

JUDGEMENT OF THE COURT (Second Chamber)

2 October 2014 (*)

(Reference for a preliminary ruling — Common agricultural policy — Common rules for direct support schemes — Single payment scheme — Definition of ‘permanent pasture’ — Land used to grow grass and other herbaceous forage not part of the system of crop rotation of the holding for a minimum of five years — Land ploughed up and sown with a type of herbaceous forage other than that previously grown on it during that period)

In Case C-47/13,

REQUEST for a preliminary ruling under Article 267 TFEU made by the Bundesverwaltungsgericht (Germany), by judgement of 15 November 2012, received at the Court on 29 January 2013, in the proceedings

Martin Grund

v

Landesamt für Landwirtschaft, Umwelt und ländliche Räume des Landes Schleswig-Holstein,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arestis (Rapporteur), J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 6 February 2014,

after considering the observations submitted on behalf of:

- Mr Grund, by S. Paulsen and P. Paulsen, Rechtsanwälte,
- the Landesamt für Landwirtschaft, Umwelt und ländliche Räume des Landes Schleswig-Holstein, by W. Ewer, Rechtsanwalt,
- the German Government, by T. Henze, J. Möller and B. Beutler, acting as Agents,
- the European Commission, by G. von Rintelen and B. Schima, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2014,

gives the following

Judgement

- 1 This request for a preliminary ruling concerns the interpretation of Article 2(2) of Commission Regulation (EC) No 796/2004 of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system provided for in Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers (OJ 2004 L 141, p. 18, and corrigendum OJ 2005 L 37, p. 22).
- 2 The request has been made in proceedings between Mr Grund, a farmer, and the Landesamt für Landwirtschaft, Umwelt und ländliche Räume des Landes Schleswig-Holstein (Regional office for agriculture, environment and rural areas of the *Land* of Schleswig-Holstein, ‘the LLUR’) concerning the classification of some of his agricultural land as ‘permanent pasture’.

Legal background

EU law

- 3 Recital 4 in the preamble to Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ 2003 L 270, p. 1 and corrigendum OJ 2004 L 94, p. 70) was worded as follows:

‘Since permanent pasture has a positive environmental effect, it is appropriate to adopt measures to encourage the maintenance of existing permanent pasture to avoid a massive conversion into arable land.’
- 4 Article 2(2) of Regulation No 796/2004 contained a definition of ‘permanent pasture’, which, in its original version, was worded as follows:

“‘Permanent pasture’: shall mean land used to grow grasses or other herbaceous forage naturally (self-seeded) or through cultivation (sown) and that has not been included in the crop rotation of the holding for five years or longer’.
- 5 Following the adoption of Commission Regulation (EC) No 239/2005 of 11 February 2005 amending and correcting Regulation No 796/2004 (OJ 2005 L 42, p. 3), which is applicable from 1 January 2005, that definition became the following:

“‘Permanent pasture’: shall mean land used to grow grasses or other herbaceous forage naturally (self-seeded) or through cultivation (sown) and that has not been included in the crop rotation of the holding for five years or longer, excluding land under set-aside schemes pursuant to Article 6 of Council Regulation (EC) No 1251/1999 ... land under set aside schemes pursuant to Article 54(2) and Article 107 of Regulation ... No 1782/2003, areas set aside in accordance with Council Regulation (EEC) No 2078/92 ... and areas set aside in accordance with Articles 22, 23 and 24 of Council Regulation (EC) No 1257/1999 ...’

- 6 Regulation No 239/2005 also added a definition of ‘grasses or other herbaceous forage’ to Article 2(2)(a) of Regulation No 796/2004, as amended by the first regulation, which was worded as follows:

“‘grasses or other herbaceous forage’: shall mean all herbaceous plants traditionally found in natural pastures or normally included in mixtures of seeds for pastures or meadows in the Member State (whether or not used for grazing animals). Member States may include crops listed in Annex IX to Regulation ... No 1782/2003’

- 7 Article 3 of Regulation No 796/2004 set out the obligations of the Member States regarding the maintenance of land under permanent pasture, as provided for in Article 5(2) of Regulation No 1782/2003.

- 8 Article 4 of Regulation No 796/2004, as amended by Regulation No 239/2005, entitled ‘Maintenance of land under permanent pasture at individual level’, provided:

‘1. Where it is established that the ratio referred to in Article 3(1) of this Regulation is decreasing the Member State concerned shall, at national or regional level, provide for the obligation of farmers applying for aid under any of the direct payment schemes listed in Annex I of Regulation ... No 1782/2003 not to convert land under permanent pasture without prior authorisation;

...

