

OPINION OF ADVOCATE GENERAL

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I — Introduction

1. In this reference for a preliminary ruling the High Court of Justice of England and Wales ('the referring court') has asked the Court of Justice of the European Communities two questions on the implementation at national level of Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers.²

2. The first question concerns the interpretation of Article 5(1) of and Annex IV to Regulation No 1782/2003. The referring court specifically seeks to ascertain whether a Member State is permitted to include requirements relating to the maintenance of visible public rights of way in the standards of good agricultural and environmental condition of land set out therein. With its second question, the referring court would like to know whether it can give rise to impermissible discrimination for constituent parts of a Member State to have different standards of good agricultural and environmental condition under Article 5 of and Annex IV to Regulation No 1782/2003 because a Member State's internal constitutional arrangements

provide that different devolved administrations are to have legislative competence in relation to different constituent parts of that Member State.

3. This reference has been made in a dispute between Mr Horvath ('the applicant') and the Secretary of State for Environment, Food and Rural Affairs ('the defendant') concerning the lawfulness of a national implementing regulation which defines the minimum requirements for good agricultural and environmental condition of agricultural land for the territory of England.

II — Legal framework

A — Community law

2 — Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ 2003 L 270, p. 1).

4. On 29 September 2003 the Council adopted Regulation No 1782/2003, which entered into force on 28 October 2003.

5. The regulation was adopted an order to provide for a policy of supporting farmers' incomes by means of a single payment scheme ('the single payment scheme'). The single payment scheme is intended to provide farmers with a minimum guaranteed income, 'decoupled' from production, by allocating to farmers 'payment entitlements' against which they may claim a direct payment annually. Receipt of the annual direct payment under the single payment scheme — if claimed by the farmer — is subject to 'cross-compliance' conditions (Article 3).

in good agricultural and environmental condition. Member States shall define, at national or regional level, minimum requirements for good agricultural and environmental condition on the basis of the framework set up in Annex IV, taking into account the specific characteristics of the areas concerned, including soil and climatic condition, existing farming systems, land use, crop rotation, farming practices, and farm structures. This is without prejudice to the standards governing good agricultural practices as applied in the context of Council Regulation (EC) No 1257/1999 and to agri-environment measures applied above the reference level of good agricultural practices.'

6. The cross-compliance conditions comprise two elements: the 'statutory management requirements' (Article 4), to be established by Community legislation, and 'good agricultural and environmental condition' (Article 5).

7. Article 5(1) of the regulation provides:

'Member States shall ensure that all agricultural land, especially land which is no longer used for production purposes, is maintained

8. If the cross-compliance conditions are not satisfied, the total amount of direct payments to be granted in the calendar year in question is to be reduced or cancelled pursuant to Article 6(1) of Regulation No 1782/2003.

9. Annex IV to the regulation states:

‘Good agricultural and environmental condition referred to in Article 5

Issue	Standards
Soil erosion: Protect soil through appropriate measures	— Minimum soil cover — Minimum land management reflecting site-specific conditions — Retain terraces
Soil organic matter: Maintain soil organic matter levels through appropriate practices	— Standards for crop rotations where applicable — Arable stubble management
Soil structure: Maintain soil structure through appropriate measures	— Appropriate machinery use
Minimum level of maintenance: Ensure a minimum level of maintenance and avoid the deterioration of habitats	— Minimum livestock stocking rates or/and appropriate regimes — Protection of permanent pasture — Retention of landscape features — Avoiding the encroachment of unwanted vegetation on agricultural land’

B — *National law*

10. In 1998, the United Kingdom Parliament passed primary legislation whereby provision was made for a system of devolved government in relation to Wales, Northern Ireland and Scotland. In relation to devolved matters, the United Kingdom Government generally acts only in respect of England.

11. The statutory relationship between the United Kingdom Government and the devolved administrations is supplemented by a ‘Devolution Memorandum of Understanding’, which seeks to provide further detailed arrangements for that relationship in the form of a statement of political intent. Under the terms of the devolution legislation and the Memorandum of Understanding, it is the responsibility of the devolved administrations to implement obligations under Community law which concern devolved matters. Under the devolution legislation, United Kingdom ministers have reserve powers to intervene where it is necessary to do so in order to ensure the implementation of these obligations. Under the devolution legislation, it is unlawful for the devolved administrations to act or legislate in any way that would be incompatible with Community law. The devolved administrations are directly accountable through the domestic courts, in the same way as the United Kingdom Government is, for shortcomings in their implementation or application of Community law.

12. In principle, the common agricultural policy in general and the implementation of Regulation No 1782/2003 in particular are devolved matters and are therefore the responsibility of each devolved administration. As a result, and with a view to complying with their obligations under Article 5 of the regulation, the defendant (acting in relation to England alone) and each of the devolved administrations adopted separate implementing regulations, defining partly different minimum requirements for good agricultural and environmental condition.

13. The relevant implementing regulation for England is the Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (England) Regulations 2004, SI 2004/3196 (‘the English implementing regulations’), which entered into force in England on 1 January 2005.

14. In paragraphs 26 to 29 of the English implementing regulations, the defendant included requirements relating to the maintenance of public rights of way in the

standards of good agricultural and environmental condition. They are defined inter alia as follows:

28. (1) Where a farmer has disturbed the surface of a visible footpath or bridleway (other than a field-edge path) as permitted under section 134 of the Highways Act 1980, he must, within the relevant period under section 134(7) of that Act, or within an extension of that period granted under section 134(8) of that Act

‘26. A farmer must not

(a) without lawful authority or excuse, disturb the surface of a visible footpath, a visible bridleway, or any other visible highway which consists of or comprises a carriageway other than a made-up carriageway, so as to render it inconvenient for the exercise of a public right of way; or

(a) so make good the surface of the path or bridleway to not less than its minimum width as to make it reasonably convenient for the exercise of a right of way; and

(b) without lawful authority or excuse, in any way wilfully obstruct the free passage along a visible highway.

(b) so indicate the line of the path or bridleway on the ground to not less than its minimum width that it is apparent to members of the public wishing to use it.

27. A farmer must maintain any stile, gate or similar structure, other than a structure to which section 146(5) of the Highways Act 1980 applies, across a visible footpath or bridleway in a safe condition, and to the standard of repair required to prevent unreasonable interference with the rights of persons using the footpath or bridleway.

(2) In this paragraph, “minimum width”, in relation to a highway, has the same meaning as in Schedule 12A to the Highways Act 1980.

29. In paragraphs 26, 27 and 28 of this Schedule

“bridleway”, “carriageway”, “field-edge path”, “footpath” and “made-up carriageway” have the meanings given to them in section 329(1) of the Highways Act 1980;

“highway” has the meaning given to it in section 328 of the Highways Act 1980; and

“visible” means visible as a route to a person with normal eyesight walking or riding along it.’

15. None of the implementing regulations adopted by the devolved administrations contains requirements equivalent to paragraphs 26 to 29 of the English implementing regulations.

16. The referring court summarised the legal effects of the relevant provisions of the Highways Act 1980 as follows:

‘Disturbance of the surface of a footpath, bridleway or other highway consisting of or comprising a carriageway other than a made-up carriageway is an offence under section 131A. Section 134 permits the ploughing of

footpaths and bridleways other than field-edge paths, but makes it an offence not to make it good within specified periods. Obstruction of free passage along any highway is an offence under section 137. By section 146(1) the owner of land is under a duty to maintain any such stile, gate or similar structure. Thus paragraphs 26 to 28 largely mirror these provisions of the 1980 Act, but only in relation to visible rights of way. ...’

III — Facts and main proceedings

17. The applicant is a farmer and the managing partner of a family farming partnership in Suffolk, England. He holds single payment scheme payment entitlements. There are public rights of way on his land within the scope of the relevant English provisions.

