



Note on the requirement of ‘eligible hectares at the farmer’s disposal’

1. INTRODUCTION

The purpose of this note is to bring to the attention of the Member States the recent Judgment of the Court of Justice of the European Union (ECJ) of 17 December 2020 in Case C-216/19 WQ v Land Berlin¹ and to provide an overview and explanation of the requirement of ‘eligible hectares at the farmer’s disposal’ with a view to facilitating the application of this requirement across the EU.

This note is aimed at assisting Member States. It is provided for information purposes only and is not a legally binding document. It clarifies provisions that are already contained in the applicable EU legislation. It does not extend in any way the obligations deriving from such legislation nor introduce any additional requirements on the farmers and competent Member States’ authorities. This note was prepared by Commission services and does not commit the European Commission. In the event of a dispute involving Union law it is, under the Treaty on the Functioning of the European Union, ultimately for the European Court of Justice to provide a definitive interpretation of the applicable Union law.

2. LEGAL FRAMEWORK

The Direct Payments (DP) Regulation (EU) No 1307/2013² requires the eligible hectares/declared parcels to be at the farmer’s disposal on a date fixed by the Member State in question³. Having the eligible hectares at the farmer’s disposal is a requirement for the allocation of payment entitlements (PEs), the activation of PEs for the purpose of

¹ C-216/19 Land Berlin ECLI:EU:C:2020:1046

² Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 (OJ L 347, 20.12.2013, p. 608)

³ The relevant provisions are summarised in the Annex.

receiving the corresponding payment under the Basic Payment Scheme (BPS) and for receiving the payment under the Single Area Payment Scheme (SAPS).

The same approach is maintained in the Commission's proposal for the Strategic CAP Plan Regulation⁴, where the definition of 'eligible hectare' refers to the eligible hectares being 'at the farmer's disposal'.

Neither the current nor the future legal frameworks specify the nature of the legal relationship that would determine that the eligible hectares are at the farmer's disposal.

3. ECJ RULING IN CASE C-216/19 LAND BERLIN

Case C-216/19 Land Berlin refers to a preliminary ruling requested by the administrative court of Berlin (*Verwaltungsgericht Berlin*).

The main dispute before the referring court was between, on one side, the farmer-owner of the land who applied for the allocation of PEs and, on the other side, the competent service of Land Berlin (*Amt für Landwirtschaft und Forsten*) that refused to allocate PEs for a certain area because a third party was using the land. The owner declared that the land was laying fallow while the third party sowed crops.

The referring court asked, among other things, if the owner of the eligible hectares has those hectares at his disposal within the meaning of the first sentence of Article 24(2) of the DP Regulation if no third party has the right to use the eligible hectares, and in particular no right of use derived from the owner, or if this area is at the disposal of a third party or at no one's disposal if a third party is using the area for agricultural purposes without any right of use.

The main elements of the ECJ judgment can be summarised as follows.

In the first place, the ECJ confirms that EU law does not define the term 'at the disposal'. Nor does it specify the exact type of legal title to demonstrate that the eligible hectares are at the farmer's disposal⁵.

The ECJ also confirms its established case law that the Member States possess a margin of discretion to require that the farmer present a valid legal title and proof for the areas covered by his/her application in accordance with national law, provided that the objectives laid down in EU rules and the general principles of EU law, in particular the principle of proportionality, are respected⁶.

Given the above, the ECJ observes that Member States can presume that an applicant who applies for PEs has the eligible hectares at their disposal. This relates to the

⁴ *Proposal for a regulation of the European Parliament and of the Council establishing rules on support for strategic plans to be drawn up by Member States under the Common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulation (EU) No 1305/2013 of the European Parliament and of the Council and Regulation (EU) No 1307/2013 of the European Parliament and of the Council (Brussels, 1.6.2018, COM(2018) 392 final)*

⁵ C-216/19 Land Berlin ECLI:EU:C:2020:1046, paragraph 34.

⁶ C-216/19 Land Berlin ECLI:EU:C:2020:1046, paragraph 35.

objective of reducing the administrative burden. The presumption is balanced by the fact that Member States are obliged to put in place a systematic control of applications for the allocation of PEs and the corresponding payment applications in accordance with Article 58(2) in conjunction with Article 59(1) of the CAP Horizontal Regulation No 1306/2013⁷ in order to prevent and, if necessary, correct irregularities and to recover undue payments. In the case of double claims, a control of the requirement that the farmer have the eligible hectares at his/her disposal is however obligatory⁸.

