



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 24 October 2013¹

Case C-396/12

**A.M. van der Ham,
A.H. van der Ham-Reijersen van Buuren**

(Request for a preliminary ruling from the Raad van State (Netherlands))

(Common agricultural policy — Regulation (EC) No 1698/2005 — Support for rural development — ‘Cross-compliance’ — Reduction of payments in the event of non-compliance with the requirements for aid — Concept of ‘intentional non-compliance’ — Attribution of culpable behaviour of a third party)

I – Introduction

1. Surprising as it may seem, in the case-law of the Court of Justice, the spreading of manure is one of the most important topics of agricultural environmental law.² It therefore made sense to make receipt of agricultural subsidies conditional on compliance with the relevant provisions of that law. This was achieved by introducing ‘cross-compliance’ in Regulation (EC) No 1782/2003³ and was extended to other support schemes, in particular support from the European Agricultural Fund for Rural Development (EAFRD) provided for in Regulation (EC) No 1698/2005,⁴ which is at issue in this case.

2. The question now is under what conditions a person in receipt of support is responsible for an infringement of the provisions governing the spreading of manure on supported areas. In this connection the Netherlands Raad van State puts questions to the Court that are of interest far beyond the realm of agricultural environmental law. They are concerned with the prerequisites for an intentional act and the determination that an act is intentional act, as well as with the extent to which acts of third parties are attributable to the recipient if he has instructed them to spread the manure.

¹ — Original language: German.

² — See for example Case C-266/00 *Commission v Luxembourg* [2001] ECR I-2073; Case C-322/00 *Commission v Netherlands* [2003] ECR I-11267; Case C-416/02 *Commission v Spain* [2005] ECR I-7487; Case C-526/08 *Commission v Luxembourg* [2010] ECR I-6151; Case C-11/12 *Maatschap L.A. en D.A.B. Langestraat en P. Langestraat-Troost* [2012] ECR; and Case C-113/12 *Brady* [2013] ECR.

³ — Council Regulation 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).

⁴ — Council Regulation of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2005 L 277, p. 1).

II – Legal framework

A– *European Union law*

3. The European Union law framework is formed by Regulation (EC) No 1698/2005 and by the regulations adopted to implement it, Regulations (EC) No 1975/2006⁵ and (EC) No 796/2004.⁶

1. Regulation (EC) No 1698/2005

4. Aid to support rural development is granted on the basis of Regulation No 1698/2005. Article 51 requires farmers who are beneficiaries of such aid to respect certain basic requirements of environmental law on the whole holding. The relevant version of paragraph 1 reads as follows:

‘1. Where beneficiaries receiving payments under Article 36(a)(i) to (v) and Article 36(b)(i), (iv) and (v) do not respect on the whole holding, as a result of an action or omission directly attributable to them, the mandatory requirements provided for in Articles 4 and 5 of and in Annexes III and IV to Regulation (EC) No 1782/2003, the total amount of their payments to be granted in the calendar year in which the non-compliance occurs shall be reduced or cancelled.

The reduction or cancellation referred to in the first subparagraph shall also apply in cases where the beneficiaries receiving payments under Article 36(a)(iv) do not respect on the whole holding, as a result of an action or omission directly attributable to them, the minimum requirements for fertiliser and plant protection product use referred to in Article 39(3).’

5. In accordance with Article 4 of, and point 4 of Annex III to, Regulation No 1782/2003, those requirements include Directive 91/676.⁷ That directive requires the Member States to adopt rules on the spreading of fertilizers.

2. Regulation (EC) No 1975/2006

6. Article 22 of Regulation No 1975/2006 provides that, inter alia, Article 65(2) of Regulation (EC) No 796/2004 is to apply with regard to reductions or exclusions to be applied following the determination of non-compliances. That reference was deleted by Article 1(10) of Regulation (EC) No 484/2009⁸ with effect from 1 January 2010.

7. The second and third subparagraphs of Article 23 of Regulation No 1975/2006 (‘Calculation of reductions and exclusions’) lay down the following rules on the calculation of reductions:

‘Where the non-compliance is due to negligence of the beneficiary, the reduction shall be calculated in accordance with the rules set out in Article 66 of Regulation (EC) No 796/2004.

5 — Commission Regulation of 7 December 2006 laying down detailed rules for the implementation of Council Regulation No 1698/2005 as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures (OJ 2006 L 368, p. 74), as amended by Commission Regulation (EC) No 1396/2007 of 28 November 2007 correcting Regulation (EC) No 1975/2006 laying down detailed rules for the implementation of Council Regulation (EC) No 1698/2005, as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures (OJ 2007 L 311, p. 3).

6 — Commission Regulation 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 Regulations (EC) No 1782/2003 and (EC) No 73/2009, as well as for the implementation of cross-compliance provided for in Council Regulation (EC) No 479/2008 (OJ 2004 L 141, p. 18), as amended by Commission Regulation (EC) No 380/2009 of 8 May 2009 (OJ 2009 L 116, p. 9).

