News from the Member States

Austria COVID-19

Agricultural Subsidies and SARS-CoV-2

Agricultural Subsidies have been one of the central themes before Austrian Courts in 2019. SARS-CoV-2 has put our lives upside down in 2020.

Already a major issue in the previous year,¹ agricultural subsidies continued to be the one subject under consideration by Austrian courts in 2019. Nevertheless, the new cases have revealed neither new nor surprising dogmatic legal considerations. Quite the contrary. The latest Austrian jurisprudence seems to be a particularly exact implementation of the requirements of EU State aid law. Still, the latest cases merit some consideration as they addressed a variety of issues.

However, nowadays one topic trumps all: the virus SARS-CoV-2, which leads to a disease called COVID-19, seems to have slowed Earth down. At least in Europe, we witness changes in our lives no one would have imagined would happen any time soon. Therefore, the current situation in Austria is addressed at the end of this report.

I. Prohibition of Discrimination and Agricultural Subsidies

In 2019, the Federal Administrative Court (*Bundesverwaltungsgericht*, FAD) dealt with agricultural subsidies and the prohibition of discrimination.² On 2nd

September 2016, the claimant applied for investment aid for the purchase of new red wine fermentation tanks according to the 'common organisation of the market in wine',³ which was implemented in Austria by an order, the so-called '*Verordnung zur Durchführung von gemeinschaftlichen Marktordnungsmaßnahmen im Weinbereich*'.⁴ According to the Austrian order, the acquisition of red wine fermentation tanks is subsidisable provided that the doors of the tanks have a minimum size of 2.000 cm² and are located at the bottom of the tank. These strict requirements were introduced by an amendment made to the Austrian order in 2015.⁵ Before that, Austrian law knew no special requirements for red wine fermentation tanks, which led to misuses in practice as easy adaptable storage tanks and white wine tanks had been used to apply for and receive State aid, which is only ap-

plicable to red wine fermentation tanks.

The claimant applied for investment aid for the purchase of ten red wine fermentation tanks with a volume of 75.000 litres. On 3rd August 2017, the Austrian Ministry for Sustainability and Tourism approved the investment aid. However, on 30th May 2018, the claimant informed the authorities that she had only bought five tanks but with a volume of 100.000 litres. The competent federal authority (Agrarmarkt Austria, AMA) undertook an on-the-spot inspection on 25th September 2018. Apart from the fact that the claimant had only bought five tanks, AMA furthermore ascertained that the tanks were not built with a specific door as proscribed by the Austrian order. Because of this, AMA denied the investment aid. In turn, the claimant appealed against the decision arguing that the tanks she had bought rely on automated technology that leads to higher pressure within the tanks and thus makes doors as prescribed by the Austrian legislator technically impossible. Therefore, holding the strict criteria established by the Austrian order against her consti-

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1 See Haslinger and Hoffberger-Pippan in EStAL 1/2019, 93 ff.

2 FAD, 25.6.2019, W104 2215247-1.

3 See, for example, Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), OJ 2007 L 299/1 (no longer in force, repealed by Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, OJ 2013 L 347/671). See also Commission Regulation (EC) No 555/2008 laying down detailed rules for implementing Council Regulation (EC) No 479/2008 on the common organisation of the market in wine as regards support programmes, trade with third countries, production potential and on controls in the wine sector, OJ 2008 L 170/1.

4 Verordnung zur Durchführung von gemeinschaftlichen Marktordnungsmaßnahmen im Weinbereich, BGBl. II Nr. 279/2013 in the version of BGBl. II Nr. 365/2016. See also Market Regulation Act 2007, in the version of BGBl. I Nr. 89/2015.