The ECJ also states that in the case of a double claim, the principles arising from case C-61/09 *Landkreis Bad Dürkheim* and Article 15(2) of Commission Regulation No 639/2014⁹ are applicable to a situation characterised by the existence of legal relationships between the different applicants who could claim to have the land concerned at their disposal¹⁰. That principle and provision are not applicable in a case where a person does not assert any legal right to the agricultural areas concerned¹¹.

The ECJ therefore concludes that when a request is submitted by two applicants claiming to exercise agricultural activity, namely by the owner of agricultural areas and by a third party with no right to use those areas, the eligible hectares corresponding to said areas are ‘at the disposal’ of the owner alone¹².

4. GUIDANCE

Based on that recent ruling and taking into account the established case law¹³, DG AGRI provides the following further clarifications on the reasoning behind and intention of the requirement of ‘eligible hectares at the farmer’s disposal’ and its implementation.

4.1. Lawful disposal

The requirement of having the eligible hectares at the farmer’s disposal is a condition for allocating PEs and receiving direct payments. Its verification is important in order to prevent and detect irregularities and protect the Union financial interests.

EU law on direct payments does not specify the nature of the legal relationship on the basis of which the area concerned is used by the farmer

⁷ Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008.

⁸ C-216/19 Land Berlin ECLI:EU:C:2020:1046, paragraphs 40-41.

⁹ Commission Delegated Regulation (EU) No 639/2014 of 11 March 2014 supplementing Regulation (EU) No 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and amending Annex X to that Regulation.

¹⁰ C-216/19 Land Berlin ECLI:EU:C:2020:1046, paragraph 43.

¹¹ C-216/19 Land Berlin ECLI:EU:C:2020:1046, paragraph 44.

¹² C-216/19 Land Berlin ECLI:EU:C:2020:1046, paragraph 45.

¹³ C-216/19 Land Berlin ECLI:EU:C:2020:1046; C-61/09 *Landkreis Bad Dürkheim*, EU:C:2010:606; C-375/08 Pontini e.a., EU:C:2010:365.

i.e. is at the farmer's disposal¹⁴. It cannot therefore be inferred that the parcels in question must be at the farmer's disposal pursuant to a specific legal title. In line with the principle of contractual freedom, all legally available forms of agricultural land tenure in national law should qualify in this regard. Tenure can be ownership, a land concession, a written lease contract, an oral lease or other form of oral agreement, or other national legal forms, legal tradition and/or legal custom.

It follows from the ruling in Case C-216/19 *Land Berlin*, in particular paragraphs 44 and 45, that a person who claims to actually use the land, but without any legal basis, cannot be considered as having the land at their disposal.

It is apparent from the ruling that an important feature of the concept of 'land at the farmer's disposal' is that the (actual) use of the agricultural land is asserted on a valid legal basis. It follows that a third person who does not have any legal basis for the land concerned cannot claim to lawfully dispose of it. On the contrary, a third party could claim to lawfully dispose of the land in a factual situation characterised by the existence of a legal relationship and links between the owner and the third party. Such a legal relationship can be any legally recognised type of agreement: explicit or tacit, oral or written. Or it can take the form of tolerating use of the land insofar as national law provides for it)¹⁵.

Lawfully disposing of land also implies obtaining the right to use it in a lawful way, i.e. in accordance with the national legal framework governing land use (for example property law, contract law, rental law, concession law, legal tradition, legal custom or other nationally recognised and available means). As established by case law, the principle of the prohibition of abusive practices applies to the CAP and it holds that the scope of EU regulations must not be extended to cover abusive practices of economic operators¹⁶. Abusive use of agricultural land (including use against the will or without the consent of the owner, or by means of fraudulent practices) with the intention of receiving direct payments falls under this principle.

4.2. Legal title

In line with the shared management principle, in their national law Member States are entitled to impose a requirement to produce a valid legal document or other proof attesting the lawful use of the eligible hectares in question¹⁷. This requirement is not to be interpreted as an additional eligibility condition but as an administrative measure in accordance with the Member States' control prerogatives (Article 58 of the CAP Horizontal Regulation No

¹⁴ C-61/09 *Landkreis Bad Dürkheim*, ECLI:EU:C:2010:606, paragraphs 54-55.

¹⁵ C-216/19 *Land Berlin* ECLI:EU:C:2020:1046, paragraph 45; C-375/08 *Pontini e.a.*, EU:C:2010:365, paragraph 88.

