

ADMINISTRATIVE LITIGATION DIVISION OF THE COUNCIL OF STATE

15TH CHAMBER

JUDGMENT

no. 241.458 of 9 May 2018

214.240/XV-3217

Cause: **DOUTRELOUX Francis**,
with address for service c/o
Mr Alain LEBRUN, Lawyer,
6, Place de la Liberté
4030 Grivegnée,

versus:

Walloon Region,
with address for service c/o
Mr Etienne ORBAN de XIVRY, Lawyer,
29, boulevard du Midi
6900 Marche-en-Famenne.

214.283/XV-3218

Cause: **Avala ASBL**,
with address for service c/o
Mr Alain LEBRUN, Lawyer,
6, Place de la Liberté
4030 Grivegnée,

versus:

Walloon Region,
with address for service c/o
Mr Pierre MOËRYNCK, Lawyer,
34/27, avenue de Tervueren
1040 Brussels.

217.684/XV-2950

Cause: **Avala ASBL**,
with address for service c/o
Mr Alain LEBRUN, Lawyer,
6, Place de la Liberté
4030 Grivegnée,

versus:

Walloon Region,
with address for service c/o
Mr Pierre MOËRYNCK, Lawyer,
34/27, avenue de Tervueren
1040 Brussels.

I. Subject matter of the proceedings

By an application submitted on 14 November 2014, Francis Doutreloux seeks the annulment of the Order of the Walloon Government of 13 June 2014 laying down agricultural cross-compliance requirements and standards (*Moniteur belge* of 16 September 2014) (214.240/XV-3217).

By an application submitted on 17 November 2014, Avala ASBL (Association du Val d'Amblève, Lienne et Affluents), a non-profit association, seeks the annulment of the same Order (214.283/XV-3218).

By an application submitted on 27 November 2015, Avala ASBL (Association du Val d'Amblève, Lienne et Affluents), a non-profit association, seeks the partial annulment of the Order of the Walloon Government of 27 August 2015 laying down rules on agricultural cross-compliance, repealing the Order of the Walloon Government of 13 June 2014 laying down agricultural cross-compliance requirements and standards and amending the Order of the Walloon Government of 12 February 2015 implementing the direct payments scheme for farmers (*Moniteur belge* of 1 October 2015) (217.684/XV-2950).

II. Procedure

Administrative documents were submitted.

The Response and the Reply were duly exchanged.

Mr Michel QUINTIN, First Auditor/Head of Division, drew up two reports on the basis of Article 12 of the General Rules of Procedure.

The Parties were notified of these reports.

Final pleadings were duly exchanged.

By orders of 23 February 2018, hearings of the cases in open court were set for 27 March 2018.

Mr Michel LEROY, President of the Chamber, acted as rapporteur.

Ms Natacha DIERCKX, Lawyer, appearing for the defendant in place of Mr Pierre MOËRYNCK and Mr Etienne ORBAN de XIVRY, made submissions.

Mr Michel QUINTIN, First Auditor/Head of Division, submitted his opposing opinion.

The provisions on the use of languages in the courts, set out in Title VI, Chapter II, of the Consolidated Acts of 12 January 1973 on the Council of State [lois sur le Conseil d'Etat, coordonnées le 12 janvier 1973], are applicable.

III. Facts

Whereas the facts relevant to consideration of the application are as follows:

On 13 March 2014, the Government of the Walloon Region approved, on a first reading, a preliminary draft order laying down agricultural cross-compliance requirements and standards; the Minister for the Budget heard and agreed the order. According to the Memorandum to Government, the preliminary draft covered all the cross-compliance standards in force and introduced clarifications or improvements. The Legislation Division of the Council of State gave its advisory opinion on 24 April (L. 55886/4). On 15 May 2014, the Government decided to insert a new Article 18 into the draft and sought the opinion of the Legislation Division on this addition; this advisory opinion was given on 21 May (L. 56.373/4).

On 13 June, the Government approved the Order laying down agricultural cross-compliance requirements and standards. The Order was published in the *Moniteur belge* of 16 September. This is the measure contested by the first two applications.

On 2 April 2015, the applicants' lawyer submitted a complaint against the Order of 13 June 2014 to the European Commission, alleging that:

- it did not provide for a ban on cutting hedges and trees during the bird breeding and rearing season,
- it required farmers to prevent overgrowth and encroachment of woody plants onto their land and to cut back woody vegetation between 1 August and 30 September on all agricultural parcels (Article 36 of the Order).

