Economics & Working Capital 2021 3-4. Issue

Subsidies granted to economic operators and sanctions within the scope of the CAP – Different treatment in terms of the EU regulation and the implementation by Member States?

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Posted on:Dec 5,2021

Abstract:

The aim of the article is to examine the decisions made by the European Court of Justice (CJEU) regarding the irregularities affecting the subsidies granted to economic operators under the Common Agricultural Policy (CAP) through the detailed examination of the National Farmers', the Hofmeister and the Belgisch Interventie cases. The main finding of the study is that the economic operators have a fine chance of success in relying on the general principles of EU law in relation to atypical regulations if they believe that the sanctions applied against them do not comply with the requirements implied in the general principles.

Introduction

It is well-known that the Common Agricultural Policy (CAP) is part of the so-called positive integration where the EU legislature has traditionally enjoyed a wide margin of discretion. The expenditures related to the Common Agricultural Policy cover a significant part of the EU budget, thus, understandably, one of the most important aspects of operating the CAP is the protection of the EU's financial interests, aiming at the prevention of fraud effecting the EU budget. However, since in most cases the EU law provides protection to the economic operators against the Member States, the general principles of the EU law, such as the principles of proportionality, equal treatment, and non-discrimination, act somewhat as counterweight to the protection of the EU's financial interests. Where payments are affected by irregularities, it may be especially significant for the economic operators to know in which cases they can rely on the general principles for protection. Obviously, it does make a difference whether a reduction by 20-30% or by 200% is applied in terms of the subsidies, or whether, in addition thereto, the given economic operator is excluded from the given subsidy scheme for several years.

In the present study, we examine several decisions rendered by the Court of Justice of the European Union in terms of irregularities affecting the subsidies, where the concerned economic operator contested the lawfulness of the Member State measure applied against him, claiming that the imposed financial sanctions do not comply with the requirements implied in the general principles. Nonetheless, in most cases the CJEU dispensed with the application of the principles relied on by the concerned economic operators.

Furthermore, we are also going to address a judgement rendered by the CJEU, in which case the concerned Member State had certain powers of implementation within the scope of applying the CAP, due to which the general principles, particularly the principle of proportionality, gained a more significant role as opposed to the protection of the EU's financial interests.

We wish to explore and, to some extent, structure the conditions under which economic operators of the concerned field can successfully rely on the general principles of the EU law against the financial interests of the EU.

The general principles of the EU law and their application within the scope of the CAP

According to Denys Simon, the general principles of the EU law are unwritten norms, established by the case law of the CJEU on the basis of certain "common values" that characterise a legal order. In Joel Rideau's opinion, the general principles are the unwritten sources of the EU law, which may be considered as "creative products" of the CJEU. Lamprini Xenou considers that the Court of Justice of the European Union does not intend to provide an accurate classification of the content of the general principles, since the CJEU wishes to maintain a certain flexibility in terms of their application, which is essential for addressing different economic situations. Anyhow, it is generally accepted in legal literature that, to a certain extent, the general principles may be "considered as possessing superlegality" in EU law, i.e. they must be observed by both the EU institutions and the Member States. In Robert Kovar's opinion, the Court of Justice of the European Union controls, inter alia, the margin of discretion of the EU institutions through the general principles.

The objectives of the common agricultural policy are set forth in Article 39 of the TFEU: to ensure a fair standard of living for the agricultural community, stabilise markets, assure the availability of supplies, ensure that supplies reach consumers at reasonable prices. Some of these objectives are of economic, and some are of social nature, and, partially, they may only be implemented to the detriment of one another. The said objectives are also legally binding, and the EU legislature may determine which of them actually gain temporary priority, and by which measures they are to be implemented.

According to the case law of the Court of Justice of the European Union, the EU legislature has a wide margin of political discretion, and a secondary EU act may only be reviewed in the case of an abuse of power or if it is clearly unsuitable for achieving the intended objectives. Pescatore considers that the courts of the European Union may not exercise discretion or they may exercise it to a minimal extent only, since discretion shall be exercised by the body responsible for economic decisions.

Among the general principles, the CJEU recognised the principle of proportionality for the first time within the scope of the Common Agricultural Policy, in its judgement rendered in the Handelsgesellschaft case. In the judgement rendered in the Günther Schilling case, the CJEU also established that the principle of proportionality is applicable in cases where the irregularity committed by the concerned economic operator was not intentional or serious. As interpreted by the CJEU, the principle of proportionality must be applied at imposing the sanction, inter alia, because the objective of the relevant secondary EU act is not to impose deterrent sanctions in cases where the concerned farmer is under a misapprehension.
The principle of equal treatment is often relied on before the CJEU, however, the Court of Justice of the European Union has recognised the application of this principle relatively rarely within the scope of the Common Agricultural Policy. In most cases, the CJEU "supported" such rulings with that different situations justify different treatment. According to the case law of the CJEU, economic decision-making based on complex analysis is required in the field of agriculture, which justifies the wide margin of discretion of the EU legislature.

