

Case C-239/23

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:

17 April 2023

Referring court:

Verwaltungsgericht Sigmaringen (Germany)

Date of the decision to refer:

28 March 2023

Applicant:

Karl und Georg Anwander GbR Güterverwaltung

Defendant:

Land Baden-Württemberg

Subject matter of the main proceedings

EAGF and EAFRD – Regulation (EU) No 1305/2013 – Compensatory allowance for land in mountain areas and certain areas facing constraints – Eligibility conditions – Programme area – Implementation of an operation outside the programme area – Administrative regulations

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Is a national administrative regulation and support practice whereby the payment of a compensatory allowance for land in mountain areas and certain areas facing constraints is precluded solely because the land to be supported by the compensatory allowance is outside the region of the Member State, within the meaning of point (b) of the second subparagraph of Article 2(1)

- of Regulation (EU) No 1305/2013, that grants the compensatory allowance compatible with the first subparagraph of Article 31(1), Article 31(2), Article 32(1)(a), the first subparagraph of Article 32(2) and the second and third subparagraphs of Article 32(3) of Regulation (EU) No 1305/2013? Is the place of business of the farmer managing the land a permissible criterion for differentiation in that regard?
2. Is the first subparagraph of Article 31(1) of Regulation (EU) No 1305/2013 to be interpreted as meaning that the rules of a Member State or a region of the Member State which has decided to grant payments to farmers in mountain areas and other areas facing constraints, within the meaning of Article 31(1) of Regulation (EU) No 1305/2013, must be defined in such a way that the payment must also be granted in respect of land that has been classified as a mountain area or other area facing constraints, within the meaning of Article 32(1) of Regulation (EU) No 1305/2013, by another Member State or another region of the same Member State which has also decided to grant payments to farmers in mountain areas and other areas facing constraints within the meaning of Article 31(1) of Regulation (EU) No 1305/2013?
 3. Are the first subparagraph of Article 31(1) and Article 31(2) of Regulation (EU) No 1305/2013 to be interpreted as meaning that, in principle, a farmer derives directly from those provisions an entitlement under EU law to the grant of the payment (compensatory allowance) by the Member State or the region of the Member State if the farmer is an active farmer and manages land which has been classified as a mountain area or other area facing constraints, within the meaning of Article 32(1) of Regulation (EU) No 1305/2013, by the Member State or the region of the Member State and the Member State concerned or the region thereof has decided to grant payments (compensatory allowances) within the meaning of the first subparagraph of Article 31(1) of Regulation (EU) No 1305/2013?

If that question is answered in the affirmative:

- (a) Against whom is the entitlement under EU law derived from Article 31(1) of Regulation (EU) No 1305/2013 directed? Is it always directed against the Member State itself or, in any event, against the region (point (b) of the second subparagraph of Article 2(1) of Regulation (EU) No 1305/2013) of the Member State if the region has decided, independently of the Member State, to grant compensatory allowances to farmers pursuant to Article 31 of Regulation (EU) No 1305/2013?
- (b) Does the entitlement under EU law require, in principle, that the farmer meets further requirements in excess of those laid down in the first subparagraph of Article 31(1) and Article 31(2) of Regulation (EU) No 1305/2013, which are stipulated by the Member State

granting the compensatory allowance or the region thereof in its national implementing measures?

4. If Question 3 is answered in the negative:

Is the first subparagraph of Article 31(1) of Regulation (EU) No 1305/2013 to be interpreted as meaning that the rules of a Member State or one of its regions laying down the conditions for the grant of the payment (compensatory allowance) within the meaning of the first subparagraph of Article 31(1) of Regulation (EU) No 1305/2013 must have such legal status that farmers are entitled to the grant of the payment (compensatory allowance) if they meet the conditions for payment laid down by the Member State in question or the regions thereof, irrespective of the actual support practice of the Member State or the region thereof?

