

Anonymised version

Translation

C-726/20 – 1

Case C-726/20

Request for a preliminary ruling

Date lodged:

29 December 2020

Referring court:

Conseil d'État (Belgium)

Date of the order for reference:

4 December 2020

Applicant:

CT

Ferme de la Sarte SPRL

Defendant:

Région wallonne

CONSEIL D'ÉTAT, JUDICIAL BRANCH

Administrative Litigation Division

XVth CHAMBER

JUDGMENT

[OMISSIS] of 4 December 2020

[OMISSIS]

1. CT,
2. **Private Limited Company Ferme de la Sarte,**
with an address for service at [OMISSIS]

Liège,

v

Région wallonne, represented
by its Government,
with and address for service at [OMISSIS]
Brussels.

I. The application

By application lodged electronically on 25 January 2019, CT and Ferme de la Sarte sprl sought annulment of ‘the decisions of the Walloon Region – Department of Agriculture – Directorate for Agricultural Structures of 26 November 2018 and 30 November 2018 declaring the action that had been brought admissible and unfounded, and as a result refusing to grant an application for set-up aid and aid for investment’.

II Procedure

[OMISSIS] **[Or. 2]** [OMISSIS]

[procedural issues without relevance for the reference for a preliminary ruling]

III. Facts

1. In order to become part of the family agricultural holding, the first applicant acquired 25.20% of the shares of the second applicant and was appointed to the position of manager. On 23 February 2018 he concluded a takeover agreement with his father in respect of the holding.

2. On 9 March 2018, the Comité d’installation (Set-up Committee) informed the first applicant that it considered that he had the equivalent of two years’ experience.

3. On 21 March 2018, the second applicant submitted three applications for aid:

- an application for set-up aid (undivided partial takeover of 63 shares in the company);
- an application for investment aid in respect of a storage barn; **[Or. 3]**
- an application for investment aid for the purchase of a cylinder mower.

4. On 20 and 28 June 2018, the Director of the Directorate for Agricultural Structures of the Department of Agriculture decided that the three applications for aid were not eligible for aid. The correspondence notifying those decisions

mentioned the possibility of submitting an appeal to the Director of the Walloon Paying Agency.

5. On 31 July 2018, the applicants lodged an appeal with the Walloon Paying Agency against the three decisions referred to above.

6. On 24 September 2018, the Walloon Paying Agency held a hearing of the first applicant.

7. On 26 November 2018, the Director of the Walloon Paying Agency took the decision to refuse the application for aid for setting-up by takeover.

That is the first contested act, the grounds for which are as follows:

‘...

Whereas, with regard to business start-up aid for young farmers, recital 17 of Regulation No 1305/2013 explains that:

“A farm and business development measure should facilitate the initial establishment of young farmers and the structural adjustment of their agricultural holding after the initial setting up”.

The description of that support scheme in the “Programme wallon de développement rural” (Walloon Rural Development Programme), listed as sub-measure “6.1- Business start-up aid for young farmers”, in point 8.2.3.3.1.6.1 of that programme, explains inter alia that:

“The purpose of the sub-measure is to grant financial aid to young people setting up whilst ensuring that they do so under the best possible conditions, that is to say, that they have suitable occupational skills and an appropriate business plan for their holdings.

The support consists of financial aid for taking over, in whole or in part, an existing holding or for creating a new holding.

...

The average set-up costs for an agricultural holding in Wallonia were EUR 225,000 during the period 2012-2014. They have steadily increased over recent years, and so the flat-rate aid of EUR 70,000 provided for in respect of that measure represents an average aid of 30% of the set-up costs.”;

Whereas this means that the business start-up support scheme for young farmers, organised in the Walloon Region and approved by the European Commission, is designed to provide partial funding for a young farmer to set up on an agricultural holding, by creating or taking over the latter, at a flat rate of EUR 70,000 and not to provide aid for existing holdings to develop an activity which is unrelated to agriculture;

Whereas the applicant’s business plan expressly mentions that the holding is being taken over and the investment being made in order to further the activities of producing turf rolls and green roofs. Whereas the business plan [Or. 4] mentions that the set-up aid is intended for the purchase of a mower for turf production, making for “faster mowing”, which will free up time for the new activity of “growing plants for green roofs”, the building of a storage shed “to provide temporary storage for the turf rolls harvested”, and “starting the growing of new plant crops (thanks to the well-equipped greenhouse) in order to embark on the production of green roofs”;