The judgement rendered in the National Farmers' Union case

The economic operator concerned by the main proceedings was an agricultural producer acting in good faith, in whose application for subsidy the area indicated in terms of the agricultural land used by him exceeded the area determined by the on-the-spot check of the authorities by

more than 20%. As a result, the Member State authorities imposed serious sanctions on him on the basis of Article 9 of Regulation (EC) No 3887/92.

The question referred to the Court of Justice of the European Union for a preliminary ruling aimed, inter alia, at whether the serious sanction imposed due to that the area declared by the concerned economic operator exceeded the area determined at an on-the-spot check by more than 20% can be deemed lawful, even if such overstatement was neither intentional nor due to gross negligence. Herein, we will primarily examine the application of the general principles of the EU law, particularly the principle of proportionality, non-discrimination, and legal certainty.

As regards the principle of proportionality, it must be stressed that the CJEU has not examined whether the restrictive measures applied by a Member State were compatible with EU law, but whether an EU act was compatible with the requirements implied in the general principles.

As interpreted by the CJEU, where the evaluation of a complex economic situation is involved, the Community institutions enjoy a wide margin of discretion. In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether it is not vitiated by a manifest error or misuse of power or whether the institution in question has not manifestly exceeded the limits of its discretion.

The objective of the concerned measure is to effectively prevent and penalize irregularities and fraudulent acts, and to enable the reform of the CAP to be implemented efficiently. In the concerned case, as established in the reasoning of the CJEU, the EU institutes had not exceeded their margin of discretion by creating a deterrent sanction system.

As regards the principle of legal certainty, the concerned economic operator relied on that serious interpretation problems have occurred in terms of certain provisions on sanctions of the relevant regulation. The CJEU acknowledged that legal certainty is a fundamental principle of the legal order of the European Union, which requires, in particular, that rules should be clear and precise so that each person concerned may be able to ascertain unequivocally what his rights and obligations are. According to the CJEU, despite the fact that the interpretation of the regulation raised some difficulties, the act nonetheless met the requirements of legal certainty, since those difficulties are in part due to the complexity of the matters involved and, as the advocate general has observed in his opinion, if the regulation is read carefully, the sense and consequences of the application of its provisions, which are intended for those involved professionally in the area, can be grasped.
The concerned economic operator relied on the principle of non-discrimination with regard to that the same sanction is prescribed by the Regulation in terms of overstatements made in good faith, and overstatements committed intentionally or due to gross negligence. The CJEU recognised the applicability of the principle of equal treatment, and stressed that those who commit fraudulent acts intentionally are also excluded from the subsidy scheme for the calendar year in question and the following calendar year.

The judgement rendered by the CJEU in the Hofmeister case

As regards this judgement, we primarily examine the compatibility of the deterrent sanctions applied to combat irregularities in relation to export refund schemes with the general principles of EU law, particularly the principles of proportionality and non-discrimination.

The principle of proportionality

The economic operator concerned by the main proceedings relied on the principle of proportionality claiming that the imposed sanction was inappropriate to achieve the pursued objective, since in such cases the sanctions should not be imposed against the exporter. The penalty entails serious financial loss for the exporter, because he does not keep the refund, but passes it on to producers through a product purchase price which is overvalued in relation to world market prices. The concerned economic operator maintained that the defaults of the concerned products are particularly difficult to detect due to the average large quantities used on the market of agricultural products which render the control of irregularities rather difficult.

The concerned economic operator argued that in such cases no sanctions would be required at all, since the exporter must return an unduly received refund which „he has already passed on to the producer through an overvalued purchase price" thus, "he inevitably suffers financial loss". Lastly, he argued that the penalty was not compatible with the principle of proportionality also because it would allow the smallest irregularity or error to be penalised regardless of whether the exporter knowingly caused damage or the irregularities caused any damages of economic nature.

The European Commission disputed the above arguments: according to its viewpoint, irregularities in the Common Agricultural Policy sector cannot effectively be combated simply by recovery of unduly received benefits or by penalties which are limited to proven cases of fault, since it is often very difficult or even impossible to prove fault.

According to case law, the EU legislature has a wide margin of discretion in the scope of the Common Agricultural Policy, consequently, the lawfulness of a secondary legal act can be affected only if it is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue or if the institution has manifestly exceeded its discretion.

As interpreted by the CJEU, the concerned sanctions are justified by the combat against irregularities and fraud detected in the area of export refunds. Since the relevant regulation prescribes a certain geographical location as the only criterion of granting the subsidy, subjective criteria related to any faults or irregularities committed by the exporter may not be taken into account in the sanction system.

"According to the reasoning" of the CJEU, to impose sanctions against exporters is necessary because the exporter is often the last link in a contractual chain of purchases for resale, and there is a real risk that he will avoid responsibility for committing irregularities if subjective elements are also taken into account.