Provisions of European Union law relied on

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, in particular Article 31(1) and (2), Article 32(1) to (3)

Provisions of national law relied on

Verordnung über die Durchführung von Stützungsregelungen und des Integrierten Verwaltungs- und Kontrollsystems (Ordinance on the implementation of support schemes and the Integrated Administration and Control System, InVeKoSV) of 24 February 2015, Paragraph 2(2)

Legislation of the *Land* of Baden-Württemberg: Verwaltungsvorschrift des Ministeriums Ländlicher Raum zur Förderung landwirtschaftlicher Betriebe in Berggebieten und in bestimmten benachteiligten Gebieten (Administrative regulation of the Ministry of Rural Affairs on support for farms in mountain areas and in certain areas facing constraints, VwV AZL) of 6 November 2019, Paragraphs 2.1, 3.2, 3.2.1, 4.2

Succinct presentation of the facts and procedure

- 1 The applicant is seeking a compensatory allowance for agricultural land in Bavaria. It operates a dairy farm in the border area between the *Länder* of Baden-Württemberg and Bavaria. Its registered office is in Baden-Württemberg. It farms around 111 hectares of land in Baden-Württemberg and 27.4253 hectares of land in Bavaria. Baden-Württemberg and Bavaria are regions within the meaning of point (b) of the second subparagraph of Article 2(1) of Regulation No 1305/2013, both at the 'NUTS 1' level for the Federal Republic of Germany in accordance

with Regulation (EC) No 1059/2003, and constitute autonomous states. According to the competent Bavarian authority, the applicant's land in Bavaria is located in a mountain area; it has been identified in Bavaria as eligible land and could theoretically receive support in Bavaria through a compensatory allowance of EUR 50 per hectare.

- 2 The financial resources made available by the defendant for the payment of compensatory allowances come in varying proportions from EAFRD budgetary resources, resources of the Federal Republic of Germany and the defendant's own resources. The defendant's support programmes – including for compensatory allowances – are described in the Measures and Development Plan for Rural Areas in Baden-Württemberg 2014-2020 (MEPL III), which was approved by the Commission on 26 May 2015.
- 3 On 8 May 2019, the applicant applied to the defendant for compensatory allowances for the management of areas facing agricultural constraints in respect of claim year 2019, including for the 27 hectares of land in Bavaria. By decision of 5 December 2019 – served on 10 February 2020 – the application submitted by the applicant in respect of the land in Bavaria was rejected on the ground that the land was not in Baden-Württemberg. The administrative appeal lodged by the applicant was unsuccessful.
- 4 The applicant brought an action on 17 June 2021. In the action, it claims that the decision of 5 December 2019 (in the form of the decision of 11 May 2021 on the administrative appeal) should be annulled and that the defendant should be ordered to grant it a compensatory allowance of EUR 1 371.26 for the land in Bavaria. In the alternative, in the event that that principal claim is unsuccessful, it is seeking a declaration that the rejection of its application for support for land in Bavaria and the underlying legal bases of the decision, namely Paragraphs 2.1 and 3.2.1 of the Administrative regulation of the Ministry of Rural Affairs and Consumer Protection of Baden-Württemberg on support for farms in mountain areas and in certain areas facing constraints (VwV AZL) of 6 November 2019, infringe Articles 31 and 32 of Regulation No 1305/2013.
- 5 The VwV AZL does not constitute a parliamentary act, but is merely an administrative regulation to guide the defendant's discretion and support practice. In the field of transaction management, including the grant of public funding to citizens, according to German constitutional tradition there is often no need for a parliamentary act to determine who, when and under what conditions it is possible or permissible to receive funding. Administrative regulations have binding effect simply in that, in practice, the administration always applies them in the same way (the administration is bound by its own acts).
- 6 The VwV AZL governs the conditions and the procedure for the grant of the compensatory allowance for areas facing natural constraints within the meaning of Article 31 of Regulation No 1305/2013 and essentially provides that two cumulative conditions must be met in order for an applicant to receive the

compensatory allowance: (a) it must have its place of business in Baden-Württemberg and (b) the land in respect of which the compensatory allowance is granted must be in Baden-Württemberg and be identified by Baden-Württemberg as an area facing constraints.