7 — Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1).

8 — Commission Regulation of 9 June 2009 amending Regulation (EC) No 1975/2006 laying down detailed rules for the implementation of Council Regulation (EC) No 1698/2005, as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures (OJ 2009 L 145, p. 25).

In the case of intentional non-compliance, the reduction shall be calculated in accordance with Article 67 of Regulation (EC) No 796/2004.’

3. Regulation (EC) No 796/2004

8. In its original version, Article 65(2) of Regulation No 796/2004 read as follows:

‘For the purposes of applying Article 6(1) of Regulation (EC) No 1782/2003, an action or omission shall be directly attributable to the individual farmer who committed the non-compliance himself and who, at the time of the determination of the non-compliance in question, is in charge of the holding, the area, the production unit or the animal concerned. Where the holding, the area, the production unit or the animal concerned was transferred to a farmer after the non-compliance had started to occur, the transferee shall equally be held liable in case he maintained the non-compliance, provided he could have reasonably detected and terminated that non-compliance.’

9. Article 2, point (3) of Regulation (EC) No 239/2005⁹ amended Article 65(2) of Regulation No 796/2004 by deleting the word ‘himself’ from its wording in some but not all language versions.

10. Article 2, point (3) of Regulation (EC) No 319/2008¹⁰ deleted Article 65(2) of Regulation No 796/2004 with effect from 1 April 2008, although Article 3 of the former regulation provided that:

‘Article 65(2) of Regulation (EC) No 796/2004, as laid down before its deletion by Article 2, point (3) of this Regulation, remains valid for the purposes of application of Article 22(1) of Regulation (EC) No 1975/2006.’

11. Articles 66 and 67 of Regulation No 796/2004 govern the extent to which aid is to be reduced in cases of negligence and intentional non-compliance.

B– *Netherlands law*

12. Under Article 5(1) of the *Besluit gebruik meststoffen* (Decree on the use of fertilizers), which was adopted in order to transpose Directive 91/676, the spreading of manure on grassland or arable land is prohibited unless carried out in a manner which is low in emissions.

13. Under Article 2(1) of the *Beleidsregels normenkader randvoorwaarden Gemeenschappelijk Landbouwbeleid* (Policy Rules governing the rules on cross-compliance under the Common Agricultural Policy (‘the Policy Rules’)), income support granted under the common agricultural policy is to be reduced by a certain percentage in the event of non-compliance with the obligations attached to the granting of such aid.

9 — Commission Regulation of 11 February 2005 amending and correcting Regulation (EC) No 796/2004 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 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers (OJ 2005 L 42, p. 3).

10 — Commission Regulation (EC) of 7 April 2008 amending Regulation (EC) No 795/2004 laying down detailed rules for the implementation of the single payment scheme provided for in Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, and Regulation (EC) No 796/2004 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 (OJ 2008 L 95, p. 63).

14. Under Article 8(1) of the Policy Rules, each case of intentional non-compliance with a requirement or rule usually attracts a reduction of 20%, while, in accordance with Article 8(2) of the Policy Rules, the existence of intent is in any event to be assessed in the light of the following criteria:

- (a) in the description of the cross-compliance concerned, a direct connection is established with the intentional nature of the non-compliance;
- (b) the complexity of the cross-compliance concerned;
- (c) the question of whether a long-established, settled policy exists;
- (d) the question of whether there is active performance of an act or the deliberate omission of an act;
- (e) the fact that the farmer was previously informed of compliance deficiencies in respect of the cross-compliance requirement concerned;
- (f) the extent to which the cross-compliance requirement is not complied with.

15. The obligation to use manure in a manner which is low in emissions is listed as a cross-compliance requirement in the Annex to the Policy Rules.

III – Main proceedings and request for a preliminary ruling

16. A.M. van der Ham and A.H. van der Ham-Reijersen van Buuren (hereinafter referred to jointly and individually as ‘Van der Ham’) are the proprietors of an agricultural holding in the Netherlands and the recipients of an agri-environmental subsidy.

17. On 13 March 2009 an inspection of the Van der Ham holding found that manure had been spread in a manner that was not low in emissions. Manure had been spread on the plot of grassland in question, on the instructions of Van der Ham, by an agricultural contractor. The Court of Justice has not been provided with any further details of the precise conditions under which the manure was spread.

18. On the basis of that finding, the College van Gedeputeerde Staten van Zuid-Holland (Provincial Executive of the Province of South Holland; ‘the Provincial Executive’), by decision of 29 July 2010, reduced the aid granted to Van der Ham for 2009 by 20% on the ground of intentional non-compliance with its obligations.

