



Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 16 September 2015¹

Case C-330/14

Gergely Szemerey

v

Miniszterelnökséget vezető miniszter

(Request for a preliminary ruling from the Gyulai Közigazgatási és Munkaügyi Bíróság (Hungary))

(Request for a preliminary ruling — Admissibility — Common agricultural policy — Direct support schemes — Integrated administration and control system — Reduction of or exclusion from payments in the event of non-compliance with eligibility and cross-compliance rules — Non-compliance by farmer with the requirement to provide a certificate for rare plant species — Proportionality — Administrative practice — Force majeure)

1. In the case before the referring court, a farmer has failed to attach a certificate relating to rare plant species — provided for by national legislation — to his application for payment of agri-environmental aid. The certificate is required in order for the application for increased aid on account of cultivation of rare plant species to be substantiated. The competent authorities have subsequently recognised a situation of *force majeure*, given that difficult weather conditions made the sowing of those plant species impossible. None the less, the application for payment was refused in its entirety and the farmer was ordered to pay a further administrative penalty that was to be offset in the course of the three following years. This was, in essence, because no certificate was submitted by the farmer in due time.

2. In that context, the Court is asked to clarify two issues. The first one concerns the appropriate degree of leeway that Member States are to enjoy in putting in place mechanisms to ensure effective control of agricultural aid schemes. The second issue, as a logical continuation of the first, turns on the compatibility with the relevant rules of EU agricultural legislation of the imposition of a penalty relating to the entire application.

¹ — Original language: English.

I – Legal framework

A – EU law

1. Regulation (EC) No 1698/2005²

3. In accordance with Article 1 thereof, Regulation No 1698/2005 lays down, amongst other things, the general rules governing EU support for rural development which is financed by the European Agricultural Fund for Rural Development (EAFRD).

4. The objectives of the regulation are to be implemented by means of measures laid down in the four axes defined in Title IV thereof. Axis 2 consists of measures intended to improve the environment and the countryside. In that context, Article 36(a)(iv) provides that support under this axis concerns measures targeting the sustainable use of agricultural land through (inter alia) agri-environment payments.

5. Article 39 of the regulation concerns agri-environment payments. Paragraphs 2 and 3 thereof provide that Member States are to grant such payments to farmers who make agri-environmental commitments on a voluntary basis. The commitments cover only those going beyond the relevant mandatory standards laid down in EU legislation and minimum requirements for fertiliser and plant protection product use and other relevant mandatory requirements established by national legislation.

6. Article 74(1) of Regulation No 1698/2005 states that Member States are to adopt all the legislative, statutory and administrative provisions necessary to ensure that the European Union's financial interests are effectively protected.

2. Regulation (EC) No 1975/2006³

7. In accordance with Article 1 thereof, Regulation No 1975/2006 lays down detailed rules for the implementation of the control procedures as well as cross-compliance in respect of the co-financed rural development support measures established pursuant to Regulation No 1698/2005.

8. Article 4 concerns applications for support and payment claims. It provides:

'1. Without prejudice to specific provisions in this Regulation, the Member States shall provide for appropriate procedures for the submission of applications for support.

...

3. Applications for support and payment claims may be adjusted at any time after their submission in cases of obvious errors recognised by the competent authority.'

2 — 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) as modified by Council Regulation (EC) No 473/2009 of 25 May 2009 (OJ 2009, L 144, p. 3).

3 — Commission Regulation of 7 December 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 2006 L 368, p. 74) as modified by Commission Regulation (EC) No 484/2009 of 9 June 2009 (OJ 2009 L 145, p. 25).

9. Article 5 sets out the general principles of control. It states:

‘1. Without prejudice to specific provisions in this Regulation, Member States shall ensure that all the eligibility criteria established by Community or national legislation or by the rural development programmes can be controlled according to a set of verifiable indicators to be established by the Member States.

...

3. Without prejudice to specific provisions, no payment shall be made in favour of beneficiaries for whom it is established that they artificially created the conditions required for obtaining such payments with a view to obtaining an advantage contrary to the objectives of the support scheme.’

10. Article 10 forms part of Chapter II ‘Controls, reductions and exclusions’. Under the heading ‘General principles’, it reads:

‘1. Applications for support and subsequent payment claims shall be checked in a manner which ensures effective verification of compliance with the conditions for granting support.