- 7 Bavaria similarly adopted a mere administrative regulation for the compensatory allowance, namely the Richtlinie des Bayerischen Staatsministeriums für Ernährung, Landwirtschaft und Forsten vom 01.03.2019 zur Gewährung der Ausgleichszulage in benachteiligten Gebieten (Guidelines of the Bavarian State Ministry of Food, Agriculture and Forestry of 1 March 2019 on the grant of the compensatory allowance in areas facing constraints, AGZ) pursuant to Regulation No 1305/2013. That administrative regulation provides analogously that (a) the farm to be supported must have its place of business in Bavaria and that (b) the land in respect of which the compensatory allowance is granted must be in Bavaria and be identified by Bavaria as an area facing constraints.
- 8 For the term ‘place of business’ the VwV AZL adopts the definition from Paragraph 2 of the InVeKoSV. Under Paragraph 2(2) of the InVeKoSV, the place of business is, in principle, the place which lies within the area of the tax office responsible for assessing income tax in respect of the farmer. For legal persons, groups of persons and pools of securities, responsibility lies with the *Land* office in whose area the place of management is located. Pursuant to the rules, the business is assigned a company number in Germany depending on the place of tax assessment. A Baden-Württemberg business is thus given a Baden-Württemberg company number and a Bavarian business is assigned a Bavarian company number. A German business is therefore always linked to a place of business in one of the German *Länder* in the company file, which is used to process applications for support. Foreign businesses – from Austria for example – with land in Baden-Württemberg can also be assigned a Baden-Württemberg company number upon request. By contrast with German businesses, no fixed link is made to a company stored in the company file in this case because (apparently) this is not technically possible. The foreign – Austrian for example – business therefore appears with a Baden-Württemberg place of business in the company file.
- 9 The Baden-Württemberg authority which has responsibility for the applicant routinely applies the VwV AZL as it stands and grants compensatory allowances on that basis. That authority’s support practice is consistent with the content of the administrative regulation. Citizens may therefore expect, pursuant to the principle of equal treatment (Article 3(1) of the Basic Law), that compensatory allowances be granted on the basis of the administrative regulation.
- 10 A web-based application is used to process applications for support in Baden-Württemberg. There is data reconciliation between the different applications of the German *Länder*, which prevents multiple applications for support being submitted in different *Länder*. An application for support can be made only in the *Land* in which the place of business is also located. No such data reconciliation takes place with other EU Member States. Because foreign businesses can be

assigned a company number in Baden-Württemberg, they are also able, in addition to an application for support in their country of origin, to submit applications for support in Baden-Württemberg and, as the case may be, in other German *Länder*.

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

- 11 The applicant is prevented by the defendant's support practice, which is based on the VwV AZL, from receiving the compensatory allowance in respect of its land in Bavaria even though that land constitutes a mountain area and has been identified in Bavaria as an eligible area. At the same time, it is not possible for it, unlike foreign businesses, to submit a further application for support outside Baden-Württemberg. Consequently, it is unable to submit an application for support in Bavaria in respect of its Bavarian land.
- 12 As a result, by virtue of the rules in Baden-Württemberg and in Bavaria the applicant does not receive a compensatory allowance for its Bavarian land, either from the *Land* of Baden-Württemberg or from the *Land* of Bavaria, even though Baden-Württemberg and Bavaria have each decided to offer and pay compensatory allowances and even though Bavaria has also identified the land in question owned by the applicant as a mountain area and thus as eligible. According to the competent Bavarian authority, the applicant would be paid a compensatory allowance of EUR 50 per hectare in respect of the Bavarian land if it were managed by a Bavarian business.
- 13 Compared with a foreign (Austrian for example) business, German (border) businesses in Baden-Württemberg are placed in a less favourable position with regard to the compensatory allowance (reverse discrimination). Baden-Württemberg border businesses do not receive a compensatory allowance for all areas facing natural constraints managed by them but only for land which, additionally, is in Baden-Württemberg. No compensatory allowance is granted for land beyond the border of the relevant *Land*. Because foreign businesses are able to submit an application for support in their country of origin as well as in Baden-Württemberg, they are not subject to this restriction.
- 14 The court has doubts as to the interpretation of the first subparagraph of Article 31(1), Article 31(2), Article 32(1)(a), the first subparagraph of Article 32(2) and the second and third subparagraphs of Article 32(3) of Regulation No 1305/2013. In the view of the referring court, it is not clear from those provisions how broad the EU law framework is within which the Member States may organise their support measures for compensatory allowances, above all in cases with a cross-border link between regions within one Member State. It is also doubtful whether, provided that the Member State or the region in question has decided to grant support through compensatory allowances, those provisions stipulate which support criteria the Member States or regions may prescribe and which they may not (see 1.). It is also unclear whether, if the Member State or the

