



Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 17 July 2014¹

Case C-422/13

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

v

Uta Wree

(Request for a preliminary ruling from the

Schleswig-Holsteinisches Oberverwaltungsgericht (Germany))

(Reference for a preliminary ruling — Common agricultural policy — Single payment scheme — Regulation (EC) No 73/2009 — Article 34 — Concept of ‘permanent pasture’ — Restored cover layer of a landfill site in after-care — Concept of ‘predominantly agricultural use’ in the case of mixed use of agricultural land)

I – Introduction

1. The application of the single payment scheme presupposes inter alia ‘eligible hectares’, as defined in Article 34(2)(a) of Regulation (EC) No 73/2009.²
2. The present case raises two questions as to whether the surfaces at issue in the case in the main proceedings are ‘eligible hectares’ for the purposes of aid, namely:
 - can the concept of ‘permanent pasture’,³ as part of the definition of the concept of ‘agricultural area’,⁴ include the cover layer of a landfill site in after-care (‘the areas at issue’)?
 - where an ‘agricultural area’ is also used for non-agricultural activities, how is the requirement of use ‘predominantly ... for agricultural activities’,⁵ on which eligibility of the areas in question is conditional, to be construed?

1 — Original language: French.

2 — 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 Regulation (EC) No 1782/2003 (OJ 2009 L 30, p. 16, corrigendum OJ 2010 L 43, p. 7).

3 — See Article 2(c) of Commission Regulation (EC) No 1120/2009 of 29 October 2009 laying down detailed rules for the implementation of the single payment scheme provided for in Title III of Regulation No 73/2009 (OJ 2009 L 316, p. 1).

4 — See Article 34(2)(a) of Regulation No 73/2009.

5 — See Article 9 of Regulation No 1120/2009.

3. Those, in essence, are the questions put forward in the request for a preliminary ruling from the Schleswig-Holsteinisches Oberverwaltungsgericht (Higher Administrative Court, Schleswig-Holstein, Germany) in proceedings between Dr Uta Wree and the Landesamt für Landwirtschaft, Umwelt und ländliche Räume des Landes Schleswig Holstein (Regional Office for Agriculture, Environment and Rural Areas of the Land Schleswig-Holstein) ('the Landesamt'), concerning the issue whether an area forming the restored cover layer of a landfill site in after-care is to be considered an area eligible for aid.

4. The Court is therefore called upon in the present case to rule on concepts at the heart of agricultural law, such as the concept of agricultural activity, the classification of agricultural area and the identification of eligible hectares for the purposes of aid, as well as the use of an area of an agricultural holding 'predominantly' for agricultural activities. I note at the outset that the order for reference pertains only to the terms of the single payment scheme, and not to considerations involving public health, food security or other matters.

II – Legal context

A – Regulation No 73/2009

5. Recital 7 of Regulation No 73/2009 is worded as follows:

'[Council] Regulation (EC) No 1782/2003 [of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) 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)] recognised the positive environmental effect of permanent pasture. The measures in that Regulation aimed at encouraging the maintenance of existing permanent pasture to ensure against mass conversion to arable land should be maintained.'

6. According to Article 2(c) and (h) of Regulation No 73/2009:

(c) "agricultural activity" means the production, rearing or growing of agricultural products including harvesting, milking, breeding animals and keeping animals for farming purposes, or maintaining the land in good agricultural and environmental condition as established in Article 6;

...

(h) "agricultural area" means any area taken up by arable land, permanent pasture or permanent crops.'

7. Under Title III of Regulation No 73/2009, entitled 'Single payment scheme', Article 34 provides:

'1. Support under the single payment scheme shall be granted to farmers upon activation of a payment entitlement per eligible hectare. Activated payment entitlements shall give a right to the payment of the amounts fixed therein.

2. For the purposes of this Title, "eligible hectare" shall mean:

(a) any agricultural area of the holding, and any area planted with short rotation coppice (CN code ex 0602 90 41) that is used for an agricultural activity or, where the area is used as well for non-agricultural activities, predominantly used for agricultural activities ...

...'

B – Regulation No 1120/2009

8. Regulation No 1120/2009⁶ lays down the rules for implementing the single payment scheme provided for in Title III of Regulation No 73/2009.

9. Article 2(c) of Regulation No 1120/2009 is worded as follows:

'For the purposes of Title III of Regulation (EC) No 73/2009 and of this Regulation, the following definitions shall apply:

...

(c) "Permanent pasture" means land used to grow grasses or other herbaceous forage naturally (self-seeded) or through cultivation (sown) and that has not been included in the crop rotation of the holding for five years or longer, excluding areas set aside ...; ... to this end, "grasses or other herbaceous forage" means all herbaceous plants traditionally found in natural pastures or normally included in mixtures of seeds for pastures or meadows in the Member State (whether or not used for grazing animals) ...'.