The principle of non-discrimination

The concerned economic operator maintained that in terms of applying the relevant regulation, imposing the same sanctions on different types of behaviour, regardless of whether it is non-culpable or characterised by serious negligence, cannot be objectively justified either by the effort to combat fraud, or by reasons of administrative simplicity. The Commission disagrees with this argument, essentially supporting its standpoint with arguments similar to the principle of proportionality.
The general principle of non-discrimination requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such

treatment is objectively justified. The CJEU refers to the application of this principle in its judgement rendered in the National Farmers' Union case. Nonetheless, the CJEU found that the contested provision has a deterrent effect, thus, in the light of the objective of deterrence, the culpable or non-culpable nature of the conduct in question becomes of no importance and, consequently, the application of the same penalty cannot be considered to be contrary to the principle of non-discrimination.

Certain findings in the opinion of the advocate general

Advocate General Christine Stix-Hackl explained that export refunds cannot be compared with direct aid, as it is the agricultural producer – and not the exporter – who in the last analysis receives the benefit of them. The Advocate General shared the view of the European Commission in terms of that the recovery of an export refund fails to exert a deterrent effect inasmuch as it is limited to reducing the amount of the refund to the amount due. The Advocate General added that although the exporter may suffer economic loss also in such latter event but it may be assumed that this loss will be less than the potential gain from an inflated refund application that passes undetected. The aim of the sanction is to deter from fraud rather than to punish financial injury, therefore the protection of the EU's financial interests.

The judgement rendered in the Belgisch Interventie case

In the main proceedings, a Belgian agricultural company exported agricultural products to a third country. The supervising agency, which specialised in international control and was established and operated on the basis of EU acts, issued the export certificate that made the export refund payable. However, it was revealed in a later investigation that the supervising agency, as it referred to in its internal correspondence, found that although the concerned product was marketed in the third state, the export activity was nonetheless unlawful, since the third state banned the import of the concerned agricultural product. The Belgian paying agency, however, found that the product was not marketed in the third state and, as the paying agency maintained, the supervising agency provided false data intentionally, for which the paying agency imposed a serious sanction amounting to 200% of the concerned sum against the supervising agency. The supervising agency acknowledged that is has provided false data but denied that it did so intentionally.

In the main proceedings, the acting Member State court rejected the third party notices requested to be served by the supervising agency to the insurance company and the agricultural company. It was also disputed in the main proceedings whether the paying agency had a legal basis to impose the concerned sanction and whether the relevant EU acts, the regulation protecting the EU's financial interest in particular, have direct effect in the legal order of the Member States. Thereafter, the case was referred to the CJEU, in which proceedings it was primarily examined whether, in the absence of specific sectoral acts, the regulation protecting the financial interests of the EU can be applied directly in similar situations and whether the Member States have the competence to impose sanctions.

The acting court of the main proceedings referred several questions for a preliminary ruling. The first question was whether Articles 5 and 7 of Regulation No 2988/95 must be applied by the Member States so that administrative sanctions can only be imposed in the application of that Regulation.

The Court recalled Article 235 TFEU, pursuant to which Member States are to take the same measures to counter fraud affecting the financial interests of the EU as they take to counter fraud affecting their own financial interests. In the concerned case, since the EU legislature has not adopted sectoral rules intended to protect the Union's financial interests against the conduct of certain operators, the CJEU established that Member States are entitled to maintain or adopt provisions in that domain. The CJEU, however, stressed that the Member States shall observe the general principles of EU law and prove that the adopted measures are necessary to combat fraud.
In a situation similar to the case concerned, it would be contrary to Article 325 TFEU to restrict Member State measures, and Article 4 TFEU requires the Member States to take all effective measures to penalise conduct detrimental to the financial interests.

The second question was whether it is contrary to the regulation protecting the financial interests of the EU to impose sanctions under the existing circumstances, i.e., in the absence of sectoral rules, against a supervising agency on the basis of Member State law.

The CJEU concluded that for the purposes of the relevant regulation, since false certificate was issued by a supervising agency allowing an exporter to receive an export refund to which he is not entitled, such agency may be regarded as a person who has "taken part in the irregularity" within the meaning of the regulation protecting the financial interests of the EU. In such cases, sanctions may be imposed against the concerned agencies provided that a sectoral EU act or Member State law prescribes sanctions for similar situations.

The EU legislature prescribes proper sanctions against exporters for accepting unlawfully requested export refunds. According to case law, Member States have no discretion to decide whether or not to recover unjustified or unlawful subsidies from the EU structural funds or the Common Agricultural Policy, including also export refunds. Consequently, proceedings against the exporter cannot be dispensed with in favour of sanctioning the international control and supervising agency.

