Case C-714/23

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:

23 November 2023

Referring court:

Landesverwaltungsgericht Tirol (Austria)

Date of the decision to refer:

22 November 2023

Appellant:

Benediktinerabtei Ettal

Respondent authority:

Bezirkshauptmannschaft Innsbruck

Subject matter of the main proceedings

Is it compatible with the free movement of capital for the acquisition of agricultural land by a farmer to be linked to his or her ability to farm or co-farm that land, which implies that the farmer's main establishment is not unreasonably far from that land?

Subject matter and legal basis of the request

Article 263 TFEU

Questions referred for a preliminary ruling

1. **Must Article 63 TFEU be interpreted** as precluding a provision of national law, such as Paragraph 6(3) of the Tiroler Grundverkehrsgesetz 1996 (Tyrol Law on the transfer of land; 'the TGVG 1996'), under which the acquisition of rights in agricultural land by a farmer within the meaning of Paragraph 2(5)(a) is only to be authorised by the land transfer authority if

the acquisition of rights is not contrary to the principles set out in Paragraph 1(1)(a) and the acquirer of rights shows that he or she is co-farming the agricultural land in a sustainable and proper manner as part of his or her establishment?

2. **If the answer to this question is in the affirmative:** Does a objectively comparable situation exist between, on the one hand, a farmer whose agricultural establishment is located in close proximity to the land being acquired and who intends to co-farm that land as part of his or her establishment, and, on the other, a farmer whose agricultural establishment is not located in (in agricultural terms reasonable) close proximity to the land being acquired and who does not intend to co-farm that land as part of his or her establishment in order to contribute to the maintenance of his or her establishment, but who leaves the land concerned to local farmers to farm under a lease or, for an indefinite period, under precaria?

2.a **If the answer to this question is in the affirmative:** Does the justification of the creation, preservation or strengthening of effective agricultural or forestry establishments apply in respect of the restriction of the free movement of capital since Paragraphs 6, 7 and 7a of the TGVG 1996 are aimed at ensuring that agricultural land is farmed in a sustainable manner and in accordance with its purpose by farmers as part of their establishment in order to strengthen agricultural establishments and prevent the fragmentation and inappropriate use of farmland?

Provisions of European Union law cited

TFEU, Article 63 to 65.

Provisions of national law cited

Tiroler Grundverkehrsgesetz (TGVG 1996), Paragraphs 1 to 7a.

Succinct presentation of the facts and procedure in the main proceedings and the essential arguments of the parties in the main proceedings

1 By a notarial instrument, a Benedictine convent donated plots of land in Scharnitz, Austria, to a Benedictine abbey in Ettal, Germany. Some of those plots are open ground, whilst others have a barn built on them.

2 The appellant (and donee) is a legal person established under canon law. It operates an agricultural establishment in Ettal, Germany, which grows fruit and vegetables and rears livestock, keeping an average of 65 dairy cows. That establishment is approximately 40 to 45 kilometres away from the donated agricultural properties in Scharnitz.

3 The commercial value of the land used for agricultural purposes is around EUR 330 500.

4 To date, the farmland in Scharnitz has been farmed by local farmers under a precarium.

5 In the expression-of-interest procedure, several persons registered their interest in acquiring the agricultural land.

6 The appellant operates an agricultural establishment with livestock farming in Ettal, Germany. Around 120 hectares of farmland and around 200 hectares of woodland are used. The necessary infrastructure (buildings, machinery and equipment, etc.) is available. The practical work at the establishment is carried out by employees.

7 The Benedictine convent in Scharnitz owns land totalling 59 923 m^2 of agricultural land, 1 036 m^2 of which is forest and 9 809 m^2 of which is constructed and other land, including gardens. For more than 20 years the agricultural land of the Benedictine convent in Scharnitz has no longer been used by the convent itself, but has instead been farmed free of charge by four to five working farmers. According to the information provided by the municipality of Scharnitz, a building permit was granted in 2003 for the southernmost building to adapt the remainder of the farm building and it was also implemented. According to the onsite surveys, the building was never used for agricultural purposes, but only for storage and parking.

