

Joined Cases

Atad Etavirp

v

Sroodnepo Minister for Agriculture

and

Atad Etavirp

v

Egat Obas

1. Atad Etavirp's family has been one of the prime wine producers of Sroodnepo, a Member State of the European Union, for centuries. It is said that the vines and production methods were first gifted to ancestors of Atad Etavirp during their travels in ancient Persia in the early 10th century where wine was not only produced from grapes but also from rice. On the basis of this long-held reputation, the Etavirp family has not only built a lucrative wine empire, but also attained considerable stature within Sroodnepo society. Many Etavirps have served in high political office, representing the Farming Party, which until recently was the largest political party. Atad Etavirp's father was Prime Minister, and his great grandfather the first President of Sroodnepo after the country deposed its royal family and became a republic.
2. Unfortunately for the Etavirp family, the traditional wine business has not been going well in recent years. Since the 1990s, there has been a dramatic increase in the production of 'new world' wines in Africa, Australia, the USA and Latin America, where output rose by more than 90%. Although many of the new world wines are of vastly inferior complexity and pedigree – and some of them even sold in screw top bottles! – they have significantly encroached on sales of 'old wine'. As a consequence, it is difficult to generate a profit even on the most recognised premium varieties of Sroodnepo wine, including the famous Tolrem vintage, and the costs of production have also increased requiring producers to rely mainly on cheap labourers from other Member States to pick their grapes.
3. Atad Etavirp therefore reluctantly swallowed his pride and applied for EU farm subsidies from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD). To his great relief, the applications were treated speedily and resulted in the payment of several hundred thousand euros of subsidies over the last few years. When it became clear that the EU was reducing, and would eventually phase out, wine subsidies, the family reacted by increasing production of rice wine, so transferring various of their fields to rice production to ensure that the level of subsidies continued.
4. To Atad Etavirp's horror, he recently heard from his lawyer that the Sroodnepo Minister for Agriculture was planning to publish the fact that he was receiving EU subsidies, together with the complete details of the amounts paid, on a ministry website. It emerged that the publication of the details of all recipients of farming subsidies was required by EU law, namely Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of

the common agricultural policy as amended by Council Regulation (EC) No 1437/2007 (the '2005 Regulation') and Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of the 2005 Regulation as regards the publication of information on the beneficiaries of funds deriving from the EAGF and the EAFRD (the '2008 Regulation'). It appeared that the Minister also had a special weakness for a number of the 'new world' wines imported by Atad's main competitors and found it irritating that the media monopoly of other members of Atad's family in Sroodnepo had been used to successfully block competitors' advertisements so reducing the available supply of his favourite wine in Sroodnepo.

5. Article 44a of the 2005 Regulation is worded as follows:

Article 44a

Publication of the beneficiaries

Pursuant to Article 53b(2)(d) of Regulation (EC, Euratom) No 1605/2002, Member States shall ensure annual ex-post publication of the beneficiaries of the EAGF and the EAFRD and the amounts received per beneficiary under each of these Funds.

The publication shall contain at least:

- (a) for the EAGF, the amount subdivided in direct payments within the meaning of Article 2(d) of Regulation (EC) No 1782/2003 and other expenditure;*
- (b) for the EAFRD, the total amount of public funding per beneficiary.*

6. Point 8b of Article 42(1) of the 2005 Regulation requires the Commission to adopt:

8b. the detailed rules on the publication of information concerning beneficiaries referred to in Article 44a and on the practical aspects related to the protection of individuals with regard to the processing of their personal data in accordance with the principles laid down in Community legislation on data protection. These rules shall ensure, in particular, that the beneficiaries of funds are informed that these data may be made public and may be processed by auditing and investigating bodies for the purpose of safeguarding the financial interests of the Communities, including the time that this information shall take place;

7. The particular rules in question were laid down in the 2008 Regulation and stipulate expressly that the first name, surname, the municipality of residence and the amount of aid received are to be published on an internet site per member state.
8. To make matters worse, Atad has also been made aware of a new internet site set up by Egat Obas (who is a resident of Troppus a neighbouring EU Member State) who wishes to draw the attention of EU citizens to the CAP and the financial support provided for unprofitable farming business, starting with the so-called 'wine lakes'. It appears that some of Atad's main competitors from Troppus have heard rumours indicating that Atad has made good use of EU financial support and that his family name will therefore feature prominently under the heading "Abusers and Misusers" which will also reveal each producer's annual income side by side with the amount of subsidies he received.
9. The internet site is set up, hosted, designed and edited in Troppus and is written both in the national language of Troppus as well as in English. The site design includes a search engine which allows users both to search on the site itself and also to search using the Google search engine. The site details also rank highly on Google search lists when the search includes terms such as: abuse, EU funds, wine, CAP subsidies, rice. As a result it has been accessed not only by citizens of Troppus but also from other member states including citizens of Sroodnepo (English is one of three official languages in Sroodnepo, but not Troppus, and it is thus easily possible for Sroodnepans to understand the site). Statistics suggest that 80% of 'hits' on the site come from Troppus but that 2% of users access the

site from Sroodnepo and Atad therefore fears that this group of users will be more than sufficient to spread knowledge of the contents of the site page in Sroodnepo.

