

Case C-228/23**Request for a preliminary ruling****Date lodged:**

12 April 2023

Referring court:

Conseil d'État (France)

Date of the decision to refer:

12 April 2023

Applicant:

AFAÏA

Defendant:

Institut national de l'origine et de la qualité (INAO)

CONSEIL D'ÉTAT (Council of State, France)

[...]

acting

in a judicial capacity

[...]

Having regard to the following procedure:

By an application and a reply, lodged on 22 October 2020 and 22 March 2022 at the secretariat of the judicial section of the Council of State, the association AFAÏA requests that the Council of State:

1. annul the decision of 4 February 2020 by which the Institut national de l'origine et de la qualité (National Institute of Origin and Quality, France; 'the INAO') rejected its request to amend the reading guide to Council Regulation (EC) No 834/2007 of 28 June 2007 and Commission Regulation (EC) No 889/2008 of 5 September 2008 in so far as it defines the concept of factory farming within the meaning of Annex I to Regulation (EC) No 889/2008, on the grounds that the INAO acted *ultra vires*;

2. order the INAO to amend the reading guide accordingly within one month of the notification of its decision and to accompany it with publicity measures explaining that the new interpretation relating to the definition of manure from factory farming is no longer applicable or in force;

[...]

AFAÏA maintains that:

- the INAO lacks the authority to issue additional measures for the application of Regulation (EC) No 834/2007 and Regulation (EC) No 889/2008;
- the interpretation contained in the reading guide, which prohibits the use in organic farming of fertilisers from livestock raised in cages or in integral slatted or grid systems and exceeding the thresholds defined in Annex I to Directive 2011/92/EU, misconstrues the meaning and scope of the regulations;
- the abovementioned interpretation and the changes it has undergone within a short period of time undermine the principles of legal certainty and protection of legitimate expectations;
- that interpretation, which is more restrictive than that adopted by other Member States of the European Union, is likely to cause significant distortions of competition between producers in different Member States.

By two defences lodged on 7 May 2021 and 9 September 2022, the INAO contends that the application should be dismissed [...]. It further submits that the pleas in law raised by the applicant are unfounded.

[...]

Having regard to the other documents in the file;

Having regard to:

- the Treaty on the Functioning of the European Union;
- Council Regulation (EEC) No 2092/91 of 24 June 1991;
- Council Regulation (EC) No 834/2007 of 28 June 2007;
- Commission Regulation (EC) No 889/2008 of 5 September 2008;
- Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017;
- Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018;

- Commission Implementing Regulation (EU) 2021/1165 of 15 July 2021;
- Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011;
- [...]

Whereas:

- 1 It is apparent from the documents in the file that, in January 2020, the INAO amended its reading guide to Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Regulation (EC) No 834/2007. The amendments were intended, inter alia, to interpret the prohibition laid down in Annex I to Regulation (EC) No 889/2008 on the use on organic land of fertilisers and soil conditioners of animal origin from ‘factory farming’ as excluding manure ‘from livestock raised in integral slatted or grid systems and exceeding the thresholds defined in Annex I to Directive 2011/92/EU’, as well as from ‘livestock raised in cages and exceeding’ those thresholds. AFAÏA, a professional union set up to defend the collective interests of organic fertiliser producers, requests the annulment of the decision of 4 February 2020 by which the INAO rejected its request to amend the reading guide in so far as it defines the concept of factory farming within the meaning of Annex I to Regulation (EC) No 889/2008, on the grounds that the INAO acted *ultra vires*. It further requests that the INAO be ordered to amend the reading guide accordingly within one month of the notification of its decision and to accompany that amendment with publicity measures explaining that the new interpretation relating to the definition of manure from factory farming is no longer in force.
- 2 [...]
- 3 On the one hand, [...] the European regulations to be taken into consideration are those applicable at the date of the present decision, namely Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007, and Commission Implementing Regulation (EU) 2021/[1]165 of 15 July 2021 authorising certain products and substances for use in organic production and establishing their lists. On the other hand, although the INAO has published on its website a new reading guide to the organic regulations, applicable from 1 January 2022, paragraph 192 of the guide reproduces word-for-word the interpretation of the concept of ‘factory farming’ contested by AFAÏA, which must be regarded as disputing the content of paragraph 192 of the new guide.
- 4 Article 3 of Regulation (EU) 2018/848 of 30 May 2018 defines ‘organic production’ as ‘the use ... of production methods that comply with this Regulation at all stages of production, preparation and distribution’. It includes among the