10. Under Article 9 of Regulation No 1120/2009:

'For the purposes of Article 34(2)(a) of Regulation (EC) No 73/2009, where an agricultural area of a holding is used as well for non-agricultural activities that area shall be considered as being used predominantly for agricultural activities, if the agricultural activity can be exercised without being significantly hampered by the intensity, nature, duration and timing of the non-agricultural activity.

Member States shall establish criteria for the implementation of the first subparagraph on their territory.'

III – The dispute in the main proceedings, the question referred and the procedure before the Court

11. Ms Wree is a veterinarian and runs a sheep farm where she breeds sheep and rears lamb for slaughter. Her flocks graze on a number of green areas situated on land in the districts of North Frisia and Schleswig-Flensburg.

12. Those pastures include the restored cover layer of the landfill site in after-care of the Ahrenshöft landfill site in the district of North Frisia and the Schleswig-Haferteich landfill site in the district of Schleswig-Flensburg ('the landfill sites'). Both of those above-ground landfill sites have reached the end of their waste-deposit phase. The Ahrenshöft landfill is still in the closure phase and will soon pass into the after-care phase, whereas the Schleswig-Haferteich landfill is already in the after-care phase. I note that the request for a preliminary ruling relates only to the second site, despite the circumstances of the Ahrenshöft landfill also being set out.

13. Under the contracts concluded by Ms Wree with the operators of the two landfill sites, she is entitled to graze her sheep, free of charge, on the pastures forming the restored cover layer of two landfill sites.

⁶ — See footnote 3.

14. By single application of 11 May 2010, Ms Wree applied to the Landesamt for grant of a single payment in respect of the 2010 harvest year. The Landesamt refused that application. Ms Wree had calculated the eligible land at her disposal at 25 5098 hectares, including the grassland situated on the two landfill sites. The Landesamt considered the eligible area to be only 5 7243 hectares, observing that the remaining areas did not exist in the agricultural land register. In the Landesamt's view, the latter areas did not constitute areas used for agricultural activities.

15. Ms Wree brought an administrative action against that decision. She claimed that she uses the areas over the landfill sites as pasture for breeding sheep and that she levels and cuts parts of them. She also argued in support of her action that the entire surface area of the landfill sites could be used without restriction for sheep grazing.

16. By decision of 31 March 2011, the Landesamt dismissed the Ms Wree's action as unfounded. Landesamt based its decision on the fact that the areas for which Ms Wree had claimed payment were not productive agricultural areas within the meaning of Regulation No 73/2009, but closed landfill sites as provided for in the Ordinance on landfill sites (Deponieverordnung).⁷

17. On 15 April 2011, Ms Wree brought an action against that decision before the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein), arguing, *inter alia*, that the primary use of the areas forming the subject-matter of the proceedings was not as a closed landfill site, since that is a state rather than a use. The Landesamt, by contrast, argued that the areas at issue are used mainly for landfills in after-care and that, for the sake of the stability of the landfill site, the land could be subjected to a controlled process of pasturing for sheep grazing. According to the Landesamt, it was essentially in order to prevent unwelcome biological processes affecting the stability of the landfill that the operators had made the areas in question available to Ms Wree free of charge.

18. By judgment of 19 January 2012, the Schleswig-Holsteinisches Verwaltungsgericht upheld Ms Wree's action. It held that she was entitled to the single payment for the year 2010 and that the landfill site areas were to be taken into account for the purpose of calculating the aid. The Landesamt filed an appeal against that decision before the referring court.

19. Taking the view that the outcome of the main proceedings turns on the interpretation of EU law, the Schleswig-Holsteinisches Oberverwaltungsgericht decided, by decision of 15 July 2013, to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is there also an agricultural area within the meaning of Article 34(2)(a) of Regulation No 73/2009 of 19 January 2009 if that area, although also used for agricultural activities (grazing for sheep-farming purposes), forms the cover layer of a landfill site in after-care?'

20. Written observations were lodged by Ms Wree, the Landesamt, the Danish Government and the European Commission. No hearing has been held.

⁷ — Ordinance of 27 April 2009 (BGBl. 2009 I, p. 900).

IV – Analysis

A – Preliminary observations

21. In order to answer the question referred for a preliminary ruling, it is necessary to consider in turn the concept of agricultural activity, the classification of agricultural area and the identification of eligible hectares, as well as the use of an area of an agricultural holding ‘predominantly’ for agricultural activities.

B – Concept of agricultural activity in the instant case

22. The Landesamt contends that the use of an area as a cover layer of a landfill site in after-care is not an agricultural use, but is part of waste management. The use of that area as pasture is, in the Landesamt’s view, one way of meeting the objectives of that use.