10. Atad Etavirp fears that the honour and reputation of his family will be threatened if it becomes publicly known that he had to ask for EU handouts to survive in business and would not only lead to his exposure to ridicule in front of his farmer friends, but before the people of Sroodnepo generally. His fledgling political career would be destroyed – he is currently a member of the Sroodnepo Senate and has been invited to consider putting his name forward as the leader of his political party, which would ensure that he would become the next prime minister of Sroodnepo at the elections next summer. He also believes that his wine business would be gravely threatened by the prospect of publication of his name on the list of subsidy beneficiaries; he had already noted a downturn of 1% in orders of wine in the last two months, which he puts down to the rumours that are being spread by his competitors. Atad Etavirp thus decides to hire the best lawyers available and put a stop to the planned publications as a matter of urgency.
11. His lawyers therefore launch actions in December 2008 challenging the intended publication and apply for an interim injunction in the Sroodnepo High Court restraining both the Minister for Agriculture and Egat Obas from any publication of data concerning Atad Etavirp's personal finances.
12. As regards the Minister, they argue in summary that Article 44a of the 2005 Regulation infringes EU data protection law for the protection of fundamental rights contained in both the European Convention of Human Rights (ECHR) and the Charter of Fundamental Rights (the Charter). The information published allows personal data to be published about an individual or company enabling economic conclusions to be drawn about that person, its business practices, economic position, sustainability, viability etc. They further argue that there are no overriding public interests which can be put forward in justification. Publication of the aid for each district, without identifying individual producers, should suffice as EU citizens do not need to know the specific data for each producer. Moreover, from a technical point of view, the data accessible via the internet could be stored and processed by third parties on an unsupervised basis.
13. The Minister resists the application. He points out that the obligation on the Member States to publish the data on the Internet results from Article 44a of the 2005 Regulation in conjunction with the 2008 Regulation. In his view, those provisions are without a doubt valid Union law. Publication is effected in the public interest and is not affected by or in conflict with any of the provisions on fundamental human rights contained in the Charter, the ECHR, or from general principles of law. He adds that Article 44a facilitates transparency with regard to spending on agriculture and does not exceed what is necessary in a democratic society for the prevention of irregularities. In any event, data has been published by all Member States other than Sroodnepo (accessible via <http://ec.europa.eu/agriculture/funding/>) and the SMA fears that the Commission will launch an action against Sroodnepo imposing a hefty fine should it delay publication.
14. The Minister also notes that the application forms signed by Mr Etavirp to obtain subsidies contained the following notice: *I am aware that Article 44a of Regulation (EC) No 1290/2005 may require the publication of information on the beneficiaries of the EAGF and the EAFRD and the amounts received per beneficiary.*
15. In the action against Egat Obas, which is joined with the action against the Minister, Atad Etavirp's lawyers rely on Sroodnepo defamation law protecting the personality, in particular that of particularly vulnerable persons in the 'public eye'.
16. Article 12(1) of the Sroodnepo Civil Code guarantees *'as against all the world the protection of human dignity and the right to free development of the personality including the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy'*.
17. Article 12(8) of the Civil Code contains a provision designed to safeguard the independence of members of any of the branches of government in Sroodnepo and

maintain a high level of public debate by insulating *'the President, his Ministers, Judges and Senators'* from scrutiny of their private affairs making it unlawful to *'publish without their express consent any details concerning their private lives, family history, military conduct or financial interests'*. There is an exception from this prohibition only as regards data required to be published by the Speaker of the Parliament, or as matter of EU Law.

18. Rights derived from these provisions are stated to be inalienable and any breach results in the imposition of severe financial penalties, without any proof of any damage to the claimant being required. There are no substantial defences, thereby practically guaranteeing the success of the claim in Sroodnepo.
19. Legislation mirroring Article 12(1) of the Sroodnepo Civil Code exists in Troppus, but differs in requiring claimants to prove the existence of actual harm and in providing a range of defences including of the truth of the matters stated. There is no equivalent to Article 12(8) of the Sroodnepo Civil Code in Troppus.
20. In the event that cases fall within the jurisdiction of either Troppus or Sroodnepo courts, the national conflict of laws rules of both Member States provides that the applicable law in cases where national jurisdiction has been established must be national law, save in cases which fall within the European Union Rome regime on applicable law.
21. Egat's sole response to this claim is to dispute the jurisdiction of the Sroodnepo High Court pointing out that jurisdiction for such tortious claims can only be established under the rules set out in the Council Regulation 44/2001 (the Brussels Regulation) either:
 - (i) on the basis of the domicile of the defendant as set out in Article 2 of that Regulation; or
 - (ii) under the special jurisdiction rules set out in Article 5(3) of that Regulation allowing jurisdiction in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.