2. The Member States shall define suitable methods and means for verifying the conditions for granting support for each support measure.

3. Member States shall make use of the integrated administration and control system provided for in Chapter 4 of Title II of Regulation (EC) No 1782/2003 (hereinafter referred to as ‘IACS’).

4. Verification of the eligibility criteria shall consist of administrative and on-the-spot checks.

5. Respect of cross-compliance shall be verified through on-the-spot checks and where appropriate through administrative checks.

...’

11. Article 11 deals with administrative controls. Paragraph 1 reads:

‘Administrative checks shall be undertaken on all applications for support and payment claims, and shall cover all elements that it is possible and appropriate to control by administrative means. The procedures shall ensure the recording of control work undertaken, the results of the verification and the measures taken in respect of discrepancies.’

12. Under the heading ‘Reductions and exclusions in the case of non-respect of eligibility criteria’, Article 18 provides:

‘1. In case any of the commitments attached to the granting of the aid, other than those related to the size of area or number of animals declared, are not respected, the aid claimed shall be reduced or refused.

2. The Member State shall determine the amount of the reduction of the aid, in particular, on the basis of the severity, extent and permanence of the non-respect found.

The severity of a non-respect shall depend, in particular, on the importance of the consequences of the non-respect taking into account the objectives pursued by the criteria which have not been respected.

The extent of a non-respect shall depend, in particular, on the effect of the non-respect on the operation as a whole.

Whether a non-compliance is of permanence shall depend, in particular, on the length of time for which the effect lasts or the potential for terminating those effects by reasonable means.

3. Where non-respect results from irregularities committed intentionally, the beneficiary shall be excluded from the measure in question both for the calendar year concerned and for the following calendar year.’

3. Regulation (EC) No 1122/2009⁴

13. Regulation No 1122/2009 sets out the detailed rules necessary for the implementation of cross-compliance, modulation and the integrated administration and control system, established by Chapter 4 of Title II of Regulation (EC) No 73/2009,⁵ and for the implementation of cross-compliance provided for in Articles 85t and 103z of Regulation (EC) No 1234/2007.⁶ In accordance with Article 87 thereof, the regulation is to be applied to aid applications relating to marketing years or premium periods starting as of 1 January 2010.

14. Regulation No 1122/2009 replaced Regulation (EC) No 796/2004.⁷ In accordance with Articles 7 and 8 of Regulation No 1975/2006, read in conjunction with the correlation table in Annex II to Regulation No 1122/2009, Articles 14, 23 and 75 of Regulation No 1122/2009 fall to be applied *mutatis mutandis* to situations governed by Regulation No 1975/2006.

15. Article 14 of Regulation No 1122/2009 concerns amendments to the single application. Paragraph 1 thereof reads:

‘After the expiry of the time limit for the submission of the single application, individual agricultural parcels or individual payment entitlements may be added in the single application provided that the requirements under the aid schemes concerned are respected.

Changes regarding the use or aid scheme in respect of individual agricultural parcels or in respect of payment entitlements already declared in the single application may be made under the same conditions.

Where the amendments referred to in the first and second subparagraphs have a bearing on any supporting documents or contracts to be submitted, the related amendments to such documents or contracts shall also be allowed.’

16. Article 23 of the regulation deals with late submissions. Paragraph 1 provides:

‘Except in cases of force majeure and exceptional circumstances as referred to in Article 75, the submission of an aid application pursuant to this Regulation after the relevant time limit shall lead to a 1% reduction per working day in the amounts to which the farmer would have been entitled if the application had been submitted within the time limit.

4 — Commission Regulation 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 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).

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

6 — Council Regulation of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ 2007 L 299, p. 1).

7 — 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. 8), as amended.

Without prejudice to any particular measures to be taken by the Member States with regard to the need for the submission of any supporting documents in due time to allow effective controls to be scheduled and carried out, the first subparagraph shall also apply with regard to documents, contracts or declarations to be submitted to the competent authority in accordance with Articles 12 and 13 where such documents, contracts or declarations are constitutive for the eligibility for the aid in question. In that case, the reduction shall be applied on the amount payable for the aid concerned.

