

Case C-731/22

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:

25 November 2022

Referring court:

Bundesverwaltungsgericht (Federal Administrative Court, Austria)

Date of the order for reference:

25 November 2022

Applicants:

IJ and PO GesbR

IJ

Defendant Authority:

Agrarmarkt Austria (AMA)

Subject matter of the case in the main proceedings

Aid law – Agricultural areas – Conditions for granting aid – Interpretation of the term ‘holding’

Subject matter and legal basis of the reference

Interpretation of Regulation (EU) No 1307/2013; Art. 267 TFEU

Question referred for a preliminary ruling

Is Article 4(1), (b) and (c), read in conjunction with Article 33(1) of Regulation 1307/2013 to be interpreted as meaning that an area is to be regarded as being managed by, and at the disposal of, the farmer if, although that area is owned by the farmer and the farmer also carries out the initial soil cultivation and crop cultivation, as well as the ongoing irrigation of the crop cultures, the area is

divided into parcels of different sizes and handed over – from the beginning of the season in April/early May until the end of the season in October – to various users for maintenance and harvesting in consideration for a fixed fee, but without the farmer being entitled to a direct share in the success of the harvest?

Provisions of EU law cited

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: Article 4, Article 32, and Article 33;

Commission Delegated Regulation (EU) No 639/2014 of 11 March 2014 supplementing Regulation (EU) No 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and amending Annex X to that Regulation: Article 15.

Provisions of national legislation cited

Verordnung des Bundesministers für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft mit horizontalen Regeln für den Bereich der Gemeinsamen Agrarpolitik (Horizontale GAP-Verordnung) (Regulation of the Federal Minister for Agriculture, Forestry, Environment and Water Management laying down horizontal rules to be applied in the area of the common agricultural policy (Horizontal CAP Regulation)), BGBl. II No 100/2015: Paragraphs 20 and 23.

Sonderrichtlinie des Bundesministers für Land- und Forstwirtschaft, Regionen und Wasserwirtschaft zur Umsetzung von Projektmaßnahmen im Rahmen des österreichischen Programms für ländliche Entwicklung 2014-2020 (Special Directive of the Federal Minister for Agriculture, Forestry, Regions and Water Management on the implementation of project measures within the framework of the Austrian Rural Development Programme 2014-2020:); Paragraph 17.

Brief summary of the facts and procedure

- 1 The applicants – that is to say a civil-law partnership (*Gesellschaft bürgerlichen Rechts*) until 2020 and a sole trader from 2021 onwards – submitted a single application (referred to as a ‘multiple application-areas’) from 2019 to 2021, in which they requested that a certain field be regarded as an arable area and applied for aid to granted in respect thereof.
- 2 However, in the course of an on-site inspection, this field was determined by the authority to be a ‘recreational area’ ineligible for aid. On the basis of the now

contested amendment notices, no direct payments were granted in respect of this field for the application years 2019 to 2021, and penalties and recovery measures were ordered.