Whereas the applicant added at his hearing that “the applications for investment relate only to turf”; whereas EV added that “only the hectares dedicated to the production of turf” would be taken over; whereas FD explained that “it concerns ultimately anything that is not typical farming”; whereas those statements are confirmed by the letter by which they brought their appeal, which states that the part of the holding that CT is taking over represents only “32[.]71 hectares of the 174[.]57 [hectares] of DS 2017 (declaration of area 2017), which is less than 20%”; whereas that corresponds to the information given in the declarations of area for the preceding years, which give in respect of “non-edible horticultural crops” – the term used by EV to describe the production of turf or sedum as he stated at the hearing – a total of 35.55 hectares in 2018 and 31.1 hectares in 2017;

Whereas it is therefore shown that the aid for setting up by takeover and the aid for investment are not intended here for the takeover of an agricultural holding but for the development of a secondary activity on a holding that is unrelated to agriculture, namely the production of turf or of green roofs;

Those applications therefore fall outside the scope of Articles 17 and 19 of Regulation No 1305/2013 as they have been implemented by the Walloon Region;

Whereas the fact alone that Ferme de la Sarte SPRL is currently engaged in agricultural activity does not mean that those applications can be granted, since the aid applied for by CT for the takeover is not, in itself, intended for the takeover or development of the agricultural activity of the holding, but for the creation on the holding of a parallel activity that is unrelated to agriculture’.

8. On 30 November 2018, the Director of the Walloon Paying Agency also took decisions not to grant the other two applications for investment aid. Those are the second and third contested acts, the grounds for which are as follows:

‘Whereas recital 15 of Regulation (EU) No 1305/2013 explains as follows with regard to investment aid:

“In order to improve the economic and environmental performance of agricultural holdings and rural enterprises, to improve the efficiency of the agricultural products marketing and processing sector, including the setting up of small scale processing and marketing facilities in the context of short supply chains and local markets, to provide infrastructure needed for the development of agriculture and

forestry and to support non-remunerative investments necessary to achieve environmental aims, support should be provided for physical investments contributing to these aims.”

[OMISSIS] [Or. 5] [OMISSIS] [citation of Article 17(1)(a) to (d) of Regulation No 1305/2013]

Whereas it can be inferred from Article 17 of Regulation No 1305/2013 and from the description of its objectives in recital 15 of that regulation, that investment aid is designed to improve agricultural production, develop, modernise or adapt the holding, or support it in acquiring machinery that is non-remunerative but beneficial for the environment. Whereas each of those objectives is related to agricultural production or at least to the agricultural character of the holding. Whereas it cannot therefore be held that such aid is intended for the acquisition of an investment that is unrelated to agricultural activity;

Whereas turf production and the production of green roofs are not mentioned in Annex I to the Treaty on the Functioning of the European Union. Whereas those types of production are not designed to produce foodstuffs, directly or indirectly. Whereas the investment applications are not, moreover, intended for the acquisition of machinery that is non-productive but beneficial to the environment, they are, on the contrary, intended for the purchase of machinery that is productive but for production that is not related to agricultural activity. Whereas the investment applications cannot therefore be considered to be related to agricultural activity;

Whereas the fact alone that Ferme de la Sarte SPRL is currently engaged in agricultural activity does not mean that those applications can be granted, since the aid applied for by CT for the investments is not, in itself, intended for the takeover or development of the agricultural activity of the holding, but for the creation on the holding of a parallel activity that is unrelated to agriculture’.

IV. Admissibility

IV.1 [OMISSIS]

[OMISSIS] [Or. 6] [OMISSIS]

IV.2. Assessment

[OMISSIS] [Or. 7] [OMISSIS]

[examination of the plea of inadmissibility put forward by the defendant on grounds that the three contested acts lack any connection]

Since the connection is established, the action is admissible in so far as it is directed against the three contested acts.

V. *Third plea – First part*

V.1. *Arguments of the parties*

The third plea alleges infringement of Article 38 of the Treaty on the Functioning of the European Union (TFEU) and Annex I thereto, of Article 17 of Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), of Articles 11 and 33 of the Order of the Walloon Government of 10 September 2015 on aid for development and investment in the agricultural sector, Articles 9 and 10 of the Ministerial Order of 10 September 2015 implementing the abovementioned order of the Walloon Government of 10 September 2015, of Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, of Articles 10 and 11 of the Constitution, of the general legal principle of proportionality and of manifest error of assessment.