If the delay amounts to more than 25 calendar days the application shall be considered inadmissible.'

17. Article 58 of Regulation No 1122/2009 lays down rules that are to be applied in case of over-declaration. It reads:

'If, in respect of a crop group, the area declared for the purposes of any area-related aid schemes ... exceeds the area determined in accordance with Article 57 of this Regulation, the aid shall be calculated on the basis of the area determined reduced by twice the difference found if that difference is more than either 3% or two hectares, but no more than 20% of the area determined.

If the difference is more than 20% of the area determined, no area-linked aid shall be granted for the crop group concerned.

If the difference is more than 50%, the farmer shall be excluded once again from receiving aid up to an amount equal to the amount which corresponds to the difference between the area declared and the area determined in accordance with Article 57 of this Regulation. ... If the amount cannot be fully off-set ... in the course of the three calendar years following the calendar year of the finding, the outstanding balance shall be cancelled.'

18. Article 75 deals with *force majeure* and exceptional circumstances. It provides:

'1. If a farmer has been unable to comply with his obligations as a result of force majeure or exceptional circumstances ... he shall retain his right to aid in respect of the area or animals eligible at the time when the case of force majeure or the exceptional circumstance occurred. In addition, when the non-compliance resulting from such force majeure or exceptional circumstances concerns cross-compliance, the corresponding reduction shall not be applied.

2. Cases of force majeure and exceptional circumstances ... shall be notified in writing to the competent authority, with relevant evidence to the satisfaction of the competent authority, within ten working days from the date on which the farmer is in a position to do so.'

B – *Hungarian law*

19. Paragraph 29(3) of Regulation No 61/2009⁸ states that, where rare plant species are considered to be of particular historical, cultural or genetic importance within the meaning of Annex 12 or 13 thereto, the person eligible for aid has a right to an increased amount of aid provided that the competent authority certifies that the plant variety in question is a plant referred to in the aforementioned annexes.

⁸ — Regulation of the Ministry of Agriculture and Rural Development of 14 May 2009 specifying the requirements for applying for agri-environmental aid made available through the European Agricultural Fund for Rural Development (Az Európai Mezőgazdasági Vidékfejlesztési Alapból nyújtott agrár-környezetgazdálkodási támogatások igénybevételének részletes feltételeiről szóló 61/2009. (V.14.) FVM rendelet).

20. Paragraph 55(4) of Regulation No 61/2009 further specifies that where an on-the-spot check reveals that the person eligible for aid is not in possession of the certificate referred to in Paragraph 29(3), the entire amount of aid is refused for one marketing year as regards the parcel concerned.

21. On the basis of Paragraph 16(2) of Regulation No 31/2010⁹ a new Paragraph 43(6) was inserted in Regulation No 61/2009. In accordance with that provision, when a rare plant species is cultivated, the certificate relating to the rare plant species referred to in Paragraph 29(3) of Regulation No 61/2009 must be attached to the application for payment. The new provision took effect on 31 March 2010.

II – Facts, procedure and the questions referred

22. The following factual circumstances can be inferred from the order for reference.

23. On 26 July 2009, Mr Szemerey applied for agricultural aid. His application was approved by the competent authority on 21 January 2010. Then, on 16 May 2010, Mr Szemerey made an application for a single area payment under an organic farming and cultivable land programme.

24. More specifically, after amending his application on 31 May 2010, Mr Szemerey applied for payment of agri-environmental aid for an amount corresponding to 52.9 hectares. In that context, he also submitted an application for priority aid — giving a right to an increase of aid otherwise payable — in respect of an amount corresponding to 29.69 hectares (of the total 52.9 hectares) to grow rare and endangered plant species which, for historical, cultural or genetic reasons, are given priority. For that purpose, Mr Szemerey had purchased seeds of white melilot (*Melilotus alba Medik*) and Swedish clover (*Trifolium hybridum L.*).

25. In spring and early summer 2010, the sowing of those rare plant species was frustrated, owing to flooding, in particular. For that reason, Mr Szemerey submitted two declarations of *force majeure*: first on 29 June 2010, and subsequently on 28 July 2010. Following the instructions of Hungarian authorities, Mr Szemerey also replaced the usage code for the land affected with the code for ‘set-aside land’. On 30 September 2010 the declaration of *force majeure* was accepted by the competent authorities.

