

STUTTGART ADMINISTRATIVE COURT

**In the name of the People
Ruling**

In the Administrative Law Case

Herbert Schaible
Deckenpfronner Straße 28, 71134 Aidlingen-Dachtel

- the Plaintiff -

Counsel:
Redeker and Colleagues Law Firm
Mozartstrasse 4-10, 53113 Bonn, file no.: 57 10 1419

versus

The Land of Baden-Württemberg,
represented by the Böblingen District Office,
Parkstraße 16, 71034 Böblingen

- the Defendant -

Stuttgart Administrative Court - 4th Chamber, with Judge Bartels acting as presiding judge at the Administrative Court, judges Müller and Burr acting as panel judges and judges Eugen Bührlé and Klaus-Dieter Hertig acting as voluntary judges

handed down the following ruling on 9 February 2012:

1. The procedure is to be suspended.
2. The European Court of Justice is to be submitted the following questions as to whether
 - a) the obligation of the Plaintiff to identify individual livestock under Art. 3, section 1, Art. 4, section 2 of Regulation (EC) no. 21/2004
 - b) the obligation of the Plaintiff to electronically identify individual livestock in accordance with Art. 9, section 3, subsection 1 of Regulation (EC) no. 21/2004 in the version of Regulation (EC) no. 1560/2007
 - c) the obligation of the Plaintiff to keep holding register C in accordance with Art. 5, section 1 in connection with Annex B, number 2 of Regulation (EC) no. 21/2004

2

are compatible with Union law and hence valid.

I.

The Plaintiff, a sheep farmer with 450 ewes, is petitioning the Court to rule that he is not subject to the obligation to identify individual livestock and keep holding register C in accordance with Regulation (EC) no. 21/2004 of the Council from 17 December 2003 pursuant to the Introduction of a System for Identifying and Registering Sheep and Goats (Official Gazette L 5, pp. 8 et seqq.). These arrangements were transposed into national law by the first Regulation Amending the Livestock Trade Regulation from 3 March 2010 (Federal Gazette I 2010, 198). The arrangement requires every animal to be individually identified with two IDs using a 12-digit code. One of these is an ear tag with black letters on a yellow background, the other one is electronic, identifying the animal with an ear tag or ruminal bolus transponder. The individual tags for the animals moreover have to be recorded in a holding register which *inter alia* must contain the identification code of the farm, the identification code of the farm of destination for outgoing livestock, the identification code of the farm of origin for incoming animals, the identification code of the animal, its year of birth and the time at which it was provided the identification, the month and year of death if the animal dies on the farm, its breed and, if known, the genotype of the animal.

2009

The Plaintiff filed for a declaratory ruling on 4 June 2010. He considers his freedom to practice a business set out in Art. 15 of the European Charter on Fundamental Rights to be infringed upon. Although fighting livestock epidemics is a legitimate objective, he argues, the traceability of livestock is only one means of attaining the goal of combatting livestock epidemics. The system of flock identification used in the past, he continues, is less of a burden on sheep and goat farmers and has proven effective in actual practice, including in the outbreak of hoof and mouth disease in Great Britain in 2003. By comparison, individual identification of animals does not offer any benefit with regard to livestock epidemics. Without electronics an individual 12-digit random number has to be scanned for each and every sheep and compared with a holding register in order to identify animals from other farms. Electronic identification of individual animals is not yet adequately developed as a technology, however. The ear tags are in some cases torn, in some cases they have had to be removed because the animals' ears are inflamed and the transponders are in some cases defective. A 5% portion of ear tags are lost or defective. Electronic identification of individual livestock is therefore unsuitable for achieving the aim sought by Community lawmakers of effectively combatting livestock epidemics. At any rate, it is not necessary, however, as the flock identification system is suitable and less costly. Finally, individual identification of livestock is argued to be inappropriate: it causes serious injuries to livestock, which imposes a burden on the farmer and is questionable in terms of animal protection as well. The animals get infections, inflammation and torn ears. Nor are ruminal bolus or transponders suitable alternatives, as these are inserted through the maw or injected. This requires the help of a veterinarian and there can be numerous complications. Electronic identification of individual livestock also causes a significant economic burden: the total costs for each sheep which is to be electronically identified (material, labour and veterinarian costs) amount to € 20.33. A ewe only yields approximately € 38.33 per year, however. The proper identification of sheep and goats is moreover a precondition in order for holders

3

to receive agricultural subsidies. If there are any deficits here, the subsidies are cut. Finally, numerous EU states have been exempted from the requirement to identify individual livestock, as their total stocks number less than 600,000 animals. With pigs and cattle, on the other hand, with regard to which there are numerous highly contagious livestock epidemics, electronic identification of individual livestock is merely possible on a voluntary basis, but not required. This, argues the Plaintiff, constitutes unfair treatment.