The fact that no EU law prescribing sanctions covered the case in the main proceedings does not preclude the Member State to adopt measures imposing sanctions, thus it may also adopt laws prescribing, under certain circumstances, the joint and several liability of the supervising agency and the exporter.

The CJEU "recalled" that the authorities of the concerned Member State did not intend to apply sanctions in the above manner, but, in most cases, imposed the sanctions prescribed for the exporter against the supervising authority, relying on the direct effect of EU Regulation protecting the financial interests of the EU and to the joint and several liability prescribed by Member State law.

Within the meaning of the relevant EU Regulation, the concerned sanction is to be imposed if an exporter provides false data intentionally, yet it appears that in the present case, the exporter was unaware of the errors in the certificate issued by the supervising agency,thus, the said sanction prescribed by the regulation cannot be applied. However, pursuant to the regulation, penalty may be applied even if the exporter has not committed any fault.

The CJEU, inter alia in its judgement rendered in the Hofmeister case, reiterated that the liability of the exporter is expressly put in the forefront by relevant EU regulation, except, as interpreted by the CJEU, for the cases where the export refund is granted to an exporter on the basis of a

certificate issued by an international control and supervising agency pursuant to EU law and where the exporter was not aware of the fact that it forwarded an erroneous certificate, particularly if that renders the insurance company exempt from liability to reimburse the suffered loss.

However, according to case law, penalty cannot be imposed unless it rests on a clear and unambiguous legal basis.

The answer of the CJEU given to the third question referred for preliminary ruling aimed, inter alia, at the limitation rules applicable under the circumstances of the concerned case and the nature of the acts interrupting them.

In the absence of a sectoral act prescribing sanctions against the supervising agency, the Member States have a margin of discretion to impose sanctions on the basis of Article 11 of Regulation No 3665/87. However, in such situation, the Member States must observe the limits of their competence and discretion to combat fraud, the general principles of EU law and the general rules laid down in Regulation No 2988/95, since the administrative bodies of Member States act within the scope of the regulation protecting the financial interests of the EU.

Regulation No 3665/87 does not include any limitation rules, thus, the regulation protecting the financial interests of the EU shall be applied in terms of the limitation period, which is directly applicable in the Member States, in the absence of EU sectoral rules providing for a shorter limitation period, which may not be less than three years, or of national rules providing for a longer limitation period. The CJEU added that the limitation periods primarily fulfil the function of ensuring legal certainty, and such function would not be wholly fulfilled, if the limitation period prescribed by the regulation protecting the financial interests of the EU could be interrupted by any act relating to a general check by the national authorities which bears no relation to any suspicion concerning the existence of irregularities.

Decisions related to the implementation by the Member states

In the scope of the Common Agricultural Policy, the Member States, by way of derogation from the wide margin of discretion of the EU legislature in principle, have a limited discretion in exercising their implementation competences. This may seem inconsistent with the fact that there are so-called atypical regulations which provide the Member States with a wide range of discretion in many issues, i.e., serving as a directive in such sense. In the scope of these atypical regulations, Member States shall exercise their discretion with regard to the objectives of the relevant regulation and to the general principles of EU law. Hereinafter we will examine certain decisions of the CJEU rendered within the scope of such atypical regulations, having particular regard to the application of the principles of proportionality and non-discrimination.

In the Szatmári Malom case, the concerned economic operator filed an application for subsidy for increasing the value of agricultural products, which was denied basically with the reasoning that the concerned subsidy can only be granted for the modernisation of existing mills but not for building new ones. According to the arguments of the concerned economic operator, the decision was unlawful, since the production capacity would not increase by closing old mills, but by the modern production methods applied in the new mills to be built would increase the total productivity of the holding. The case was referred for a preliminary ruling to the CJEU.

One of the most important questions of the dispute was whether the Hungarian provisions met the requirements of the relevant EU regulations which exclusively allow for the eligibility of the applications aiming at the modernisation of existing capacities. According to the arguments of the European Commission and the Hungarian government, the concerned measure was included in the Hungarian rural development program because the milling in the country is characterised by critical under-utilisation.

Pursuant to the relevant regulation, the rules on eligibility of expenditure shall be set at national level, subject to the special conditions laid down by the regulation relevant for certain rural development measures. That is a so-called atypical regulation, i.e., Member States are entitled to adopt implementation measures in the context of the discretion provided by such regulation. In the viewpoint of the CJEU, the Hungarian legislator has not exceeded this discretion. Nonetheless, individual decisions shall be rendered with regard to the general principles of EU law, i.e., to the requirements implied in the principle of equal treatment. That principle requires the economic operators not to be excluded from the subsidy scheme if the new milling capacities replace old capacities without causing any capacity increase.

