



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

13 June 2013*

(Agriculture — European Agricultural Guidance and Guarantee Fund — ‘Scrutiny period’ — Possibility for a Member State to extend the scrutiny period where it is impossible to carry out that scrutiny in the time allowed — Repayment of financial assistance — Penalties)

In Case C-3/12,

Request for a preliminary ruling under Article 267 TFEU from the Conseil d’État (France), made by decision of 28 November 2011, received at the Court on 2 January 2012, in the proceedings

Syndicat OP 84

v

Établissement national des produits de l’agriculture et de la mer (FranceAgriMer), successor in law to the Office national interprofessionnel des fruits, des légumes, des vins et de l’horticulture (Viniflor), itself successor in law to the Office national interprofessionnel des fruits, des légumes et de l’horticulture (Oniflor),

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, U. Löhmus, M. Safjan (Rapporteur) and A. Prechal, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Établissement national des produits de l’agriculture and de la mer (FranceAgriMer), by J.-C. Balat, avocat,
- the French Government, by G. de Bergues and N. Rouam, acting as Agents,
- the Polish Government, by M. Szpunar and B. Majczyna, acting as Agents,
- the European Commission, by P. Rossi and D. Bianchi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 March 2013,

* Language of the case: French.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 2(4) and 6 of Council Regulation (EEC) No 4045/89 of 21 December 1989 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1989 L 388, p. 18), as amended by Council Regulation (EC) No 3094/94 of 12 December 1994 (OJ 1994 L 328, p. 1) ('Regulation No 4045/89').
- 2 The request has been made in the context of proceedings between Syndicat OP 84, an agricultural organisation, and the Établissement national des produits de l'agriculture et de la mer (FranceAgriMer), successor in law to the Office national interprofessionnel des fruits, des légumes, des vins et de l'horticulture (Viniflor), itself successor in law to the Office national interprofessionnel des fruits, des légumes et de l'horticulture (Oniflor), regarding the lawfulness of the recovery of Community aid received from the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (the 'EAGGF').

Legal context

- 3 Article 8(1) of Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970(I), p. 218) provides:

'Member States in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary to:

- satisfy themselves that transactions financed by the [EAGGF] are actually carried out and executed correctly,
- prevent and deal with irregularities,
- recover sums lost as a result of irregularities or negligence.

...'

- 4 The first to fourth recitals and the tenth recital in the preamble to Regulation No 4045/89 state:

'... under Article 8 of Regulation ... No 729/70 ..., the Member States take the measures necessary to satisfy themselves that transactions financed by the [EAGGF] are actually carried out and are executed correctly, to prevent and deal with irregularities and to recover sums lost as a result of irregularities or negligence;

... national provisions relating to scrutiny which are more extensive than those provided for in the Regulation are not affected by this Regulation;

... Member States must be encouraged to reinforce the scrutiny of commercial documents of undertakings receiving or making payments which they have carried out in accordance with Directive 77/435/EEC [of 27 June 1977 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1977 L 172, p. 17)];

... the implementation by Member States of the rules arising from Directive 77/435/EEC has disclosed the need for certain provisions of that Directive to be amended on the basis of experience gained; ... in view of the nature of the provisions concerned the amendments should be included in a Regulation;

...

... while it is the responsibility of the Member States in the first instance to adopt their scrutiny programmes, it is necessary that these programmes be communicated to the Commission so that it can assume its supervisory and coordinating role and to ensure that the programmes are adopted on the basis of appropriate criteria; ... scrutiny can thus be concentrated on sectors or undertakings where the risk of fraud is high.'

5 Article 1(2) of Regulation No 4045/89 provides:

'For the purposes of this Regulation "commercial documents" shall mean all books, registers, vouchers and supporting documents, accounts, production and quality records, and correspondence relating to the undertaking's business activity, as well as commercial data, in whatever form they may take, including electronically stored data, in so far as these documents or data relate directly or indirectly to the transactions referred to in paragraph 1.'

6 Article 2 of the regulation states:

'1. Member States shall carry out systematic scrutiny of the commercial documents of undertakings taking account of the nature of the transactions to be scrutinised. Member States shall ensure that the selection of undertakings for scrutiny gives the best possible assurance of the effectiveness of the measures for preventing and detecting irregularities under the system of financing by the Guarantee Section of the EAGGF. Inter alia the selection shall take account of the financial importance of the undertakings in that system and other risk factors.