The Plaintiff petitions the Court

1. to hold that he is not subject to the obligation to identify individual livestock in accordance with Art. 3, section 1, Art. 4, section 2 of Regulation (EC) no. 21/2004,
2. to hold that he is not subject to the obligations to electronically identify individual livestock in accordance with Art. 9, section 3, subsection 1 of Regulation (EC) no. 21/2004 in the version of Regulation (EC) no. 1560/2007 and
3. to hold that he is not subject to obligations to keep so-called holding register C from Art. 5, section 1 in connection with Annex B, no. 2 of Regulation (EC) no. 21/2004.

The defending Land petitions the Court

to reject the Complaint.

As reasons, the Land argues that the Complaint is inadmissible. The Plaintiff lacks a legitimate interest in a quick declaratory judgment required for an action to obtain a precautionary declaratory judgment. The District Office has not issued any order obligating the Plaintiff to perform electronic identification of individual livestock or to keep a holding register. Nor are any such orders being contemplated. The Plaintiff, argues the Defendant, has the possibility if an administrative order is issued to file an objection and take legal action contesting such. These legal recourses have a suspensive effect. In the view of the Defendant, it is for this reason reasonable to expect of the Plaintiff that he await a possible order. Otherwise the complaint is also argued to be unfounded, as Regulation (EC) no. 21/2004 constitutes binding law.

In a decision rendered on 30 March 2011 the Chamber rejected the petition of the Plaintiff to issue a temporary ruling that the obligations in question were lacking a binding nature by means of an injunctive order because the Chamber was of the opinion that the matter did not possess the required urgency (file no.: 4 K 2013/10); the Plaintiff filed a complaint which has yet to be decided upon.

Please see the briefs that have been exchanged for additional details.

II.

The Court has submitted the questions relating to the validity of the obligation to identify individual livestock, to electronically identify individual livestock and to keep

4

holding register C of the Plaintiff in accordance with Regulation (EC) no 21/2004 formulated in the operative provisions of the judgment to the Court of Justice of the European Union in accordance with Art. 267, section 2 TFEU and is therefore suspending the procedure in corresponding application of § 94 of the Administrative Court Rules (VwGO) until a decision is handed down by the Court of Justice of the European Union.

The questions that have been raised are pertinent to the ruling of the Court. The Court affirms the admissibility of the action for declaratory judgment, as the Chamber already stated in the decision from 30 March 2011 in procedure 4 K 2013/10; please refer to this.

The Plaintiff has made precisely these questions the sole subject of the legal dispute before the national court. He is solely complaining about the compatibility of the provisions under Union law in question with primary law of the European Union. Although he only believes that the provisions of Article 15, section 1 of the Charter on Fundamental Rights of the European Union, according to which each and every person has the right to work and practice a freely selected or accepted profession, have been explicitly violated. The Chamber is nevertheless of the opinion that the fundamental right set out in Art. 16 of the Charter on Fundamental Rights, the freedom to conduct a business, according to which freedom to conduct a business is recognised in accordance with Union law and the legal provisions and customs of individual states, constitutes a higher fundamental right, and therefore takes precedence over Art. 15, section 1. Because the Plaintiff is an independent shepherd, he practices a business with the aim of making a living; this is intended to be for a certain amount of time. This thus opens up the domain protected by Art. 16 of the Charter on Fundamental Rights. The higher provision in Art. 16 of the Charter on Fundamental Rights takes precedence in its scope of application over Art. 15, section 1 of the Charter on Fundamental Rights, however (see Jarass, Charta der Grundrechte der Europäischen Union, margin no. 4 pursuant to Art. 15, margin no. 4 pursuant to Art. 16). The provisions of Regulation EC no. 21/2004 in question regulate the business freedom of the Plaintiff, as these require him to identify his sheep in a certain manner. The Plaintiff considers these obligations under Union Law to be disproportionate in the meaning of Art. 52, section 1, subsection 2 of the Charter on Fundamental Rights. There is much to support this, as the Chamber also has doubts regarding the compatibility of the provisions in question with freedom to practice a business:

1. The Chamber does not fail to recognise that the new system launched to identify individual livestock causes considerable expenses in terms of equipment and organisation in switching away from the existing system of identification. Nevertheless it is the case that lawmakers have broad latitude in selecting suitable means of combatting livestock epidemics in the case of sheep. Together with the holding register, additional documents (Art. 6 of the Regulation), the livestock holding register (Art. 7 of the Regulation) and the electronic database (Art. 8 of the Regulation), the new system is able to trace the path of each individual livestock and thus quickly identify animals which may have been infected when an epidemic breaks out. Hence individual identification of livestock is generally suited to attain the objective of effectively combatting livestock epidemics. Nor is this suitability put in question by the deficits of a technical nature which have occurred in the introduction of the system such as, for instance, a rate of 4.2% of identification media being lost or not functioning on livestock after one year, or poor recognition rates for livestock identified with ruminal bolus (see

5

pursuant hereto Bayrische Landesanstalt für Landwirtschaft, Endbericht zum Vorhaben: Elektronische Kennzeichnung von Schafen und Ziegen zum Zweck der Rückverfolgbarkeit, no date, Exhibit K 26 to the Complaint). By way of comparison with the previous report by the Landesanstalt (Exhibit K 15), this report indicates a trend towards better use and fewer negative side-effects, leading the Court to consider the argument that the technology is not mature and therefore unsuitable to be unjustified.

2. The Chamber does have considerable doubts, however, with regard to the aspect of proportionality in the meaning of Art. 52, section 1, subsection 2 of the Charter on Fundamental Rights. The required (electronic) identification of individual livestock and the keeping of the holding register restricts the business freedom of the farmers involved and impose additional obligations on them, the reasonability of which would appear questionable.

a) The Chamber also has considerable doubts with respect to equal treatment with other states of the EU. For the obligation to electronically label individual animals to apply, a state must have a minimum of 600,000 goats and sheep together, or 160,000 goats. Below this minimum, electronic identification is not compulsory. Pursuant hereto, Regulation (EC) no. 21/2004 states in ground 11 that introduction of an electronic identification system might not be justified in member states in which stocks of sheep or goats are relatively small. In effect, this means that this obligation does not apply in 14 member states of the EU. By the same token, all that matters is the absolute number of livestock - not, however, whether the ratio of livestock to space or population in the respective country is high, i.e. dense, or not. There is, however, a particularly great danger of livestock epidemics and in particular rapid spread of an epidemic especially in the case of denser ratios. Nothing more is stated by the lawmakers as to why electronic identification is not considered to be justified with lower absolute numbers of livestock. There are probably no reasons for this relating to livestock epidemics, however.

b) European lawmakers also proceed differently compared to the animal species of pigs and cattle. Only flock identification is required in the case of pigs, whose numbers are very high especially in Germany and with regard to which intensive livestock raising means that epidemics can spread very rapidly and reoccur. Trading in pigs is particularly intensive, however, which would lead one to expect that individual identification would be required here. Individual identification is required in the case of cattle, although not electronically. The Court cannot see any reason why the most expensive system is prescribed for livestock which are held in the most extensive manner, are not traded as intensely and have the lowest value. This must have an especially deleterious effect on sheep farmers who only have a few animals - as a second business or hobby, for example. The provisions of the Regulation also apply to these sheep farmers without there being any possibility for exception.

c) In economic terms, farmers have to purchase identification media which cause material costs to accrue to a tune of € 7.00 for electronic ear tags and € 4 for ruminal bolus. They must furthermore purchase equipment to perform the identification and electronically scan the identification media. On top of this, there are costs of veterinary work which has to be performed on a not insignificant number of livestock whose ears become infected or torn, and in the insertion of ruminal bolus. Sheep farmers also incur additional expenses in placing the identification on livestock, checking it and scanning it at regular intervals as well as in terms of the time they need to become acquainted with

equipment and the electronic files these produce. Cost estimates made by the Association of German Sheep Farmers (Vereinigung deutscher Landesschafzuchtverbände e.V.) (Exhibit K 24) of € 20.33 per animal and year appear to be somewhat high, as these costs are not set off against costs which would arise anyway in the case of flock identification. Nevertheless the annual expense compared to the value of a ewe - which is approximately € 60 - is considerable. For this reason, the identification obligation imposes costs threatening the viability of sheep farmers, especially smaller farms.

d) All of these items, which give rise to doubts regarding reasonableness and proportionality, show that the required identification of individual livestock, especially in electronic form, and the obligation to keep a holding register, do not constitute coherent and systematic arrangements for combatting livestock epidemics.

This decision is not contestable (see Kopp/Schenke, VwGO, 18th edition, § 146, margin no. 15).

Bartels

Müller

Burr

(stamp illegible) notarised: Stuttgart, 22 Feb. 2012
Stuttgart Administrative Court
Certifying Civil Servant at the Business Office
(signature)
Eberhart, Senior Court Secretary