19. The Provincial Executive normally uses the criteria set out in Article 8(2) of the Policy Rules in order to assess whether a failure to meet the cross-compliance requirements was intentional. The prohibition on spreading manure in a manner that is not low in emissions is a ‘long-established, settled policy’ within the meaning of Article 8(2)(c) of the Policy Rules, and, consequently, the non-compliance with that prohibition was assumed to be intentional. The contractor’s failure to spread the manure in a manner which was low in emissions was attributed to Van der Ham.

20. By decision of 2 December 2010, the Provincial Executive dismissed the objection raised by Van der Ham as unfounded. The action brought before the Rechtbank's-Gravenhage (District Court, The Hague) was also unsuccessful, and Van der Ham lodged an appeal against the judgment of that court with the Raad van State (Council of State). The Raad van State has referred the following questions to the Court of Justice for a preliminary ruling:

- ‘1. How should the term “intentional non-compliance” in Article 51(1) of Regulation (EC) No 1698/2005, as amended by Council Regulation (EC) No 74/2009 of 19 January 2009, in Article 23 of Regulation (EC) No 1975/2006 and in Article 67(1) of Regulation (EC) No 796/2004 be understood? In order to assume that intentional non-compliance has occurred, is it sufficient that there is non-compliance with a long-established, settled policy within the meaning of Article 8(2)(c) of the Policy Rules?
2. Does European Union law preclude a ruling in a Member State that there is “intentional” non-compliance with a scheme, within the terms of those regulations, simply because one or more of the following circumstances obtained:
 - (a) intent has already been assumed in the cross-compliance requirement in respect of which there has been non-compliance;
 - (b) the cross-compliance requirement concerned is complex;
 - (c) long-established, settled policy exists;
 - (d) there has been an active performance of an act, or a deliberate omission of an act;
 - (e) the farmer was previously informed of compliance deficiencies in respect of the cross-compliance requirement concerned;
 - (f) the extent to which cross-compliance is not complied with is such that intent can be assumed?
3. Can “intentional non-compliance” be attributed to the beneficiary of the aid if a third party carries out the works on his instructions?’

21. In the proceedings before the Court of Justice, written observations have been submitted by the European Commission, the Kingdom of the Netherlands, the Republic of Slovenia and the Republic of Estonia. At the hearing on 25 September 2013, argument was also presented by Van der Ham, but not by Estonia.

IV – Legal assessment

22. It must now be clarified first of all which version of the regulations cited is applicable (see under A). I shall then go on to discuss the criteria for intentional non-compliance with the requirements (see B) and the circumstances under which a beneficiary of aid is responsible for non-compliances by persons acting under his instructions (see C).

A – The relevant legal position

23. The questions referred by the Raad van State relate to Article 51 of Regulation No 1698/2005 as amended by Regulation (EC) No 74/2009 and, with no further particulars of the applicable version, to Article 23 of Regulation No 1975/2006 and Article 67 of Regulation No 796/2004.

24. The inspection of Van der Ham's holding was in fact made on 13 March 2009. In the present case, the regulations mentioned must therefore be applied and interpreted in the versions in force at that time.¹¹

25. In the case of Article 51 of Regulation No 1698/2005, this means the version *before* it was amended by Regulation (EC) No 74/2009, since the amendments relevant to this case did not come into effect until 1 January 2010.

26. Articles 22 and 23 of Regulation No 1975/2006 were also amended, by Article 1(10) and (11) of Regulation No 484/2009,¹² but those amendments too did not come into force until 1 January 2010. Here too it is therefore the version prior to the amendment that must be interpreted.

27. Finally, although Regulation No 796/2004 was not amended by Regulation (EC) No 380/2009 until 16 May 2009, after Van der Ham was inspected, those amendments applied for aid applications in respect of years or premium periods beginning on 1 January 2009 or later. It was subsequently repealed by Article 86 of Regulation (EC) No 1122/2009¹³ with effect from 1 January 2010, but continued to apply in respect of aid applications relating to marketing years or premium periods starting before 1 January 2010. Regulation No 796/2004 as amended by Regulation No 380/2009 therefore applies to the present case. This does not give rise to any problems of retroactive effect since the provisions that are germane to this case are not affected by the amendments.

B – The first and second questions referred for a preliminary ruling

28. By its first question, the referring court seeks to know how the term 'intentional non-compliance' in Article 23 of Regulation No 1975/2006 and Article 67(1) of Regulation No 796/2004 should be interpreted and whether the term is open to an interpretation according to which there is already an intentional non-compliance if the rule violated is a long-established, settled policy. The second question is rather more open in its formulation, asking whether there must be assumed to be intentional non-compliance if one or more of the circumstances defined in national policy rules obtain.

1. Admissibility

29. The Slovenian Government argues that the second question should be confined to the criterion already named in the first question, namely whether there has been a breach of a long-established, settled policy. So far as the criteria listed in the remaining points are concerned, the question is purely hypothetical and has no direct bearing on the main proceedings.