18. The applicant brought a claim before the referring court for the judicial review of paragraphs 26 to 29 of the English implementing regulations. He argues that the inclusion of requirements relating to the maintenance of public rights of way infringes Community law. First of all, public highways do not constitute agricultural land. Secondly, the English implementing regulations infringe the Community-law principle of equality, since none of the implementing regulations adopted by the other devolved administrations in the United Kingdom contains rules to that effect.

19. Thereupon the referring court made an order asking the Court of Justice for an interpretation of Regulation No 1782/2003 pursuant to Article 234 EC. The defendant brought an appeal against that order, which was dismissed by the Court of Appeal.

visible public rights of way in its standards of good agricultural and environmental condition under Article 5 and Annex IV to [Regulation No 1782/2003]?

IV — Questions

20. By order of 11 July 2007, the Court of Appeal made a reference to the Court of Justice for a preliminary ruling on the following questions asked by the High Court:

- (2) Where a Member State's internal constitutional arrangements provide that different devolved administrations shall have legislative competence in relation to different constituent parts of that Member State, can it give rise to impermissible discrimination for constituent parts to have different standards of good agricultural and environmental condition under Article 5 of and Annex IV to [Regulation No 1782/2003]?

Where a Member State has provided for a system of devolved government, in relation to which powers are retained to the central State authorities to act for the whole of the territory of the Member State to ensure compliance with that Member State's obligations under Community law, in relation to [Regulation No 1782/2003]:

V — Procedure before the Court of Justice

'(1) Can a Member State include requirements relating to the maintenance of

21. The order for reference was lodged at the Court Registry on 14 September 2007.

22. Written observations were submitted by the applicant in the main proceedings, the Governments of the United Kingdom and the Federal Republic of Germany, and by the Commission within the period laid down in Article 23 of the Statute of the Court of Justice.

No 1782/2003 expressly excludes paths on agricultural fields where those fields are used as forage areas and infers from that that rights of way could not fall within the scope of the regulation because they relate to paths. In addition, Regulation No 1782/2003 lays down common rules for the Community prohibiting the Member States from either ignoring the minimum requirements or adding to them in certain regions in their territory.

23. At the hearing on 26 November 2008, oral argument was presented by the agents of the applicant in the main proceedings, the Governments of the United Kingdom, the Federal Republic of Germany, and Ireland, and by the Commission.

VI — Main arguments of the parties

A — *The first question*

24. The applicant in the main proceedings takes the view that the maintenance of public rights of way prescribed by the English implementing regulations is not among the minimum requirements for good agricultural and environmental condition which a Member State may define under Article 5(1) of and Annex IV to Regulation No 1782/2003. Rather, these include the retention of landscape features, farm structures, and avoiding the deterioration of habitats. The applicant also argues that Article 43 of Regulation

25. Even if the contested English provisions were to be regarded as environmental protection rules, they would not constitute minimum requirements for good agricultural and environmental condition. Because the Treaty provisions on agriculture form the legal basis for Regulation No 1782/2003, the environmental protection aspect of those minimum requirements cannot be construed as a separate provision providing for purely environmental controls. Under Article 4 of Regulation No 1782/2003, the Community institutions alone have the power to lay down statutory requirements in the area of the environment.

26. In the view of the United Kingdom Government, the first question must be answered in the affirmative. In this connection it refers to the drafting history of Regulation No 1782/2003 and in particular to the express inclusion of environmental protection requirements in its provisions, above all in Article 5.

27. The United Kingdom Government contends that the retention of landscape features in Annex IV covers the maintenance of public rights of way. A broad interpretation should be given to the concept because the concept of 'landscape' in Community environmental legislation includes features resulting from human intervention and features of historical, cultural or archaeological significance, and it is recognised that the landscape comprises an important component of the environment. In this respect it would not be conducive to achieving the environmental aims of Article 5 of Regulation No 1782/2003 to give a restrictive meaning to 'landscape features', which excluded from the scope of that expression rights of way such as footpaths and bridleways. Furthermore, under Annex IV those 'standards' are related to the 'issue' of guaranteeing a 'minimum level of maintenance' and 'avoiding the deterioration of habitats'.

29. The Commission states that the concept of 'landscape features' lies at the heart of the main dispute. In this connection, a Member State is perfectly entitled to take the view that the maintenance of public rights of way is likely to protect habitats from deterioration, which is also an 'issue' under Annex IV. Similarly, a Member State may regard rights of way as 'landscape features'. In addition, in its view the words 'and environmental' following the word 'agricultural' in Article 5(1) of Regulation No 1782/2003 give the Member States the power to define minimum requirements which serve purely environmental purposes. There is no contradiction between the legal basis of Regulation No 1782/2003 and the inclusion of environmental aims in its provisions, since Article 6 EC provides precisely for environmental protection requirements to be integrated into the definition and implementation of other Community policies, including agricultural policy.

28. The Commission argues that the first question concerns the latitude accorded to the Member States under Article 5(1) of and Annex IV to Regulation No 1782/2003. In its view, the Member States enjoy considerable discretion in defining the minimum requirements for good agricultural and environmental condition of land, with the result that there could be significant variations in the different minimum requirements depending on the Member State or even depending on the region. Furthermore, many of the concepts contained in Annex IV, such as 'appropriate machinery use' or 'landscape features', are so general that they allow the Member States a wide margin of interpretation.

B — *The second question*

30. The applicant claims that there is a difference in treatment in identical situations within the United Kingdom, which forms a single state. This fact increases the burden on

English farmers, who, like their counterparts from other parts of the United Kingdom, wish to receive their payment entitlements in full. Such a difference in treatment is not objectively justified and thus breaches the general principle of non-discrimination which each Member State must respect, above all in the implementation of Community law, irrespective of its internal constitutional arrangements or the allocation of legislative powers at national level. Furthermore, such a difference in treatment is contrary to the Treaty provisions on agriculture.

31. According to the applicant, even though Article 5(1) of Regulation No 1782/2003 provides that a Member State may define the minimum requirements at national or regional level, that does not mean that the Community legislature confers a power to define the minimum requirements on the regional governments within the Member States. Furthermore, the expression 'at regional level' refers to areas the unity of which is justified by the characteristics mentioned in the provision of the regulation, and is not to be construed, for example, in a political sense. Nevertheless, even though Article 5(1) leaves a Member State free to decide the level at which the minimum requirements are to be defined, that Member State is required to prevent any breach of the Community law principles of equality and non-discrimination in its territory.

32. The United Kingdom Government submits that the second question is to be answered in the negative. The case-law of the Court of Justice indicates that Member States are free to implement their Community obligations by measures adopted centrally or at regional or local level. It follows that regional implementation of Article 5(1) of Regulation No 1782/2003 in the United Kingdom is in principle consistent with Community law. It also follows from the fact that in its case-law the Court recognises the right of regional implementation enjoyed by the Member States that differences in implementation by the devolved administrations do not amount to discrimination contrary to Community law. Discrimination, within the meaning laid down by Community law, could arise only if the same lawmaker treated the same situations differently. This is a logical conclusion, since differences in implementation in different regions are no more discriminatory in principle than differences in implementation in different Member States. Furthermore, the reference in Article 5(1) of Regulation No 1782/2003 to minimum requirements being defined at 'national or regional level' makes it clear that Member States are free to implement their obligations at regional or local level, an option which is admittedly not dependent on an express reference.

33. Lastly, the United Kingdom Government states that such conclusions are consistent with the principle of subsidiarity and with the principle which underlies it, to the effect that decisions are to be taken as closely as possible to the citizen.

34. The German Government, whose observations relate solely to the second question, likewise suggests that the second question should be answered in the negative. In its view, different minimum requirements in constituent parts of the territory which are imposed by different devolved authorities do not infringe the general prohibition of discrimination under Community law, as there is no difference in treatment. Community law recognises the national constitutional structures and the allocation of competences for the implementation of Community law, in particular the competence of regional authorities. Against that background, the Member State as a whole is not the correct reference framework for assessing a difference in treatment, but the competent regional authority which implements Community law on the basis of its own competence.