- 3 In any event, the field is an arable area that is used exclusively for agricultural activities (cultivation of field vegetables). It is a 'self-harvest area' under the ownership of the applicant, who carries out the soil cultivation, the cultivation planning and the cultivation of the crop cultures in order to hand over the field, which is divided into parcels of different sizes, to different users at the beginning of the season (late April/early May, depending on the weather) for management.
- 4 From the time of payment of a 'seasonal fee' and handover of the parcel for maintenance and harvesting, the right and obligation to maintain the parcel lies solely with the user. The applicant makes some gardening tools available to the users for general use. The users are required to comply with the guidelines for organic farming. Under the terms of the user agreement, users assume 'responsibility' from the start of the season until the end of the season (26 October at the latest). This includes the regular removal of weeds, which must then be retained on the parcel as a mulch layer. In the event of a prolonged period of absence, the area must be maintained and harvested by a substitute user.
- 5 The areas were thus under the care of the users on the reference date provided for under Article 33(1) of Regulation (EU) No 1307/2013, which was set for 9 June in Austria (Paragraph 23(1) of the Horizontal CAP Regulation).
- 6 During the period in which the field is in use by the applicant's customers, the applicant remains responsible for ensuring that the entire field is irrigated regularly, in a manner she deems fit. She also reserves the right to mow heavily weed-infested parcels, and to demand reimbursement of the incurred costs, in the event that the user fails to carry out appropriate maintenance. Harvesting is carried out by the users alone; however, the applicant does not give any harvest guarantee 'due to unpredictable natural conditions'.
- 7 Under the terms of a current agreement with the users, the vegetables not harvested by the users are to be handed over to charitable organisations. This comprises 200 kg to 300 kg of vegetables, which are mainly root vegetables.
- 8 The applicant herself also cultivates a parcel on the field in question, on which over 200 kg of vegetables have been harvested for several years. This parcel is of medium size (4 m x 8 m) and is intended to serve as a standard example for new customers.
- 9 For the field in question – in respect of which direct payments were requested – the holding also received project support under Paragraph 17 ('Diversification into non-agricultural activities') of the Special Directive of the Federal Minister for Agriculture, Forestry, Regions and Water Management on the implementation of project measures within the framework of the Austrian Rural Development Programme 2014-2020. The objectives of this project support are to 'strengthen

agricultural enterprises by means of additional non-agricultural income generated from selling products and services in accordance with market requirements’ and to ‘generate non-agricultural income through the development of economic activities in rural areas using agricultural production factors’. Specifically, this involved subsidising equipment for soil cultivation and sowing, as well as the irrigation system, for the purposes of cultivating fine vegetables.

Principal arguments of the parties to the main proceedings

- 10 The applicant argues that the areas would be at her disposal on 9 June of each claim year (which is the reference date set in Austria under Article 33(1) of Regulation (EU) No 1307/2013). According to the applicant, the *de facto* transfer of a single crop management measure (namely the removal of weeds) to the user is, by its very nature, a marketing measure, in respect of which non-fulfilment could lead to poorer harvests or qualities. In the instant case, this would therefore constitute a speculative purchase (*‘Hoffnungskauf’*). In any event, the power of disposal over the areas would remain with the farmer.
- 11 According to the applicant’s argument, such contracts have always been customary in the vegetable growing industry, the fruit growing industry (for example, pick-your-own strawberry farms) and in the timber industry. This model has been enshrined in the Allgemeines bürgerliches Gesetzbuch (Austrian General Civil Code, ‘the ABGB’) since as far back as 1812. According to both settled case-law and the user agreement, ownership of the harvested crop transfers at the time of harvesting, even if the parcel has been ‘made available’ for use prior to that time. Since self-harvest parcels are – in comparison to purely market-based fruit sales – an innovative sales concept involving direct sales to the end customer, the holding also qualified to receive diversification support from the AMA during the 2015/16 year. The concept was scrutinised at that time and found to be eligible for support; it was also subject to an on-site inspection by the AMA. According to the applicant’s submissions, the self-harvest parcels combine these traditional legal forms with the stakeholder involvement required by EU law (see Article 52 et seq. of Regulation (EU) No 1305/2013).
- 12 Even in the context of the normal arable farming, harvesting is mostly carried out by agricultural contractors. According to the applicant, she would carry out the soil cultivation, seedbed preparation and sowing, perform two hoeing passes, provide the irrigation, and carry out the post-harvest mulching. All seeds and planting material are also provided exclusively by the applicant. If this were not the case, then it would be almost impossible to assure the organic status in the event of an inspection. The applicant would provide professional irrigation throughout the year. Only certain maintenance work would be outsourced to the buyers of the harvested crop. According to the applicant’s submissions, this is the equivalent, from a legal perspective, of engaging a service provider.