¹⁶ T-259/05 *Spain v Commission*, ECLI:EU:T:2009:232, paragraphs 96-97; C-375/08 *Pontini e.a.*, EU:C:2010:365, paragraph 88.

¹⁷ C-216/19 *Land Berlin* ECLI:EU:C:2020:1046, paragraph 35, C-375/08 *Pontini e.a.*, EU:C:2010:365, paragraphs 82 and 86.

1306/2013, Article 57 of the Commission proposal for the CAP Horizontal Regulation¹⁸). The requirement serves two purposes: to check that the condition of the land's being at the farmer's disposal is met and to prevent irregularities and abuse¹⁹.

However, in line with the recent ruling, a national requirement to produce valid legal proof of having the eligible hectares at the farmer's disposal must respect the objectives of the relevant EU regulations and the general principles of EU law, in particular the principle of proportionality²⁰. This means that the following applies.

- Member States should recognise all possible national legally available forms of agricultural land tenure and give its farmers the opportunity to prove their right to use it accordingly.
- It has to be possible to obtain such proof in accordance with national law.
- The requirement has to respect the objectives of the relevant EU rules on direct payments and the principle of proportionality.
- It must not lead to the creation of additional eligibility conditions or conditions that do not comply with EU law. The current DP Regulation exhausts the eligibility conditions for receiving direct payments. The Member States may not, therefore, create additional eligibility conditions.

4.3. Member State control

The ECJ recognises the possibility for Member States to presume that the eligible hectares in question are at the disposal of the applicant who lodges an application for the allocation of PEs and states that this presumption is counterbalanced by the obligation for Member States to put in place a systematic administrative control mechanism for aid applications²¹. This refers to the systematic administrative checking of aid applications and payment claims in accordance with Articles 58(2) and 59(1) of the CAP Horizontal Regulation No 1306/2013²². The control in this case covers the administrative checking of aid applications to verify that the aid eligibility conditions have been met (Article 74(1) of the CAP Horizontal Regulation No 1306/2013).

¹⁸ Proposal for a Regulation of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013 – COM/2018/393 final – 2018/0217 (COD).

¹⁹ For example, to check the enjoyment and use of the areas in question and to prevent the aid applicant from unlawfully using someone else's land (C-375/08 Pontini e.a., EU:C:2010:365, paragraphs 82 and 88).

²⁰ C-216/19 Land Berlin ECLI:EU:C:2020:1046, paragraph 35.

²¹ C-216/19 Land Berlin ECLI:EU:C:2020:1046, paragraph 36 and 38.

²² C-216/19 Land Berlin ECLI:EU:C:2020:1046, paragraphs 38-39.

In practical terms, Member States are not obliged to check every aid application to verify the fulfilment of the requirement of having the eligible hectares at the farmer's disposal as it is not included in the list of mandatory cross-checks listed in Article 29 of Regulation No 809/2014²³ (except in double claims cases, where its mandatory check is referred to in point 3 of said Article). Nevertheless, to do such check can be a discretionary choice for the Member States' control-setting.

In view of the above, Member States could decide to include the verification of the fulfilment of the requirement of having the eligible hectares at the farmer's disposal in the scope of the systematic checks carried out pursuant to Article 59(1) of the CAP Horizontal Regulation No 1306/2013. In particular, they can do so if particular conditions in a Member State indicate there is a need for such checks in order to prevent certain types of irregularities linked to claims not supported by any legal title to the land in question. As a supplement, Member States can decide to include such a check during the on-the-spot-checks carried out pursuant to Article 59(2) of the CAP Horizontal Regulation No 1306/2013.

A verification could be done, for example, by collecting and validating the relevant information if requested under the relevant national rules (e.g. beneficiary/owner's statement of having the land at their disposal, beneficiary/owner's indication of the type of legal title and/or contract) at the time of submission of the single application or during the registration of parcels in the Land Parcel Identification System (LPIS). The European Court of Auditors²⁴ considers it good practice to supplement the LPIS with information on whether the parcels are at the farmer's disposal²⁵, which would enable Member States to cross-check such information against aid applications. As explained above (sections 4.1 and 4.2), all legally available forms of agricultural land tenure in accordance with national law can be taken into account.

Member States could have national provisions to carry out checks either by using existing databases (e.g. land register, if the legal title is ownership) or requesting the beneficiary to provide evidence of the land's being at their disposal, especially if they are selected for on-the-spot checks or in case of reasonable doubt that the title may not be valid. Such reasonable doubt may be triggered by a complaint lodged before the Paying agency or be a result from the Paying Agency own control activities. Other situations may also

²³ Commission Implementing Regulation (EU) No 809/2014 of 17 July 2014 laying down rules for the application of Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to the integrated administration and control system, rural development measures and cross compliance.