5 FAD, 25.6.2019, W104 2215247-1, para 6.

tutes a violation of the prohibition of discrimination as *inter alia* foreseen in Art 40 TFEU.⁶

The Austrian FAD held that the Austrian order has to be interpreted in light of EU Regulation 1308/2013 establishing a common organisation of the markets in agricultural products.⁷ The Regulation allows Member States to grant agricultural subsidies such as investment aid, contingent upon the fulfilment of certain additional criteria. However, the Court also stressed that such national measures must not lead to the discrimination of farmers. Any additional restrictions imposed on farmers have to pursue a legitimate interest of Common Agricultural Policy (CAP) and be proportionate. In the present case, the Court came to the conclusion that the fermentation tanks the claimant had bought – although not in compliance with the Austrian order – pursue the objec-

tive of enhancing the Austrian production of red wine. Furthermore, it was shown during the proceedings that the tanks acquired could not be confused with storage or white wine tanks. Accordingly, the strict requirements established by the Austrian order could not be held against her.⁸ Unfortunately, however, the Court did not elaborate further on this question. Since the claimant had applied for investment aid for the acquisition of ten tanks with a volume of 75.000 litres but in fact bought less tanks with a higher volume, the investment aid had to be denied.⁹ The decision taken by the Court – despite the fact that it did not make a final decision in this regard – proves the overall importance of the prohibition of discrimination in the agricultural sector (Art 40 TFEU), which is not only binding for the EU, its agencies and institutions but also for the Member States. Any restrictions

imposed on farmers have to pursue a legitimate interest of Common Agricultural Policy (CAP) and be proportionate. Apparently, situations shall be considered on a case-by-case basis and occasionally some of the criteria imposed by national authorities cannot be held against farmers – especially in case the relevant restrictions are not apt to pursue a specific interest in the individual case concerned. This is at least what the Court's decision insinuates. However, it remains to be seen how Austrian Courts will deal with questions of the boundaries of Member States' discretion as introduced by the prohibition of discrimination (hopefully with a final and conclusive answer) in the future.

II. Single Payment Scheme and Agricultural Subsidies

In 2019, Austrian Courts were concerned with the so-called single payment scheme (*Einheitliche Betriebsprämie*, EBP) again.¹⁰ In its decision of 31st January 2019,¹¹ the Higher Administrative Court dealt with an allegation made by the claimant according to which AMA had committed an error when identifying subsidisable agricultural areas. In 2019, the claimant applied for agricultural subsidies in the form of a single payment scheme for the years 2009-2013, which were granted by AMA at first. However, an on-site inspection revealed that the information provided by the claimant regarding the subsidisable agricultural areas was partly incorrect. As a result, AMA reduced the subsidies. The claimant appealed against the decision.¹² Since 2000, AMA had used the so-called '*Almleitfaden*'¹³ in order to

6 See also Case C-126/04, *Heineken Brouwerijen BV v Hoofdproductschap Akkerbouw* [2005] ECLI:EU:C:2005:24, para 16; joint Cases C-117/76 and 16/77, *Albert Ruckdeschel & Co. und Hansa-Lagerhaus Ströh & Co. gegen Hauptzollamt Hamburg-St. Annen*; *Diamalt AG gegen Hauptzollamt Itzehoe* [1977] ECLI:EU:C:1977:160, para 7.

7 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, OJ 2013 L 347/671.

8 See also C-135/13, *Szatmári Malom Kft. gegen Mezőgazdasági és Vidékfejlesztési Hivatal Központi Szerve* [2014] ECLI:EU:C:2014:327.

9 FAD, 25.6.2019, W104 2215247-1, para 2.2.3.

10 See already Haslinger/ Hoffberger- Pippan in EStAL 1/2019, 93 ff.

11 Higher Administrative Court, 31.1.2019, Ra 2018/07/0357. A similar decision was taken in April of the same year, which will not be elaborated further in this article. For more details, see Higher Administrative Court, 2.4.2019, Ra 2017/17/0328. Furthermore, the FAD dealt with the single payment scheme on various occasions in 2019. See, eg, all from this Court: 3.01.2019, W114 2120371-1; 18.2.2019, W114 2206109-1; 13.3.2019, W113 2204592-1; 16.4.2019, W118 2163954-1; 9.5.2019, W118 2205982-1; 7.6.2019, W114 2219218-1; 9.7.2019, W104 2219497-1; 2.8.2019, W118 2206291-1; 19.8.2019, W104 2220639-1.