30. It is true that the administrative authority's decisions are based only on the criterion mentioned. It cannot however be ruled out that the other criteria may also be important for deciding the dispute. The second question must therefore also be answered as a whole.

11 — See inter alia Case C-243/09 *Fuß* [2010] ECR I-9849, paragraphs 39 and 40, and Case C-342/12 *Worten* [2013] ECR, paragraphs 30 and 31.

12 — Commission Regulation (EC) No 484/2009 of 9 June 2009 amending Regulation (EC) No 1975/2006 (OJ L 145, p. 25).

13 — Commission Regulation (EC) No 1122/2009 of 30 November 2009 laying down detailed rules for the implementation of Council 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 in 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 L 316, p. 65).

2. Appraisal

31. In order to answer the first two questions, we must first examine the concept of intent and then look into the national criteria.

a) The concept of intent

32. As the referring court says, no definition is given of the term ‘intentional non-compliance’ as used in Article 23 of Regulation No 1975/2006 and Article 67(1) of Regulation No 796/2004. Since the regulations also make no reference to national law in this regard, the concept of intent must be given an independent and uniform interpretation for the purposes of European Union law.¹⁴

33. Although the concept of intent does occasionally appear in the case-law, neither the legislature nor the Court of Justice has as yet developed a universally valid definition.

34. This is illustrated by the judgment, referred to by the referring court, in the case of *Afrasiabi and Others*¹⁵ and the interpretation given there of Article 7(3) and (4) of Regulation (EC) No 423/2007 concerning restrictive measures against Iran.¹⁶ According to the French version of that provision, the knowing and wilful¹⁷ participation in certain activities is prohibited, as a result of which the Court of Justice decided that both factors must be present cumulatively.¹⁸ On the other hand, in the German,¹⁹ English²⁰ or Dutch²¹ versions of Regulation No 423/2007 and of the judgment, knowledge and intent are combined. But the knowledge factor is already present in intent.²²

35. It can at any rate be inferred from *Afrasiabi* that the parties submitting observations are correct in agreeing that the concept of intent includes both factors, namely knowledge²³ and will, even if the knowledge factor is not expressly mentioned. This is based on a view sufficiently widely accepted in Europe²⁴ for it to be assumed that the European Union legislature is guided by it when using the term intent.

36. Knowledge and will must relate to the necessary facts and circumstances of the non-compliance. In this regard it may be inferred from *Afrasiabi* that it is sufficient that the offender accepts the possibility of the non-compliance.²⁵

37. We must therefore conclude that for the purposes of Article 23 of Regulation No 1975/2006 and Article 67(1) of Regulation (EC) No 796/2004 an intentional non-compliance at least requires the offender to be conscious of the possibility of non-compliance and to accept that possibility.

14 — See inter alia Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; and Case C-467/08 *Padawan* [2010] ECR I-10055, paragraph 32.

15 — Case C-72/11 *Afrasiabi and Others* [2011] ECR I-14285.

16 — Council Regulation of 19 April 2007 concerning restrictive measures against Iran (OJ 2007 L 103, p. 1).

17 — ‘Sciemment et volontairement’.

18 — *Afrasiabi and Others*, cited in footnote 15, paragraph 64.

19 — ‘Wissentlich und vorsätzlich’.

20 — ‘Knowingly and intentionally’.

21 — ‘Bewust en opzettelijk’.

22 — See Case C-367/09 *SGS Belgium and Others* [2010] ECR I-10761, paragraph 57.

23 — *SGS Belgium and Others*, cited in footnote 22.

24 — See Advocate General Mayras in his Opinion of 29 October 1975 in Case 26/75 *General Motors* [1975] ECR 1367, 1388.

25 — Cited in footnote 15, paragraph 64. See also Case C-221/04 *Commission v Spain* [2006] ECR I-4515, paragraph 71, for deliberate action.

b) The Netherlands criteria for a finding of intent

38. It is now necessary to clarify whether it is admissible to do without a definite establishment of knowledge and will and instead assume the presence of intent if certain criteria are satisfied, such as where the non-compliance relates to a long-established, settled policy.

39. According to the Commission, the Member States may enact such rules if they have regard to the principles of effectiveness and equivalence. Accordingly, the criteria should not unduly impair the effectiveness of requirements of European Union law or render it less favourable than the effectiveness of purely national requirements. These two principles are however normally applicable for national rules only in so far as the Member States regulate the procedure for applying the substantive law of the European Union in the absence of European Union provisions.²⁶

40. The collection of evidence may be ascribed to procedural law; but that does not apply for rules for the appraisal of evidence such as the criteria in this case. These relate to the establishment of a material condition, provided in European Union law, for the reduction of aid. The criteria must therefore respect the regulatory content of that condition. This means they must neither result in an assumption of intent where there is no intent within the meaning of European Union law, nor preclude intent where for purposes of European Union law such intent exists.