This Order was repealed by Article 47 of the Order of the Walloon Government of 27 August 2015, which is contested by the third application (217.684/XV-2950).

On 23 November 2015, the European Commission decided to take no further action on the complaint because the cause, namely the Order of 13 June 2014, had been repealed.

IV. Joinder

Whereas the three applications are connected and should be joined;

V. Admissibility

A. Applications 214.240/XV-3217 and 214.283/XV-3218

Whereas the Order contested by Applications 214.240/XV-3217 and 214.283/XV-3218 was repealed by Article 47 of the Order contested by Application 217.648/XV-2950; whereas, in this last application, the applicant seeks

‘the annulment, without retroactive effect, of Article 22 of the contested Order and the annulment, in full, of Article 47 of the contested Order in so far as it repeals Article 28 of the Order of the Walloon Government of 13 June 2014 laying down agricultural cross-compliance requirements and standards’; whereas in its final pleadings, the applicant states that it ‘now intends to seek the retroactive annulment of Article 22 of the contested Order and to withdraw its first plea’;

Whereas the second plea of the third application is directed exclusively against Article 22 of the contested Order and contains no criticism of Article 47; accordingly, whereas the repeal, by Article 47, of the Order contested by the first two applications has become final;

Whereas the first applicant substantiates his legal standing to bring the action by the fact that he is an arable and livestock farmer and therefore one of the main persons to whom the contested measure is addressed; whereas, however, it should be pointed out that the contested Orders do not forbid or require certain actions, but establish that the fulfilment or omission of these actions forms part of the conditions that determine the receipt of agricultural aid; whereas the applicant does not allege that he was wholly or partly deprived of all or part of that aid for failing to comply with the provisions he is criticizing in the first contested Order, nor that, between 13 June 2014 and 1 October 2015, he behaved, so as not to lose aid, in any way that he would have liked to avoid;

Whereas the second applicant, which substantiates its standing through its objects as an association, which are to defend the environment in a particular area, does not allege that the contested Order, during the period it was in force, was applied in any way that adversely affected the interests defended by the applicant; whereas annulment of the first contested Order is no longer of interest to the applicants; whereas the first two applications are inadmissible;

B. Application 217.648/XV-2950

1. The applicant's claims

Whereas, in its application, the applicant states that it is asking the Council of State to annul, without retroactive effect, Article 22 of the contested Order and to annul, ‘in full’, Article 47 of the contested Order in so far as it repeals Article 28 of the Order of the Walloon Government of 13 June 2014 laying down agricultural cross-compliance requirements and standards;

whereas two pleas are put forward in this application, the first directed against Article 47 of the contested Order and the second against Article 22 thereof; whereas,

in its final pleadings, the applicant withdraws the first plea and ‘now intends to seek the retroactive annulment of Article 22 of the contested Order’;

2. The Council of State’s assessment

Whereas Article 14(b) of the Consolidated Acts on the Council of State allows only defendants and interveners to request that certain effects of annulled regulatory acts should be regarded as final or provisionally maintained; whereas it is not for the applicant to make such a request; whereas the application must be construed – as the applicant indicates in its final pleadings – as directed against Article 22 of the contested Order;

VI. Substance: the second plea of Application 217.684/XV-2950

A. The applicant’s arguments

Whereas the applicant alleges an infringement of EU Regulation No 1306/2013, which, in Annex II, GAEC 7,¹ imposes a ban on cutting hedges and trees during the bird breeding and rearing season; whereas the applicant argues that the Order of the Walloon Government of 13 June 2014 omitted to transpose this, and that, following a complaint to the European Commission, the contested Order now transposes the rule; but that this is inadequate, given that the period to be regarded as ‘the bird breeding and rearing season’ under Article 22 of the contested Order is fanciful and thus unworthy of an authority such as the Walloon Region; whereas the applicant argues that everyone knows that the nesting season does not end on 30 June and that it starts when the birds form a breeding pair or build a nest before 15 April, and that this is the case for a large number of bird species nesting in trees and in hedges; whereas the applicant produces extracts from a reference work – *Les passereaux de Belgique [Passerines of Belgium]*, Part One, 2nd edition, Brussels, 1957, by R. Verheyen, published by the Royal Belgian Institute of Natural Sciences – which gives details of the breeding and rearing season for several species of birds in Belgium;

Whereas, in the Reply, the applicant points out that:

- the plea is not explicitly alleging a manifest error of assessment, but that is what it implies; .
- the defendant asserts, with no evidence, that ‘the nesting season for passerines in the farming environment is concentrated between 15 April and 30 June’;
- Regulation No 1306/2013 protects not just passerines, but all birds;
- the Response focuses on the fact that hedges do not offer adequate shelter before 15 April because they are not sufficiently leafy: but this is only true for essentially deciduous hedges whose bulk is not increased by ivy; however, birds target not only hedges to provide them with nesting sites, but also trees: this

¹ Abbreviation of ‘Standards for good agricultural and environmental condition of land’.

applies in particular to cavity-nesting species, which do not need thick foliage in order to nest inside trees, and to other species which nest in evergreens such as spruce, box, yew, juniper and holly;

- it is untrue to say that by far the greatest part of the nesting season is over by 30 June, and it is not acceptable to claim that if nests are destroyed, the species concerned can still build replacement nests: this is completely out of step with the philosophy of Regulation No 1306/2013;
- the burden of proving its assertions falls on the defendant, and this proof should be clear from the administrative file compiled during the procedure to enact the contested Order: but it is not;
- the plea must be interpreted in the light of this absence and consequently alleges a manifest error of assessment or, at the very least, an inadequate account of the facts;
- it is not for the applicant to demonstrate that all species of birds nest outside the periods restrictively laid down by the contested Order: nevertheless, it has shown that a whole range of species has very frequently nested outside this period, which is a clear illustration of the manifest error and, above all, of the inadequate account of the facts revealed by the Response;
- reference is made inter alia to information on the website www.aspas-nature.org, headed ‘The Town Council is going to prune the trees in my village...’, which clearly states that in France, the tree nesting season lasts until August;
- as to legal uncertainty and scientific uncertainty, Marcel Bayle states, in a text entitled ‘Uncertainties arising from new hunting legislation’, that ‘[m]any young birds remain dependent on their parents until the end of August. These principles of nature are well known’ (page 1160; accessible online);
- Regulation No 1306/2013 covers nesting of birds, not nesting of the main bird species or of the majority of birds; therefore any argument as to whether there are certain species that nest between 15 April and 30 June becomes irrelevant as soon as it is established that other species are nesting beyond 30 June;

B. The Council of State’s assessment

Whereas Regulation No 1306/2013 sets out, in Annex II, Standards for good agricultural and environmental condition of land, of which No. 7 requires ‘Retention of landscape features, including where appropriate, hedges, ponds, ditches, trees in line, in group or isolated, field margins and terraces, and including a ban on cutting hedges and trees during the bird breeding and rearing season and, as an option, measures for avoiding invasive plant species’; whereas this regulation does not specify ‘the bird breeding and rearing season’ to which it refers;

Whereas Article 22 of the contested Order provides that ‘Farmers shall not cut hedges and trees during the period from 15 April to 30 June’; whereas the administrative file contains inter alia a Memorandum to the Walloon Government which states that this provision was added ‘in order to take into account the obligation contained in the Regulation, where GAEC 7 explicitly mentions a ban on cutting hedges and trees during the breeding and rearing season’;

Whereas the very brief text of Regulation No 1306/2013 leaves the competent national authorities some discretion in specifying the breeding and rearing season; whereas, although it is probable that, as the applicant maintains, the dates used do not fully cover the breeding and rearing season of all birds, it is reasonable to take the view, as the defendant does, that a majority of birds nest and breed during this period; whereas the documentation produced by the applicant relates to ornithological arguments, which it is not for the Council of State to resolve; whereas the plea is unfounded;

VII. Costs and case preparation allowance

Whereas the defendant has requested a case preparation allowance only for Case 217.684/XV-2950; whereas this should be granted to the defendant,

**ON THOSE GROUNDS,
THE COUNCIL OF STATE HAS DECIDED TO:**

Article 1.

Join the cases listed under Roll Numbers 217.684/XV-2950, 214.240/XV-3217 and 214.283/XV-3218.

Article 2.

Dismiss the applications.

Article 3.

Award a case preparation allowance to the defendant in Case 217.684/XV-2950 against Avala ASBL in the sum of 700 euros.

Order the applicants to pay the other costs, fixed at the sum of 600 euros, with each applicant responsible for a maximum of 200 euros.

Delivered in the 15th Chamber sitting in open court in Brussels on 9 May 2018
by:

Mr Michel LEROY,	President of the Chamber,
Ms Diane DÉOM,	Councillor of State,
Mr Yves HOUYET,	Councillor of State,
Ms Nathalie ROBA,	Registrar

Registrar

Presiding

Nathalie ROBA

Michel LEROY