12 See Commission Regulation (EC) No 1122/2009 of 30 November 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 73/2009 as regards crosscompliance, modulation and the integrated administration and control system, under the direct support schemes for farmers provided for that Regulation, as well as for the implementation of Council Regulation (EC) No 1234/2007 as regards cross-compliance under the support scheme provided for the wine sector, OJ L 316/65.

13 Manual of AMA, HOR/01/2000. The legal basis for the manual was Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, OJ L 391/36; Council Regulation (EC) No 1254/1999 of 17 May 1999 on the common organisation of the market in beef and veal, OJ L 160/21 and the Working Document of the Commission, VI/8388/9.

identify subsidisable agricultural areas. This manual was amended in 2010,¹⁴ introducing a digitalized system. The claimant argues that based on this new method, the size of subsidisable agricultural areas was different and deviated from previous results.¹⁵ Therefore, according to him, AMA's previous results were based on an error, which he could not be held accountable for. The Higher Administrative Court rejected the possibility to invoke the concept of 'error' in order to avoid the reduction of agricultural subsidies. The newly established method might have led to different but also more accurate results. According to the Court, the claimant did not demonstrate sufficiently in which way AMA may have had committed an error when the calculation method changed and in which way the commitment of alleged error may have put the claimant at disadvantage.¹⁶ Furthermore, the Court emphasized that the '*Almleitfaden*' as well as any other guidelines issued by AMA merely constitute additional technical aid in order to identify subsidisable areas. The farmer himself is primarily responsible for the correctness of his declarations. If it is alleged that AMA had committed an error, this must be brought forward in front of Court, be substantiated and demonstrated sufficiently. Since this was not the case, the reduction of subsidies by AMA was lawful.

III. Tenantry and Agricultural Subsidies

Apart from specific subsidies in the wine sector and the single payment scheme, Austrian courts also

dealt with tenantry in the context of State aid. In the first case, which was decided by the FAD in April 2019, the claimant had applied for agricultural subsidies by using 'IN-VEKOS-GIS', a specially developed online-app in order to facilitate the administrative process.¹⁷ An on-the-spot inspection, which had taken place on 4th September 2017, however, revealed that the claimant had violated several cross-compliance obligations. The concept of cross-compliance obligates farmers to adhere to certain standards, which are not necessarily linked to State aid, such as the protection of the environment. According to Art 93 of Regulation 1306/2013,¹⁸ which serves – among others – as legal basis for rules on cross-compliance at EU level, Member States are allowed to set up additional 'standards of good agricultural and environmental condition of land'.¹⁹ Austria has made use of its discretionary power by issuing the '*Horizontale GAP-Verordnung*',²⁰ an order requiring beneficiaries of State aid to obey

inter alia specific Austrian water laws, such as the '*Qualitätsverordnung Chemie-Grundwasser*'.²¹ *Inter alia*, the claimant was accused of having dumped the dung in the immediate vicinity of the stables. Furthermore, it was alleged that the dung had trickled into the groundwater posing a high risk of contamination. The claimant countered that she had merely been the farm's tenant and that the proprietor had persistently refused to make any alterations in order to fulfil the aforementioned obligations.²² Therefore, the claimant argued, she was not accountable for having violated the relevant cross-compliance obligations. The Court, however, countered that the beneficiary of State aid is fully responsible for the adherence to cross-compliance standards irrespective of whether he/she owns or merely leases the farm. A person is to be considered a beneficiary if he/she applies and in further consequence receives State aid. The claimant clearly met this criterion in the present case.²³

14 See the new manual as of 2010, available at <https://www.ama.at/getattachment/cb25d8efcbdd-4d41-af9c-50d75264159e/GIS_Handbuch_2017_Version_7.pdf> (last accessed on 19 March 2018).