23. However, both the Landesamt and the Commission appear to accept that agricultural use is also made of the areas, since Ms Wree grazes her flocks on the areas at issue for profit.

24. The referring court does not ask the Court expressly whether the fact that Ms Wree grazes her flocks on pastures forming the restored cover layer of landfill sites means that Ms Wree’s activity must be classified as ‘agricultural activity’ for the purposes of Article 2(c) of Regulation No 73/2009.

25. The fact remains, in my view, that the grazing of flocks on areas made up of the restored cover layer of landfill sites may in itself constitute an agricultural activity, since that activity involves ‘breeding animals and keeping animals for farming purposes’ within the meaning of Article 2(c) of Regulation No 73/2009, in contrast to, for example, non-for-profit activities.

26. On the other hand, I do not consider that activity which consists in grazing flocks on pastures made up of the restored cover layer of landfill sites may be regarded as ‘maintaining the land in good agricultural and environmental condition’, as provided for in Article 2(c) of Regulation No 73/2009. I therefore concur in the view of the Landesamt on this point in that, if the after-care phase also involves environmental protection, it nevertheless does not constitute ‘maintaining the land in good agricultural and environmental condition’ which, under Article 2(c) of Regulation No 73/2009, is also an agricultural activity.

27. That must be the case, in my view, because it is difficult to accept that the site of a former landfill, even in after-care, meets the requirement of ‘good agricultural ... condition’ set in Article 2(c) of Regulation No 73/2009.⁸ Places whose good agricultural condition can be maintained easily do not require as much monitoring for the purpose of health protection as the landfill sites at issue in this case.

28. Moreover, as rightly pointed out by the Commission, interpreting the concept of agricultural area involves determining whether the surfaces in question may be classified as ‘land’, since the definition of permanent pasture contained in Article 2(c) of Regulation No 1120/2009 includes reference to that term, or whether, on the contrary, the restored cover layer of landfill sites ought to be regarded as coming within the concept of ‘ground installation’. Indeed, like the Commission, I take the view that pasture has to be land per se and that a ground installation or building cannot come within the definition of pasture.⁹

⁸ — To reiterate: the areas at issue are available to Ms Wree free of charge.

⁹ — The Commission notes, as an example of situations that do not involve ‘land’, the situation of pastures located on the roofs of houses.

29. In her written observations, Ms Wree states that the sealing layer is located above a gas drainage layer and a protection layer. According to Ms Wree, it consists of two components, namely a mineral layer and a geomembrane. In the zone beneath the landfill, the mineral layer is Trisoplast, a mixture of sand, bentonite and polymer. In the zone above the landfill, the mineral layer is composed of 50 centimetres of clay.

30. The landfill sites are thus covered by different layers. Although the restored cover layer of the landfill sites was added, it nevertheless contains matter present in natural soil, namely sand and clay. It follows, in my view, that it cannot be held that all terraced land must necessarily be regarded as forming part of a ground installation. On the contrary, there is nothing to prevent the restored cover layer of landfill sites from being regarded as land, since it has the specific function of being as similar as possible to a natural surface that is covered by grass and other herbaceous forage. Similarly, in the case of areas such as motorway shoulders, they result from earth excavation but are no different from natural surfaces once a restored cover layer has been added. It is common ground that such surfaces come within the definition of land. I therefore consider that the restored cover layer of landfill sites may legally be regarded as land.

C – Classification of agricultural area and identification of ‘eligible hectares’

31. It follows from Article 34(2)(a) of Regulation No 73/2009 that an ‘eligible hectare’ is unquestionably part of an agricultural area. As Advocate General Mazák has stated, the expression ‘[aid-] eligible hectare’ refers to all the arable land and permanent pasture — except areas under permanent crops and forests — which are used for an agricultural activity.¹⁰

32. Moreover, in keeping with the Court’s interpretation, features of the landscape such as banks, paths and ditches cannot, in principle, be taken into consideration in determining the areas eligible for aid.¹¹

33. A permanent pasture, on the other hand, does constitute an agricultural area. In that respect, I refer to Article 2 of Regulation No 1120/2009, according to which permanent pastures are ‘land used to grow grasses or other herbaceous forage naturally (self-seeded) or through cultivation (sown) and that has not been included in the crop rotation of the holding for five years or longer, excluding areas set aside ...; and to this end, “grasses or other herbaceous forage” means all herbaceous plants traditionally found in natural pastures or normally included in mixtures of seeds for pastures or meadows in the Member State (whether or not used for grazing animals)’.

34. In *Landkreis Bad Dürkheim*¹² the Court interpreted Article 44(2) of Regulation No 1782/2003, a provision identical in scope to Article 34 of Regulation No 73/2009. The Court ruled that *the classification* of ‘arable land’ or ‘permanent pasture’, and thus of ‘agricultural area’, *depends on the actual use* of the land in question (my emphasis).¹³

35. It seems to me that neither the classification of the areas at issue as pasture nor their actual use to that end can be seriously challenged.

