU) No 1305/2013, (EU) No 1306/2013 and (EU) No 1307/2013 as regards resources and application in the years 2021 and 2022 and Regulation (EU) No 1308/2013 as regards resources and the distribution of such support in respect of the years 2021 and 2022

Charter of Fundamental Rights of the European Union ('the Charter'): Articles 20 (equality before the law) and 21 (non-discrimination)

Judgment of 7 April 2022, *Avio Lucos* (C-116/20, EU:C:2022:273)

Judgment of 7 April 2022, *Avio Lucos* (C-176/20, EU:C:2022:274)

Order of 26 November 2021, *Agrárminiszter* (C-273/21, not published, EU:C:2021:967)

Judgment of 12 September 2013, *Slancheva sila* (C-434/12, EU:C:2013:546)

Provisions of national law relied on

Real Decreto 41/2021, de 26 de enero, por el que se establecen las disposiciones específicas para la aplicación en los años 2021 y 2022 de los Reales Decretos 1075/2014, 1076/2014, 1077/2014 y 1078/2014, todos ellos de 19 de diciembre, dictados para la aplicación en España de la Política Agrícola Común (Royal Decree 41/2021 of 26 January 2021 laying down specific provisions for the application in 2021 and 2022 of Royal Decrees 1075/2014, 1076/2014, 1077/2014 and 1078/2014, all of 19 December 2014, enacted for the application of the Common Agricultural Policy in Spain; 'RD 41/2021'): first final provision, paragraph 5

Real Decreto 1075/2014, de 19 de diciembre, sobre la aplicación a partir de 2015 de los pagos directos a la agricultura y a la ganadería y otros regímenes de ayuda, así como sobre la gestión y control de los pagos directos y de los pagos al desarrollo rural (Royal Decree 1075/2014 of 19 December 2014 on the application from 2015 of direct payments to agriculture, livestock farming and other support schemes and on the management and control of direct payments and payments for rural development; ‘RD 1075/2014’): Article 11(2) and (3)

Constitución Española (Spanish Constitution): Article 14 (equality)

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 1 March 2021, the Asociación Española de Productores de Vacuno de Carne (ASOPROVAC; Spanish Association of Beef Cattle Producers) filed an administrative action against RD 41/2021, seeking the annulment of paragraph 5 of the first final provision of that R[oyal]D[ecree] (‘the contested provision’), which amends Article 11(2) and (3) of RD 1075/2014.
- 2 In accordance with the original version of that article, an aid applicant was required to indicate in respect of each parcel of land whether that parcel was intended for cultivation or was to be subject to maintenance. In the case of maintenance, if a parcel was pastureland, it was necessary to state whether maintenance was to be effected by means of grazing or other techniques. The list of maintenance activities is set out in Annex IV to RD 1075/2014.
- 3 Following the amendment of Article 11(2) and (3) of RD 1075/2014 by RD 41/2021, that provision now provides, inter alia, that it is necessary to indicate whether pastureland is to be used for a production activity by way of grazing and, in the case of permanent public common pastureland, that only production based on the grazing of animals from the aid applicant’s own holding is permitted and none of the maintenance activities listed in Annex IV to RD 1075/2014 are allowed.

The essential arguments of the parties in the main proceedings

- 4 The applicant submits that the contested provision is automatically void for the following reasons:
 - Infringement of Articles 4 and 32 of Regulation No 1307/2013 and Article 4 of Delegated Regulation No 639/2014 and infringement of the case-law of the Court of Justice on the eligibility of permanent grassland for the receipt of direct support: the Spanish State may not lay down eligibility conditions for grassland which are not stipulated by EU legislation and which are contrary to that legislation, such as the new requirement that grassland must actually be grazed and, furthermore, must be grazed by animals from the aid applicant’s own holding (that is, which is used for the applicant’s own livestock farming)

where that grassland is public common pastureland, as though the support were coupled support.