objectives of organic production referred to in Article 4: ‘(b) maintaining the long-term fertility of soils; ... (d) substantially contributing to a non-toxic environment; (e) contributing to high animal welfare standards ...’. According to Article 5 of the same regulation, ‘organic production is a sustainable management system that is based on the following general principles: ... (g) the restriction of the use of external inputs; where external inputs are required or the appropriate management practices and methods referred to in point (f) do not exist, the external inputs shall be limited to: (i) inputs from organic production; ... (ii) natural or naturally derived substances; ...’. According to Article 6 of that regulation, ‘as regards agricultural activities and aquaculture, organic production shall, in particular, be based on the following specific principles: (a) the maintenance and enhancement of soil life and natural soil fertility ...; (b) the limitation of the use of non-renewable resources and external inputs to a minimum; (c) the recycling of waste and by-products of plant and animal origin as input in plant and livestock production; ...’. Article 9 of the regulation provides ‘... 3. For the purposes and uses referred to in Articles 24 and 25 and in Annex II, only products and substances that have been authorised pursuant to those provisions may be used in organic production, provided that their use in non-organic production has also been authorised in accordance with the relevant provisions of Union law and, where applicable, in accordance with national provisions based on Union law ...’. Under Article 12 of that regulation, which defines the ‘plant production rules’, ‘1. Operators that produce plants or plant products shall comply, in particular, with the detailed rules set out in Part I of Annex II ...’. According to Article 14 of that regulation, which defines the ‘livestock production rules’, ‘1. Livestock operators shall comply, in particular, with the detailed production rules set out in Part II of Annex II ...’. Article 24 of the same regulation, on the ‘authorisation of products and substances for use in organic production’, provides that: ‘1. The Commission may authorise certain products and substances for use in organic production, and shall include any such authorised products and substances in restrictive lists, for the following purposes: ... (b) as fertilisers, soil conditioners and nutrients; ...’. Annex II to that regulation provides, in ‘Part I: Plant production rules’, that ‘1.9.2. The fertility and biological activity of the soil shall be maintained and increased: ... (c) in all cases, by the application of livestock manure or organic matter, both preferably composted, from organic production. 1.9.3. Where the nutritional needs of plants cannot be met by the measures provided for in points 1.9.1 and 1.9.2, only fertilisers and soil conditioners that have been authorised pursuant to Article 24 for use in organic production shall be used, and only to the extent necessary. ...’ The same annex provides, in ‘Part II: Livestock production rules’, under ‘General requirements’, that ‘... 1.1. Except in the case of beekeeping, landless livestock production, where the farmer intending to produce organic livestock does not manage agricultural land and has not established a written cooperation agreement with a farmer as regards the use of organic production units or in-conversion production units for that livestock, shall be prohibited’, that ‘1.4.2.1. ... organic animals shall graze on organic land ...’ and that ‘1.6.3. The stocking density in buildings shall provide for the comfort, well-being and species-specific needs of the animals, and shall depend in particular on

the species, the breed and the age of the animals. ... 1.6.8. Cages, boxes and flat decks to raise livestock shall not be used for any livestock species'. It also lays down, under the rules specific to the various animal species, requirements relating to the floors of livestock housing, prohibiting them from being entirely of a slatted or grid construction.

- 5 For the application of the provisions set out in the previous paragraph, reference should be made to Commission Implementing Regulation (EU) 2021/1165 of 15 July 2021. Article 2 of that implementing regulation provides that 'for the purposes of point (b) of Article 24(1) of Regulation (EU) 2018/848, only the products and substances listed in Annex II to this Regulation may be used in organic production as fertilisers, soil conditioners and nutrients for plant nutrition ..., provided that they are compliant with the relevant provisions of Union law ...'. Annex II provides that 'fertilisers, soil conditioners and nutrients listed in this Annex may be used in organic production, provided that they are compliant with: – the relevant Union and national legislations on fertilising products, in particular, where applicable, Regulation (EC) No 2003/2003 and Regulation (EU) 2019/1009; and – Union legislation on animal by-products, in particular Regulation (EC) No 1069/2009 and Regulation (EU) No 142/2011, in particular Annexes V and XI'. The products listed include 'farmyard manure', 'dried farmyard manure and dehydrated poultry manure', 'composted animal excrements, including poultry manure and composted farmyard manure' and 'liquid animal excrements', with the qualification 'factory farming origin forbidden'.
- 6 The concept of 'factory farming' ('élevages industriels'), as referred to in the French version of Implementing Regulation (EU) 2021/1165, is defined neither by that regulation nor by Regulation (EU) 2018/848. Although that concept is found in most language versions of the implementing regulation – notably the English version – the Danish, Dutch and Portuguese versions in particular refer to the concept of 'élevage hors sol' (landless livestock production). Neither regulation defines the latter concept: point 1.1. of Part II of Annex II to Regulation (EU) 2018/848 simply states, as mentioned in paragraph 4, that 'landless livestock production' is to be prohibited where the farmer intending to produce organic livestock does not manage agricultural land and has not established a written cooperation agreement with a farmer as regards the use of organic production units for that livestock. It is also clear from the note of the expert group convened by the European Commission in May 2021 to determine the scope of the concept of 'factory farming' that, if it is not possible to give a precise definition, the application of that concept should be based on a set of indicia, including, in particular, animals being raised in cages or not being allowed to turn through 360 degrees, landless livestock production, the type of housing (solid floor, lighting, etc.), the exceeding of certain density limits and the feed conditions (antibiotics, genetically modified organisms).
- 7 The divergence between the different language versions of Implementing Regulation (EU) 2021/1165, referred to in the previous paragraph, already existed