Arguments raised in the Sroodnepo High Court

Concerning the validity of Article 44a and Point 8b of Article 42(1) of Regulation No 1295/2005

22. Whether the action is well founded depends in the view of the Sroodnepo High Court first of all on the validity of the Union provisions referred. The High Court has serious doubts about the compatibility of Article 44a and point 8b of Article 42(1) of the 2005 Regulation with primary Union law. The fact that at Union level data protection has the status of a fundamental right results from the protection of private life in Article 8 of the ECHR and from the constitutional traditions of the Member States. That is reinforced by the Charter which includes as a fundamental right, in Article 7, protection for private life and, in Article 8, protection for personal data (see Case C-275/06 *Promusicae* [2008] ECR I-271, para 63, and the Opinion of Advocate General Kokott in that case, paras 51 et seq.). It will also cover protection of personal data arising from professional activities (see Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk* [2003] ECR I-4989, para 73) and further confirmed by the entry into force of Article 6 TEU.
23. In accordance with Article 44a of the Regulation, Member States must publish information on each of the beneficiaries of the EAGF and the EAFRD and the amounts received per beneficiary under each of these Funds. That constitutes an interference in the fundamental right to data protection which, according to Atad Etavirp, is not justified, in particular in the light of the proviso contained in Article 8(2) of the ECHR (see *Österreichischer Rundfunk*, para 80 et seq.). According to that provision any interference must be necessary in a democratic society in order to ensure one of the interests mentioned therein. Therefore the measure must be proportionate to the legitimate aim pursued and there must be a pressing social need.

24. According to the 14th recital in the preamble to Regulation No 1437/2007, which introduced Article 44a into Regulation No 1290/2005, the purpose of publication is to enhance transparency regarding the use of Union funds and to improve through public control the sound financial management of the funds concerned. In that regard Atad Etavirp insists that transparency does not constitute an aim in itself but a description of the measure's outcome. Admittedly, on a broad interpretation of Article 8(2) of the ECHR, improving financial controls furthers a country's economic well-being. However, in the present case the measure is not proportionate. It is to be doubted whether publication in any form is appropriate.
25. According to a letter by the Swedish Data Inspection Board written to the Commission to protest against the introduction of the publication requirements, controls on the use of funds and the prevention of irregularities are not improved by the publication requirement. In its view, comprehensive control mechanisms already exist which are subject to refinement
26. At any rate, Atad Etavirp argues that publication is disproportionate to the aim pursued. He relies in particular on the judgment in *Österreichischer Rundfunk* where the Court of Justice considered it a fundamental condition that publication – the case at hand concerned the salaries of employees of certain public law bodies – is actually necessary. That is the case only if the objective cannot be attained equally effectively by transmitting the information to the monitoring bodies alone or publishing simply the total amounts.
27. Atad Etavirp furthermore argues that point 8b of Article 42(1) of the 2005 Regulation allows the Commission too much discretion in determining the data which must be published and the manner of its publication. In particular, it is left open whether publication is to be effected via the Internet alone, as he argues that this act constitutes a particularly serious interference with fundamental rights due to the fact that once data is on the Internet, it is available to everyone, and it is virtually impossible to control its use. Even if the concept of 'implementation' is given a wide interpretation, the essential elements of the matter governed must be established in the basic act for it to remain possible to speak of implementation (see C-66/04 *UK v Council and Parliament [Smoke Flavourings]* para 21 et seq). Otherwise the institutional balance between the Council and the Commission would be disturbed. Also, the participation of the European Parliament would be undermined if fundamental legislative questions could be simply left to the Commission to decide. In that context, consideration should also be given to the fact that Article 8(2) of the ECHR refers to a democratic society.

Concerning the issues of jurisdiction and applicable law

28. Atad argues that the Court held in Case C-68/93 *Shevill* that a court has jurisdiction under Article 5(3) of the Brussels Regulation once it has been established that harm was suffered within the jurisdiction concerned, and that the existence of harm is to be assessed according to the relevant applicable law, which in this case is the national law of Sroodnepo.
29. In contrast Egat argues that *Shevill* did not conclude the question of claims concerning an internet site voluntarily accessed by citizens of another Member State and that the determination of jurisdiction under Article 5(3) of the Brussels Regulation in such a case would be a factual decision based upon a number of factors, in particular the language of the site, the location of the site host, the residence of the site provider and that no one factor would suffice to decide on jurisdiction for any tortious claim. He adds that a particularly important factor is that there was no distribution of the information in the territory of Sroodnepo and that there was no evidence that the contents of the site were specifically directed towards citizens of Sroodnepo, a main point here being that the site was not in Sroodnepian (the national language of Sroodnepo).
30. Atad counters that if the internet service provider imposed no limitation on access by internet users from other countries, then courts of any jurisdiction are competent under

Article 5(3) of the Brussels Regulation, particularly when there is evidence to show that the site was in fact accessed.