²⁴ Special Report 25/2016: 'The Land Parcel Identification System: a useful tool to determine the eligibility of agricultural land – but its management could be further improved', point 30, https://www.eca.europa.eu/Lists/ECADocuments/SR16_25/SR_LPIS_EN.pdf

²⁵ In box 7 of Special Report 25/2016, the following example is provided: in Scotland, any declared change in ownership or the right to use parcels must be supported by appropriate background documents signed by both parties to the transfer. Similarly, all newly declared parcels must be supported by a document proving the right to use the land. The Scottish LPIS contains information about land ownership and/or tenancy agreements.

lead to verification of the legal title, for example if a given parcel has not been declared for several years.

If two or more applications for the allocation of PEs or payment for the same eligible hectares are submitted, the control of the requirement of having the eligible hectares at the farmer's disposal is obligatory²⁶ (see chapter 4.4 below).

The abovementioned control settings also need to take into consideration that the Member States' Paying agencies operate in the context of administrative procedures and controls in line with their role in implementing CAP schemes.

In cases involving criminal activities such as extortion, violence, organised crime, bribery, money-laundering, forgery of official documents and the like, the Paying agencies have a limited role to play, given their limited powers and lack of expertise in those areas. Others are competent to deal with such cases, such as the police, the judiciary, national anti-fraud bodies, the European Anti-Fraud Office and recently also the European Public Prosecutor's Office.

4.4. Double claims

A situation where an eligible hectare is subject to an application by more than one farmer for the allocation and activation of PEs (BPS) or direct payments (SAPS) is referred to here as a double claim. This has to be seen in the context of the whole set of eligible conditions, including having the eligible hectares at the farmer's disposal.

In case C-216/19 *Land Berlin*, the ECJ distinguishes between two situations. The first is when both applicants declare they have legal rights to use the land in question. The second is when one of them has a legal right and the other does not have any legal basis to go on for the use of the land in question.

It follows from case C-216/19 *Land Berlin* that the main criteria for deciding in a double claims case, as established in case C-61/09 *Landkreis Bad Dürkheim*²⁷, are applicable in the first case, when the applicants have the eligible hectares concerned at their disposal and their claims are based on legal relationships. In the second case, when the third party does not have a valid legal title to the land in question and the eligible hectares are therefore not at their disposal, the principles established in case C-61/09 *Landkreis Bad Dürkheim* do not apply²⁸.

²⁶ C-216/19 *Land Berlin* ECLI:EU:C:2020:1046, paragraphs 40-41.

²⁷ C-61/09 *Landkreis Bad Dürkheim* EU:C:2010:606, paragraphs 63 and 68-69.

²⁸ C-216/19 *Land Berlin* ECLI:EU:C:2020:1046, paragraphs 43-44.

Consequently, in the context of a double claim, the analysis to be carried out by the competent national authorities of the allocation of the PE or the direct payment should involve the following two steps.

- Firstly, determining who has the eligible hectares at their lawful disposal. If one of the applicants does not have any legal right, he/she cannot claim to lawfully dispose of the land in question.
- Secondly, if two parties can demonstrate a legal relationship with regard to the land, national authorities have to determine who holds the decision-making power for the agricultural activities carried out on those hectares and bears the profits and financial risks associated with those activities, in accordance with the principles established in case C-61/09 *Landkreis Bad Dürkheim*.

On the basis of the principles established in case C-61/09 *Landkreis Bad Dürkheim*, Article 15(2) of Regulation No 639/2014²⁹ specifies that (if both applicants have legal rights to the land in question) the decision whom to allocate the payment entitlement to must be based on the following criteria:

- who has the decision-making power in relation to the agricultural activities exercised on the land in question;
- who bears the benefits and the financial risks of those activities.

5. CONCLUSION

Having the eligible hectares at the farmer's disposal is a legal requirement for the allocation of PEs and the reception of direct payments. The control of that requirement prevents and detects irregularities, protecting the EU's financial interests. ECJ case law, including the recent case C-216/19 *Land Berlin* on the requirement of 'eligible hectares at the farmer's disposal' upholds the following understanding of the Commission.