15 Higher Administrative Court, 31.1.2019, Ra 2018/07/0357, para 15.

16 See eg all from the FAD: 17.11.2017, W114 2176364-1; 15.11.2017, W180 2144364-1, 13.11.2017, W164 2117175-1.

17 FAD, 17.4.2019, W104 2214566-1/2E.

18 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, OJ 2013 L 347/579.

19 See Preamble of Regulation No 1306/2013.

20 Verordnung des Bundesministers für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft mit horizontalen Regeln für den Bereich der Gemeinsamen Agrarpolitik (Horizontale GAP-Verordnung), BGBl II 100/2015, in the version of BGBl II 57/2018.

21 Verordnung des Bundesministers für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft über den guten chemischen Zustand des Grundwassers (Qualitätszielverordnung Chemie Grundwasser – QZV Chemie GW), BGBl II 98/2010 BGBl II 248/2019.

22 FAD, 17.4.2019, W104 2214566-1/2E. para 2.

23 FAD, 17.4.2019, W104 2214566-1/2E. para 8.

In a second case, also decided by the FAD, the claimant had applied for agricultural subsidies for the year 2017.²⁴ An on-the spot inspection had revealed that he had not administered the farm entirely on his own account and at his own risk. Until 2016, the claimant had leased it from the owner B. When the farm was sold, B continued to exert significant influence over the farm. Furthermore, the claimant had received a monthly salary from B. Because of this constellation, AMA did not consider the claimant to be a 'farmer' within the meaning of Art 4 para 1 lit a) of Regulation 1307/2013.²⁵ Consequently, AMA did not consider him eligible to apply for agricultural subsidies. The claimant countered that B was only helping at the farm since he himself was a Polish native and did not speak German well.²⁶ The Court did not accept the claimant's counterargument but agreed with the findings of AMA. It emphasized that the farmer must act on its own account and at its own risk. It is not problematic *per se* to employ staff in order to help administer and cultivate the farm. What is necessary though is to maintain the authority to issue directives with regard to the persons employed at the farm. The ECJ had already empha-

sized this in its decision '*Landkreis Bad Türkheim*', where it stressed that 'the farmer must therefore be able to exercise a certain degree of decision-making power when using the area concerned'.²⁷ The Court arrived at the conclusion that the farmer had not gained a sufficient level of decision-making power as he was receiving a monthly salary from B, who still had significant influence over the farm. Therefore, the claimant was not eligible to apply for State aid.²⁸

In a third case, the FAD arrived at a comparable conclusion.²⁹ The claimant had applied for agricultural subsidies for the year 2018. AMA requested the claimant to provide further information since according to the information which had been hitherto provided to AMA, several agricultural areas had not been cultivated by the farmer himself but by X and Y. The farmer countered that indeed, X and Y were factually still cultivating some areas but that he was the legal proprietor. Therefore, he argued, he was eligible to apply for agricultural subsidies with regard to those areas. The Court did not approve with the arguments brought forward by the farmer. It rather stressed that according to the ECJ in '*Pontini*',³⁰ a farmer within the meaning of Regulation

1307/2013 is the person, who cultivates the agricultural areas in question in his/her own name and on his/her own account and not the person, who is in possession of a valid legal title over the area.³¹

It can therefore be concluded that Austrian Courts apply very strict standards when it comes to the concept of tenancies and agricultural subsidies. Farmers are required to make themselves aware of the legal situation in order to avoid problems or – in the worst case – the reimbursement of unlawful aid.

IV. Austrian Measures in Response to the COVID-19 Crisis

Compared to several other countries in Europe, Austria did not hesitate to impose a number of harsh measures to slow down the spread of the virus and keep numbers of infections as low as possible. The first positive COVID-19 tests took place on 25th of February. Starting from 10th March, each day brought new restraints and currently we find ourselves living in a country where nearly everything – except life-sustaining businesses – has been put on hold. Consequently, all sectors of the economy suffer and an end is not in sight yet.