...

4. The scrutiny period shall run from 1 July to 30 June of the following year.

Scrutiny shall cover a period of at least 12 months ending during the previous scrutiny period; it may be extended for periods, to be determined by the Member State, preceding or following the 12-month period.

...'

7 Under Article 4 of that regulation:

'Undertakings shall keep the commercial documents referred to in Articles 1(2) and 3 for at least three years, starting from the end of the year in which they were drawn up.

The Member States may prescribe a longer period for the retention of these documents.'

8 Article 5(1) of Regulation No 4045/89 states:

'The persons responsible for the undertaking, or a third party, shall ensure that all commercial documents and additional information are supplied to the officials responsible for the scrutiny or to the persons empowered for that purpose. Electronically stored data shall be provided on an appropriate data support medium.'

9 Article 6 of the regulation provides:

‘1. Member States shall ensure that officials responsible for the scrutiny shall be entitled to seize commercial documents, or have them seized. This right shall be exercised with due regard for relevant national provisions and shall not affect the application of rules governing proceedings in criminal matters concerning the seizure of documents.

2. Member States shall adopt appropriate measures to penalise natural or legal persons who fail to fulfil their obligations under this Regulation.’

10 Article 9(1) of the regulation provides:

‘Before 1 January following the scrutiny period Member States shall send the Commission a detailed report on the application of this Regulation.’

11 In Annex II to Commission Regulation (EEC) No 1863/90 of 29 June 1990 laying down detailed rules for the application of Council Regulation (EEC) No 4045/89 (OJ 1990 L 170, p. 23), as amended by Commission Regulation (EC) No 2278/96 of 28 November 1996 (OJ 1996 L 308, p. 30) (‘Regulation No 1863/90’), Section 4(g) provides for the notification, in the annual report submitted by the Member States pursuant to Article 9(1) of Regulation No 4045/89, of ‘the results of those scrutinies carried out pursuant to the scrutiny period prior to that covered by the present report, for which the results were not available at the time of submission of the report for that scrutiny period’.

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

12 Syndicat OP 84 – an agricultural umbrella organisation for 48 fruit and vegetable producers – implemented an operational programme covering the period from 1 July 1997 to 31 December 1998. It received Community aid for those purposes from the Guarantee Section of the EAGGF.

13 By letter of 30 May 2000, Syndicat OP 84 was informed by the competent national authorities that an on-site inspection was to take place pursuant to Regulation No 4045/89. However, the inspection could not begin until 22 January 2001 and was completed on 24 January 2001.

14 As the inspection disclosed that some of the actions for which Syndicat OP 84 claimed to be entitled to Community aid were not eligible on account of their wholly individual nature, and that the procedure in accordance with which Syndicat OP 84’s members financed the operational fund did not comply with Article 15 of Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables (OJ 1996 L 297, p. 1), the Oniflhor asked Syndicat OP 84 by letter of 30 October 2001 to repay, in their entirety, the amounts received in respect of 1997 and 1998 and subsequently issued an enforcement order in respect of the amounts to be recovered.

15 By judgment of 7 November 2006, the Tribunal administratif de Marseille (Administrative Court, Marseilles) annulled the enforcement order issued against Syndicat OP 84. However, by judgment of 8 December 2008, the Cour administrative d’appel de Marseille (Administrative Court of Appeal, Marseilles) set aside the judgment at first instance and dismissed the claims submitted by Syndicat OP 84 to the Tribunal administratif de Marseille. Syndicat OP 84 thereupon lodged an appeal in cassation before the Conseil d’État (Council of State).

16 Syndicat OP 84 submits inter alia a ground of appeal alleging that the Cour administrative d’appel de Marseille erred in law in holding that the authorities could, without misapplying Article 2 of Regulation No 4045/89, commence an inspection during the scrutiny period falling between 1 July

1999 and 30 June 2000, and continue it during the scrutiny period falling between 1 July 2000 and 30 June 2001, on the ground that Syndicat OP 84's conduct had made it impossible actually to carry out an inspection during the first of those periods.