- Infringement of Article 60 of Regulation No 1306/2013 and infringement of the case-law of the CJEU on the artificial creation of conditions for access to aid: the contested provision has introduced an irrebuttable presumption of fraud which aims to exclude intensive beef cattle farmers from the support scheme, based on the underlying view that they do not deserve to receive area-related direct aid, even though they have been in receipt of such aid since 2000 without ever having been required to graze their animals on areas of permanent pastureland that are part of their holdings.
- Infringement of Articles 20 and 21 of the Charter and of Article 14 of the Spanish Constitution, which guarantee equality before the law and the prohibition of discrimination in matters which fall within the competence of the European Union: discriminatory treatment has been established as between Spanish and European beef cattle farmers and also as between Spanish farmers themselves, since the grazing of animals from the aid applicant's own holding is required only on public common pastureland and not on privately owned pastureland.
- Infringement of the principles of legitimate expectations and legal certainty: the contested provision was enacted after the EU legislation had been applicable for six years, when the Commission had ordered Member States to ensure the continuation, in 2021 and 2022, of the aid which farmers had been receiving without amending the eligibility conditions for such aid which were applicable in the period 2014-2020, since the reform of the CAP will be delayed and only budgetary adjustment measures have been approved in that respect under Regulation 2020/127. The Spanish State has failed to comply with those requirements without any legal basis and without any reasons of urgency or necessity existing.
- Infringement of the principles of the reservation of law, the conferral of powers, the hierarchy of norms and the primacy of EU law: the Spanish State – which only has powers to implement EU legislation – has breached those principles by limiting, under RD 41/2021, the possibility of declaring grassland on the basis of its ownership (public or private) and use (exclusive or common).

5 The Administración del Estado (State Administration), the defendant, argues, essentially, as follows:

- EU regulations are directly applicable but it may be necessary for Member States to enact implementing measures (see Regulation No 1307/2013 (Article 4(1)(c)(ii) and (iii) and (h), and (2)) and Regulation No 1306/2013 (Articles 4(1), 5, 7(1) and 58(1) and (2)). In fulfilment of that obligation, the Spanish government published, inter alia, RD 1075/2014 and has gradually

inserted into it the amendments required to ensure the correct application of the CAP. In that connection, RD 41/2021 is a consequence of the adoption of Regulation 2020/2220.

- The extension of the application of the current CAP does not limit the government’s powers to include the necessary amendments in RD 1075/2014. Moreover, the Kingdom of Spain, as an EU Member State, has an obligation to adopt those amendments under Article 58(1) of Regulation No 1306/2013.
- Following the amendment inserted by RD 41/2021, Article 11(2) of RD 1075/2014 is compatible with the EU legislation where it states that, inter alia, the agricultural production activity provided for in Article 4(1)(c)(i) of Regulation No 1307/2013 may be carried out only on parcels of public common pastureland through the grazing of animals belonging to the farmer’s holding.
- As regards the artificial creation of conditions for access to support, in accordance with paragraph 29 of the judgment of the Court of Justice in Case C-434/12, there is no rebuttable presumption in the present case that beef cattle farmers have artificially created the conditions for receipt of CAP support but rather a finding of this fact as admitted in the application.
- The applicant’s claim that the defendant misused its powers in adopting RD 41/2021, through which, in the applicant’s submission, the defendant does not seek to ensure the correct application of EU legislation but rather to apply in advance the strategic plan that the Spanish government has allegedly prepared for the time when the new CAP is approved, in order to exclude the beef cattle farming sector from the CAP support scheme, is wholly unfounded.
- RD 41/2021 does not create discriminatory treatment contrary to Articles 20 and 21 of the Charter and Article 14 of the Spanish Constitution, since it only requires the grazing of animals from the applicant’s own holding on public common pastureland and not on privately owned pastureland. In that respect, it should be recalled that grazing is not permitted as an agricultural activity for the maintenance of an agricultural area in a state suitable for grazing under any circumstances, irrespective of whether the pastureland concerned is public or private, owned by the aid applicant or a third party. Accordingly, there is no discrimination between beef cattle farmers who hold grazing rights on public, common grassland and the holders of grazing rights on private grassland: neither is entitled to declare that they carry out the maintenance of those grasslands through grazing. While it is the case that, as far as private pastureland is concerned, the provision does not stipulate that the agricultural production activity must be carried out using animals from the applicant’s own holding or exclude the possibility that the maintenance tasks listed in Annex IV to RD 1075/2014 may be performed on that pastureland, the reason for this is the different body of rules applicable to each type of pastureland. No

discrimination exists because, in all cases, the aid applicant is required actually and genuinely to carry out an agricultural activity on common pastureland.