10 — Opinion in *Landkreis Bad Dürkheim* (C-61/09, EU:C:2010:265, point 23).

11 — Judgment in *Vonk Noordegraaf* (C-105/13, EU:C:2014:1126, paragraph 47).

12 — C-61/09, EU:C:2010:606, paragraphs 36 and 37.

13 — In that judgment the Court also held the fact that parcels of land which are actually used as arable land or as permanent pasture have the overriding purpose of nature and landscape conservation cannot preclude those parcels from being classified as agricultural land.

D – Use of an area of an agricultural holding predominantly for agricultural activities

36. Article 9 of Regulation No 1120/2009 specifies under what conditions an agricultural area of a holding which is also used for non-agricultural activities may nevertheless be regarded as used ‘predominantly’ for agricultural activities for the purposes of Article 34(2)(a) of Regulation No 73/2009. According to the first subparagraph of Article 9 of Regulation No 1120/2009, that is so ‘if the agricultural activity can be exercised without being significantly hampered by the intensity, nature, duration and timing of the non-agricultural activity’. Under the second subparagraph of that Article 9, Member States are to establish criteria for the implementation of the first subparagraph of that provision on their territory.

37. In the present case, it must therefore be ascertained whether operations specific to an after-care phase of a landfill site significantly hamper agricultural activity by reason of their intensity, nature, duration and timing.

38. In my view, it is the objective characteristics of the area and the activity that are decisive in assessing whether an area may be regarded as being used for agricultural activities and whether non-agricultural activities ‘significantly’ hamper the agricultural activities. As the Danish Government observes, not incorrectly, the subjective opinion of a farmer cannot be decisive. In certain cases, moreover, the objective characteristics of an area or activity are indeed capable of significantly hampering an agricultural activity.¹⁴

39. It is for the national court to ascertain whether the agricultural activity carried out by Ms Wree is significantly hampered by the nature of the non-agricultural activity, which consists in practical measures related to the closure phase and to the after-care phase. The use of the areas at issue as cover for former landfill sites is not in itself decisive. However, an analysis must be carried out on the activities undertaken by landfill managers in order to comply with obligations under the provisions of European Union and national law on landfill sites.¹⁵

40. In concluding, I note, moreover, that in its judgment in *Landkreis Bad Dürkheim*¹⁶ the Court also examined the concept of management and stated that it did not mean that ‘the farmer has unlimited power over the area in question when using it for agricultural purposes’. It did find, however, that ‘the farmer must enjoy a degree of autonomy with regard to that area sufficient for the carrying out of his agricultural activity, that being a matter for the referring court to assess, taking into account all the circumstances of the case’.¹⁷ I take the view that this criterion of sufficient autonomy may be used *mutatis mutandis* to assess whether other activities significantly hamper agricultural activities.

41. I therefore propose that the Court’s answer to the question referred for a preliminary ruling be that Article 34(2)(a) of Regulation No 73/2009 must be interpreted as meaning that an area such as that at issue in the main proceedings is regarded as an agricultural area for the purposes of that provision if pasture for sheep breeding can be undertaken there without being significantly hampered by measures necessary for managing the former landfill site. It is for the national court to determine whether that is actually the case.

14 — It is possible, for example, that pastures bordering motorways or airports and covered in vegetation may be subject to safety requirements which entail the farmer’s losing all autonomy in terms of timing or access to those pastures, with the result that non-agricultural activities significantly hamper agricultural activities.

15 — Under Article 3(10) of the Law to promote life-cycle management and ensure the environmentally-sustainable disposal of waste [Gesetz zur Förderung der Kreislaufwirtschaft und Sicherung der umweltverträglichen Beseitigung von Abfällen) (Kreislaufwirtschafts- und Abfallgesetz)], 27 September 1994 (BGBl. 1994 I, p. 2705), landfill sites constitute ground installations or waste disposal facilities. In any event, they retain that classification for as long as they remain subject to after-care obligations or safety rules.

16 — EU:C:2010:606, paragraph 61.

17 — *Ibidem* (paragraph 61).

V – Conclusion

42. In the light of the foregoing, I propose that the Court give the following reply to the Schleswig-Holsteinisches Oberverwaltungsgericht:

An area covered by grass or other herbaceous forage, which forms the cover layer of a landfill site which is in the after-care phase and which also serves as pasture for sheep breeding, is to be regarded as an agricultural area for the purposes of Article 34(2)(a) of Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003, if such activity can be undertaken there without being significantly hampered by measures necessary for managing the former landfill site. It is for the national court to determine whether that is actually the case.