41. The effectiveness of the condition of an intentional breach of the requirements could be adversely affected if each of those criteria were to be grounds for an irrebuttable presumption of intent as the first two questions suggest, because a situation where those criteria are satisfied even though the non-compliance was not intentional cannot be ruled out.

42. The spreading of manure may be a clear case. This activity is normally performed intentionally and in a particular way. If there is a long-established, settled policy in the matter, it can be assumed that the parties concerned were aware of the risk of non-compliance if it were spread in a particular way and that they at least accepted that possibility.

43. Where other non-compliances are concerned, deliberate intent may be doubtful despite awareness of the ban. One need think only of strictly protected plant species within the meaning of Article 13 of the Habitats Directive,²⁷ which under Article 51(1) of Regulation No 1698/2005 and Annex III.A point 5 must not intentionally be cut down or destroyed, where it is sufficient that the possibility of such damage is accepted.²⁸ These protective provisions may for example be breached by the mowing of grassland where there are specimens of a strictly protected species that have been overlooked despite careful scrutiny. In such a case it must at least be possible to refute the Netherlands criteria.

44. On the other hand, leaving aside the actual content of the criteria, there can – as the Netherlands Government underlines – be no objection to Article 8(2) of the Netherlands Policy Rules simply requiring, as the text has it, *reference to be had to* certain criteria for the purpose of assessing intent. There can be no harm in simply taking suitable criteria into account.

45. So far as the individual criteria are concerned, in the form in which they are used in the Policy Rules most of them appear capable of supporting a finding of intent.

26 — Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995] ECR I-4705, paragraph 17; Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 95; Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 67; Case C-1/06 *Bonn Fleisch* [2007] ECR I-5609, paragraph 41; and Joined Cases C-608/10, C-10/11 and C-23/11 *Südzucker* [2012] ECR, paragraph 62.

27 — Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

28 — *Commission v Spain* (otters), cited in footnote 25.

46. The most important criterion in this case, and the one referred to by the administrative authority to substantiate its finding of intent, namely that the rules for the low-emission spreading of manure are part of a long-established, settled policy, should not, however, be misunderstood. It does not allow the *a contrario* conclusion that, in case of doubt, new rules are not intentionally breached. On the contrary, a beneficiary of agricultural aid must be familiar with *all* the rules that have to be observed when such aid is received. If that error is avoided, then this criterion appears perfectly suitable to underpin the assumption of an intentional breach of the prohibition: it allows us to assume that the beneficiary of the aid must have been aware that there was a risk of the requirements being breached by particular practices, making it more likely that he at least accepted the possibility of a non-compliance.

47. Finally, the second question is ambiguous in relation to the criterion of the complexity of a provision: of course, the complexity of a requirement does not allow the conclusion that non-compliance was intentional. Rather, particularly complex requirements are especially easy to misunderstand. The criterion of complexity was probably therefore included in the list more as evidence against the assumption of intent. However, this criterion, too, should not be understood as necessarily precluding intent.

48. In summary, it must be said that the criteria listed in Article 8(2) of the Netherlands Policy Rules governing the rules on cross-compliance under the Common Agricultural Policy may be referred to for the purpose of presuming, rebuttably, that there has been an intentional breach of the requirements of Articles 4 and 5 of and Annexes III and IV to Regulation (EC) No 1783/2003. The interpretation and application of those criteria must not, however, undermine the condition of ‘intentional’ non-compliance.

C – The third question referred for a preliminary ruling

49. By its third question the Raad van State wishes to know whether a non-compliance can be attributed to a farmer as intentional if the work resulting in the non-compliance was carried out by a third party on his instructions. A number of systems of attribution may be envisaged in this regard. A system whereby the beneficiary of the aid was held responsible for every non-compliance on his holding, or at least for every non-compliance culpably occasioned by the person acting on his behalf, irrespective of his own personal fault, would be particularly effective. Limiting attribution to culpable non-compliances by the beneficiary in person would be much more generous to the farmers concerned. I will show below that a middle way between these extremes must be chosen.

1. The text

50. According to Article 51(1) of Regulation No 1698/2005, the reduction of or exclusion from payments is conditional on the requirements not being respected ‘as a result of an action or omission directly attributable to’ the beneficiary.

51. Under Article 22 of Regulation No 1975/2006, inter alia Article 65(2) of Regulation No 796/2004 is to apply with regard to reductions or exclusions to be applied following the determination of non-compliances. That provision stipulates as a condition for the attribution of an act or omission to a farmer that he ‘committed the non-compliance’.

52. The direct attribution of the non-compliance which this provision requires and the necessity that the beneficiary of the aid committed it suggest that only a non-compliance by the beneficiary in person justifies a reduction of the aid. The French version of Article 65(2) of Regulation No 796/2004 is however rather less restrictive in its formulation, requiring only that the beneficiary has directly caused the non-compliance (‘être à l’origine’).