35. The German Government also claims that any difference in treatment is objectively justified by the allocation of powers between central and devolved authorities in a Member State laid down by national law, in particular constitutional law.

36. The Commission notes that under Article 5(1) of Regulation No 1782/2003 the Member States defined minimum requirements at national or regional level. Accordingly, it does not appear that the Community legislature considered a uniform approach in

each Member State to be necessary. Even though it is reasonable to suppose that the regionalisation of the minimum requirements for good agricultural and environmental condition of land is permissible only if it is consistent with the different aims of the regions, it is much more likely that the Community legislature simply left it to each Member State to choose the appropriate regulatory level within its political system in order to adopt the required standards.

37. With regard to the question of discrimination, the Commission takes the view that a difference in treatment can lead to such discrimination within the meaning of Community law only if it can be attributed to a single source. The argument put forward by the applicant in the main proceedings, according to which the United Kingdom is the author of the discrimination because it is responsible for complying with its obligation under Community law and has chosen a manner in which to implement the provisions in question which has caused discrimination, must be rejected. The Commission argues that none of the provisions of the Treaty calls into question the devolved structure of many Member States. Rather, each Member State has the right to determine the political level at which certain matters, including obligations under Community law, are to be regulated, provided that the aim of the Community legislation in question is achieved. The fact that the United Kingdom ministers retain a residual power to intervene in devolved areas is irrelevant to the present case.

38. In the oral procedure, Ireland essentially supported the position of the United Kingdom Government and of the Commission. With regard to the second question it argued that the Member States have the power in principle to decide, themselves and in accordance with their constitutional rules, on the manner in which Community law is implemented domestically. However, the measures adopted must fall within the margin of discretion accorded and implement the requirements of Community law. Differences in practical implementation are therefore permissible under Community law and do not constitute discrimination against individuals.

39. In addition, Ireland expresses concern that a contrary interpretation by the Court of Justice could jeopardise the cross-border cooperation between Ireland and the United Kingdom in matters falling within the competence of the Northern Ireland authorities, such as agriculture and environmental protection.

VII — Legal assessment

A — *First question*

40. With its first question, the referring court essentially seeks to ascertain whether the obligation imposed on farmers by the

English implementing regulations to ensure the maintenance of public rights of way is covered by Regulation No 1782/2003. For that to be the case, it would have to be classified under the minimum requirements for good agricultural and environmental condition within the meaning of Article 5(1).

41. Another main point at issue in the present case, which must be dealt with first in my opinion, concerns the question whether Regulation No 1782/2003 also gives the national authorities the power to adopt environmental policy measures. Whilst the United Kingdom Government and the Commission argue that such a format exists, the matter is called into question in principle by the applicant in the main proceedings.³

42. The answers to these questions require an interpretation of Regulation No 1782/2003, which must first be considered in its overall context as a legislative measure to implement the common agricultural policy (CAP) in order to gain a better understanding of its regulatory purpose. It is therefore necessary first to clarify the historical and political background to its evolution. Consideration will then be given to the relevant provisions of the regulation and to its legal bases in primary law.

³ — See paragraph 49 of the applicant's written pleadings.

1. Environmental policy aspects in Regulation No 1782/2003

(a) The relationship between agriculture and environmental protection in the CAP

43. Agriculture has for a long time played a leading role in the European integration process. The CAP was one of the first areas in which the Member States handed over some of their national sovereignty to the Community and committed by far the largest part of the Community budget in terms of expenditure. That leading role can be explained by the particular situation in the post-war years and its importance for supplying the needs of the population: the CAP was originally developed to meet the need to ensure the supply of foodstuffs, to stabilise the markets and to guarantee an adequate standard of living for the agricultural population.⁴

44. Whilst the CAP was still regarded as the motor of integration in the 1960s because it led the way in terms of integration, it has to some extent become a burden on the Community as a result of various unfortunate developments. Thus technical advances, intensive production methods and the associated production of surpluses have led to increasing damage to the environment. In view of these new environmental risks, the Community's efforts to reorient and reform the CAP were partly aimed at striking a balance between production and environmental protection.⁵

45. Particularly important on the path towards Community environmental legislation on agriculture was 'Agenda 2000',⁶ adopted at the European Council meeting in Berlin on 26 March 1999, which set out a new European agricultural model in which environmental requirements were to play a greater role. It is also worth mentioning the Mid-Term Review of the Common Agricultural Policy presented by the Commission on 10 July 2002,⁷ which was adopted by the Heads of State and Government as 'Agenda 2000', and in which it recommended a whole-farm approach where single payments per

4 — Schwartz, W., *Kommentar zu EU- und EG-Vertrag* (ed. Heinz Mayer), Article 32, paragraph 6, p. 17, explains that the inclusion of the agricultural sector in the common market was extremely controversial at first for military and political reasons. Against that background, the decision by the founding states of the EEC to communalise the agricultural sector cannot be regarded highly enough. Following the traumatic experiences of the two world wars and the subsequent years of hunger, it was a lasting peacemaking measure of the same quality as the pooling of the national mining and steel industries in the European Coal and Steel Community. Priebe, R./Mögele, R., *Agrarrecht*, in: M. Dausies (ed.), *Handbuch des EU-Wirtschaftsrechts*, Vol. 1, Part G, paragraph 2, p. 3, explain that the present situation of European agricultural policy can be understood only against the background of the situation which existed when the Community was founded. Agriculture in Europe at the end of the 1950s had been influenced largely by the aim of security of supply and by a relative backwardness in terms of development and income compared with other economic sectors.

5 — According to Heuser, I., 'Bodenschutz als Ziel der gemeinsamen Agrarpolitik', *Jahrbuch des Agrarrechts* (ed. C. Calliess and Others), Cologne 2006, p. 187, agriculture is characterised at present increasingly by the fact that technical progress, intensive production methods and the associated production of surpluses are accompanied by increasing pressure on environmental media.

6 — See the Conclusions of the Berlin European Council of 26 March 1999 on the content of the CAP reform. They state that 'the content of this reform will ensure that agriculture is multifunctional, sustainable, competitive and spread throughout Europe, including regions with specific problems, that it is capable of maintaining the countryside, conserving nature and making a key contribution to the vitality of rural life, and that it responds to consumer concerns and demands as regards food quality and safety, environmental protection and the safeguarding of animal welfare'.

7 — Communication from the Commission to the Council and the European Parliament of 10 July 2002, COM(2002) 394 final, p. 22.

farm, which were independent of production, were conditional on compliance with statutory cross-compliance standards relating to the environment, food safety and quality, and animal welfare.

(b) Environmental protection requirements in Regulation No 1782/2003

46. A similar approach had already been introduced by the horizontal Regulation (EC) No 1259/1999,⁸ Article 3 of which imposed on the Member States the obligation to take environmental measures.⁹ In that regulation, direct payments were harmonised and made conditional on environmental protection requirements. That regulation, like the subsequently adopted Regulation No 1782/2003 which is at issue in the present reference for a preliminary ruling, took soil protection aspects into consideration. However, whilst the Member States enjoyed a margin of discretion under Regulation No 1259/1999 as regards the application of protection requirements, all recipients of direct payments are now subject to that measure under Regulation No 1782/2003.¹⁰

47. It is clear from the drafting history of Regulation No 1782/2003 that it had been intended to give greater importance to environmental policy requirements than was envisaged in the original Commission proposal.¹¹ For example, the obligation imposed on the Member States by Article 5(1) to ensure that all agricultural land is maintained 'in good environmental condition' was added only subsequently in the course of the legislative procedure. The same is true of the obligation under Article 3 of Regulation No 1782/2003, which is worded in essentially the same terms, imposed on a farmer receiving direct payments, who is responsible for the implementation of the national requirements on the spot.

8 — Council Regulation (EC) No 1259/1999 of 17 May 1999 establishing common rules for direct support schemes under the common agricultural policy (OJ 1999 L 160, p. 113).