In the main proceedings of the Gorje case, a Slovenian local government filed an application for subsidy for rural development, which was approved by the Slovenian paying agency. Thereafter, in the course of an on-the-spot check, it was found that the construction works had been commenced before the decision on awarding the tender was rendered, i.e., prior to the eligibility date. However, one of the conditions of the tender was that no work may be carried out prior to the eligibility date. The two most important questions referred for a preliminary ruling aimed at the lawfulness of the above and on whether an application is to be rejected in its entirety if it includes both eligible and non-eligible elements.

The opinion of the advocate general for the Gorje case mentioned that the relevant secondary EU act also includes provisions on the temporal conditions of eligibility, thus, there is no impediment to the stipulation of an eligibility date in national regulations.

The CJEU did not refer to the protection of the financial interests of the EU when it examined the compatibility of the provision with EU law, pursuant to which the payment of the whole sum is to be rejected if any expenditure included therein was incurred prior to the decision on eligibility.

In agreement with those stated in the opinion of the advocate general, the CJEU established that Member States shall, in principle, impose the proportionate sanctions laid down in the relevant regulation, except if a false declaration was made intentionally by the beneficiary of the subsidy, in which case he shall be excluded from the subsidy scheme. As interpreted by the CJEU, Member States may exclude ineligible expenditures, which “sanction” meets the requirements of the principle of proportionality and also have sufficient deterrent effect. Yet, it should be noted that according to the standpoint of the European Commission, stricter measures would be lawful.

The judgement rendered in the Lingurár József case also offers some important lessons in relation to the application of the principle of proportionality. The applicant of the main proceedings filed an application for subsidy in respect of forest plots, which was rejected only with the reasoning that 0.18% of the concerned forests is owned by the Hungarian State, and no subsidy may be paid in relation to state-owned plots pursuant to the relevant EU regulation.

The CJEU recalled that, in principle, regulations have direct effect in national law, yet Member States may adopt implementation measures provided that they meet certain criteria. It should be stressed that, according to case law, by relying on the relevant provisions of the regulation concerned, it may be determined whether they prohibit, require or allow Member States to adopt certain implementing measures, in the light of the objectives of that regulation, and whether the measure concerned comes within the scope of the discretion that each Member State is recognised as having. In this case, the relevant regulations did not cover the case when an area is owned both by the state and by private owners, only Regulation No 1974/2006 laying down detailed rules for the application of Regulation No 1698/2005 set out that state-owned forests are to be excluded from the scope the relevant regulation.

It is laid down by the relevant EU regulation that Member States are responsible for the implementation of rural development programs and for determining the areas falling within the scope of a given subsidy. In such regard, the CJEU examined whether the relevant EU regulations authorise Member States to adopt the concerned measures.

As established by the CJEU, the interpretation of the Hungarian government, i.e., the national implementation of Article 42(1) of Regulation No 1689/2005, particularly under the circumstances of the main proceedings, led to a reversal of the relationship between the rule set forth by that provision and the exception set out in the regulation laying down the detailed rules. The CJEU pointed out that Article 42(1) of Regulation No 1698/2005 establishes the principle that the subsidies at issue shall be provided to private persons. Regulation No. 1974/2006, however, which lays down the detailed rules in relation to the said regulation, excludes state-owned areas from the subsidy scheme, as an exception. Thus, a radical consequence such as the entire exclusion applied in the case of the main proceedings, cannot fall within the ambit of the discretion enjoyed by each Member State for the implementation of relevant regulations.

Moreover, the CJEU implicitly acknowledged that the concerned EU support is intended to compensate for costs incurred and income foregone resulting from the restrictions on the use of forests laid down in Natura 2000, and the fact that part of a plot is owned by the State does not eliminate the need to compensate for the restrictions. As regards such findings, the CJEU relied on secondary EU acts, however, the aforesaid rather stems from primary EU law which lays down the objective to increase the quality of life of farmers and, to a certain extent, a legal obligation.

Excluding the whole area from the subsidy scheme, even though only a small fragment thereof was owned by the state, would not only necessarily eliminate the compensatory aim of the relevant regulations, but would also be contrary to the principle of proportionality.

The judgement of the CJEU rendered in the Pontini case derogated from the above to some extent, however, the general principles played a significant role in that case as well. Criminal proceedings were initiated against the economic operator concerned by the main proceedings, since he committed a series of fraudulent acts, lasting for several years, to the detriment of the EU budget. The concerned subsidy related to livestock was payable under the condition, inter alia, that the economic operator possessed also sufficient forage areas. In relation to such areas, the concerned economic operators submitted fictive contracts at filing their application for subsidy. One of the most important questions referred for a preliminary ruling was whether the obligation laid down by national law, prescribing that the right to use sufficient forage areas was required for the eligibility of the subsidy related to livestock, is compatible with the relevant EU regulations.