between the different language versions of Regulation (EC) No 889/2008, which it replaced. Thus, in accordance with Article 12 of Regulation (EC) No 834/2007, which provided for the application, in organic farming, of manure from organic production, but also permitted the use of fertilisers and soil conditioners which had been authorised by the Commission, Regulation (EC) No 889/2008 authorised the use of the same products, with the exception, also, of those originating, in the French and English versions, from ‘factory farming’ (‘élevages industriels’), and, in other versions, from landless livestock production (‘élevage hors sol’), without further defining those concepts. However, Article 16 of that regulation provides that ‘landless livestock production, by which the operator of the livestock does not manage agricultural land and/or has not established a written cooperation agreement with another operator according to Article 3(3), is prohibited’. In addition, those authorisations were referred to as falling within the scope of ‘[authorisations] under Regulation (EEC) No 2092/91 and carried over by Article 16(3)(c) of Regulation (EC) No 834/2007’, which provided that ‘products and substances used before adoption of this Regulation for purposes corresponding to those laid down in paragraph 1 of this Article, may continue to be used after said adoption. The Commission may in any case withdraw such products or substances in accordance with Article 37(2)’.

- 8 Previously, Council Regulation (EEC) No 2092/91 of 24 June 1991, repealed by Regulation (EC) No 834/2007 of 28 June 2007, had imposed no restrictions originally on the use of the products at issue. However, the French version of Annex II, in force from 2006, provided, in the case of ‘farmyard manure’ and ‘dried farmyard manure and dehydrated poultry manure’: ‘coming from extensive husbandry and only in the sense of Article 6(5) of Council Regulation (EEC) No 2328/91’, the latter referring to ‘livestock enterprises where the beef-cattle stocking rate does not ... exceed three livestock units (LU) per hectare of ... forage area’ and, in the case of ‘composted animal excrements, including poultry manure and composted farmyard manure’ and ‘liquid animal excrements’: ‘provenance d’élevage hors sol interdite’ (‘factory farming origin forbidden’), without further defining the concept of ‘élevage hors sol’. The English version of those provisions used the term ‘factory farming’ (*élevage industriel*). The guide to the application of those provisions produced by the European Commission, which also used the term ‘élevage industriel’, emphasised that it was for the Member States to define its scope. It suggested including livestock holdings combining, on the one hand, an installation preventing livestock from turning through 360 degrees or keeping them predominantly in the dark or without bedding and, on the other hand, the absence of land for crop production allowing the application of manure.
- 9 In support of its request for annulment of the refusal to amend the contentious content of the INAO reading guide, AFAÏA submits, inter alia, that the guide misconstrues the scope of the regulations at issue, since the concept of factory farming adopted by those regulations must be understood as referring to landless livestock production, whereas the interpretation adopted by the guide excludes all livestock holdings with an integral slatted or grid system and cages, above a

certain number of livestock, even though those livestock holdings are not necessarily involved in landless livestock production.