9 — Article 3 of Regulation No 1259/1999, which has the heading 'Environmental protection requirements', provides as follows in paragraph 1: 'Where agricultural activity within the scope of this Regulation is concerned, Member States shall take the environmental measures they consider to be appropriate in view of the situation of the agricultural land used or the production concerned and which reflect the potential environmental effects. These measures may include: — support in return for agri-environmental commitments, — general mandatory environmental requirements, — specific environmental requirements constituting a condition for direct payments'. Schwartz, W., cited above (footnote 4), Article 34, paragraph 13, p. 31, interprets that provision as authorising the Member States to take appropriate measures. Adam, V., *La réforme de la politique agricole commune de l'Union*, Vol. I, Paris 2001, p. 266, mentions the importance of the environment-oriented political conditionality as a result of the inclusion of the clause cited above. The author describes it as a significant step forward in environmental policy within the CAP.

10 — See Bianchi, D., *La Politica Agricola Comune (PAC)*, Guezzano 2007, p. 46, who refers to the extension of environment policy conditionality since the 1999 reform.

48. This addition, alongside the obligation to maintain agricultural land 'in good agricultural condition' has far-reaching consequences for the interpretation of Regulation No 1782/2003, as it suggests that both objectives are to be regarded as having equal status according to the Community legislature.

11 — Commission proposal of 21 January 2003 for a Council Regulation establishing common rules for direct support schemes under the common agricultural policy and support schemes for producers of certain crops, COM(2003) 23 final.

49. It should be stressed that Article 2(c) of Regulation No 1782/2003 contains a legal definition of 'agricultural activity', which, in addition to conventional activities, expressly includes 'maintaining the land in good agricultural and environmental condition as established under Article 5'.

50. Furthermore, the obligation to maintain land in good environmental condition applies without exception to 'all agricultural land, especially land which is no longer used for production purposes'. The reasoning underlying that provision is given in the third recital in the preamble to Regulation No 1782/2003, according to which its legislative aim is to avoid the abandonment of agricultural land. The purpose of that provision is therefore to preserve the potential usefulness of land for agricultural purposes for the future. It is thus clear that the Community legislature was conscious of the close connection between environmental protection and agriculture.

51. A further characteristic of the above-mentioned reform of the CAP, which gives central importance to environmental protection,¹² is the political conditionality expressed in Regulation No 1782/2003 where direct aid is coupled to compliance with binding rules, which include basic standards for the protection of the environment. This is expressly referred to in the second recital in the

preamble. The same is true of the need emphasised in the 24th recital to make the single farm payment conditional upon cross-compliance with, amongst other things, environmental protection.

52. The fact that Regulation No 1782/2003 to some extent also pursues purely environmental aims and authorises the Member States to take appropriate measures is shown, lastly, by the need mentioned in Annex IV to 'avoid the deterioration of habitats' and to ensure the 'retention of landscape features', which have the character of environmental rather than agricultural policy.

53. It is clear from the above that the CAP has become a Community policy which takes into account the needs of environmental protection. Regulation No 1782/2003 reflects this policy in so far as, despite the emphasis on agricultural aspects, it also pursues environmental aims.¹³ Consequently, the Member States are also authorised under Article 5(1) and Annex IV to act in the interests of environmental protection.

12 — See points 43 to 46 of this Opinion.

13 — Dubois, L./Blumann, C., *Droit matériel de l'Union européenne*, 3rd edition, p. 315 et seq., refer to the innovations made by the new common agricultural policy. These include the protection of consumers, agriculture and the environment, and price stability. They also point out the greater use of environmental policy conditionality as a result of the adoption of Regulation No 1782/2003.

(c) The legal bases in primary law

54. This conclusion is also consistent with the requirements of primary law. The Council adopted Regulation No 1782/2003 on the basis of the Treaty, in particular Articles 36 EC and 37 EC and Article 299(2) EC, and thus on the basis of the provisions concerning agricultural policy.

55. However, this does not preclude environmental policy issues being taken into account, especially since Article 6 EC, which was created as a clause imposing a general obligation by the Treaty of Amsterdam, provides that environmental protection requirements must be integrated into the definition and implementation of all Community policies and activities. That provision, which reflects the principle whereby all Community measures must satisfy the requirements of environmental protection, implies that a Community measure cannot be part of Community action on environmental matters merely because it takes account of those requirements.¹⁴

56. Through Article 6 EC, it is intended above all to ensure that the aims set out in

Articles 2 EC, 3 EC and 174(1) EC are achieved.¹⁵ It therefore cannot be ruled out that in certain situations the protection of the environment can take precedence over the other aims of the CAP on the basis of that Treaty provision.¹⁶

2. The Member States' powers to define minimum requirements

(a) Regulation No 1782/2003 as conferring rule-making powers

57. The Community legislature has rarely perceived its rule-making competences in the sphere of the CAP exhaustively in such a way that the Member States no longer retain any rule-making powers. In any case, the Treaty does not require the Community legislature to lay down definitive rules governing agricultural policy matters. The Community legislature may in principle also leave certain

14 — See Case C-62/88 *Greece v Council* [1990] ECR I-1527, paragraph 20. Nevertheless, in the case of Regulation No 1782/2003, the emphasis of the Community's activity is clearly on agriculture.

15 — Article 6 EC refers to the Community policies and activities referred to in Article 3. Article 3 EC sets out the Community activities which are intended to implement the aims of the Treaty referred to in Article 2 EC, including sustainable development of economic activities and a high level of protection and improvement of the quality of the environment. This makes clear that the clause imposing a general obligation extends to all Community action. In this connection, the common policy in the sphere of agriculture (Article 3 (e)), the common policy in the sphere of transport (Article 3 (f)), the establishment and development of trans-European networks (Article 3(o)) and measures in the spheres of energy and tourism (Article 3(u)) have particular environmental relevance (see also Jahns-Böhm, J., *EU-Kommentar* (ed. J. Schwarze), Article 6 EC, paragraph 10, p. 277).

16 — In the view of Heuser, I., cited above (footnote 5), p. 201, the protection of the soil can take precedence over the other objectives of the common agricultural policy in certain situations on the basis of the environmental clause imposing a general obligation contained in Article 6 EC.

matters or individual regulatory areas for national regulation,¹⁷ especially since the Member States play a central role in the legislative and administrative implementation of Community law.

number of 'issues' and 'standards'. Each of those categories includes both objectives and criteria which are to be taken into consideration in the implementation of the requirements. Regulation No 1782/2003 therefore simply puts forward a general regulatory framework,¹⁹ allowing the Member States a considerable margin of discretion, as the United Kingdom and the Commission rightly state.²⁰ The Member States are thus responsible for giving substance to the specified regulatory framework in their own legal order.

58. This happened in the present case. Regulation No 1782/2003 is designed to confer rule-making powers,¹⁸ expressly including the obligation on the Member States to adopt implementing measures. Under Article 5(1), the 'minimum requirements' are defined on the basis of the 'framework' set up in Annex IV, which consists of a

59. There is also a broad margin of discretion resulting from the use of general clauses and terms requiring interpretation, such as those regarding the 'appropriateness' of the national measures in question or the machinery to be used. In this respect, the arguments put forward by the United Kingdom Government and the Commission are correct.

17 — See Priebe, R., 'Differenzierung und Dezentralisierung in der gemeinsamen Agrarpolitik', *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger*, 2002, p. 1350. See also Adam, V., cited above (footnote 9), p. 178, who points out that certain regulations in the field of the CAP confer rule-making powers on the Member States. This calls into question neither the exclusive competence of the Community nor the direct validity of a regulation. The author explains that many regulations gave the Member States a broad margin of discretion, which certainly does not imply a renationalisation of the CAP. This view is also shared by Priebe, R./Mögele, R., cited above (footnote 4), paragraph 19. Thiele, G., *Das Recht der Gemeinsamen Agrarpolitik der EG*, Berlin 1997, p. 76, distinguishes between regulations which do not leave the Member States any substantive margin of discretion and must accordingly be directly applied and regulations which either expressly confer on the Member States the competence to lay down substantive provisions or do not make any definitive provisions, with the result that the Member States enjoy a margin of discretion.