region thereof grants support through compensatory allowances, the citizen concerned derives an entitlement under EU law to payment of the compensatory allowance from Article 31(1) of Regulation No 1305/2013 (see **2.**) and whether it can be inferred from the rules of EU law what legal status the implementing acts of the Member State or the region laying down the conditions for support in respect of the compensatory allowance must have (see **3.**).

- 15 **1.** Article 32(2) to (4) of Regulation No 1305/2013 lays down various criteria for the Member States and the regions thereof on which the delimitation of eligible areas under that regulation is to be based. It is unclear to the referring court whether those criteria for the delimitation of areas are definitive and what stipulations for the Member States can be inferred from those rules in connection with cases of support crossing the borders of a Member State or the regions thereof.
- 16 The wording of recital 26 and the first subparagraph of Article 32(2) of Regulation No 1305/2013 suggests that the Member States (or the regions thereof) may have recourse in the delimitation of areas only to criteria connected with the biophysical properties or the natural condition of the land to be supported. Recital 26 and the first subparagraph of Article 32(2) of Regulation No 1305/2013 each describe in detail the reasons for which potentially eligible land is to be classified as facing natural constraints and as an (eligible) mountain area. On the other hand, it is not expressly mentioned whether in delimiting areas the Member States or the regions thereof may apply derogating criteria, that is to say, criteria unconnected with the natural condition of the land to be supported. In view of the legal character of Regulation No 1305/2013 (see the first and second sentences of paragraph 2 of Article 288 TFEU), it seems unreasonable to suggest that the Member States or the regions thereof may employ criteria for the delimitation of areas not set out in Article 32 of Regulation No 1305/2013. Latitude for the Member States or the regions thereof in the choice of form and methods would be more in keeping with character of an EU directive (see the third paragraph of Article 288 TFEU).
- 17 The second subparagraph of Article 32(3) of Regulation No 1305/2013 enables a delimitation of areas which is confined to the area of the respective local administrative unit. It is questionable whether at the same time the procedure in respect of cross-border cases (between different Member States or different regions of one Member State) is prescribed for Member States. It is clear from the second subparagraph of Article 32(3) of Regulation No 1305/2013 that the legislature envisaged that delimitations of areas in Member States are to be carried out at the level of local administrative units ('LAU 2'), that is to say, at the level of the administrative authority which has a local connection with the areas to be classified as eligible. If the local administrative units are to carry out the delimitation of areas in practice, this means, in the view of the referring court, that each local administrative unit carries out the delimitation of areas only within its own area of responsibility, as the local connection required by the abovementioned provision exists only for those areas. The principle of

effectiveness of EU law (*‘effet utile’*) enshrined in Article 4(3) TEU suggests, however, that the Member States may not organise their criteria and procedures for the grant of the compensatory payment in such a way that it is ultimately not paid for certain land even though the land has been classified as eligible, irrespective of the Member State or the region or local administrative unit which made that classification.