26. On 19 March 2011, while recognising a situation of *force majeure*, the competent authority refused Mr Szemerey’s application for payment in its entirety and imposed an administrative penalty of HUF 2 483 953 which was to be offset from area applications for the following three years. Mr Szemerey appealed against that decision as regards the penalty imposed.

27. On 13 January 2012, the Mezőgazdasági és Vidékfejlesztési Hivatal Központi Szerve (Central Office for Agriculture and Rural Development; ‘the Office’) upheld the decision on the ground that Mr Szemerey had not submitted the certificate relating to the rare plant species, which should have been submitted on 15 May 2010 (i.e. when the application for payment was made) or, at the latest, on 9 June 2010. In that context, the Office further observed that a failure to submit the documents which substantiate the information in the application cannot be remedied. For that reason, it considered that

9 — Regulation of the Ministry of Agriculture and Rural Development of 30 March 2010 amending Regulation No 61/2009 specifying the requirements for applying for agri-environmental aid made available through the European Agricultural Fund for Rural Development and the Ministerial Regulations on aid made available through the European Agricultural Fund for Rural Development (Az Európai Mezőgazdasági Vidékfejlesztési Alapból nyújtott agrár-környezetgazdálkodási támogatások igénybevételének részletes feltételeiről szóló 61/2009. (V. 14.) FVM rendelet, valamint más, az Európai Mezőgazdasági Vidékfejlesztési Alapból nyújtott támogatásokról szóló miniszteri rendeletek módosításáról szóló 31/2010. (III.30.) FVM rendelet).

Mr Szemerey was not entitled to the priority aid for rare plant species and the area of land to be used for those species for the purposes of determining the entitlement to payment was therefore deemed to be 0 hectares. Given that the resulting over-declaration was greater than 50% of the area determined, the Office relied on Article 58 of Regulation No 1122/2009 to impose a penalty.

28. Mr Szemerey brought an appeal against that decision before the Gyulai Közigazgatási és Munkaügyi Bíróság (Gyula Administrative and Labour Court). Having doubts as to the compatibility of the relevant national legislation with EU law, that court decided to stay the proceedings and refer the following questions for a preliminary ruling:

- ‘(1) Must the principle of flexibility and of the possibility of amending [recitals] 20 and 27 in the preamble to Regulation [No 796/2004] and [recitals] 18, 23 and 26 in the preamble to Regulation [No 1122/2009] be interpreted as precluding a national provision, under which, in the case of the cultivation of a rare plant species, the certificate relating to the rare plant must be attached to the application for payment, having regard to the administrative practice, in accordance with which it was possible to apply for the certificate only before applying for payment between 2 and 15 April 2010, and it was possible to attach it only at the same time as the presentation of the single application, and the provision did not make it possible to remedy the defect in the application constituted by the failure to produce a certificate?
- (2) Is this arrangement consistent with the obligation of a Member State not to undermine the objectives of the Common Agriculture Policy, or can it be said that the effective exercise of the right to aid under European Union law of farmers who grow rare plants became impossible or excessively difficult and unpredictable in 2010 when the legislation was amended (amendment of Paragraph 43(6) of [Regulation No 61/2009], made law by [Regulation No 31/2010])?
- (3) Do [recital] 57 in the preamble to Regulation [No 796/2004] or [recital] 75 in the preamble to Regulation [No 1122/2009] and, in particular, the principle of proportionality preclude an administrative practice which, in the event that there is no certificate relating to the rare plant, and without taking into consideration intention, negligence or the circumstances of the case, imposes a penalty for over-declaration in respect of the entire application, when the application for payment, in respect of the entire plot of land, otherwise complies with the requirements for granting the aid, and the farmer grows the declared plant in the area declared?
- (4) Are the grounds for exemption contained in [recitals] 67 or 71 in the preamble to Regulation [No 796/2004] or in [recital] 75 in the preamble to Regulation [No 1122/2009] applicable in the event that the farmer claims that a prejudicial or inappropriate administrative practice amounts to exceptional circumstances, and seeks to demonstrate that the practice of the administrative body was wholly or partly the cause of his error?
- (5) Can the accepted declaration of *force majeure* submitted by the farmer in relation to the total loss of the crop (sowing) be regarded as correct information for the purposes of [recital] 67 in the preamble to Regulation [No 796/2004] and [recital] 93 in the preamble to Regulation [No 1122/2009], which would exonerate the farmer in respect of the failure to submit the certificate relating to the rare plant and thereby entail exemption from the penalties relating to the entire application?’