- The claim in the application of infringement of the principles of the hierarchy of norms and the primacy of EU law is based on a false premiss which consists of the presumption that the Spanish legislation conflicts with the EU legislation. Since there is no such conflict, there is no infringement of the principle of the hierarchy of norms or of the principle of the primacy of EU law.
- As regards infringement of the principles of legal certainty and legitimate expectations, the argument put forward by the applicant is again based on a false premiss, which consists of the presumption that RD 41/2021 lays down conditions for the receipt of CAP support that differ from and are additional to those laid down by the EU legislation. However, in fact, the aim of the amendments inserted into RD 1075/2014 by RD 41/2021 is purely to interpret or clarify Regulation No 1307/2013; it has been expressly stated that a correct interpretation of the EU provision does not permit the holders of grazing rights over public common pastureland to declare a production activity other than grazing with their own animals and that they may not declare agricultural maintenance activities in respect of such areas.
- It is unacceptable that a person (whether or not a farmer or a beef cattle farmer) who has been granted grazing rights over public common pastureland, and who merely assigns those grazing rights to a third party so that that person can use the grassland to graze their cattle, should be entitled to have a legitimate expectation that, by doing so, he or she is carrying out an agricultural activity which qualifies him or her to receive CAP support. Ultimately, the conduct of beef cattle farmers described in the application has always been contrary to EU legislation. And if this has actually been put into practice, the competent public authorities should commence the appropriate procedures to scrutinise the irregularities committed.
- The issue in these proceedings is whether or not Article 11(2) and (3) of RD 1075/2014, as amended, is compatible with the EU legislation. For that purpose, it will be necessary to interpret the concepts of eligible hectare, agricultural area, permanent grassland and agricultural activity for the purposes of receipt of area-related direct aid, as laid down in Articles 4 and 32 of Regulation No 1307/2013, in addition to the reference to the prohibition on creating artificial conditions for access to aid laid down in Article 60 of Regulation No 1306/2013.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 6 The Tribunal Supremo (Supreme Court) considers that the reference for a preliminary ruling is essential because the answers to the questions raised for the

purpose of adjudicating on the main proceedings are not apparent from the case-law of the Court of Justice examined below.

- 7 Although the order in Case C-273/21 dealt with the interpretation of Article 32(2)(a) and (b) of Regulation (EU) No 1307/2013, the issue raised differed from that in the present case. Those proceedings concerned an area classified under Hungarian law as an aerodrome but on which no activity relating to an aerodrome was carried out. The Court found that that area should be classified as an agricultural area used for agricultural purposes since it was in fact used as permanent pastureland for livestock.
- 8 In the judgment in Case C-116/20, there was a certain similarity between the facts of that case (see, inter alia, paragraphs 26 to 31 of the judgment) and those of the present case. However, those proceedings examined the particular circumstances of an aid applicant who was refused aid on the grounds that he did not meet certain conditions imposed by the Romanian national measure whereas, in the present case, an action has been brought directly against a particular legislative provision, not a measure enacted in implementation of a legislative provision. Moreover, the questions resolved by the Court of Justice in that case related to the interpretation of Regulation (EU) No 73/2009, repealed by Regulation No 1307/2013 which is applicable to this case. Therefore, the reasoning set out in that judgment (particularly in paragraphs 75, 76, 85, 86 and 87) do not definitively dispel the uncertainties of the Tribunal Supremo (Supreme Court) about the correct interpretation of Articles 4 and 32 of Regulation No 1307/2013 and Article 60 of Regulation No 1306/2013.
- 9 In the preliminary-ruling proceedings in Case C-176/20, as in the present case, the interpretation concerned Articles 4 and 32 of Regulation No 1307/2013 and Article 60 of Regulation No 1306/2013 (in conjunction with recitals 4 and 16 of Delegated Regulation No 639/2014). However, in Case C-176/20, the interpretation of those provisions related to facts which are not exactly the same as the facts of this case. That case (see paragraph 49 of the judgment) dealt with the determination of whether the concept of ‘active farmer’ covers a legal person who has concluded a concession contract relating to an area of pastureland belonging to a municipality and who grazes on that land animals which have been loaned to it, free of charge, by natural persons who own those animals. On the other hand, this case is aimed at determining whether or not persons who merely hold a non-exclusive grazing right over common farmland which does not belong to them can be treated as ‘managers’ of the pastureland to which those grazing rights relate for the purposes of carrying out the maintenance of those agricultural areas in a state suitable for grazing and, also, whether or not it is possible to consider that, in such cases, where those persons assign that right to a third party so that that person can use the grassland to graze cattle, they are carrying out an agricultural activity as provided for in Article 4(1)(c)(i) of Regulation No 1307/2013. In addition, as regards the interpretation of Article 60 of Regulation (EU) No 1306/2013, significant differences also exist between the present case and the case examined in that judgment, because in that judgment – unlike in the present case – reference

was made, as facts to be taken into account, to the conclusion, in breach of the applicable national law, of the concession contract and to the content of the loan-for-use contracts at issue in the main proceedings, in particular if it were apparent from them that the grazing of the animals loaned was carried out not by Avio Lucos, but by the owners of those animals.

WORKING DOCUMENT