53. The different language versions of a provision of European Union law must be given a uniform interpretation. In the case of divergence between the versions, the provision must therefore be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.²⁹ Where the language versions differ, a provision must also be interpreted on the basis of the real intention of its author.³⁰

2. Legislative history

54. The prerequisite contained in Article 51(1) of Regulation No 1698/2005 that the non-compliance must be ‘a result of an action or omission directly attributable to’ the individual farmer was formulated in Article 6(1) of Regulation No 1782/2003 when the link between agricultural support and environmental standards, known as ‘cross-compliance’, was introduced.

55. Although the German and Dutch versions of Article 51(1) of Regulation No 1698/2005, which we are looking at here, differ slightly from the formulation in Article 6(1) of Regulation No 1782/2003, the English and French versions of those provisions in particular show that they are basically intended to have the same content. It must therefore be assumed that the divergences in the German and Dutch versions are due only to a less coherent translation and are not intended to alter the content.

56. In the legislative procedure for Regulation No 1782/2003, the Commission proposed that payments should be reduced or cancelled for every case of non-fulfilment of basic requirements.³¹ This proposal can still be discerned in the second recital in the preamble to the regulation, where the payment of direct aid is linked to compliance with the rules, although direct attribution is not mentioned. Only the amount withdrawn is to be determined on the basis of criteria which are proportionate, objective and graduated.

57. By contrast, in the Council the Member States set great store by direct responsibility of the beneficiary.³² It must therefore be assumed that, with the formulation applicable today, the legislature wished to prevent aid payments being reduced irrespective of the farmer’s personal responsibility.

58. Recital 45 in the preamble to Regulation No 1698/2005 may be understood as confirming this approach. It states that a penalty system should be set up where *beneficiaries* receiving payments do not meet the mandatory requirements provided for in Regulation No 1782/2003 on all of their holding, taking into account the severity, extent, permanence and repetition of non-compliance. If, on the other hand, the non-compliance does not originate with the beneficiary, there is no cause for a penalty.

59. The requirement that the non-compliance be directly attributable to the individual farmer was made explicit by Article 65(2) of Regulation No 796/2004. In the original versions of the German, Danish, English, Italian, Dutch and Swedish texts, the farmer had to have committed the non-compliance himself for it to be attributed to him. That could have been taken to mean that only non-compliances by the farmer *personally* allow the subsidies to be reduced.

29 — Case 19/67 *van der Vecht* [1967] ECR 345, 354; Case 30/77 *Bouchereau* [1977] ECR 1999, paragraphs 13 and 14; Case C-56/06 *Euro Tex* [2007] ECR I-4859, paragraph 27; and Case C-426/05 *Tele2 Telecommunication* [2008] ECR I-685, paragraph 25.

30 — Case 29/69 *Stauder* [1969] ECR 419, paragraph 3; Case 55/87 *Moksel Import und Export* [1988] ECR 3845, paragraph 49; Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 47; Case C-188/03 *Junk* [2005] ECR I-885, paragraph 33; and Joined Cases C-261/08 and C-348/08 *Zurita García and Choque Cabrera* [2009] ECR I-10143, paragraph 54.

31 — Article 6 of the Proposal for a Council Regulation establishing common rules for direct support schemes under the common agricultural policy and support schemes for producers of certain crops, COM(2003) 23, p. 23.

32 — Non-paper 1 ‘Annexe III and Article 6’, Council document 9971/03 ADD 1 of 3 June 2003.

60. Later, however, the word ‘himself’ was deleted from those language versions in order to make clear that the farmer concerned can also be held liable ‘where the farmer did not act himself in the strict sense’.³³ As the Netherlands Government stresses, the beneficiary’s responsibility is *not* therefore confined to non-compliances committed by him in person.

61. Considered together, the origin of Article 51(1) of Regulation No 1698/2005 and the origin of Article 65(2) of Regulation No 796/2004 point to the conclusion that a non-compliance is to be penalised only on the basis of the personal responsibility of the aid beneficiary, but that he need not have committed the non-compliance in person.

3. Systematic considerations

62. The hierarchical relationship between Article 51(1) of Regulation (EC) No 1698/2005 and Article 65(2) of Regulation No 796/2004 allows the responsibility of the aid beneficiary to be more closely defined (see under a) below). On the other hand, neither later additions to the system (see under b)) nor general principles (see under c)) nor the risk of abuse (see under d)) require the beneficiary’s liability to be extended.

a) Fault

63. The considerations so far argue predominantly for reductions to be limited to non-compliances that lie within the responsibility of the aid beneficiary. Positive criteria for establishing such responsibility are provided by the provisions that link reductions in aid to intent and negligence.