29. Written observations have been submitted by Mr Szemerey, the Office, the Hungarian and Greek Governments and also the European Commission all of whom, with the exception of the Greek Government, presented oral argument at the hearing held on 24 June 2015.

III – Analysis

A – Preliminary remarks

30. First of all, it must be borne in mind that the referring court has submitted several questions to the Court, which all refer to *recitals* of Regulations No 796/2004 and No 1122/2009 and not to the legally binding provisions of those instruments. What is more, the questions referred contain no mention of Regulations No 1698/2005 and No 1975/2006 concerning the EAFRD, which provide the legal framework for dealing with the problems underlying the order for reference. And what is yet more, the order for reference leaves certain crucial issues pertaining to the national legal and factual context unanswered.

31. While certainly regrettable in many respects, that fact does not suffice to declare the present request for a preliminary ruling inadmissible.¹⁰ This conclusion follows from the spirit of cooperation inherent in the procedure laid down in Article 267 TFEU. As the Court has itself observed on numerous occasions, it is, in that regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject matter of the dispute.¹¹

32. Having said that, I take this opportunity of emphasising the importance of providing a clearly defined framework of analysis (both on the legal and on the factual plane) in the order for reference. This is not simply to facilitate the task of the Court, but also to ensure that all those willing to present observations are in a position to do so.¹² Indeed, as the observations submitted in this case neatly illustrate, failure to do so may lead not only to confusion as to the applicable legislative framework, but also to the established factual background of the reference.

33. The fact that the referring court has not made reference to the relevant provisions of EU law does not, in my view, prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case before it, as required by the case-law.¹³ In the present case, despite the shortcomings of the order for reference already described, the issues on which the referring court is seeking guidance can with relative ease be extrapolated from it.

34. As I understand it, there are two issues on which the referring court is, in reality, seeking guidance. The first one relates to the leeway, or rather the limits thereto, that Member States enjoy in designing the mechanisms of control of aid schemes. The second issue turns on what the appropriate consequences of an incomplete application for payment under a specific aid scheme are.

35. I will deal with both issues in turn. As I have indicated elsewhere,¹⁴ it should not be forgotten that farming constitutes a professional activity. That fact ought to be kept in mind when interpreting and applying EU agricultural legislation.

10 — On the limits to admissibility, see my Opinion in *Gullotta and Farmacia di Gullotta Davide & C.*, C-497/12, EU:C:2015:168, point 20 in particular.

11 — Recently, judgment in *Subdelegación del Gobierno en Guipuzkoa - Extranjería*, C-38/14, EU:C:2015:260, paragraph 26 and case-law cited. See also, among many, judgment in *Fuß*, C-243/09, EU:C:2010:609, paragraph 40 and case-law cited.

12 — See, for example, order in *Viacom*, C-190/02, EU:C:2002:569, paragraph 14 and case-law cited.

13 — See, for example, judgment in *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve*, C-562/13, EU:C:2014:2453, paragraph 37 and case-law cited.

14 — See my Opinion in *Demmer*, C-684/13, EU:C:2015:131, point 71.

B – *The obligation to ensure effective control of aid schemes*

36. The first and second questions referred, which I will consider jointly, concern the compatibility with EU law of national legislation which requires a farmer to provide, at the moment of the application for payment, a certificate concerning the rare plant species that constitute the basis of the application (for payment of priority aid). In that regard, the Office and the Hungarian Government maintained at the hearing that the certificate may be applied for independently of the sowing of the seeds of the plants in question. They further asserted that the certificate is intended to identify the rare plant species which give rise to priority aid and thus, to facilitate the task of authorities to determine eligibility for this particular kind of aid.