According to the economic operators concerned by the main proceedings, to construe the relevant EU legislation as meaning that livestock can be reared only on forage areas belonging to the producer or in relation to which he can show that he holds a specific legal right of enjoyment would be contrary to the spirit of that legislation, since the relevant EU rules make the payments conditional upon the simple use or availability of the forage areas. The Italian government maintained, on the other hand, that it is the Member States' responsibility to check the regularity of payments, and requiring a valid legal document and legal title makes it possible fulfil such obligation.

The European Commission argued that it is necessary to examine whether the relevant EU legislation lays down, as an eligibility condition, an obligation to produce a valid legal document attesting to the right to use the forage areas and, if not, whether such requirement meets the criteria implied in the legal order of the EU.

Having regard to the EU provisions relevant in the field, the CJEU concluded that the eligibility for the subsidies in question may be determined on the basis of the size of the agricultural area at issue and on the number of cattle kept thereon, instead of requiring a legal document attesting to a legal title for the forage areas. One of the most important objectives pursued by the relevant EU rules is to halt the trend towards intensification of beef and veal production. In order to achieve such objective, the condition of eligibility is to prove the actual use and utilization of the forage area, and not the submission of a legal document attesting to a legal title.

The CJEU examined, sharing the view of the European Commission, the requirement of the national law at issue in the light of the criteria of EU law: the "nature and objectives" of the integrated administration and control system, as well as the breadth of the discretion accorded to Member States.

On the basis of the relevant EU regulations, within the framework of the integrated administration and control system, effective monitoring of the use of EU subsidies must be implemented and, where necessary, sanctions must be determined in relation to the protection of the financial interests of the EU and the regularity of the payments in the scope of the CAP, where Member States have discretion.

The relevant EU regulations prescribe that applications for subsidy must include all necessary information, including those required by the relevant EU regulations and national legislation. The relevant regulations provide discretion to the Member States in relation to monitoring. Inter alia, Member States must ensure the reliable identification of parcels and the rejection of applications contrary to the objective of the system, as well as the protection of the financial interests of the EU.

Pursuant to the relevant EU regulations, as interpreted by the CJEU, the Member States enjoy a measure of discretion as regards the supporting documents and the evidence to be required from an aid applicant in relation to the forage areas covered by the application. In the light of that discretion, it is permissible for the Member States to lay down more detailed rules as to the evidence to be submitted in support of an application for subsidy, particularly to the legal documents certifying the enjoyment and use of the forage areas. Nonetheless, it should be noted that such discretion is subject to certain limits.

The relevant EU regulations, such as those regulating subsidies or the protection of the financial interests of the EU, lay down limitations as regards the discretion of the Member States:

pursuant to the former, the Member States may render decisions on the basis of objective criteria only, and, inter alia, must observe the principle of equal treatment and prevent the distortion of trade and competition. The acting national courts shall examine also whether the obligation to provide evidence attesting to the legal title apply to all applicants.

The latter, i.e., the regulation protecting the financial interests of the EU, prescribes that the measures adopted for ensuring the lawfulness and effectiveness of the transactions affecting the financial interests of the EU shall be proportionate to the objectives pursued and shall be appropriate to the specific nature of each sector.

In summary of the aforesaid, the CJEU found that in terms of the exercise by Member States of their discretion in respect of the evidence to be provided in support of an aid application, particularly as regards the regulation requiring an applicant for subsidy to produce a valid legal document attesting to his right to use the concerned forage areas, "must be consistent with the objectives pursued by the EU legislation concerned, as well as the general principles of EU law and, in particular, the principle of proportionality".

The Court of Justice of the European Union clarified that in the course of applying the relevant EU provisions and the provisions of the integrated administration and control system, the national and the EU legislature, as well as the acting national courts must bear in mind, when applying the principle of proportionality, that the adopted measures should not exceed the extent necessary for the objectives pursued and the introduced measures shall be appropriate thereto.

The regular and proper implementation of the Common Agricultural Policy, as well as of the provisions covering the integrated administration and control system and aiming at the protection of the financial interests of the EU, requires the adoption of national measures. Legislation – such as that applicable in the case before the referring court – seeks to comply with those objectives. The CJEU added that the requirements imposed under that legislation also intend to prevent rearers from being able to make unlawful use of land belonging to others with the aim of circumventing the EU legislation, and found that the provision of a valid legal document appears to be consistent with the requirements of the principle of proportionality.

The CJEU apparently lacks a comprehensive understanding as regards the circumstances of the main proceedings, thus, it "stressed" that although the examined national provisions are consistent to the criteria implied in the principle of proportionality, the national court must examine whether, inter alia, the principle of proportionality was observed with regard to the specific circumstances of the given case.

The application of the general principles against the EU regulations

It should be stressed that in the National Farmer's case and in the Hofmeister case, the lawfulness of the concerned secondary EU acts was disputed in the light of the general principles. On the other hand, in the Szatmári Malom, Gorje, and Lingurár cases, the general principles of the EU law were applied in the scope of certain atypical regulations implemented by Member States, as regards which the general principles and the objectives pursued by the given regulation must be taken into account. This latter application of the general principles contributed significantly to judgements financially favourable to the concerned economic operators. Although the closure of the Pontini case was not so favourable to the concerned economic operators, the general principles played also a rather significant role in that case.