18 — This includes regulations which must be supplemented by implementing measures adopted by the Community or the national legislature on the basis of an express or implicit power or obligation (see Schroeder, W., in: *EUIV/EGV Kommentar* (ed. R. Streinz), Article 249 EC, paragraph 61; Ruffert, M., in: *EUIV/EGV Kommentar* (ed. C. Calliess/M. Ruffert), Article 249 EC, paragraph 43, p. 2133). The Court has ruled that the Community legislature is not prevented from empowering a Member State to take implementing measures in a regulation (see Case C-251/91 *Teulie* [1992] ECR I-5599, paragraph 13, and Case 230/78 *Eridania Zuccherifici* [1979] ECR 2749, paragraph 34).

19 — See also Borghi, P., 'Il regolamento N° 1782/2003 e le norme dell'organizzazione mondiale del commercio (OMC/WTO)', *Rivista di diritto agrario*, 2005, p. 100, who considers that Annex IV merely provides a outline (consisting of the aims and the instruments which must be used to realise those aims), to which the Member States must adhere in defining the minimum requirements for good agricultural and environmental condition. A similar view is also taken by Bianchi, D., cited above (footnote 10), p. 228, in whose opinion the Community legislature has merely created a general regulatory framework. It has thus sought to accord the Member States a broad margin of discretion and at the same time transferred a considerable responsibility.

20 — Priebe, R., cited above (footnote 17), p. 1360, states that Community agricultural law is implemented predominantly by the Member States. In this connection, she notes that in Community agricultural legislation the Member States have been given scope to interpret and to draw distinctions. That scope is expressed in the form of general clauses in the legislation.

(b) The practical implementation of Regulation No 1782/2003 in England

(i) The concept of 'landscape' within the meaning of Regulation No 1782/2003

60. However, this does not relieve the Member States of the duty to adopt implementing measures which are consistent with Community law. Regulation No 1782/2003 constitutes the legal benchmark by which the national implementing measures are to be assessed.²¹

61. With regard to the central question whether the obligation on farmers to ensure the maintenance of public rights of way can be classified under the minimum requirements for good agricultural and environmental condition within the meaning of Article 5(1), the United Kingdom Government argues that such an activity can be attributed to the standard 'retention of landscape features' mentioned in Annex IV. However, this is contested by the applicant in the main proceedings.

62. The question therefore arises as to the meaning of the concept of 'landscape feature'. As Regulation No 1782/2003 does not itself contain any legal definition of the concept, it is subject to the Court's power of interpretation. In this connection, consideration must be given to the natural use of language and the context in which the concept is generally used.

63. In addition to its meaning in art, the word 'landscape', which is inherent in this concept in the English language version ('*landscape features*'),²² appears to have a purely physiognomic and a geographical meaning.²³ In my opinion, it is necessary in the present case to examine the latter two categories.

21 — As the Court stated in *Eridania Zuccherifici* (cited above in footnote 18, paragraph 34), the direct applicability of the measure empowering the Member State to take the national measures in question will mean that the national courts may ascertain whether such national measures are in accordance with the content of the Community regulation.

22 — It is also similar in the German ('*Landschaftselemente*'), Italian ('*elementi caratteristici del paesaggio*'), Dutch ('*landschapselementen*'), Portuguese ('*características das paisagens*') and Swedish ('*landskapselement*') language versions.

23 — A clear distinction is made in *Meyers Enzyklopädisches Lexikon*, 9th edition, 1971-1984, Vol. 14, p. 598.

(ii) The physiognomic concept of landscape

alludes to the geographical concept of landscape, especially since topography is a term from geography.

64. The physiognomic concept of landscape designates no more than 'an expanse of terrain which is visible from a particular place or direction'.²⁴ Visible public rights of way which could be perceived from a place with one glance should be included in the concept of landscape under that definition.

(iii) The geographical concept of landscape

66. Based closely on the Greek origin of the word 'topography',²⁶ the current scientific term means, on the one hand, 'local knowledge', 'description of a place' or 'cartography'. On the other hand, it is also used to describe the configuration or structure of a place. The term 'topography' therefore refers not only to the technique of representing a certain configuration of a place or the structure of the earth's surface on a map, but also to the features to be shown. These features or topographical indicators can be attributable to nature and to human influence.²⁷ In addition to various buildings and infrastructures, the man-made features also include roads.²⁸

— Topographical features

65. However, the expression 'landscape features' in Annex IV to Regulation No 1782/2003 has certain semantic differences in the individual language versions. For example, the French language version refers to '*particularités topographiques*',²⁵ which

67. In these circumstances, there can be no difficulty in describing public rights of way as topographical features.

24 — According to a definition in the *Shorter Oxford English Dictionary*, 5th edition, 2002, Vol. 1, p. 1536, the concept 'landscape' in English means 'an expanse of terrain or district which is visible from a particular place or direction; an expanse of (country) scenery'. It is consistent with the definition of the same concept in French ('*paysage*'), which, according to *Le Nouveau Petit Robert*, 2007, p. 1836, is '*étendue de terre qui s'offre à la vue*'.

25 — It is also similar in the Spanish language version ('*particularidades topográficas*').

26 — The word 'topography' is of Greek origin and a combination of the Greek words 'τόπος' (topos), which means 'place', and 'γραφειν' (graphein), which means 'to write'. 'Topographein' literally means 'to describe a place'.

27 — See the entry for the term 'topography' in *The New Encyclopaedia Britannica*, 15th edition, 1975-, Vol. 11, p. 848, and in *Webster's Ninth New Collegiate Dictionary*, 1987, p. 1244.

28 — See the entry for the term 'topographic map' in *The New Encyclopaedia Britannica* (footnote 27), Vol. 11, p. 848, according to which it shows both natural and man-made features. The latter category includes cities, towns and villages, roads, railways, canals, dams, bridges, tunnels, parks, and other features.

— Definition of the geographical concept of landscape

completely such human influences even though it assumes that the definable land will be characterised primarily by natural factors.

68. Nevertheless, the geographical concept of landscape also includes topographical features. According to one definition, this designates ‘a certain part of the earth’s surface which on the basis of its outward appearance and through the interaction of the prevailing geofactors (including human activity) has a particular character and is thereby distinguished from the surrounding area’.²⁹ According to another definition, ‘landscape’ in the geographical sense describes ‘a tract or region of land with its characteristic topographical features, especially as shaped or modified by (usually natural) processes and agents’.³⁰

70. The conclusion that public rights of way are covered by the concept of ‘landscape’ is further supported by the fact that human action in nature certainly does not always have to be regarded as harmful, but is definitely also recognised as a valuable factor in shaping the environment, for instance in building and forming the landscape. Consequently, a distinction is now drawn between ‘original natural landscape’ and ‘cultural landscape’ created by human intervention.³¹

69. According to these definitions, visible public rights of way can constitute ‘landscape features’ within the meaning of Annex IV to Regulation No 1782/2003. The first of the abovementioned definitions describing the geographical concept of landscape expressly states that a part of the earth’s surface can also be influenced by human activity, such as the laying of paths. The second definition of landscape at least appears not to exclude

71. As a result, landscapes, as they are now understood, may be formed by natural elements such as ‘trees, bushes, shrubs, hedges, flowers, grasses, water, and rocks’ and also by artificial devices like ‘decks, terraces, plazas, pavements, fences, gazebos, and fountains’.³² All of this suggests that man-made features such as footpaths and field tracks are to be regarded as part of the landscape in the geographical sense described above.

29 — See *Meyers Enzyklopädisches Lexikon* (footnote 23), Vol. 14, p. 598.