17 On the view that consideration of that ground of appeal raises questions regarding the interpretation of the relevant provisions of Regulation No 4045/89, the Conseil d'État decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- (1) Must the scrutiny period from 1 July of one year to 30 June of the following year, referred to in Article 2(4) of ... Regulation No 4045/89 ..., be understood as the period during which the authorities responsible for the scrutiny must inform the producer organisation of the planned inspection, and commence and complete the scrutiny operations in their entirety on-site and on paper and notify the results of that scrutiny, or must it be understood as the period during which only some of those procedural steps have to be carried out?
- (2) Where the conduct or the shortcomings of the producer organisation make it impossible actually to carry out an inspection commenced during a scrutiny period, may the authorities – despite the absence of any express provision to that effect in [Regulation No 4045/89] – carry out the scrutiny operations during the subsequent scrutiny period, without causing the procedure to be marred by an irregularity which the organisation under scrutiny may rely on against the decision giving due effects to the results of the scrutiny?
- (3) In the event of a negative reply to the previous question, may the authorities, where the conduct or the shortcomings of the producer organisation make actual scrutiny impossible, require repayment of the financial assistance received? Does such a measure constitute one of the penalties which may be applied pursuant to Article 6 of [Regulation No 4045/89]?

The questions referred

Questions 1 and 2

- 18 By the first two questions, which it is appropriate to consider together, the referring court asks, in essence, whether the first subparagraph of Article 2(4) of Regulation No 4045/89 must be interpreted as meaning that the authorities may carry out the scrutiny operations – notified during the scrutiny period falling between 1 July of one year and 30 June of the following year – beyond the end of that period, without causing the procedure to be marred by an irregularity which the operator under scrutiny may rely on against the decision giving due effects to the results of the scrutiny.
- 19 It is true that the first subparagraph of Article 2(4) of Regulation No 4045/89, under which '[t]he scrutiny period shall run from 1 July [of one year] to 30 June of the following year', does not explicitly provide for the option of continuing scrutiny operations – which have been notified to the operator during such a period – beyond the end of that period, whether or not by reason of failure to cooperate on the part of the operator under scrutiny.
- 20 In order to interpret the first subparagraph of Article 2(4) of Regulation No 4045/89, it is therefore necessary to take account not only of its wording and broad logic, but also of its context and of the objectives pursued by Regulation No 4045/89 as a whole.

- 21 In relation to those objectives, it is apparent from the first, third and fourth recitals of Regulation No 4045/89, read in conjunction, that that regulation seeks to strengthen the effectiveness of inspections for which Member States are responsible in order to prevent and eliminate irregularities that may exist in the context of the EAGGF (see Joined Cases C-671/11 to C-676/11 *Unanimes and Others* [2013] ECR, paragraph 17).
- 22 To ensure that national scrutiny is actually carried out and executed correctly and, accordingly, that the need to protect the financial interests of the European Union is served, Regulation No 4045/89 makes that scrutiny itself subject to supervision and coordination on the part of the Commission, reflecting the reasoning of the tenth recital. Article 2 specifically of that regulation seeks to organise the uniform system for scrutiny under the supervision of the Commission. Article 2(4) ensures inter alia that scrutiny is to some extent systematic and to some extent regular (see *Unanimes and Others*, paragraph 18).
- 23 Since Article 2 of Regulation No 4045/89 is intended to regulate the scrutiny carried out by Member States for the purposes of safeguarding the financial interests of the European Union, the term ‘scrutiny period’ must be read in the light of the objective of the effective scrutiny required under that provision.
- 24 Compliance with that objective implies that a scrutiny operation may be carried out beyond the temporal limits of the scrutiny period as defined in Article 2(4) of Regulation No 4045/89 where, in practical terms, it has been impossible to carry out the whole of the operation within the time available.
- 25 That may also be the case even where it is not the operator under scrutiny who has made it impossible for the scrutiny to be carried out within the time allowed.
- 26 It must nonetheless be specified that, where the impossibility of carrying out the scrutiny operation – and, accordingly, of notifying the Commission of the results before the expiry of the time allowed for the completion of that operation and the notification – is attributable to the scrutiny authorities, the Member State concerned cannot rely, vis-à-vis the European Union, on the objective of effectiveness to justify non-compliance with the time frame for scrutiny as provided under Article 2(4) of Regulation No 4045/89.
- 27 Moreover, it appears that the possibility of taking further steps, where necessary, in the scrutiny operations has already been contemplated with the adoption of Regulation No 1863/90. As the Commission stated in its written observations, Section 4(g) of Annex II to Regulation No 1863/90 allows inclusion of the findings made in the context of scrutiny undertaken during the preceding scrutiny period, the results of which were not available at the time when the report for that period was submitted. Since that report must, in accordance with Article 9 of Regulation No 4045/89, be submitted to the Commission before 1 January following the scrutiny period, Regulation No 1863/90 offers at least the possibility of completing scrutiny operations, commenced during the preceding scrutiny period, after that period has ended.
- 28 That being so, it should be noted that, with regard to the operators scrutinised, the validity of the inspections carried out cannot depend on the extent to which those inspections are consistent with the rules under Article 2(4) of Regulation No 4045/89.
- 29 That provision merely lays down organisational rules in order to secure the effectiveness of the scrutiny and, as is apparent from paragraph 22 above, governs the relations between the Member States and the European Union for the purposes of safeguarding the European Union’s financial interests. On the other hand, that provision does not apply to relations between scrutiny authorities and the operators scrutinised.