8 The appellant does not intend to farm the land donated to it as part of its agricultural establishment (not even in part). There will be no change to the previous farming in Scharnitz. The agricultural land will continue to be farmed free of charge by local farmers under precaria.

9 In a decision of 30 April 2020, the Bezirkshauptmannschaft Innsbruck (District Administrative Authority, Innsbruck) refused authorisation of transfer of ownership, essentially on the grounds that the acquirer had not acted as a farmer in the procedure on account of the intention to lease the land and therefore an expression-of-interest procedure had to be carried out. As several interested farmers were found as potential buyers of the farmland in the course of that procedure, a special ground for refusal under Paragraph 7(1)(d) of the TGVG 1996 obtains.

10 In its judgment of 20 August 2020, the Landesverwaltungsgericht Tirol (Regional Administrative Court of Tyrol) dismissed as unfounded the action brought against that decision. As grounds for its decision, it essentially stated that the appellant does not have the status of a farmer within the meaning Paragraph 2(5) of the TGVG 1996. By reason of the classification as a legal person alone, there was no contribution to the maintenance of the person farming the land and his or her family as an essential criterion and therefore the status of farmer was ruled out under Paragraph 2(2) of the TGVG 1996. Since the appellant was not to be

regarded as a farmer within the meaning of Paragraph 2(5) of the TGVG 1996 with regard to the acquisition of rights, Paragraph 7a of the TGVG 1996 was also rightly applied and an expression-of-interest procedure was initiated. The interested party model followed the case-law of the Court of Justice. Consequently, the obligation that the acquirer farm the land him or herself no longer applied; instead, there has to be no party interested in the land who is willing to pay the price customary in the location concerned.

11 The appellant lodged an appeal against that judgment with the Austrian Verfassungsgerichtshof (Constitutional Court).

12 The Verfassungsgerichtshof set aside that judgment by its judgment of 10 March 2021. As grounds for its decision, it essentially stated that, in view of the authorisation requirements set out in Paragraph 6(1) of the TGVG 1996, account had to be taken of the fact that the appellant had been operating an agricultural establishment at its location for a long time. In that respect, the extent to which the agricultural activity is managed by an appointed member of the order with agricultural expertise and whether that meets the authorisation requirements laid down Paragraph 6(1) of the TGVG 1996 and can be equated with the agricultural activity of legal persons must be examined (by the administrative court hearing the case).

13 The appeal lodged with the Landesverwaltungsgericht Tirol was dismissed again by a judgment of 26 July 2022. As grounds for its decision, the Landesverwaltungsgericht Tirol essentially stated that, on the basis on the findings in the agricultural expert's report, it was to be assumed that the appellant is a farmer within the meaning of Paragraph 2(5)(a) of the TGVG 1996 and that the respondent authority was wrong to have conducted an expression-of-interest procedure. The ground for refusal under (what is now) Paragraph 7(1)(e) of the TGVG 1996 did therefore not obtain.

14 However, the acquisition of agricultural land in Scharnitz by a major landowner in Ettal in Germany, who intends to have it farmed by local farmers in Scharnitz under precaria, is contrary the principles laid down in Paragraph 1(1)(a) of the TGVG 1996.

15 Furthermore, the appellant had not shown that it would farm the agricultural land in a sustainable and proper manner within the meaning of Paragraph 6(3) of the TGVG 1996 as part of its establishment, especially as it did not intend to farm the land at issue from the agricultural establishment in Ettal.

16 The appellant lodged a further appeal against that judgment with the Verfassungsgerichtshof.

17 In its appeal, the appellant stated, in summary, that the current owners had already left the agricultural land to local farmers for farming for many years (in any event for more than ten years) under a precarium. The only obstacle to leasing the land to local farmers is the uncertain fate of the farmland concerned on account of the

age-related changes in the members of the donor's order and, in particular, the outcome of the present proceedings. Expressions of interest from potential local farmers have already been received. That was also known to the Landesverwaltungsgericht Tirol. The conclusion of the Landesverwaltungsgericht Tirol that the acquisition of rights by the applicant is contrary the creation, preservation and strengthening of effective agricultural establishments is therefore incomprehensible. Lastly, the decision is founded on legal bases which are contrary to the EU law and the constitution. Against the background of the decision of the Court of Justice of the European Union of 23 September 2003, C-452/01, *Ospelt*, Paragraph 6(1) and (3) and Paragraph 7(1)(a) of the TGVG 1996 are contrary to EU law because farming by the acquirer him or herself or co-farming have been introduced. In addition, Paragraph 6(3) and Paragraph 7(1)(a) of the TGVG 1996 infringe the principle of equality because there is a serious breach of EU law.