- 13 With regard to the authority's argument that this is a purely recreational activity (see below), the applicant submits that, in France, there are numerous examples of permacultures where – in a close combination of different vegetable varieties – considerable yields are achieved, which in some cases are higher than those achieved through conventional vegetable cultivation. She therefore rejects the contention that small-scale, manual vegetable cultivation would necessarily produce lower yields than large-scale mechanised cultivation. According to the Applicant, her customers have included both kindergartens and schools which did not perform the field cultivation work during 'free time'. Similarly, parcels were also leased free of charge to four refugee families from Ukraine; according to the applicant, these families could work on their parcel throughout the day, since they were not engaged in any gainful employment. The applicant contends that, for many people, this is actually a matter of producing their own food and is not simply a meaningful leisure activity.
- 14 According to the applicant's argument, the adopted concept ensures that the organic vegetables produced do not enter the food retail industry via intermediaries, but instead reach the customers directly by means of self-harvesting. The higher income generated by eliminating the intermediate trade and adopting alternative strategies for marketing the farms' initial production serves to protect the income and economic health of the holdings.
- 15 The defendant authority argues that there is an entitlement to aid if the relevant areas are at the disposal of the land manager on 9 June of the respective claim year (see Paragraph 23(1) of the Horizontal CAP Regulation, Article 33(1) of Regulation (EU) No 130[7]/2013). According to the case-law of the Court of Justice of the European Union, the areas would be deemed to be at the farmer's disposal if there is evidence of actual use of those areas and the farmer has a sufficient degree of autonomy in conducting his or her agricultural activity. Hence, the farmer would have to be able to exercise a certain degree of decision-making power when using the area concerned in order to be able to carry out his or her agricultural activity on this area (see judgment of 7 April 2022, *Avio Lucos*, C-116/20, EU:C:2022:273, judgment of 14 October 2010, *Landkreis Bad Dürkheim*, C-61/09, EU:C:2010:606, and judgment of 24 June 2010, *Pontini and Others*, C-375/08, EU:C:2010:365). According to the defendant authority, however, the field in question would not be at the applicant's disposal on 9 June, since the applicant had made the 'self-harvest parcels' available to the customers from the time of handover for use. As of the handover date, the field was no longer actually used by the applicant; instead, the respective parcel was used by the respective customer.
- 16 After the handover date, the applicant would not have sufficient autonomy to carry out the agricultural activity, since responsibility transferred to the customer at the time he or she took charge of a self-harvest parcel, and in any event from the end of April/beginning of May. According to the authority's submissions, it is the customers who decide whether to maintain the parcel, whether the weeds are to be extracted or mowed, as well as whether or not to appoint a 'substitute user'.

It is therefore the client's exclusive responsibility to determine whether and how to maintain the parcel and, consequently, whether or not he or she will achieve crop yields and, if so, in what quality.

- 17 According to the authority, the users carry out the harvesting and maintenance in their free time and hence the area is a recreational area according to Paragraph 20(3) of the Horizontal CAP Regulation. If the primary purpose of agricultural production under the Common Agricultural Policy (CAP) is to supply the population with agricultural products, then this would constitute a leisure activity – just as if it were a substitute for a private garden – through which agricultural products are produced in either large or small quantities, depending on the user's preference. The authority contends that there is no systematic generation of products to supply the population.
- 18 In response to the applicant's argument that self-harvest parcels are legally identical to engaging a service provider, the authority contends that farmers pay a service provider for their service; this means that farmers merely have the work carried out on their behalf, on their account and at their risk. Under such an arrangement, the farmer would keep the harvest. In the case of the field in question, the Defendant authority submits that the situation is reversed: The users (= customers) of the parcels had to pay a fee in order to be allowed to use these parcels, in other words to maintain, weed and harvest them, etc. The customers kept the harvest. It therefore follows that the customers were not working in the name of, on the account of and at the risk of the applicant.
- 19 In response to the objection that the transfer of use for self-harvesting is a traditional form of contract within the agricultural industry, the authority contends that, in the case of pick-your-own strawberry farms for example, the respective farmer cultivates the area. The customers (that is to say, pickers,) are merely allowed to pick the strawberries – usually at a favourable price. However, the pickers are not responsible for the pick-your-own strawberry farm. It is the farmer of the strawberry field who decides how to manage the pick-your-own strawberry farm and when harvesting can take place.