37. As a preliminary point, there is no doubt that it is for the Member States to ensure effective control of aid schemes. In fact, they are obliged to do so. This emerges clearly from Article 74 of Regulation No 1698/2005 and Article 5(1) of Regulation No 1975/2006. It transpires from those provisions that Member States are, on the one hand, to adopt all the legislative, statutory and administrative provisions necessary to ensure that the financial interests of the European Union are effectively protected. Member States are in that regard to ensure, on the other hand, that the eligibility criteria pertaining to different types of aid can be controlled according to a set of verifiable indicators to be established by the Member States. This is necessary to avoid abuses.

38. Nevertheless, Member States enjoy discretion in deciding on the specific realisation of checks, both administrative and on-the-spot checks, which are to ensure effective verification of compliance with the conditions for granting support. This transpires from Article 10 of Regulation No 1975/2006.

39. In the present case, there seems to be little doubt that the requirement under national legislation to provide the certificate at the time of the application for payment is designed to enable the competent authorities to verify, *ex ante*, that the conditions for granting support in the context of a specific aid scheme are fulfilled. In that sense, the requirement contributes to the effectiveness of administrative controls and the verification that the beneficiary is eligible for the agri-environmental aid in question. Therefore, the requirement to provide a certificate for the rare plant species at the time of application appears to be fully compatible with EU law. That is so, in particular, because it is designed to ensure that controls by the competent authorities are effective, as required by Article 74 of Regulation No 1698/2005.

40. What is more, it emerges from the case-file and from the submissions of the Office and the Hungarian Government at the hearing that the national legislation in fact allows beneficiaries to submit the certificate at issue up to 25 calendar days after the deadline for the application for payment for a given aid year (namely, 9 June). This seems to be fully consistent with Article 23 of Regulation No 1122/2009 which allows the beneficiary either to submit the application after the expiry of the deadline for doing so or to complete the application after the submission of the application. The reduction that is applied, in accordance with Article 23(1) of Regulation No 1122/2009, is a 1% reduction per working day of the amounts to which the farmer would have been entitled had the application, and the supporting documents, been submitted within the time limit. In that case, the reduction is applied to the amount payable for the aid concerned. If the delay amounts to more than 25 calendar days the application is considered inadmissible.

41. It seems to me that that provision, which provides for a certain grace-period in submitting the application for payment (in accordance with Article 14 of Regulation No 1122/2009), embodies the flexibility that the referring court also mentions. In that light, I cannot see why the relevant national provisions relating to the submission of the certificate in question would be incompatible with EU law.

42. There are two further issues which need to be addressed, however.

43. The first issue is whether it was possible, in the year 2010, to obtain a certificate and by extension, priority aid. Given the strict approach that the Court has adopted in relation to the obligations of Member States to ensure effectiveness of the control of aid schemes,¹⁵ it is only exceptionally that a measure designed to ensure effective controls could be considered to infringe the principle of proportionality. This would be so only in the event that it is virtually impossible — or at the very most, excessively difficult — to obtain aid.

44. In that regard, Mr Szemerey argues that the certificate can only be obtained for planted seeds and that, to obtain the certificate in question, an application therefor must be submitted at the latest on 15 April. His submission is that the cumulative effect of those circumstances renders it impossible for a farmer to obtain priority aid, or at the very least, excessively difficult, not least for plant species that can be sown later than March.¹⁶ Supposing that to be true, it would be my view that the detailed rules for the application of the relevant national legislation regarding the year 2010 cannot survive scrutiny in the light of the principle of proportionality.

45. However, it seems to me that it would be wrong to draw such a conclusion, provided that the referring court can verify that the following elements proffered by the Office and the Hungarian Government at the hearing hold true.

46. In fact, on the basis of the explanations given by those parties at the hearing, it seems that the certificate at issue may, in fact, be obtained before the sowing of the seeds (as it simply appears to attest to the rareness of the plant variety in question within the meaning of the relevant national legislation). In addition, no deadline is prescribed in the national legislation for the submission of an application for a certificate, the only requirement being that the farmer must attach the certificate to the application for payment (the date of 15 April being purely indicative). If that is so, I cannot see any reason to consider that the requirements pertaining to the submission of a certificate for the rare plant species could be considered to be disproportionate to the aim pursued, namely, to ensure effective *ex ante* control. It remains, however, the task of the referring court to verify whether that is so.