30 — In the *Shorter Oxford Dictionary* (footnote 24), Vol. 1, p. 1536, the word ‘landscape’ is defined as a geographical term, meaning ‘a tract or region of land with its characteristic topographical features, especially as shaped or modified by (usually natural) processes and agents’.

31 — See *Meyers Enzyklopädisches Lexikon* (footnote 23), Vol. 14, p. 598.

32 — See the detailed article on the term ‘landscape architecture’ in *The New Encyclopaedia Britannica* (footnote 27), Vol. 7, p. 139 et seq.

72. It must therefore be stated that public rights of way are also to be regarded as 'landscape features' within the meaning of Annex IV to Regulation No 1782/2003.

(d) Maintenance of public rights of way as a measure to 'ensure maintenance' and to 'avoid the deterioration of habitats' within the meaning of Annex IV to Regulation No 1782/2003

(c) Measure for the 'retention of landscape features'

73. By imposing on farmers the obligation to maintain public rights of way, the Member State complies with its duty under Community law stemming from Annex IV to Regulation No 1782/2003 of ensuring that landscape features are not removed and are retained.

76. At the same time, such a measure could be classified under the 'issue' of 'maintenance' within the meaning of Annex IV to Regulation No 1782/2003. This includes the requirement both to 'ensure a minimum level of maintenance' and to 'avoid the deterioration of habitats'.

74. The aim of the English implementing regulations is to ensure the continued existence of such public rights of way. It contains rules to encourage farmers to protect public rights of way. First of all, they prohibit farmers, under threat of a penalty, from disturbing the surface of a visible footpath, a visible bridleway or any other visible highway. Secondly, it requires farmers, in the event of a contravention, to make good the damaged path or bridleway so as to make it reasonably convenient for the exercise of a right of way.

77. If it is assumed, as in this Opinion, that a broad interpretation should be given to the concept of landscape, which also includes public rights of way as landscape features, there is nothing to prevent the measures laid down for their retention, such as those provided for in the English implementing regulations, being regarded as measures to ensure maintenance within the meaning of that provision.

75. The measures provided for in the English implementing regulations are therefore perfectly capable of ensuring the retention of landscape features.

78. Apart from this, in my opinion, there is no doubt that public rights of way have a considerable importance for the preservation

of human habitats in rural areas, especially since the importance of rights of way for human economic development was recognised even in Roman law.³³ First and foremost, rights of way allow farmers access to the agricultural land farmed by them.

which in turn provides an opportunity for the rural and urban population to relax.³⁵ The function of the environment of allowing an opportunity to relax, which is enhanced by the availability of public rights of way, has economic benefits for the rural population, whose existence is often also reliant on tourism, because it creates an important value driver.

79. Secondly, as is also clear from the order for reference,³⁴ public rights of way promote the mobility of inhabitants of rural areas and of visitors from other parts of the country. In regions with attractive landscapes, footpaths and trails can improve public access to nature and thus allow for day trips or longer trips,

80. At the same time, public rights of way serve to protect the environment by marking walking routes for visitors which are safer for flora and fauna, thereby ensuring that the environmental damage caused by people is contained. They thus help to preserve habitats for fauna and flora. At the same time, it is ensured that walkers and trekkers stay on the

33 — According to Monier, R., *Manuel élémentaire de droit romain*, 6th edition, Paris 1947, p. 432, real servitudes, which include rights of way, were intended to encourage an optimal economic use of a property. In Roman law, a distinction was drawn within real servitudes between rural servitudes (*servitutes praediorum rusticorum*) and urban servitudes (*servitutes praediorum urbanorum*). That distinction did not depend on where the properties in question were located, but on the purpose of the servitude. Rural servitudes included the right of horse or foot passage (*iter*), a right for carriages drawn or cattle driven by man (*actus*) and *via*, which comprises the first two rights but extends also to carriage drawn by horses or other animals, and the right to conduct water across land (*acqueductus*). Those four servitudes are probably the oldest in Roman law. The right of way (*iter*) also permitted riding. The right to *via* encompassed the right to walk, to cross by carriage and to drive cattle. The servitude of *acqueductus* could also include the extraction of water. Other types of rural servitudes included the right of lead cattle to water, the right to draw water, the right of pasture, and the right to search for minerals (see Mayer-Maly, T., *Römisches Recht*, 2nd edition, 1999, p. 97 et seq.).

34 — The order for reference reproduces certain passages of the Regulatory Impact Assessment (RIA). Reference is made to economic impacts, environmental impacts, broader rural impacts and regional impacts of the English implementing regulations.

35 — See Ditt, K., 'Vom Natur- zum Umweltschutz? England 1949 bis 1990', *Natur- und Umweltschutz nach 1945 — Konzepte, Konflikte, Kompetenzen* (ed. Franz-Josef Brüggemeier and Jens Ivo Engels), 2005, p. 39, who notes that legislation for England and Wales for nature conservation during the 1940s already drew a distinction between strict nature conservation for scientific purposes and nature conservation and landscape protection for aesthetic and tourism purposes. As regards nature conservation and landscape protection for aesthetic and tourism purposes, on 18 March 1949 Parliament adopted the National Parks and Access to the Countryside Act. The law provided inter alia that County Councils were to open free land not used for agriculture, by agreement with its owners, for the population seeking an opportunity to relax, guarantee old rights of way and create new rights of way. In addition to setting up nature parks, 'Areas of Outstanding Natural Beauty' (AONB) were to be established. On account of the growing interest in using nature and landscape in the post-war period, the Government adopted the Countryside Act on 3 August 1968. It gave County Councils the opportunity to create Country Parks for the population seeking an opportunity to relax, the costs for which would be largely reimbursed by the State. The Countryside and Rights of Way Act 2000, which applies at present, makes provision for public access to the countryside; according to the preamble, the Act also pursues environmental policy aims such as 'conserving an area's natural beauty', 'nature conservation' and 'the protection of wildlife'.

specially designated paths and do not walk without permission on any neighbouring fields used for agricultural purposes and cause damage to the crops there.

Annex IV states that the standards laid down include the retention, that is to say, the non-removal of landscape features. As has already been shown, public rights of way constitute landscape features within the meaning of that provision.³⁷

81. In this respect there is a legitimate public interest in public rights of way being regularly maintained and being protected against deterioration. Because the obligation to maintain public rights of way serves that purpose, it can also be classified as a measure to 'avoid the deterioration of habitats' within the meaning of Annex IV to Regulation No 1782/2003.

84. Secondly, a statutory obligation, as provided for by the English implementing regulations, guarantees a minimum level of maintenance within the meaning of Annex IV, as it both ensures a minimum level of maintenance and avoids the deterioration of habitats.³⁸

3. Conclusions

82. In summary, it may be stated that Article 5(1) of and Annex IV to Regulation No 1782/2003 confer on the Member States a broad margin of discretion in defining the minimum requirements for good agricultural and environmental condition of land.³⁶

83. The minimum requirements within the meaning of that provision also include those which primarily serve an environmental aim. The maintenance of public rights of way can be classified in this category of minimum requirements, especially since, first of all,

85. The maintenance of public rights of way as a minimum requirement defined at regional level within the meaning of Article 5(1) of Regulation No 1782/2003 is thus consistent with the framework laid down in Annex IV. Furthermore, there is nothing to suggest that this measure would be in itself disproportionate with the aim pursued of maintaining all agricultural land in good agricultural and environmental condition. The use of 'criteria which are proportionate, objective and graduated', as prescribed in the second recital in the preamble to Regulation No 1782/2003, concerns a decision to be taken by the Member States in the individual case regarding the withdrawal of aid, the lawfulness of which must be determined, where necessary, by the competent national court. Lastly, it should be pointed out that

36 — See point 57 of this Opinion.

37 — See point 72 of this Opinion.