Brief summary of the basis for the reference

- 20 The reference for a preliminary ruling seeks to clarify the conditions under which aid may be claimed for an area of arable land.
- 21 To this end, the concept of a 'holding' within the meaning of Regulation (EU) No 1307/2013 must be interpreted. Under this Regulation, 'holding' means all the units used for agricultural activities and managed by a farmer situated within the territory of the same Member State.
- 22 Hence, the unit must firstly be used for an 'agricultural activity'. This is particularly the case if agricultural products are grown on the unit. In the present case, there is no doubt that agricultural products (vegetables) are being grown.

- 23 Secondly, the unit must be ‘managed’ by the farmer. In this regard, the Court has already ruled that the agricultural activities on the areas in question must be carried out in the name and for the account of the farmer. In this specific case, it is doubtful whether this condition is fulfilled.
- 24 Under Article 32 of Regulation (EU) No 1307/2013, any agricultural area of a holding that is used, at least predominantly, for an agricultural activity is eligible for aid. This is so in the case for the field in question, which is used as arable land – and not, for example, as a ‘recreational area’.
- 25 On the other hand, it is doubtful whether the parcels are at the farmer’s disposal on 9 June of each claim year, as is required under Article 33 of Regulation (EU) No 1307/2013, read in conjunction with Paragraph 23 of the Horizontal CAP Regulation.
- 26 When analysing the case-law pertaining to the issues of uncertainty, it is apparent that none of the judgments of the Court of Justice of the European Union that were considered match the specific details of the case.
- 27 The statement that the agricultural activity must be carried out on the land concerned in the farmer’s name and on his behalf was cited in the judgment in *Landkreis Bad Dürkheim*, primarily in connection with the requirement that no third party carry out any agricultural activity on the disputed areas at the same time. In order to avoid the situation where a number of farmers claim allocation of the parcels concerned to their holding, it was necessary to emphasise in that judgment that these areas may not, during that period, be considered as allocated to other farmers’ holdings for the purposes of the single payment scheme.
- 28 The requirement that the agricultural activity must be carried out in the farmer’s own name and on his or her own behalf is not fully met in the instant case of a ‘self-harvest area’ because, although the applicant owns the areas, carries out the preparatory and clean-up work on them, and also ensures they are continuously irrigated, the users are charged only a fixed amount for this; the question of whether and to what extent a yield is generated has no bearing on the applicant’s operating results.
- 29 The *Avio Luco* judgment appears to be more relevant. In that judgment, the Court considered it permissible for direct payments to be granted to a person who does not himself fully manage a particular grassland area, but passes it on free of charge to animal breeders to use for grazing, providing that, in so doing, he undertakes not to interfere with the grazing and to carry out maintenance measures, that is, measures to ensure the upkeep of the pastureland, such as the removal of poisonous weeds and excess water. In this respect, the concept of ‘agricultural activity’ also includes the maintenance of pastureland in good agricultural and environmental condition.
- 30 This approach also seems appropriate for the present case, in which the applicant maintains an area of arable land in a condition that is suitable for the cultivation of

crops by means of preparatory measures, continuous irrigation and, where necessary, the removal of weeds, and also cultivates the crops herself, even though she does not harvest them. In this case, the Applicant retains the power of disposal and also appears to retain a sufficient degree of autonomy in the exercise of the agricultural activity, since she can choose her own contract partners and also exerts influence on the success of the harvest during the vegetation period. By contrast, the fact that she receives only a lump sum payment and that the economic success is not directly linked to the harvest yield, would appear to be of secondary importance. This is particularly the case given that the adopted approach is intended specifically to ensure that agricultural production on the area in question will be economically viable for the applicant over the longer term and hence that she will simply be able to sustain it.

- 31 Hence, in the view of the referring court, the more compelling arguments militate in favour of the field at issue in the present case being deemed an area that is eligible to receive aid in connection with the applicant's holding.