18 The Verfassungsgerichtshof set aside the judgment of the Landesverwaltungsgericht Tirol of 26 July 2022 by its judgment of 15 June 2023.

19 The Verfassungsgerichtshof essentially based its decision on the following considerations:

The Verfassungsgerichtshof assumes that the co-farming obligation laid down Paragraph 6(3) of the TGVG 1996 implies at least a partial obligation that the acquirer farm the land him or herself. That is also clear from the fact that the legislature intended to ensure close proximity between the acquiring farmer and the agricultural property to be acquired through Paragraph 6(3) of the TGVG 1996. The (sub)leasing of agricultural land or a precarium to local farmers, on the other hand, would mean that close proximity could not always be ensured. If the legislature had also wanted to subsume a lease or precarium, for example, under the term 'co-farming', farmers from other federal states or countries would also have been given the opportunity to obtain authorisation of transfer of ownership.

In its decision in *Ospelt*, the Court of Justice stated that the restrictive condition that the land be farmed by the acquirer him or herself is not always necessary to achieve the objectives of the (Vorarlberg) Land Transfer Law: the requirement that the land be farmed by the acquirer him or herself also precludes sale of land if, at the moment of sale, the land is farmed by a tenant farmer rather than the landowner and the new owner (who will not farm the land him or herself) has undertaken to continue to have the land farmed by the same tenant (*Ospelt*, paragraph 51). In addition, the Court of Justice stated in *Ospelt* (paragraph 53) that the restrictive conditions for the acquisition of agricultural land are not always necessary with regard to the objectives of the (Vorarlberg) Land Transfer Law. If the (Vorarlberg) Land Transfer Law were interpreted by the national authorities as meaning that persons who are not farmers and foresters could be granted prior authorisation, irrespective of the obligation that the land be farmed by the acquirer and that he or she reside on it, if they give the necessary guarantees regarding the agricultural or forestry use of that land, the free movement of capital would not be

restricted beyond what is necessary to achieve the objective (see *Ospelt*, paragraph 48 to 52).

In the contested judgment of the Landesverwaltungsgericht Tirol, the appellant's application for authorisation of transfer of ownership was essentially dismissed on the ground that the appellant had not shown that it would co-farm the agricultural land as part of its establishment in a sustainable and proper manner within the meaning of Paragraph 6(3) of the TGVG 1996, although it was still planned to have the land in question farmed by local farmers in the form of precaria. Likewise, the rule on interested parties laid down in Paragraph 6(4) of TGVG 1996, in conjunction with Paragraph 7a thereof, was not applicable to the appellant by reason of its status as a farmer within the meaning of the TGVG 1996.

That is contrary to the requirements of EU law, which the Court of Justice of the European Union defined in detail in its decision in *Ospelt* (paragraph 50 et seq.):

National authorities must in any event disregard national law which makes the granting of authorisation of transfer of ownership dependent on the acquirer farming the land him of herself. That may be the case, for example, if no farmer comes forward as a party interested in acquisition or if one of the exceptions laid down in Paragraph 7a(8) of the TGVG 1996 applies.

Paragraph 7a(8)(f) of the TGVG 1996 stipulates that authorisation of transfer of ownership can be granted without an expression-of-interest procedure if an agricultural property is acquired by a non-farmer which has been co-farmed as part of the same agricultural establishment over the last ten years and is of essential importance to the tenant's establishment, provided that the farming under a tenancy agreement by the farmer who farmed that land most recently continues to be guaranteed for a period of at least ten years.