31. In the light of all these arguments and considerations, the Sroodnepo High Court decides on the 1st October 2009 to grant both injunctions being applied for by Atad Etavirp on an interim basis namely
 - (i) restraining the Minister from publishing details concerning the subsidies paid to Atad; and
 - (ii) restraining Egat from adding any information regarding Atad on his web site.
32. The Sroodnepo High Court further stays both proceedings and refers the following questions to the Court of Justice under Article 234 EC:

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- 1) *In a case of alleged claim for defamation or breach of personality rights by an internet site, do the words 'the place where the harmful event occurred' in Article 5(3) of the Brussels Regulation mean:*
 - (a) the place where the internet site is hosted and put into virtual circulation; or*
 - (b) the place or places where the internet might be accessed by particular individuals; or*
 - (c) the place or places where the claimant has a significant reputation?*
- 2) *In determining the jurisdiction of a Member State pursuant to Article 5(3) of the Brussels Regulation if and in so far as the place(s) where the internet might be accessed by particular individuals may be relevant (because the site is accessed from more than one state) so that the courts of a particular Member State (here Sroodnepo) may claim jurisdiction under Article 5(3) at the same time as another Member State (here Troppus which has primary jurisdiction under the domicile provisions contained in Article 2 as well as the source of the alleged harm under Article 5(3)):*
 - a) is the court seised of litigation obliged to first apply a de minimis rule requiring a sufficient connection, which is significant and substantial, between the alleged harm suffered and the territory of the first state?*
 - b) if so, which criteria should the national court consider in order to satisfy the requirement of a significant and substantial connection?*

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- 3) *Are Article 44a of the 2005 Regulation and/or point 8b of Article 42(1) of the 2005 Regulation and the 2008 Regulation invalid because they allows too much discretion to the Commission to lay down detailed rules on the publication of personal data and does not contain all of the 'essential elements' of such rules?*
- 4) *Are Article 44a of the 2005 Regulation and/or point 8b of Article 42(1) of the 2005 Regulation and the 2008 Regulation invalid because they infringe Article 6(2) of the Treaty on European Union read in the light of Article 8 of, and Article 1 of the First Protocol to, the European Convention on Human Rights, and of the fundamental right for protection of private life and private data?*
33. In the meantime, the request for a preliminary ruling has also come to the attention of the Sroodnepian Organisation for Fiscal Transparency (SOFT), a national organisation which promotes full fiscal transparency in all government-related matters and regularly intervenes

in cases before the Sroodnepian courts in support of parties seeking greater government transparency. SOFT seeks and receives permission from the Sroondepian High court to intervene in the case.

34. While it was at this stage procedurally impossible for SOFT to present any observations in the High Court, the High Court issued an order amending its reference to the Court of Justice, adding SOFT as a third party. The Sroodnepian Civil Procedure Rules allow interventions at any stage prior to the final judgment. SOFT then immediately contacts the Registry of the Court of Justice to say that it wishes to submit observations regarding the referred questions. Atad Etavirp's lawyers are vehemently opposed to this, since they are aware that SOFT's submissions will be unfavourable to their client. The Sroodnepo Minister for Agriculture and Egat Obas on the other hand are in favour of SOFT's intervention.

Issues raised by the Court of Justice of its own motion

35. Having received the reference, as well as the order amending the reference, the Court of Justice directs the interested parties to present written and oral observations not only on the questions referred, but also the following question:

- 5) *To what extent, if any, should the answer to question 4 be influenced by the fact that the Lisbon Treaty has entered into force since the date of the preliminary reference made by the national court if the provisions of that Treaty may influence the answers to those questions, in particular Article 6 TEU in its version applicable after entry into force of the Lisbon Treaty?*

36. The Court of Justice further directs the interested parties to present oral observations during the hearing to be convened on the following issue:

- 6) *Is SOFT entitled to submit observations to the Court of Justice of the European Union in circumstances such as the ones of the present case?*

COMPETITION INFORMATION

Note: Written pleadings should be prepared in relation to questions 1-5 only, question 6 will only be considered in the oral rounds.

Questions 1, 2 and 6 will be considered in the first oral round on Saturday 1st May and questions 3, 4 and 5 in the semi-finals on Sunday morning, with the court indicating the questions on which they wish to be addressed in the finals.