- 18 **2.** It is also unclear to the referring court whether farmers derive an entitlement under EU law to payment of the compensatory allowance from the first and second subparagraphs of Article 31(1) of Regulation No 1305/2013 vis-à-vis the authority of a Member State which approves applications for support and – if so – under what conditions. The wording of the first and second subparagraphs of Article 31(1) of Regulation No 1305/2013, and in particular the words *‘wird Landwirten gewährt, die’* in Article 31(2), certainly points to that conclusion. According to general language usage, the wording implies that it is mandatory to pay the compensatory allowance if the conditions set out in the following clause (starting with *‘... die’*) are met. Mandatory character is also present in this form in other language versions of the regulation, such as the English version of Article 31(2) of Regulation No 1305/2013 (*‘shall be granted to farmers who’*).
- 19 However, that understanding of the provision runs counter to the system established by Regulation No 1305/2013. It is designed as a multi-tiered system and entails programming by the Member States or the regions thereof (see the third sentence of Article 6(1) and the first sentence of Article 6(2) of Regulation No 1305/2013). Only where there is such programming by the Member State in question are support programmes funded by the EAFRD. By virtue of that design, the Member States may in principle – subject to a number of exceptions – decide whether they wish to offer individual support programmes mentioned in Regulation No 1305/2013. The support measure ‘compensatory allowance’ is not mentioned in the regulation as a measure which Member States must mandatorily include in their programming, unlike, for example, the agri-environment-climate measures under the third sentence of Article 28(2) of Regulation No 1305/2013.
- 20 **3.** It is likewise doubtful to the referring court whether it is possible to infer from Article 31(1) of Regulation No 1305/2013 stipulations for the Member States as to the necessary legal status the Member State’s rules laying down the conditions for the grant of the compensatory allowance. It is not specified in detail in Regulation No 1305/2013 how Member States should organise support under their national law. It is therefore apparent that the Member States have a broad scope for implementation in this regard, but their implementation in national law may not deprive the individual measures (Articles 14 to 39 of Regulation No 1305/2013) of their effectiveness (*‘effet utile’*). Organising the support criteria in the form of administrative regulations (non-binding legal provisions) therefore appears problematic. Their legal status means that the authority processing applications is bound only by the support practice based on the administrative regulations (principle that the administration is bound by its own acts). If that authority does not establish such support practice, and generally derogates from the

administrative regulation, only the derogating support practice acquires external effect vis-à-vis the respective farmer. The authorities processing applications can thus, in theory, subsequently modify the conditions for support which were previously laid down in an administrative regulation.

- 21 Relevance to the decision: The answer to Question 3 affects the way in which the referring court will be required to decide on the applicant's principal claim (obligation to grant a compensatory allowance of EUR 1 371.26). As national law stands at present, the applicant is not entitled to the grant of the compensatory allowance in respect of its land in Bavaria. On the basis of the defendant's support practice, which is consistent with Paragraphs 2.1 and 3.2.1 of the VwV AZL, the compensatory allowance is granted only for land in Baden-Württemberg. There is no basis under national law for an entitlement in respect of land in Bavaria. If Question 3 is answered in the negative by the Court of Justice, the principal claim must be rejected.
- 22 The answers to Questions 1, 2 and 4 affect the referring court's decision on the claim made by the applicant in the alternative (declaration of the unlawfulness of the rejection of its application for support). If Question 3 is answered in the negative, the referring court is required to decide on the claim in the alternative. Questions 1, 2 and 4 include different options which under national law each in themselves – if the Court of Justice were to answer one of these questions in the affirmative – result in the defendant's current support practice based on the VwV AZL and the organisation of the support criteria therein being unlawful, as a consequence of which the rejection of the application for support submitted by the applicant is also unlawful. By the application, the applicant is able to secure an order that it should be granted and paid retrospectively a compensatory allowance for the land in Bavaria in respect of claim year 2019, even if to do so the defendant would first have to modify the support criteria. As they stand at present, the support criteria do not permit a compensatory allowance for land in Bavaria.
- 23 Thus far, there is no case-law of the Court of Justice regarding Articles 31 and 32 of Regulation No 1305/2013 and the compensatory allowances governed therein for areas facing natural constraints.
- 24 There are not yet any published decisions from courts in Baden-Württemberg on compensatory allowances under Article 31 of Regulation No 1305/2013 and the VwV AZL, which was adopted on that basis. As regards the legal situation in Bavaria – which corresponds *mutatis mutandis* to that in Baden-Württemberg – there is a final, published judicial decision of the Bayerischer Verwaltungsgerichtshof (Bavarian Higher Administrative Court). In that case, the applicant was a farmer on the border between Bavaria and Hesse (another *Land*, that is to say, a region of Germany). The farm covered land in both Bavaria and Hesse and the applicant was also seeking a compensatory payment for the land in Hesse, which it was not granted on the ground that the land was not in Bavaria.