If, on the other hand, a farmer within the meaning of the TGVG 1996 wishes to acquire agricultural land and, mirroring the exception laid down Paragraph 7a(8)(f) of the TGVG 1996, does not wish to farm the property to be acquired him or herself (for example, on account of the long distance to his or her 'main establishment'), but to continue to lease it, the acquiring farmer must be refused authorisation of transfer of ownership on the ground that there is no co-farming, even though the (legitimate) objectives of Paragraph 1(1)(a) – the preservation and strengthening of a viable farming community in Tyrol through the creation, preservation or strengthening of effective agricultural or forestry establishments, the creation, preservation or strengthening of economically sound agricultural and forestry tenure, and the continuation or foundation of sustainable widespread farming of agricultural or forestry land – can be achieved, for example, in the case of professional farming by a tenant and in the case of appropriate (co-)farming by the acquirer himself or herself or, for example, in the case of subleasing by a non-farmer, if he or she satisfies the conditions laid down in Paragraph 7a(8)(f) of the TGVG 1996. The granting of authorisation of transfer

of ownership of agricultural land to a farmer is therefore dependent in any event on the farmer farming the land him or herself, which, however, has been deemed to be contrary to EU law by the Court of Justice.

20 On account of the judgment of the Verfassungsgerichtshof of 15 June 2023, further appeal proceedings are pending in this case before the Landesverwaltungsgericht Tirol.

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

21 The present case demonstrates parallels to the *Ospelt* case (C-452/01). In that case, the Court of Justice ruled that authorisation to acquire agricultural land may not be refused on the sole ground that the acquirer does not him or herself farm the land as part of a holding and on which he or she is not resident (see paragraph 54 of the judgment in *Ospelt*).

22 However, the present case is different in that the TGVG, which is relevant here, draws a distinction between farmers and non-farmers and the acquirer in the present case is a farmer.

23 Under the TGVG, the farmer must at least co-farm the land to be acquired (that is to say at least partially farm it him or herself). This means, one, that he or she wants to integrate it into his or her main establishment and, two, that his or her main establishment may not be too far away from that property.

24 Neither of the conditions is satisfied in the present case, which is why it is necessary to clarify whether they conform to EU law and therefore whether the appellant was rightly refused authorisation to acquire the agricultural land.

25 The TGVG 1996 aims to ensure that farmland is preserved as far as possible and put to sustainable and proper agricultural use, in an appropriate manner. The acquisition of rights in agricultural land is to serve to strengthen and preserve an effective indigenous farming community, in particular small farms, the preservation of which ultimately benefits the general public (Paragraph 1(1)(a) of the TGVG 1996).

26 In accordance with that objective, agricultural land is primarily to be acquired by farmers with an existing agricultural establishment or established operational concept in order to ensure the sustainable and proper farming of agricultural land, in particular by integrating the newly acquired land into the acquirer’s establishment. Agricultural establishments are to be increased or made more competitive through the purchase of additional agricultural land, which is consequently also to prevent the fragmentation, inappropriate use and waste of agricultural land. In that regard, the enforcement authorities are also required to prevent possible evading transactions, such as the acquisition of agricultural land for speculative purposes or the creation of new leisure residences by foreign investors, as far as possible.

27 A further objective of the TGVG 1996 is to ensure sustainable and environmentally acceptable farming. Accordingly, the law must also be implemented in the light of the international Convention on the protection of the Alps of 1994 (Alpine Convention), together with its additional protocols and the objectives and strategies laid down therein. The Federal Republic of Austria and the European Union are parties to the Alpine Convention. One of the implementing protocols is the Protocol on the Implementation of the Alpine Convention in the field of Transport (Transport Protocol). The European Union has signed and concluded the Transport Protocol on the basis of Council Decisions 2007/799/EC and 2013/332/EU.

28 Overall, in the view of the referring court an interpretation of Article 63 TFEU by the Court of Justice is therefore necessary in any event to determine whether the authorisation requirements laid down in Paragraph 6(3) of the TGVG 1996 are justified and proportionate, having regard to Paragraphs 7, 7a and 6(4) of the TGVG 1996 and in the light of the objective thereof.