64. While it is true that the two basic regulations, Regulation No 1698/2005 and Regulation No 1782/2003, contain no provisions to that effect, Article 23 of Regulation No 1975/2006 nevertheless refers, for the implementation of Article 51 of the former regulation, to Articles 66 and 67 of Regulation No 796/2004. These are concerned with the calculation of reductions and exclusions for negligent and intentional non-compliances respectively.

65. Although negligence and intent are explicitly mentioned only in connection with the assessment of penalties, it must be inferred from the context that both criteria, each taken individually, also constitute grounds for the penalty. The system of reductions and exclusions under Article 51 of Regulation No 1698/2005 is therefore based on the principle of fault. The beneficiary is liable for culpable non-compliances committed either negligently or intentionally.

66. This is confirmed by recitals 56 and 57 in the preamble to Regulation No 796/2004. According to the first of these recitals, the system of reductions and exclusions with regard to cross-compliance obligations (in the field of environmental law) aims in particular to set an incentive for farmers to respect the already existing legislation in the different fields of cross-compliance. The system should therefore intervene only in the case of non-compliances which were within the farmer’s control. That means intentional or negligent non-compliances, as recital 57 confirms.

67. The mere fact that work is carried out by other persons does not preclude fault on the part of the farmer in such a case. Such fault may in particular reside in the choice, instruction or supervision of the contractor (*culpa in eligendo, instruendo vel custodiendo*).

33 — See Article 2(3) of and recital 18 in the preamble to Regulation (EC) No 239/2005, cited in point 9. The French version originally required the non-compliance to be caused directly by the farmer; following the correction, the causation need not be ‘direct’. In other language versions, such as the Estonian and Polish versions, the word ‘himself’ has been retained, however. These must be editing mistakes.

68. The aid beneficiary must normally ensure that the person carrying out farm work for him has the necessary skills and knowledge to avoid non-compliances. In particular, he must not give any instructions that will inevitably result in a breach of the requirements, but must formulate the instructions in such a way that the work does not result in non-compliances. And he must give the service provider adequate supervision, so that non-compliances can be prevented if necessary.

69. With regard to the present case, it would be understandable for the Netherlands authorities to assume intentional non-compliance given the long-established, settled policy that the spreading of manure should be low in emissions. It would then be up to the aid beneficiary to refute that assumption. To that end he could, for example, demonstrate that he had engaged a reliable and experienced contractor, that he had instructed him to spread the manure in a manner that was low in emissions, and that he had supervised him adequately and informed him of the particular conditions on his land. If the farmer were unable to demonstrate that he had fulfilled his obligations completely, he would in most cases be guilty only of negligence. In the event of manifest non-compliances such as engaging a contractor who is known to be unreliable and failing to provide adequate supervision, it may however be more appropriate to assume his acceptance of the possibility that requirements might be breached, in other words intent.

b) Attribution in the case of transfer of land

70. Nor can an extension of attribution in the main proceedings be based on the *Langestraat* case,³⁴ which is mentioned in the request for a preliminary ruling.

71. In that case, the Court of Justice confirmed that non-compliance with cross-compliance rules by the person to whom or from whom the agricultural land was transferred must be attributed *in full* to the farmer submitting the aid application.³⁵

72. That decision is, however, based on the second subparagraph of Article 23(1) of Regulation (EC) No 73/2009.³⁶ That provision is not applicable to the present case for reasons of time alone. Above all, however, it is concerned with another specific situation, namely the transfer of land.

c) Attribution on the basis of the principle of *respondeat superior*

73. The Netherlands Government nevertheless tries to establish a more extensive responsibility with the principle of *respondeat superior*, according to which a person who engages third parties to carry out works is responsible for those third parties.

74. I am not aware of the existence of any such general rule in European Union law, and the Netherlands Government itself has not advanced anything to substantiate it.

75. So far as the laws of the Member States are concerned, Netherlands civil law seems to have such a rule both for the law of contract and for non-contractual law, in other words the law of tort.³⁷

34 — Cited in footnote 2.

35 — *Maatschap L.A. en D.A.B. Langestraat en P. Langestraat-Troost*, cited in footnote 2, paragraph 44.

36 — Council Regulation 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 and (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003 (OJ 2009 L 30, p. 16).

37 — See respectively Article 6:76 and Articles 6:170, 6:171 and 6:172 of the Netherlands Burgerlijk Wetboek (Civil Code).

76. A comparison of the legal systems of the Member States reveals differences, however. The principle of attributing the misconduct of auxiliary persons irrespective of any fault on the principal's part is basically alien to the laws of many Member States in the field of tort. In those States a principal is not therefore liable for the misconduct of his auxiliary personnel in the same way as for his own, but only in so far as he has made a wrong choice or failed to perform proper supervision, for example.³⁸

77. The position in contract law is different. If a person makes use of a third party in order to fulfil a contractual obligation, for the great majority of Member States it must be assumed that their legal orders provide solutions whereby the culpable behaviour of the obligor's agent towards the contract partner is attributed to the obligor. He is therefore liable for the misconduct of the third party acting for him in the same way as for his own.³⁹

78. Liability for persons employed to perform obligations is therefore a generally recognised rule of contract law. On the other hand, the aid granted to Van der Ham is based not on a contract concluded according to the principles of personal autonomy but on an act of the public authorities. This legal relationship is none the less similar to a contract in so far as, like a contract, it establishes a bond of mutual obligations where the continued granting of aid on the one part is linked to compliance with the requirements for such aid on the other.