In the first part of the plea, the applicants consider that the contested acts wrongly state that the production of turf, and of other crops such as sedum, does not constitute agricultural production as referred to in Annex I to the TFEU. They argue that horticultural production in the broad sense is covered by the list in the abovementioned Annex I. They state that Article 38 TFEU seeks to define agricultural products and that that provision gives a double definition of them: first, a definition that may be described as conceptual and, secondly, a definition that may be described as analytical by reference to an enumerative list. They consider that the contested acts give a restrictive analysis of that provision since they limit agricultural products to those which relate to food, within the general meaning of the term. They note that Chapter 6 of the abovementioned Annex I refers to ‘Live trees and other plants; bulbs, roots and the like; cut flowers and ornamental foliage’ and that in the event of difficulty of interpretation, the conceptual definition may be adopted. They consider that a plant product as referred to in Chapter 6 means a product interpreted as being a product of the soil, which is envisaged by Article 38 TFEU in its conceptual definition. They contend that if the opposing party maintains its interpretation of that provision, it may be necessary to make a reference to the Court of Justice of the European Union for a preliminary ruling. **[Or. 8]**

The opposing party responds that the plea is inadmissible since it alleges infringement of Articles 20 and 21 of the Charter of Fundamental Rights of the European Union but the applicants fail to explain in what way those provisions are infringed. It considers that, contrary to what the applicants contend, turf is not referred to in Annex I to the TFEU since it is not covered by ‘Live trees and other plants; bulbs, roots and the like; cut flowers and ornamental foliage’. It considers, based on the information appearing on the European Commission’s official website, that ‘live plants and floriculture products’ only includes ‘live trees, shrubs and bushes and other goods commonly supplied by nursery gardeners or florists for planting or ornamental use’. It concludes that there is therefore no need

to refer a question to the Court of Justice of the European Union for a preliminary ruling.

The applicants respond that they maintain the submissions made in their application for annulment. They do not see how it is possible to distinguish turf from live plants and floriculture products, since turf is a live plant requiring horticultural work and may be intended for ornamental use. They therefore consider that the explanations given by the opposing party are unconvincing and that the latter dismisses too readily the possibility of referring to the Court of Justice of the European Union a question on whether turf production can be regarded as being an agricultural and/or horticultural activity.

In their recent pleadings, the parties refer to their earlier pleadings.

V.2. *Assessment*

Article 17 of Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005 provides as follows:

‘Investments in physical assets’

1. Support under this measure shall cover tangible and/or intangible investments which:

(a) improve the overall performance and sustainability of the agricultural holding;

(b) concern the processing, marketing and/or development of agricultural products covered by Annex I to the TFEU or cotton, except fishery products; the output of the production process may be a product not covered by that Annex; where support is provided in the form of financial instruments, the input may also be a product not covered by that Annex on condition that **[Or. 9]** the investment contributes to one or more of the Union priorities for rural development;

(c) concern infrastructure related to the development, modernisation or adaptation of agriculture and forestry, including access to farm and forest land, land consolidation and improvement, and the supply and saving of energy and water; or

(d) are non-productive investments linked to the achievement of agri-environment-climate objectives as pursued under this regulation, including biodiversity conservation status of species and habitat as well as enhancing the public amenity value of a Natura 2000 area or other high nature value systems to be defined in the programme.

2. Support under point (a) of paragraph 1 shall be granted to farmers or groups of farmers.

In the case of investments to support farm restructuring, Member States shall target the support to farms in accordance with the SWOT analysis carried out in relation to the Union priority for rural development “enhancing farm viability and competitiveness of all types of agriculture in all regions and promoting innovative farm technologies and sustainable management of forests”.

3. Support under points (a) and (b) of paragraph 1 shall be limited to the maximum support rates laid down in Annex II. Those maximum rates may be increased for young farmers, for collective investments, including those linked to a merger of Producer Organisations, and for integrated projects involving support under more than one measure, for investments in areas facing natural and other specific constraints as referred to in Article 32, for investments linked to operations under Articles 28 and 29 and for operations supported in the framework of the EIP for agricultural productivity and sustainability in accordance with the support rates laid down in Annex II. However, the maximum combined support rate may not exceed 90%.