2. Where it is established that the obligation referred to in Article 3(2) of this Regulation cannot be ensured, the Member State concerned shall, further to the measures to be taken in accordance with paragraph 1, provide, at national or regional level, for the obligation of farmers applying for aid under any of the direct payment schemes listed in Annex I of Regulation ... No 1782/2003 to re-convert land into land under permanent pasture for those farmers who have land at their disposal which was converted from land under permanent pasture into land for other uses.

...’

- 9 Regulation No 1782/2003 was replaced by Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation ... No 1782/2003 (OJ 2009 L 30, p. 16 and corrigendum OJ 2010 L 43, p. 7), with effect from 1 January 2009. Recital 7 in the preamble to Regulation No 73/2009 states:

‘Regulation ... No 1782/2003 recognised the positive environmental effect of permanent pasture. The measures in that Regulation aimed at encouraging the maintenance of existing permanent pasture to ensure against mass conversion to arable land should be maintained.’

- 10 Regulation No 796/2004 was replaced by Commission Regulation (EC) No 1122/2009 of 30 November 2009 laying down detailed rules for the implementation of Regulation (EC) No 73/2009 as regards cross-compliance, modulation and the integrated administration and control system, under the direct support schemes for farmers provided for [by] that regulation, as well as for the implementation of Council Regulation (EC) No 1234/2007 as regards cross-compliance under the support scheme provided for the wine sector (OJ 2009 L 316, p. 65), with effect from 1 January 2010.

- 11 Article 2(2) of Regulation No 1122/2009 refers, as regards the definition of ‘permanent pasture’, to the definition set out in Article 2(c) of Commission Regulation (EC) No 1120/2009 of 29 October 2009 laying down detailed rules for the implementation of the single payment scheme provided for in Title III of Council Regulation (EC) No 73/2009 (OJ 2009 L 316, p. 1), which applies in principle from 1 January 2010.

- 12 Article 4 of Regulation No 1122/2009, entitled ‘Maintenance of land under permanent pasture at individual level’, provides:

‘1. Where it is established that the ratio referred to in Article 3(1) of this Regulation is decreasing the Member State concerned shall, at national or regional level, provide for the obligation of farmers applying for aid under any of the direct payment schemes listed in Annex I to Regulation ... No 73/2009 not to convert land under permanent pasture without prior authorisation.

If the authorisation referred to in the first subparagraph is subject to the condition that an area of land shall be established as permanent pasture, such land shall, as of the first day of conversion, be considered as permanent pasture by way of derogation from the definition laid down in Article 2(2). Those areas shall be used to grow grasses or other herbaceous forage for the five consecutive years following the date of conversion.

2. Where it is established that the obligation referred to in Article 3(2) of this Regulation cannot be ensured, the Member State concerned shall, further to the measures to be taken in accordance with paragraph 1 of this Article, provide, at national or regional level, for the obligation of farmers applying for aid under any of the direct payment schemes listed in Annex I to Regulation ... No 73/2009 to re-convert land into land under permanent pasture for those farmers who have land at their disposal which was converted from land under permanent pasture into land for other uses.

...’

- 13 Article 2(b) of Regulation No 1120/2009 defines ‘permanent crops’ as being ‘non-rotational crops other than permanent pasture that occupy the land for five years or longer and yield repeated harvests, including nurseries, and short rotation coppice’.

- 14 Article 2(c) of Regulation No 1120/2009 contains a definition of ‘permanent pasture,’ which is worded as follows:

“‘permanent pasture’: means land used to grow grasses or other herbaceous forage naturally (self-seeded) or through cultivation (sown) and that has not been included in the crop rotation of the holding for five years or longer, excluding areas set aside in accordance with Council Regulation (EEC) No 2078/92 ..., areas set aside in accordance with Articles 22, 23 and 24 of Council Regulation (EC) No 1257/1999 ... and areas set aside in accordance with Article 39 of Council Regulation (EC) No 1698/2005 ...; and to this end, ‘grasses or other herbaceous forage’ means all herbaceous plants traditionally found in natural pastures or normally included in mixtures of seeds for pastures or meadows in the Member State (whether or not used for grazing animals). Member States may include arable crops listed in Annex I.’

- 15 In that connection, Article 2(d) of Regulation No 1120/2009 defines ‘grassland’ as follows:

“‘grassland’ means arable land used for grass production (sown or natural); for the purposes of Article 49 of Regulation ... No 73/2009 grassland shall include permanent pasture’.