- 10 In its defence, the INAO bases the interpretation given in its reading guide on the requirements of organic farming, described in the preamble to Council Regulation (EC) No 834/2007 of 28 June 2007, according to which ‘organic production is an overall system of farm management and food production that combines best environmental practices, a high level of biodiversity, the preservation of natural resources, the application of high animal welfare standards and a production method in line with the preference of certain consumers for products produced using natural substances and processes’. Furthermore, the INAO states that it has drawn certain conclusions from the change in terminology in the French version of Regulation (EC) No 834/2007 and Regulation (EC) No 889/2008, which substituted the term ‘factory farming’ (‘élevage industriel’) for the term ‘landless production’ (‘élevage hors sol’) which appeared in the amended Council Regulation (EEC) No 2092/91 of 24 June 1991. The INAO submits that, by interpreting the concept of factory farming as referring to the livestock housing conditions, both in terms of freedom to move and access to outdoor spaces and in terms of stocking density, and by understanding the term ‘factory’ in the ordinary sense, as referring to the mechanisation of processes and mass production, the French authorities intended to exclude holdings whose size and farming conditions are incompatible with the objectives of the abovementioned regulation, including animal welfare and consumer confidence in the organic production chain, and so did not misconstrue the context and objectives pursued by Regulation (EC) No 889/2008. The INAO points out that a survey of 19 Member States conducted in April 2020 by the Fédération nationale d’agriculture biologique (National Federation of Organic Farming, France) revealed that most of them interpret the concept of factory farming as including farms that use cages and slatted and grid systems and exceed certain thresholds regarding the number of livestock per holding. However, it is apparent from the survey that the thresholds used by those Member States are in some cases more restrictive than those used by the INAO, which has adopted the thresholds referred to in Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, which requires the assessment of ‘installations for the intensive rearing of poultry or pigs with more than: (a) 85 000 places for broilers, 60 000 places for hens; (b) 3 000 places for production pigs (over 30 kg); or (c) 900 places for sows’. Furthermore, some Member States also adopt criteria for livestock feed, prohibiting feed that contains genetically modified organisms.
- 11 First, neither Regulation (EU) 2018/848 nor Implementing Regulation (EU) 2021/1165 defines the concept of ‘factory farming’ (‘élevage industriel’), nor is it defined, for that matter, in previous regulations that used that concept. Moreover, it is apparent from the documents in the file that Member States interpret the concept differently. Some Member States continue to equate the concept with landless livestock production, whereas other Member States distinguish between the two concepts and define the concept of ‘factory farming’ by reference to the

technical requirements and variable livestock number thresholds, or in some cases the requirements in terms of feed.

- 12 Second, it follows from the provisions referred to in paragraphs 4 and 5 that for organic crop production, livestock manure used for soil fertilisation must in principle itself originate from organic production, but that where this does not cover the nutritional needs of crops, and only to the extent necessary, fertilisers and soil conditioners permitted for organic farming, as defined in Annex II to Implementing Regulation (EU) 2021/1165, may be used. Although it also follows from those provisions that, in organic livestock production (i) landless production is prohibited, (ii) cages, boxes and flat decks cannot be used to raise any livestock species, (iii) livestock housing must, for bovine, ovine and porcine animals, have a solid laying or rest area which is not slatted, for poultry, at least one third of the floor area must be solid and not of slatted or of grid construction, and for laying hens, a sufficiently large part of the floor area must be available for the collection of bird droppings, those factors alone are not sufficient, given the uncertainties identified in paragraph 11, to determine whether the concept of ‘factory farming’ referred to in Annex II to Implementing Regulation (EU) 2021/1165 must, in the light of the context of that provision and the objective pursued by that regulation, be equated with the concept of landless livestock production, and whether, failing that, it necessarily includes, above a certain number of livestock, the use of systems composed entirely of slats, grids or cages.
- 13 The answer to AFAĪA’s plea in law alleging that the interpretation resulting from the disputed content misconstrues the meaning and scope of the provisions of Regulation (EU) 2021/1165 prohibiting the use in organic farming of fertilisers and soil conditioners from factory farms thus depends on the answers to the following questions: first, whether the concept of ‘factory farming’ must be interpreted as equivalent to that of landless livestock production; second, if the answer to the previous question is that the concept of ‘factory farming’ is distinct from that of landless livestock production, what criteria must be used to determine whether a livestock holding must be categorised as factory farming within the meaning of Annex II to that regulation.
- 14 The questions set out in paragraph 13 are decisive for the resolution of the present dispute and raise a serious difficulty of interpretation, in the absence of case-law of the Court of Justice of the European Union shedding light on the purpose and scope of the provisions at issue. It is for that reason appropriate to refer them to the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union and, pending a ruling by the Court of Justice, to stay the proceedings relating to AFAĪA’s application.

HEREBY ORDERS:

[...] The proceedings on the application lodged by AFAĪA shall be stayed pending a ruling by the Court of Justice of the European Union on the following questions:

1. Is Annex II to Commission Regulation (EU) 2021/1165 of 15 July 2021, which was adopted to implement Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018, to be interpreted as meaning that the concept of factory farming contained therein is equivalent to that of landless livestock production?

2. If the concept of factory farming is distinct from the concept of landless livestock production, what criteria must be used to determine whether a livestock holding must be categorised as factory farming within the meaning of Annex II to Regulation (EU) 2021/1165?

[...]

WORKING DOCUMENT