4. Support under points (c) and (d) of paragraph 1 shall be subject to the support rates laid down in Annex II.

5. Support may be granted to young farmers setting up for the first time in an agricultural holding as head of the holding in respect of investments to comply with Union standards applying to agricultural production, including occupational safety. Such support may be provided for a maximum of 24 months from the date of setting up as set out in the rural development programme, or until the actions defined in the business plan referred to in Article 19(4) are completed.

6. Where Union law imposes new requirements on farmers support may be granted for investments to comply with those requirements for a maximum of 12 months from the date on which they become mandatory for the agricultural holding’.

Article 38 TFEU provides as follows:

‘1. The Union shall define and implement a common agriculture and fisheries policy.

The internal market shall extend to agriculture, fisheries and trade in agricultural products. “Agricultural products” means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products. References to the common agricultural policy or to agriculture, and the use of the term “agricultural”, shall be understood as also referring to fisheries, having regard to the specific characteristics of this sector. **[Or. 10]**

2. Save as otherwise provided in Articles 39 to 44, the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products.

3. The products subject to the provisions of Articles 39 to 44 are listed in Annex I.

4. The operation and development of the internal market for agricultural products must be accompanied by the establishment of a common agricultural policy’.

Annex I to the TFEU includes, in Chapter 6, ‘Live trees and other plants; bulbs, roots and the like; cut flowers and ornamental foliage’.

Commission Implementing Regulation (EU) 2018/1602 of 11 October 2018 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff includes the following note concerning the nomenclature in Chapter 6 of Annex I to the TFEU: ‘Subject to the second part of heading 0601, this chapter covers only live trees and goods (including seedling vegetables) of a kind commonly supplied by nursery gardeners or florists for planting or for ornamental use’. That nomenclature does not mention turf among live trees and other plants; bulbs, roots and the like; cut flowers and ornamental foliage.

In its judgment of 4 October 2018, the Court of Justice of the European Union held as follows:

‘108. Second, it must also be noted that, where there is no judicial remedy against the decision of a national court, that court is in principle obliged to make a reference to the Court within the meaning of the third paragraph of Article 267 TFEU where a question of the interpretation of the FEU Treaty is raised before it (judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 42).

109. Moreover, the obligation to make a reference laid down in that provision is intended in particular to prevent a body of national case-law that is not in accordance with the rules of EU law from being established in any of the Member States (judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 33 and the case-law cited).

110. Indeed, that court is not under such an obligation when it finds that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt, and the existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the European Union (see, to that effect, judgments of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 21; of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraphs 38 and 39; and of 28 July 2016, *Association France Nature Environnement*, C-379/15, EU:C:2016:603, paragraph 50)’ (CJEU, judgment of 4 October 2018, *European Commission v French Republic*, C-416/17, EU:C:2018:811, paragraphs 108 to 110). **[Or. 11]**

The decisive ground in the contested acts is based on an interpretation of Article 17 of Regulation (EU) No 1305/2013, cited above, excluding from the scope of that provision the production of turf or of green roofs. That interpretation is, however, challenged by the applicants, since the provision in question has not been the subject of an interpretation by the Court of Justice, and the correct interpretation of EU law is not so obvious as to leave no scope for any reasonable doubt. As this concerns an application for aid within the framework of the common agricultural policy, it is necessary to avoid the development of case-law relating to the concept of ‘agricultural product’ which would not be in accordance with the rules of EU law.

Accordingly, the Conseil d’État considers it should refer a question to the Court for a preliminary ruling [OMISSIS]

[wording of the question contained in the operative part]

**ON THOSE GROUNDS,
THE CONSEIL D’ÉTAT HEREBY DECIDES:**

Article 1

To reopen the proceedings.

Article 2.

To refer the following question to the Court of Justice of the European Union for a preliminary ruling:

‘Is Article 17 of Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005 to be interpreted as excluding from its scope the production of turf or of green roofs?’. [Or. 12]

[OMISSIS] [procedural issues]

Delivered at an open hearing of the XVth Chamber in Brussels, on 4 December 2020, by [formation of the court].

[OMISSIS] [signatures of the Registrar and of the President of the Chamber]