In the National Farmers' Union case, seemingly unjustified serious sanctions were applied against an economic operator acting in good faith due to an overstatement in the field of agriculture. Particularly the ignorance of the principles of legal certainty and non-discrimination raises prima facie issues. The case law of the CJEU is apparently consistent in that it is rather problematic to hold the EU legislature accountable for whether or not the requirements implied in the general principles of EU law were observed, particularly in the situations that require complex assessment in the scope of the CAP. In the cases of national implementation, however, the general principles of the EU law carry much greater weight: for example, as regards the application of the principle of proportionality, it should only be examined whether the adopted measures exceeded the extent necessary. On the other hand, the CJEO recognised the application of the principle of non-discrimination, in the absence of which a sanction lasting for several years could have been imposed against the concerned company in the given case.

In the Hofmeister case, primarily the application of the principles of proportionality and non-discrimination should be examined. The concerned economic operator relied on that the EU regulation prescribing the serious financial sanctions applied against him does not comply with the requirements implied in the general principles of EU law due to several reasons.

The concerned economic operator presented some rather serious arguments as regards the principle of proportionality: the only reason why the CJEU have not taken account of such arguments was that the acting authorities were not able to assess the subjective elements of fault, and even if they would have assessed it, that would not have rendered the repression of irregularities related to export refunds possible.

The ignoration of the requirements implied in the principle of non-discrimination may be the most obvious: that principle requires comparable situations not to be treated differently and different situations not to be treated in the same way. However, the CJEU, as an answer to the argument that acts lacking fault and those committed intentionally should be assessed differently, established that such argument cannot be relevant regarding sanctions with deterrent effect.
It should be noted that the CJEU referred to the National Farmer's case at applying the principle of non-discrimination, where more serious sanctions were imposed against the agricultural producers who acted intentionally than against those who acted in good faith. Most probably, the difference between the two cases can be explained by that more serious sanctions are required to repress abuses in the field of export refunds than as regards irregularities committed by agricultural producers.
The comparison of the judgements rendered in the Hofmeister and in the Belgisch Interventie cases may be interesting in terms of the sanctioned economic operators. A control or supervising agency may also be deemed as an economic operator, leaving aside its special authorisations, nonetheless, it is the exporter who can primarily be deemed as such.

In the Belgisch Interventie case, the national paying agency imposed sanctions against the supervising agency, although, in principle, the EU rules prescribe that deterrent sanctions should be imposed against exporters. As regards the application of such provision Member States have no discretion, as it was established by the CJEU, inter alia, in the judgement rendered in the Hofmeister case.

The regulation protecting the financial interests of the EU lay down general rules to promote the combat against fraudulent acts affecting the EU budget, but that regulation is not directly applicable to the legal dispute at issue, since the EU failed to adopt specific sectoral rules.

According to the CJEU, however, the Member States are entitled to lay down certain rules in the absence of specific EU sectoral provisions, which standpoint the CJEU justified, inter alia, with that the Member States have an obligation stemming from primary EU law to combat fraud committed to the detriment of the EU budget. Such national rules may be adopted provided that they rest on a clear and unambiguous legal basis and meet the requirements implied in the general principles of EU law. It should be stressed that no sanctions may be imposed against the economic operators based directly on the primary EU law or on the regulation protecting the financial interests of the EU which cannot be applied directly.

In the Belgisch Interventie case, the national paying agency did not wish to impose sanctions on the basis of the national law prescribing the joint and several liability of the exporter and the supervising agency, but it intended to apply the EU act, which prescribes sanctions in terms of exporters, to the supervising agency, relying on the direct applicability of the EU regulation protecting the financial interests of the EU. Although the EU rules expressly put the liability of the exporter in the forefront, in the concerned case, as interpreted by the CJEU, there is an exception: provided that the exporter received export refund based on the erroneous certificate issued by the supervising agency and that the exporter was not aware of such error, the EU regulation prescribe that the supervising agency shall be deemed as a contributor, and the insurance company may be exempt from the reimbursement of the loss due to the erroneous certificate. It should be recalled that in the Hofmeister case, the CJEU dispensed with the application of the requirements implied in the general principles of the EU law relied on by the exporter with the reasoning, inter alia, that the exporter can take out insurance.

Although the CJEU recognised the possibility that, in the absence of specific sectoral EU rules, national sanctions may be applied under the circumstances of the concerned case if certain requirements are met, the CJEU also found it lawful, under the aforesaid conditions, that the Member State applied the EU provisions prescribing sanctions in terms of the exporter against the supervising agency, particularly if relying on the direct applicability of the regulation protecting the financial interests of the EU. It should be mentioned, however, that a national law prescribing the joint and several liability of the exporter and the supervising agency was in effect, providing the clear leal basis required by EU law.