47. The second issue, intimately linked to the first, concerns the principle of legal certainty. Mr Szemerey has also put forward the argument — a point of view which seems to be shared by the referring court — that the relevant legislation was amended very covertly, only leaving the beneficiaries a period of approximately two weeks (31 March 2010 to 15 April 2010) to adjust to the new requirements. Indeed, under the rules previously in force, the certificate could also be produced at a later stage, during on-the-spot checks (that could, according to the Office, take place on 10 June at the earliest).

48. Although it is for the referring court to verify whether that legislative amendment — or rather the detailed rules for its entry into force as regards the year 2010 — are at variance with the requirements of legal certainty,¹⁷ I would nevertheless note the following.

49. First, the requirement of a certificate for rare plant species is not new: only the point in time at which it was to be submitted to authorities has changed. Second, the farmer could apparently obtain the certificate without actually sowing the seeds of the rare plants in question. Third, there is no legal obligation to apply for the certificate at the latest on 15 April.¹⁸ In that regard, the Hungarian Government specified at the hearing that, if a farmer wishes to ensure that he is in possession of the

15 — In that regard, the obligations of the Member States have been interpreted strictly in the case-law, which requires effective and adequate controls. See, by analogy, judgment in *Syndicat OP 84*, C-3/12, EU:C:2013:389, paragraphs 21 to 23 and case-law cited.

16 — The parties also disagree on at which point in time the plant species Mr Szemerey intended to sow (in particular white melilot) ought to be sown according to professional standards.

17 — Order in *Dél-Zempléni Nektár Leader Nonprofit*, C-24/13, EU:C:2014:40, paragraph 32 and case-law cited.

18 — See point 46 above for the possibility of the farmer to obtain a certificate without sowing and for the non-binding deadline of 15 April.

certificate in question at the time he is to submit his application for aid, that date is *de facto* the last possible date to submit an application for a certificate (to the extent that the farmer wishes to avoid any form of deduction). That means that for the year 2010, the time for applying for the certificate was made slightly (25 days) shorter than the previous year. In my view, that is not problematic from the viewpoint of legal certainty.

50. In light of the above, I conclude that Regulations No 1698/2005 and No 1975/2006, read in conjunction with Regulation No 1122/2009, do not, as a matter of principle, preclude a national provision, under which, in the case of the cultivation of a rare plant species, the certificate relating to the rare plant must be attached to the application for payment.

C – Failure to submit the certificate and appropriate penalties

51. The third, fourth and fifth questions referred address, in essence, the proportionality of the penalty inflicted as a result of the failure to submit the certificate in question.

52. The parties disagree on several crucial elements underlying the case pending before the referring court. For obvious reasons, the task of verifying the correctness of the assertions made by the parties lies with the referring court.

53. To reiterate, Mr Szemerey claims that he could not obtain the certificate in question due to the fact that sowing was impossible and that he made an application for the recognition of a situation of *force majeure* as soon as possible. He further argued that owing to the time-limits applicable (caused by the change in legislation with regard to the need to submit the certificate at the time of the application), it was practically impossible to obtain the certificate for the purposes of submitting it at the time of the application for payment.

54. The Office, on the other hand, argues that sowing was not a precondition for obtaining the certificate and that, in any event, given that one of the plants in question (white melilot) is sown in spring, Mr Szemerey ought to have known at the time of his application that he would not be able to sow the seeds of the rare plant species in question. Even though a situation of *force majeure* was accepted, the Office none the less imposed a penalty pursuant to Article 58 of Regulation No 1122/2009, which falls to be applied in the event of an (area-related) over-declaration.

55. On the basis of the order for reference and the questions referred, I understand that even supposing that Mr Szemerey did not qualify for priority aid due to the failure to submit the certificate at issue, he was nevertheless entitled to a basic amount of aid under the aid scheme in question. It is on that basis that I will assess the proportionality of the penalty thus imposed.

56. Let me begin by noting that despite the obscurity surrounding the qualification of the certificate at issue (eligibility criterion for priority aid¹⁹ or a supporting document),²⁰ the point on which there is least uncertainty is that the failure to provide the certificate in due time (by 9 June) leads to refusal of priority aid. As I understand it, the question the referring court is seeking an answer to is whether, in addition to the refusal to grant priority aid, Member State authorities may impose further penalties, pursuant to Article 58 of Regulation No 1122/2009 on account of over-declaration.