79. Accordingly, the principle of a person being liable for his contractual assistant seems applicable by analogy, since its ratio is that the person who uses an assistant to fulfil an obligation, thereby gaining the advantage of extending his radius of action, should also bear the disadvantage arising from any misconduct on the part of that assistant. The intention is consequently to avoid the contractual partner being placed at a disadvantage as regards liability for a breach of obligation on the part of the obligor.

80. This consideration cannot, however, in any way alter the fact that the European Union legislature did not include the principle of *respondeat superior* in the provisions for the reduction of agricultural aid for non-compliance with the cross-compliance rules. On the contrary, in Article 51 of Regulation (EC) No 1698/2005 it expressly adopted the criterion of whether the non-compliance is directly attributable to the beneficiary of the aid, and in Articles 65 to 67 of Regulation No 796/2004 it laid down rules for that attribution in the sense of responsibility for fault.

81. It would therefore be incompatible with the principle of legal certainty to accept that the aid beneficiary were responsible for persons acting on his behalf, regardless of personal culpability. That principle requires that rules of law must be clear and precise and their application must be foreseeable by those subject to them. That applies all the more in the case of rules liable to entail adverse financial consequences.⁴⁰

d) The risk of abusive practices

82. Finally, the necessity of fault cannot be refuted by the Netherlands Government's argument that a narrow interpretation of a farmer's liability might encourage abusive practices.

38 — See, for example, for German law Paragraph 831 of the Bürgerliches Gesetzbuch, for Austrian law Article 1315 of the Allgemeines Bürgerliches Gesetzbuch or for Spanish law Article 1903 of the Código Civil.

39 — See in detail *Ranieri, Europäisches Obligationenrecht*, 3rd edition (2009), pp. 796 ff. See also Article III-2:106 of the Draft Common Frame of Reference (DCFR) ('A debtor who entrusts performance of an obligation to another person remains responsible for performance') and the references in relation to the law of the Member States in *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)*, pp. 762-3, which may be accessed at http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf.

40 — See Case C-288/07 *Isle of Wight Council and Others* [2008] ECR I-7203, paragraph 47; Case C-201/08 *Plantanol* [2009] ECR I-8343, paragraph 46 and the case-law cited; and, specifically on agricultural aid, Case 117/83 *Könecke* [1984] ECR 3291, paragraph 11; Case 137/85 *Maizena and Others* [1987] ECR 4587, paragraph 15; and Case C-172/89 *Vandermoorde v Commission* [1990] ECR I-4677, paragraph 9.

83. There would certainly be a considerable risk of abuse if the beneficiary's responsibility were confined to non-compliances committed in person, as the wording would allow if interpreted very narrowly, because in that case the requirements could be circumvented by a simple division of labour.

84. However, abuse is not encouraged by limiting beneficiaries' responsibility to culpable non-compliances. Every abuse would necessarily involve fault on the beneficiary's part.

4. Conclusion for the third question

85. A failure to comply with the cross-compliance requirements by persons engaged to carry out work on behalf of a farmer in receipt of aid on the basis of Regulation No 1698/2005 are therefore to be attributed to the farmer only if he himself is at fault, and such fault may in particular reside in the selection, instruction or supervision of those other persons.

V – Conclusion

86. I therefore propose that the Court answer the request for a preliminary ruling as follows:

- (1) An intentional non-compliance within the meaning of Article 23 of Regulation (EC) No 1975/2006 and Article 67(1) of Regulation (EC) No 796/2004 requires at the least that the offender is conscious of the possibility of non-compliance and accepts that possibility.
- (2) The criteria listed in Article 8(2) of the Netherlands Policy Rules governing the rules on cross-compliance under the Common Agricultural Policy may be referred to for the purpose of presuming, rebuttably, that there has been an intentional breach of the requirements of Articles 4 and 5 of and Annexes III and IV to Regulation (EC) No 1783/2003. The interpretation and application of those criteria must not, however, undermine the condition of 'intentional' non-compliance.
- (3) A failure to comply with the requirements of Articles 4 and 5 of and Annexes III and IV to Regulation (EC) No 1782/2003 by persons engaged to carry out work on behalf of a farmer in receipt of aid on the basis of Regulation (EC) No 1698/2005 are to be attributed to the farmer only if he himself is at fault, and such fault may in particular reside in the selection, instruction or supervision of those other persons.