38 — See points 77 and 81 of this Opinion.

according to the second recital in the preamble to that regulation such withdrawal is to be without prejudice to sanctions laid down under other provisions of Community or national law.

the general principle of non-discrimination under Community law precludes regional differences in implementation of Community law in a Member State, which — where the Member State's internal constitutional arrangements provide that different devolved administrations are to have legislative competence in relation to different constituent parts of that Member State — provides for constituent parts to have different standards of good agricultural and environmental condition under Article 5 of and Annex IV to the Regulation No 1782/2003.

86. In this respect the English implementing regulations stay within the boundaries of the regulatory framework defined by Regulation No 1782/2003.

87. For that reason, the answer to the first question should be that a Member State can include requirements relating to the maintenance of visible public rights of way in its standards of good agricultural and environmental condition under Article 5 of and Annex IV to Regulation No 1782/2003.

1. Devolved implementation of Community law

B — *The second question*

88. With its second question, the referring court essentially seeks to ascertain whether

89. Before I examine the breach of the general principle of non-discrimination under Community law alleged by the applicant in the main proceedings, I believe that it should be pointed out that Community law does not preclude devolved implementation at national or at regional level. This can be explained by the demands of the CAP for devolved and differentiated implementation, but also by the constitutional autonomy enjoyed by the Member States, recognised in the case-law of the Court, in the allocation of their domestic competences.

(a) Devolved and differentiated rule-making under the CAP

90. The main themes of the reform of the CAP introduced by 'Agenda 2000' include the devolution of powers from the Community to local level and flexible programming through a wide range of measures which can be implemented according to the specific needs of the Member States.³⁹ In other words, devolution and differentiation are now the main elements of the present CAP.⁴⁰

91. Regulation No 1782/2003 implements this political concept by expressly authorising

the Member States under Article 5(1) to define minimum requirements 'at national or regional level'. This suggests that the Community legislature did not consider a uniform regulatory approach within each Member State to be necessary, but instead wished to leave each Member State to choose the appropriate regulatory level within its own political system.

92. The devolved organisation of agricultural law takes account of the fact that regional differentiation is entirely necessary. Thus, Article 33(2)(a) EC specifically requires that in working out the common agricultural policy and the special methods for its application, account is to be taken of the structural and natural disparities between the various agricultural regions. The margin of discretion which Regulation No 1782/2003 accords to national and regional decision-makers for implementation also contributes to a differentiation corresponding to the needs of each region.⁴¹

39 — See the Commission information brochure 'Agenda 2000 — Strengthening and widening the European Union', p. 7 (available at http://ec.europa.eu/agenda2000/index_en.htm). It is also stated in the explanatory statement for 'Agenda 2000' that agriculture in the EU-15 is highly diverse in its natural resources, its farming methods, its competitiveness and income level, and also its traditions. In the Union, diversity is one of the strengths of European agriculture, contributing to its character and quality. However, in order to derive greater benefit from this, that diversity requires the appropriate consequences to be drawn for agricultural policy — the present method of operation and management of the CAP were devised for a Community of 6 and have not really changed since then. It will not meet the needs of a Union of 15 which is preparing for the accession of new Member States. It has become far too complex and bureaucratic, and sometimes even almost impossible for farmers to understand. A new, *more decentralised* model has, therefore, to be developed which grants the Member States greater freedom to regulate certain matters themselves, taking better account of the respective sectors or the respective local conditions, COM(1998) 158 final, p. 3.

40 — See also Priebe, R., cited above (footnote 17), p. 1351, and Adam, V., cited above (footnote 9), p. 239.

41 — Boch, C., 'Devolution and Community law', *A true European*, 2005, p. 54, points out that devolved decision-makers increasingly have to deal with matters in which the Community legislature lays down the main policy objectives. This also applies to situations in which the devolved decision-makers are accorded a margin of discretion. Nevertheless, that margin of discretion enables them to take account of regional or local differences.

93. Further considerations, such as the greater closeness of national, regional and local decision-makers to the situation and to the citizen,⁴² the simplification of legislation and the easing of the burden on the administration, might suggest a devolved organisation of agricultural law provided that the Community's aims in connection with the CAP continue to be observed.

consideration the present moves towards decentralisation in the Member States, such as in the United Kingdom, largely following a similar political logic,⁴³ which suggests a convergence in developments at Community level and at national level.⁴⁴

94. A devolved organisation of agricultural law takes account not least of the increased importance of the regions within the European Union, which finds expression, for example, in the principle of subsidiarity being enshrined by the Treaty of Maastricht, the creation of the Committee of the Regions, the responsibility of the regions for the implementation of Community law and the possibility of representation in the Council under Article 203 EC. In addition, it takes into

(b) Autonomy of the Member States in the allocation of their internal powers

95. Lastly, the devolved implementation of Community law is consistent with the consist-

42 — This is at least consistent with the notion of subsidiarity, without thereby affirming that the second paragraph of Article 5 EC is applicable, especially since under that provision the principle of subsidiarity does not apply in areas which do not fall within the exclusive competence of the Community. The extent to which the Community has exclusive competence in agriculture is disputed in legal literature (see Schwartz, W., cited above (footnote 4), Article 37, paragraph 7, p. 38). Even assuming competing competences between the Community and the Member States (see judgment in Case C-158/89 *Weingut Dietz-Matti* [1990] ECR I-2013), the intensity of regulation which exists in the agricultural sector and is constantly increasing and the fact that almost all general provisions in that field are made by regulation have not really left the individual Member States any margin of discretion. On the other hand, as Lenaerts, K./Van Nuffel, P., *Constitutional Law of the European Union*, 2nd edition, London 2005, paragraph 5-029, p. 102, rightly explain, the notion of subsidiarity as a political principle is older than the provision laid down in the second paragraph of Article 5 EC and therefore had an influence on several Community policy areas, including the CAP, before it was enshrined in the Treaty.

43 — See Leyland, P., 'La devolution britannica: integrazione, responsabilità e controlli', *Unione europea e autonomie regionali — Prospettive per una Costituzione europea*, Turin, 2003, p. 91 et seq., who states that the redistribution of powers among the regions in the United Kingdom, which is known as devolution, essentially seeks to modernise the state's administration and bring citizens closer to the place when the important decisions are taken. These developments are also intended to ensure that the particular features of each region are taken into consideration.

44 — Torre, A., 'Uno Stato a geometria variabile. Asimmetrie della politica, delle istituzioni e dei diritti nella devolution del Regno Unito', *Unione europea e autonomie regionali — Prospettive per una Costituzione europea*, Turin 2003, p. 144 et seq., speaks of a convergence between devolution in the United Kingdom and the constitutionalisation process in the European Union, which enhances the autonomy of the large regional authorities. Birkinshaw, P., 'Devolution in the United Kingdom: Processes, problems and consequences for the UK constitution', *L'Europa tra federalismo e regionalismo*, Milan 2003, p. 67, stresses that devolution in the United Kingdom was carried through at a time when the regions within the European Union were taking on greater importance.

ent case-law of the Court,⁴⁵ according to which each Member State is free to allocate powers, including legislative powers, internally as it sees fit and to implement Community acts which are not directly applicable by means of measures adopted by regional or local authorities, provided that that allocation of powers enables the Community legal measures in question to be implemented correctly. Under that case-law, the question as to which part of a Member State is to transpose a directive is not an issue of Community law, but is a matter which falls to be governed by the domestic allocation of competences.⁴⁶

order, it is prevented from relying on domestic circumstances in order to circumvent its obligations under Community law.⁴⁷

96. The reverse side of this neutrality of the Community legal order vis-à-vis the organisational structure of the Member States is that to the same extent as a Member State is entitled to allocate its powers internally as it sees fit and as prescribed by its constitutional

97. It is true that the Treaty makes express provisions for a system of devolved transposition and implementation of Community law in the third paragraph of Article 249 EC only as regards the legal form of the directive; however, that system also applies in the case of the implementation of other Community legal acts, such as a regulation, which needs to be given substance by national legislation.⁴⁸ As has already been stated,⁴⁹ Regulation No 1782/2003 is to be classified in this category of Community legal acts.