German law

- 16 In order to implement the obligations of the Member States in relation to the maintenance of permanent pasture laid down by EU legislation, the Federal German legislature adopted the Law on obligations relating to direct payments (Direktzahlungen-Verpflichtungengesetz). Paragraph 3 thereof provides that the *Länder* are responsible for ensuring that the proportion of permanent pasture on their territory does not appreciably diminish. Under Paragraph 5(3)(1), the government of the *Länder* are empowered to prohibit or to restrict the ploughing up of permanent pasture where the proportion of permanent pasture has decreased by more than 5%.
- 17 On the basis of those powers, on 13 May 2008, the *Land* Schleswig-Holstein adopted the Permanent Pasture Maintenance Regulation (Dauergrünland-Erhaltungsverordnung, ‘the DGL-VO SH’). Under Paragraph 1(1) of the DGL-VO SH, if it is established, on the basis of applications for the single farm payment, that the proportion of permanent pasture has decreased by more than 5%, the competent authority is to publish that information, so that after publication, permanent pasture may not be ploughed up without authorisation.
- 18 In that connection, Paragraph 2 of the DGL-VO SH provides:
- ‘1. Once the declaration referred to in Paragraph 1(1) has been published, farmers who claim direct payment may not plough up permanent pasture, as defined in Article 2(2) of Regulation ... No 796/2004 ... for as long as they are in receipt of direct support. ...
2. By way of derogation from subparagraph 1, the competent authority may authorise the ploughing up of permanent pasture. ...’
- 19 The competent ministry in the *Land* Schleswig-Holstein published a decision of general scope in the *Official Journal of the Land Schleswig-Holstein* on 23 June 2008, declaring that the proportion of permanent pasture had decreased by more than 5%. As a result, the prohibition on ploughing up permanent pasture pursuant to Paragraph 1(1) of the DGL-VO SH applied from the day following its publication.

The dispute in the main proceedings and the question referred for a preliminary ruling

- 20 Mr Grund is a farmer who makes an application each year under the single payment scheme. In his applications, he declared that, from 1998 and 1999, he cultivated field grass on two of his fields. In 2005, he put a clover and grass mixture on both fields by overseeding after scarification and from 2005 to 2008 notified them as fields planted with a clover and grass mixture. In 2009, the two fields concerned were used to grow field grass. At the beginning of the 2010 farming year one of the two fields was leased out and has since been the subject of an application for subsidies as a grass meadow. On the other field, Mr Grund has cultivated silage maize since 2010, pursuant to an authorisation in exchange for which another field he owned had to be sown as permanent pasture.
- 21 By letter of 9 January 2009, the LLUR informed Mr Grund that it had reclassified the two fields as permanent pasture, as between 1998 and 2008 they had been used uninterruptedly as pasture for six years or more. In addition, the LLUR informed Mr Grund that the prohibition on ploughing up permanent pasture laid down by the DGL-VO SH applied to those fields.
- 22 On 4 June 2009, Mr Grund brought a declaratory action before the Schleswig-Holsteinische Verwaltungsgericht (Administrative Court, Schleswig-Holstein), pursuant to Paragraph 43(1) of the Administrative Procedure Code (Verwaltungsgerichtsordnung), seeking a declaration that the two fields subject to the reclassification by the LLUR did not fall with the prohibition on ploughing up permanent pasture. In support of his application, Mr Grund claimed to have a legitimate interest in that finding and maintained that those two fields could not be classified as

permanent pasture because the fields used to grow field grass were ploughed up after one or two years. Mr Grund claimed that, in any event, changing from a clover and grass mix to field grass or vice versa constituted crop rotation, which prevented the creation of permanent pasture and put an end to the use of the land at issue as permanent pasture.