As early as on 11th March, an increase in guarantees for SMEs and the decision to grant them even to larger enterprises was adopted: First, the Austrian Promotional Bank (*Austria Wirtschaftsservice, AWS*) introduced a program on bridge-finance guarantees of €10 million for the financing of working capital of SMEs with a guarantee of 80% of the bridge-finance loan up to €2.5 million per under-

24 FAD, 30.7.2019, W114 2208075-1.

25 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 2013, L 347/608.

26 FAD, 30. 7.2019, W114 2208075-1, para 9.

27 Case C-61/09, *Landkreis Bad Dürkheim gegen Aufsichts- und Dienstleistungsdirektion* [2010] ECLI:EU:C:2010:606, para 63.

28 FAD, 30. 7.2019, W114 2208075-1, para 3.3.

29 FAD, 30.7.2019, W114 2208075-1.

30 Case C-375/08 *Luigi Pontini and others* [2010] ECLI:EU:C:2010:365.

31 FAD, 30.7.2019, W114 2208075-1, para 2.

taking for a maximum of five years.³² Second, the Austrian Hotel and Tourism Bank (*Österreichische Hotel- und Tourismusbank, ÖHT*)³³ grants less expensive loans to SMEs which expect a decline in sales of 15% compared to the previous year. For the tourism sector, liabilities for bridge-financing and the costs of those assumptions of liability are borne by the Federal Ministry of Agriculture, Regions and Tourism.

In order to prevent massive unemployment and illiquidity of undertakings, the Federal Government set up a COVID-19-Crisis Management Fund by law³⁴ on 14th of March. This aid package of €4 billion was intended to secure short-time work and to provide financial support to small and medium-sized enterprises. Only four days later, the amount of aid was raised to €38 billion. In addition to the Crisis Management Fund, the law on the establishment of a Federal Wind-Down Financial Holding Company (*Abbaubeteiligungs-gesellschaft des Bundes, ABBAG*) was amended, introducing the ABBAG as an extension of the Federal Minister of Finance regarding measures related to SARS-CoV-2. The measures are intended to pro-

vide financial aid³⁵ to undertakings with headquarters or permanent establishment and main operational activities in Austria based on the understanding that illiquidity due to the Corona virus is *force majeure*. However, it is important to note that there is no legal right to the granting of the aid.

Further measures are a €2 billion credit line for exporters by the OeKB (*Österreichische Kontrollbank*)³⁶ and several special provisions on taxes.³⁷ The Federal Ministry of Digital and Economic Affairs even issued an emergency call for research and development projects in relation to COVID-19, carried out through the Austrian Research Promotion Agency (*Forschungsförderungsgesellschaft, FFG*).³⁸

Further federal measures are in preparation. The nine regions also plan to introduce additional financial support especially designed for the regional economy.

At first sight, all these measures seem to be in line with Arts 107 para 2 lit b or para 3 lit b TFEU, the General Block Exemption Regulation and the rules on de-minimis aid. Where appropriate, the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees³⁹ was also borne in mind. There does not seem to be any legal uncertainty, which is undoubtedly helpful when urgent measures are needed.

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32 <<https://www.aws.at/aws-ueberbrueckungsgarantien/?ref=topnews>> (25.03.2020).

33 <<https://www.oeh.at/coronavirus-massnahmenpaket-fuer-den-tourismus-weil-sie-sich-jetzt-auf-uns-verlassen-koennen/>> (25.03.2020).

34 COVID-19 Fondsgesetz, BGBl I 51/2014.

35 According to an ordinance, the so-called Richtlinie für die Gewährung der Finanzmittel durch den COVID-19-Fonds-Verordnung, BGBl II 100/2020.

36 <<https://www.oekb.at/en/oekb-group/news-und-wissen/news/2020/covid-19-aid.html>> (25.03.2020).

37 <<https://www.bmf.gv.at/en/information/information-coronavirus.html>> (25.03.2020).

38 <<https://www.ffg.at/ausschreibung/emergencycall-covid-19>> (25.03.2020).

39 OJ 2008 C 155/10.

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