- 30 Accordingly, Article 2(4) of Regulation No 4045/89 cannot, in particular, be construed as conferring upon the operators concerned a right enabling them to oppose checks other or broader than those envisaged by that provision. Moreover, in so far as it might have the effect of preventing the recovery of aid which has been unlawfully collected or used, such a right would imperil the protection of the financial interests of the European Union (see *Unanimes and Others*, paragraph 29).
- 31 In any event, the checks required under Regulation No 4045/89 concern operators who voluntarily signed up for the support scheme established by the Guarantee Section of the EAGGF and who, in order to receive aid, accepted the performance of inspections to verify that the European Union's resources had been used properly. Those operators cannot validly call into question the lawfulness of such scrutiny simply because it was not in conformity with the organisational rules concerning the relations between the Member States and the Commission (see *Unanimes and Others*, paragraph 30).
- 32 The fact remains that legal certainty for the operators scrutinised vis-à-vis the public authorities who carry out those inspections and who decide, where appropriate, whether to bring proceedings is ensured by the rule laid down in Article 3 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1), under which proceedings are, as a rule, time-barred after four years have elapsed from the time of the infringement of a provision of European Union law as a result of an act or omission on the part of an economic operator, which has, or would have, the effect of adversely affecting the budget of the European Union. As the Court has already observed, in general, time-bars fulfil the function of ensuring legal certainty (see Case C-278/02 *Handlbauer* [2004] ECR I-6171, paragraph 40 and the case-law cited).
- 33 The possibility that the recipient of aid granted under the support scheme established by the Guarantee Section of the EAGGF may have to undergo an inspection outwith the period specified in Article 2(4) of Regulation No 4045/89 cannot therefore be regarded as undermining legal certainty, so long as proceedings in that connection are not yet time-barred.
- 34 It follows from all of the foregoing that the answer to Questions 1 and 2 is that the first subparagraph of Article 2(4) of Regulation No 4045/89 must be interpreted as meaning that the authorities may, if necessary, carry out the scrutiny operations – notified during the scrutiny period falling between 1 July of one year and 30 June of the following year – beyond the end of that period, without causing the procedure to be marred by an irregularity which the operator under scrutiny may rely on against the decision giving due effects to the results of the scrutiny.

Question 3

- 35 In view of the reply given to Questions 1 and 2, there is no need to reply to Question 3.

Costs

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

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

The first subparagraph of Article 2(4) of Council Regulation (EEC) No 4045/89 of 21 December 1989 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC, as amended by Council Regulation (EC) No 3094/94 of

12 December 1994, must be interpreted as meaning that the authorities may, if necessary, carry out the scrutiny operations – notified during the scrutiny period falling between 1 July of one year and 30 June of the following year – beyond the end of that period, without causing the procedure to be marred by an irregularity which the operator under scrutiny may rely on against the decision giving due effects to the results of the scrutiny.

[Signatures]