19 — The qualification of the certificate is an issue of national law that remains for the referring court to determine. Nevertheless, the reference in the fifth question referred to recitals that concern eligibility criteria support the view that the certificate constitutes an eligibility criterion in itself. Also the premiss from which the referring court starts, namely that Mr Szemerey is entitled to a basic amount of aid despite the late submission of the certificate suggests that the certificate constitutes an eligibility criterion for priority aid.

20 — On the other hand, the explanations given by the Office and the Hungarian Government at the hearing tend to suggest that the certificate is a supporting document.

57. It is my position that no further penalties can be imposed without infringing the principle of proportionality.

58. Subject to verification by the referring court, this is so because the failure to provide the certificate on time does not lead to exclusion from aid altogether, but simply to non-eligibility for an increase of the basic amount of aid, the supplement referred to as priority aid. Keeping that in mind, I have difficulty in accepting that the competent Hungarian authorities have applied Article 58 of Regulation No 1122/2009 correctly to the present set of factual circumstances. Indeed, that provision applies to the specific circumstances of (area-related) over-declaration.²¹ Here, however, the size of the overall area (52.9 hectares) declared is not in dispute. In those circumstances, the imposition of a penalty for over-declaration sits rather uneasily with the principle of proportionality.²²

59. As regards the appropriate legal basis for determining the consequence of the failure to submit the certificate at issue, that depends, in the final analysis, on the qualification of the certificate as a *per se* eligibility criterion or a supporting document.

60. On the one hand, if the certificate were to constitute an eligibility criterion for aid — which it remains for the referring court to verify — Article 18 of Regulation No 1975/2006 falls to be applied. Under that provision, where eligibility criteria are not respected, aid claimed may be reduced or refused. Only in the case of intentional failure to comply with eligibility criteria is it justified to refuse aid outright for both the calendar year concerned and the following year.

61. On the other hand, if the certificate at issue were to be considered a mere supporting document, Article 23 of Regulation No 1122/2009 — applicable *mutatis mutandis* to the context of the EAFRD — lays down specific rules that fall to be applied in the context of late submission of supporting documents. The consequences of failure to submit a full application are laid down in that same provision: as explained in point 40 above, after 25 calendar days the application is deemed inadmissible and no payment is made.

62. Therefore, in the circumstances emerging from the order for reference, the principle of proportionality precludes the imposition of a penalty for over-declaration and by extension, penalties relating to the entire application, within the meaning of Article 58 of Regulation No 1122/2009.

63. For the sake of completeness, I will make the following observation about the issue of *force majeure*. In the present context, *force majeure* could not be of relevance — for the purposes of payment of priority aid — unless Mr Szemerey's assertion that the certificate could only be obtained after sowing hold true, which is again for the referring court to verify. In that case, the fact that he could not sow might at all events exonerate the farmer in respect of the failure to submit the certificate, provided that the conditions laid down in Article 75(2) of Regulation No 1122/2009 as regards notification of *force majeure* are met.

IV – Conclusion

64. In the light of the foregoing, I propose that the Court answer the questions referred by the Gyulai Közigazgatási és Munkaügyi Bíróság as follows:

- (1) Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and Commission Regulation (EC) No 1975/2006 of 7 December 2006 laying down detailed rules for the

21 — See also Article 16 of Regulation No 1975/2006 on over-declaration in the context of the EAFRD.

22 — See, for example, judgment in *Maatschap L.A. en D.A.B. Langestraat en P. Langestraat-Troost*, C-11/12, EU:C:2012:808, paragraph 39 and case-law cited.

implementation of Council Regulation No (EC) 1698/2005, as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures (as modified), read in conjunction with 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 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, do not, as a matter of principle, preclude a national provision, under which, in the case of the cultivation of a rare plant species, the certificate relating to the rare plant must be attached to the application for payment.

- (2) In the circumstances emerging from the order for reference, the principle of proportionality precludes the imposition of a penalty for over-declaration within the meaning of Article 58 of Regulation No 1122/2009.