- The eligible hectares have to be at the farmer's disposal in a lawful way and asserted on a legal basis in accordance with applicable national law.
- The Member States have the discretion to require appropriate proof that the hectares declared in the aid application are at the farmer's disposal and to establish detailed rules on the matter, requiring both actual and lawful land use.
- Although Member States have a margin of discretion and a right to presume the eligible hectares are at the disposal of the applicant, they also have a general obligation to carry out systematic administrative controls, including of the fulfilment of that requirement. Member States may decide on the extent of those controls in the light of their national specificities.

²⁹ Commission Delegated Regulation (EU) No 639/2014 of 11 March 2014 supplementing Regulation (EU) No 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and amending Annex X to that Regulation.

- Although Member States have the discretion to decide how to design the checks of the fulfilment of the ‘eligible hectares at the farmer’s disposal’ requirement in accordance with Articles 58 and 59 of the CAP Horizontal Regulation No 1306/2013, the control mechanism must consist of effective ways of preventing and correcting irregularities. In order to achieve this, the control designed by the Member States should be more targeted (for example to specific red-flag situations) and not just limited to obvious cases of double or conflicting claims.

The above remains valid for the requirement of ‘eligible hectares at the farmer’s disposal’ in the Commission proposal for the Strategic CAP Plan Regulation.

ANNEX

Regulation No 1307/2013

- Concerning the payment entitlements

Art. 21 (4) As regards Member States which take the decision referred to in paragraph 3, when the number of owned or leased-in payment entitlements established in accordance with Regulation (EC) No 1782/2003 and with Regulation (EC) No 73/2009 which a farmer holds on the final date for submission of applications to be set in accordance with point (b) of the first subparagraph of Article 78 of Regulation (EU) No 1306/2013 exceeds the number of **eligible hectares** which the farmer declares in his aid application in accordance with point (a) of the first subparagraph of Article 72(1) of Regulation (EU) No 1306/2013 for 2015, and which are **at his disposal** on a date fixed by the Member State, which shall be no later than the date fixed in that Member State for amending such an aid application, the number of payment entitlements exceeding the number of eligible hectares shall expire on the latter date.

Art. 24 (2) Except in the case of force majeure or exceptional circumstances, the number of payment entitlements allocated per farmer in 2015 shall be equal to the number of **eligible hectares**, which the farmer declares in his aid application in accordance with point (a) of the first subparagraph of Article 72(1) of Regulation (EU) No 1306/2013 for 2015 and which are **at his disposal** on a date fixed by the Member State. That date shall be no later than the date fixed in that Member State for amending such an aid application.

Art. 30 (7) (d) allocate, in cases where they apply Article 21(3) of this Regulation, payment entitlements to farmers whose number of **eligible hectares** that they declared in 2015 in accordance with point (a) of the first subparagraph of Article 72(1) of Regulation (EU) No 1306/2013 and that **are at their disposal** on a date fixed by the Member State, which shall be no later than the date fixed in that Member State for amending such an aid application, is higher than the number of owned or leased-in payment entitlements established in accordance with Regulation (EC) No 1782/2003 and with Regulation (EC) No 73/2009 that they hold on the final date for submission of applications to be set in accordance with point (b) of the first subparagraph of Article 78 of Regulation (EU) No 1306/2013;

Art. 33 (1) For the purposes of the activation of payment entitlements provided for in Article 32(1), the farmer shall declare the **parcels corresponding to the eligible hectares** accompanying any payment entitlement. Except in the case of force majeure or exceptional circumstances, the parcels declared shall be **at the farmer's disposal** on a date fixed by the Member State, which shall be no later than the date fixed in that Member State for amending the aid application as referred to in Article 72(1) of Regulation (EU) No 1306/2013.

Art. 39 (2) Except in the case of force majeure or exceptional circumstances, the number of payment entitlements allocated per farmer in the first year of implementation of the basic payment scheme shall be equal to the number of **eligible hectares** which the farmer declares in his aid application in accordance with point (a) of the first subparagraph of Article 72(1) of Regulation (EU) No 1306/2013 for the first year of implementation of the basic payment scheme and

which are at **his disposal** on a date fixed by the Member State. That date shall be no later than the date fixed in that Member State for amending such aid application.

- Concerning the SAPS

Art. 36 (5) Except in the case of force majeure or exceptional circumstances, the **hectares** referred to in paragraph 2 shall be **at the farmer's disposal** on a date fixed by the Member State, which shall be no later than the date fixed in that Member State for amendment of the aid application referred to in Article 72(1) of Regulation (EU) No 1306/2013.