- 23 The LLUR challenged those arguments, taking the view that land used to grow field grass which was regularly ploughed up had to be treated as natural permanent pasture. The decisive factor was that the same type of crop was grown without interruption; otherwise crop rotation would occur. According to the LLUR, since field grass had been grown on the two fields for an interrupted period of more than five years they constituted permanent pasture, irrespective of the subsequent sowing of a clover and grass mixture.
- 24 By judgement of 13 October 2010, the Schleswig-Holsteinische Verwaltungsgericht, ruling at first instance, dismissed the action as unfounded essentially because a rotation of different types of herbaceous forage did not put an end the status of permanent pasture once it had been acquired. By judgement of 12 May 2011, the Schleswig-Holsteinische Oberverwaltungsgericht (Regional Administrative Court, Schleswig-Holstein), hearing the parties on the same day, rejected Mr Grund's appeal against that judgement on the ground that, irrespective of whether there is a rotation of crops only when there is a change from grasses or other herbaceous forage to other arable crops, a change from grasses to another type of herbaceous forage does not affect the characteristics of existing permanent pasture.
- 25 On 28 June 2011, Mr Grund brought an appeal on point of law against that judgement before the Bundesverwaltungsgericht (Federal Administrative Court).
- 26 In its request for a preliminary ruling, the referring court states that it is bound by the facts found by the appeal court in its judgement of 12 May 2011. It states that, as regards the first field which was leased out, Mr Grund still has an interest in a finding that it is not permanent pasture since he might, in appropriate circumstances, receive a higher rent for his fields. Therefore, it must be determined whether, on 12 May 2011, the latter constituted permanent pasture. As regards the other field, which, since 2010 has no longer been used as pasture but to grow silage maize, the referring court considers that the application for a declaration refers to the date of conversion, since Mr Grund's obligation to plant permanent pasture on replacement land as consideration for the authorisation to plough up permanent pasture granted in respect of that field derives from the status as permanent which ended that year. Therefore, with regard to the last mentioned field, it is appropriate to determine whether it was permanent pasture in 2010.
- 27 The referring court states that the outcome of the proceedings depends on the interpretation of the definition of 'permanent pasture' within the meaning of EU law and, in particular, of Article 2(2) of Regulation No 796/2004, since the relevant German legislation makes express reference to that provision, despite the fact that it was subsequently amended by Regulation No 239/2005 and indeed replaced by Regulation No 1122/2009. Thus, the outcome of the dispute in the main proceedings depends on which amendments concerning agricultural land prevent classification as permanent pasture. In that connection, that court cannot discern, in the definition of 'permanent pasture' set out in that provision, any indication of whether ploughing up pasture would, in itself, exclude the classification as 'permanent pasture'. That court also states that, in its view, the succession of various kinds of herbaceous forage does not constitute crop rotation for the purposes of Regulation No 796/2004, but observes that the correct interpretation of EU law is not so clear as to exclude all reasonable doubt. It mentions certain provisions of that law relating to investigations of the structure of farms which might affect the interpretation of that concept.

- 28 In those circumstances, the Bundesverwaltungsgericht decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is agricultural land “permanent pasture” within the meaning of Article 2(2) of [Regulation no 796/2004] if used currently and for at least five years for the cultivation of grass or other herbaceous forage but during this period the area has been ploughed and instead of the previous herbaceous forage (in this case clover and grass mixture) another herbaceous forage (in this case field grass) sown, or do such cases constitute a crop rotation precluding the creation of permanent pasture?’

The question referred

Preliminary observations

- 29 The request for a preliminary ruling refers to the definition of ‘permanent pasture’ in Article 2(2) of Regulation No 796/2004. It is clear from the order for reference that the relevant dates for determining whether the two fields at issue in the main proceedings fall within the definition of ‘permanent pasture’ must be 2010 and 2011 respectively. It follows that it is the definition of ‘permanent pasture’ in the EU legislation applicable in those two years which must be applied to the facts in the main proceedings, namely Article 2(c) of Regulation No 1120/2009. Therefore, the Court will give an interpretation of the definition of ‘permanent pasture’ as referred to in that provision. In that connection, the fact that the national legislation concerned still refers to Regulation No 796/2004 is irrelevant.

- 30 However, as the Advocate General noted in point 35 of her Opinion there is no material difference between the definition of ‘permanent pasture’ set out in Article 2(2) of Regulation No 796/2004 and that set out in Article 2(c) of Regulation No 1120/2009, the decisive factors in that definition for the resolution of the dispute in the main proceedings being, on any basis, virtually identical in both of them. Therefore, it must be stated that, if the referring court were to find, in accordance with national procedural law, that the dispute ultimately falls within the definition of ‘permanent pasture’ laid down in Article 2(2) of Regulation No 796/2004, the answer given in the present judgement to the question referred may be transposed to the previous legislative act.

Substance

- 31 By its question, the referring court asks essentially whether the definition of ‘permanent pasture’ set out in Article 2(c) of Regulation No 1120/2009 must be interpreted as meaning that it covers agricultural land which is currently, and has been for five years or more, used to grow grass and other herbaceous forage even though, during that period, the land has been ploughed up and sown with a variety of herbaceous forage other than the kind previously grown on it.
- 32 It must be stated at the outset that the fact that the wording of the definition of ‘permanent pasture’ in Article 2(c) of Regulation No 1120/2009 makes no mention of the fact that ploughing up the land and sowing it with a variety of herbaceous forage other than that which was previously cultivated there excludes, in itself, classification as ‘permanent pasture’.
- 33 It must also be noted that that definition does not make any distinction between grass and certain herbaceous forage, so that all grasses and all other herbaceous forage are part of one single category which is not subdivided. It is clear from the wording ‘land used to grow grasses or other herbaceous forage’ in that definition that all varieties of herbaceous forage are considered as equivalent for the purposes of Article 2(c) of Regulation No 1120/2009 and that the choice of the specific variety of herbaceous plant grown on the land concerned does not, in

itself, have any effect on the classification of that land as ‘permanent pasture’. The fact that that wording includes grasses and other herbaceous forage thus shows that ‘crop rotation’, within the meaning of that provision, takes place only where a crop other than herbaceous forage is grown.