Nonetheless, we cannot exclude the possibility that the CJEU only finds it lawful if a Member State adopts proper laws that meet the requirements of EU law in the absence of specific sectoral EU rules, with regard to the obligations of the Member States stemming from the primary EU law and from the regulation protecting the financial interests of the EU.

In our interpretation, the CJEO “approved” the “transfer” of the sanctions prescribed in terms of the exporter to the supervising agency within the meaning of the relevant regulation, i.e., the Member State was entitled thereto under the specific circumstances of case of the main proceedings, on the basis of the primary EU law and the regulation protecting the financial interests of the EU. As mentioned before, the existence of the relevant national law ensured that the requirements implied in the principle of legal certainty was met in terms of the concerned economic operator.

The questions arising are raised by the direct application of the regulation protecting the financial interests of the EU. The CJEU excluded the application of that regulation in the main proceedings, with the reasoning that a national law or a specific sectoral act would be required thereto. Thus, the “transmission” of the regulation protecting the financial interests of the EU “approved by the CJEU” can only be construed so that such regulation, along with the

obligations stemming from the primary EU law, authorises the Member States to apply the financial sanction prescribed in terms of the exporter by the EU regulation against the supervising authority. In such regard, the concerned Member State applies EU law directly in its decision. Nonetheless, according to the CJEU, the requirements implied in the general principles of the EU are to be met in the application of such sanctions.

Application of the general rules in relation to atypical regulations

Where Member States implement atypical regulations, the general principles of EU law, contrary to the aforesaid, are more significant than the protection of the financial interests of the EU. The judgement rendered in the Szatmári Malom case offers an excellent example of the flexible application of general principles of EU law in an individual case, as required by the economic conditions of the concerned field. On the other hand, the judgement rendered in the Lingurár case could be a textbook example of that the economic operator concerned by the main proceedings can rely on the general principles of EU law in terms of exclusion from subsidy if the Member State implemented an atypical regulation, and that he can rely on certain pursued objectives determined by an EU regulation against the Member State. In the judgement rendered in the Gorje case, although irregularities were committed, the protection of the financial interests of the EU was almost completely marginalised by the principle of proportionality.

The judgement rendered in the Pontini case, on the one hand, pointed out the limits of the application of the general principles of the EU law on the concerned field, yet, on the other hand, rendered further ways of applying the general principles possible for the economic operators.

Under the specific circumstances of the case of the main proceedings, the CJEU could not exercise “censorship” over the protection of the financial interests of the EU or the national measures aiming at the implementation of payments and required by the efficient operation of the integrated administration and control system, where those measures were applied as sanctions against intentional and continuous fraudulent acts.

However, the CJEU established two essential points, on which the economic operators can most probably rely provided that the Member States, justified by the Pontini judgement, apply sanctions against them in cases where they fulfil the criteria determined by the relevant subsidy regulations and did not commit intentional fraudulent acts: the CJEU established that the right to subsidy depends on the criteria determined by the EU regulation and not on meeting additional requirements laid down by the Member States, and also that the acting national court must examine the requirements implied in the general principles individually in each case, even if the additional criteria laid down by the given Member State comply with the EU law.

Summary

According to the viewpoint of many, the protection of the financial interests of the EU carries greater weight in the scope of the Common Agricultural Policy than the general principles of the EU law, particularly the principles of proportionality and equal treatment. The case law of the CJEU does enhance that assumption in the cases where Member State authorities apply secondary EU acts. The lawfulness of the sanctions determined by such regulations, aiming at the deterrence from the violation of the financial interests of the EU, would actually be hard to question relying on the requirements implied in the general principles of the EU law.

Nonetheless, a significant difference must be made in such regard: the agricultural producer companies can rely on the general principles, particularly on the principle of equal treatment, with a greater chance of success than the traders of agricultural products receiving export refunds. The judgement rendered in the Belgisch Intervetie case can be deemed as a specific hybrid exception: the CJEU considered the transfer of the sanctions prescribed by the EU regulation lawful, yet, the Member States applying such sanction must also have regard to the general principles.

The economic operators have a fine chance of success in relying on the general principles of EU law in relation to atypical regulations if they believe that the sanctions applied against them do not comply with the requirements implied in the general principles. It may appear so that the judgement rendered in the Pontini case does not support such theory, but the erga omnes effect of the judgements of the CJEU, which is independent from the individual actors, will probably allow economic operators to rely on two essential findings in the future, provided that they will not have committed a series of fraudulent acts of similar seriousness: the right to subsidy does not depend on meeting additional criteria laid down by Member States but on complying with the criteria determined by the relevant EU regulation, and the acting national court must examine the requirements implied in the general principles individually in each case, even if the additional criteria laid down by the given Member State comply with the requirements of the EU law.

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