- 34 In addition, the system providing for the obligation to maintain permanent pasture laid down by Regulation No 1122/2009 also shows that the category of permanent pasture cannot be divided into subcategories of separate pasture, and, accordingly, that the choice of the variety of herbaceous forage grown is irrelevant in that respect. It is clear from the words used in Article 4(1) and (2) of that regulation that only using the land for crops other than permanent pasture is subject to the obligation to obtain prior authorisation. The words ‘other uses’ referred to in those provisions only preclude ‘other uses’ of land than as permanent pasture as a general and indivisible category. Similarly, the obligation to ‘reconvert land into land under permanent pasture’ laid down in that article makes sense only if the land concerned is no longer used as pasture after having been intended for ‘another use’.
- 35 Thus, the EU legislature does not attach any importance to which variety of herbaceous forage was actually grown on the land concerned. In particular, that legislation does not require the land concerned to be reseeded with the same variety of herbaceous forage which was previously grown on it. What is important for the classification as ‘permanent pasture’ within the meaning of Article 2(c) of Regulation No 1120/2009 depends on the actual use of the land in question (see, judgement in *Landkreis Bad Dürkheim*, C-61/09, EU:C:2010:606, paragraph 37). Furthermore, neither the change of variety of grass nor the technical procedure used, such as ploughing up or scarification with overseeding has any effect on that classification.
- 36 Moreover, the objective of maintaining permanent pasture laid down in recital 7 in the preamble to Regulation No 73/2009 also indicates that changing from a certain type of pasture to another on the same area cannot be regarded as ‘crop rotation’ within the meaning of Article 2(c) of Regulation No 1120/2009, which excludes the classification of ‘permanent pasture’ in that article. It follows from that recital that, having regard to the positive effect on the environment of permanent pasture, measures aimed at encouraging the maintenance of existing permanent pasture to ensure against mass conversion to arable land should be adopted.
- 37 However, the objective of maintaining permanent pasture may be achieved only if a succession of different uses of the land as pasture is also able to confer the status of permanent pasture on that land after five years. To do so, it must be difficult to reconvert pasture into arable land, in particular, by preventing a farmer from easily avoiding his land used to grow grass and other herbaceous forage from being classified as ‘permanent pasture’ within the meaning of Article 2(c) of Regulation No 1120/2009 and, therefore, avoiding the obligations relating to its maintenance.
- 38 If it were accepted that only the change from one type of herbaceous forage to another could exclude that classification as ‘permanent pasture’ during the period of five years or more referred to by that provision, it would be difficult to attain the objective of maintaining permanent pasture. Therefore, ploughing up and seeding the land during that period with a type of herbaceous forage other than that previously grown on it cannot, in itself, have any effect on that classification.
- 39 Moreover, it must be stated that the provisions of EU law on investigations into the structure of farms which the referring court mentions cannot affect that interpretation of the definition of ‘permanent pasture’ set out in Article 2(c) of Regulation No 1120/2009 since, as the Advocate General noted in point 66 of her Opinion, the aim and purpose of those provisions differs from

those in the legislation on direct payments with which the reference for a preliminary ruling is concerned.

- 40 Having regard to all of the foregoing, the answer to the question referred is that the definition of ‘permanent pasture’ set out in Article 2(c) of Regulation No 1120/2009 must be interpreted as covering agricultural land which is currently, and has been for five years or more, used to grow grass and other herbaceous forage, even though that land has been ploughed up and seeded with another variety of herbaceous forage other than that which was previously grown on it during that period.

Costs

- 41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

- 1. The definition of ‘permanent pasture’ set out in Article 2(2)(c) of Commission Regulation (EC) No 1120/2009 of 29 October 2009 laying down detailed rules for the implementation of the single payment scheme provided for in Title III of Council Regulation (EC) No 73/2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers must be interpreted as covering agricultural land which is currently, and has been for five years or more, used to grow grass and other herbaceous forage, even though that land has been ploughed up and seeded with another variety of herbaceous forage other than that which was previously grown on it during that period.**

[Signatures]

(*) Language of the case: German