45 — Case C-97/01 *Commission v Luxembourg* [2003] ECR I-5797, paragraph 37; Case C-417/99 *Commission v Spain* [2001] ECR I-6015, paragraph 37; Case C-156/91 *Hansa Fleisch* [1992] ECR I-5567, paragraph 23; C-131/88 *Commission v Germany* [1991] ECR I-825, paragraph 71; Joined Cases 227 to 230/85 *Commission v Belgium* [1988] ECR I, paragraph 9; Case 97/81 *Commission v Netherlands* [1982] ECR 1819, paragraph 12; and Case 96/81 *Commission v Netherlands* [1982] ECR 1791, paragraph 12. See also the Opinion of Advocate General Sharpston in Case C-212/06 *Gouvernement de la Communauté française and gouvernement wallon* [2008] ECR I-1683, point 101, and the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-103/01 *Commission v Germany* [2003] ECR I-5369, point 27.

46 — See Ruffert, M., cited above (footnote 18), Article 249, paragraph 63, p. 2140.

47 — This shows the origins of the Community legal order in international law, which are also recognised by the Court (see Case 26/62 *Van Gend and Loos* [1963] ECR I and Case 6/64 *Costa v ENEL* [1964] ECR 585. International law governs only relations between States, without interfering in their internal affairs. In this respect, based on the principle of the sovereignty of States, has no bearing on the law governing the organisation of the State. Consequently, it is consistent with a principle of customary international law, which was codified in Article 27 of the Vienna Convention on the Law of Treaties, that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. As Boch, C., cited above (footnote 41), p. 54, rightly states, at a formal level the EU/EC treaties constitute international agreements which are binding on the Member States. The fact that the Member States are the contracting parties means that, from a Union perspective, the national constitutional arrangement of each Member State must be irrelevant. Internal matters are of no concern to the Union, which remains in the main 'blind' towards the internal distribution of powers.

48 — See Case 30/70 *Scheer* [1970] ECR 1197, paragraph 10, and Case 137/80 *Commission v Belgium* [1981] ECR 2393, paragraphs 3 to 9. See also Lenaerts, K./Van Nuffel, P., cited above (footnote 42), paragraph 14-047, p. 607.

49 — See point 58 of this Opinion.

98. Therefore it is not contrary to Community law for a Member State's internal constitutional arrangements to provide that different devolved administrations shall have legislative competence in relation to different constituent parts of that Member State and, by virtue of the rule-making powers conferred on them, those administrations themselves define standards of good agricultural and environmental condition under Article 5(1) of and Annex IV to Regulation No 1782/2003.

be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.⁵¹

2. The alleged breach of the principle of non-discrimination

99. The principle of non-discrimination under Community law, as laid down in Article 34(2) EC, on which the applicant in the main proceedings evidently relies,⁵⁰ is a specific expression of the general principle of equality, which is one of the fundamental principles of Community law and which requires that comparable situations must not

100. In accordance with the case-law of the Court, the Member States must comply with the principle stated in Article 34(2) EC in the implementation of Community legislation, in particular where Community rules leave Member States to choose between various methods of implementation or options.⁵² The principle of non-discrimination as an objective legal norm therefore applies not only to the Community legislature, at which it is

50 — In his written pleadings, the applicant in the main proceedings relies only on the general principles of non-discrimination and equality, but refers to the case-law of the Court of Justice on Article 34(2) EC. However, only Article 34(2) EC is applicable to the present case; it contains a specific prohibition of discrimination which applies not only to the common organisation of agricultural markets, but to the CAP as a whole (see also Schwartz, W., cited above (footnote 4), Article 34, paragraph 30, p. 34).

51 — See Case C-273/04 *Poland v Council* [2007] ECR I-8925, paragraph 86; Case C-182/03 *Belgium v Commission* [2006] ECR I-5479 paragraph 170; Joined Cases C-87/03 and C-100/03 *Spain v Council* [2006] ECR I-2915, paragraph 48; Case C-14/01 *Niemann* [2003] ECR I-2279, paragraph 49; Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 39; Case C-122/95 *Commission v Germany* [1998] ECR I-973, paragraph 62; Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraph 35; Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115, paragraph 46; Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 18; Case 203/86 *Spain v Council* [1988] ECR 4563, paragraph 25; Joined Cases 201 and 202/85 *Klensch* [1986] ECR 3477, paragraph 9; Joined Cases 66/79, 127/79 and 128/79 *Salumi and Others* [1980] ECR 1237, paragraph 14; Joined Cases 117/76 and 16/77 *Ruckdeschel and Ströh* [1977] ECR 1753, paragraph 7; Joined Cases 124/76 and 20/77 *Moulins et Huileries de Pont-à-Mousson and Providence agricole de la Champagne* [1977] ECR 1795, paragraph 16; Case 125/77 *Koninklijke Scholten-Honig and De Bijenkorf* [1978] ECR 1991, paragraph 26; and Joined Cases 103/77 and 145/77 *Royal Scholten-Honig and Tunnel Refineries* [1978] ECR 2037, paragraph 26; and my Opinion in Case C-338/06 *Commission v Spain* [2008] ECR I-10139, point 57.

52 — *Klensch* (cited above in footnote 51, paragraph 10) and Case C-351/92 *Graff* [1994] ECR I-3361, paragraphs 17 and 18.

primarily directed, but also to the Member States in so far as they act through or in execution of a Community regulation, for example on the basis of a power conferred on them.⁵³

limits of a Member State, but may be restricted at one part of that territory.

101. The applicability of the principle of non-discrimination under Community law legally requires, first of all, the existence of a difference in treatment, which raises the question of the relevant reference framework. That reference framework includes the category of persons who may be included in the comparison.⁵⁴

103. This has already been stated by the Court in relation to the law on State aid, in the judgment in *Portugal v Commission*,⁵⁵ which considered the question whether regionally restricted tax reductions are to be regarded as State aid 'favouring certain undertakings or the production of certain goods' within the meaning of Article 87(1) EC, that is to say, they have selective character.

(a) The relevant reference framework for assessing a difference in treatment

(i) *Mutatis mutandis* application of the criteria for determining selectivity in the law on aid

102. As the German Government rightly states, the reference framework for assessing a difference in treatment in a specific case need not necessarily be defined within the

104. As the Court found in that judgment, as regards the assessment of the condition of selectivity, which is a constituent factor in the concept of State aid, it is clear that Article 87(1) EC requires assessment of whether, under a particular statutory scheme, a State measure is such as to 'favour certain undertakings or the production of certain goods' in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question.⁵⁶ In the opinion of the Court, such an analysis is also required in respect of a measure adopted not by the national legislature but by an infra-State authority, since a

53 — See Van Rijn, T., *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft — Kommentar* (ed. Groeben/Schwarze), Vol. 1, 6th edition, Article 34 EC, paragraph 59.

54 — Case C-300/06 *Vofß* [2007] ECR I-10573, paragraph 40, and Case C-256/01 *Allonby* [2004] ECR I-873, paragraphs 61 and 73.

55 — Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 57.

56 — *Portugal v Commission* (cited above in footnote 55, paragraph 54); Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40; Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 68; Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 41.

measure adopted by a regional authority and not the central power is likely to constitute aid if the conditions laid down by Article 87(1) EC are satisfied.⁵⁷

105. The Court considered whether an infra-State body enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate.⁵⁸ In such a case, it is the area in which the infra-State body responsible for the measure exercises its powers, and not the country as a whole, that constitutes the relevant context for the assessment of whether a measure adopted by such a body favours certain undertakings in comparison with others in a comparable legal and factual situation, having regard to the objective pursued by the measure or the legal system concerned.⁵⁹

106. I believe that it is reasonable to apply such an approach to the present situation, because the criteria employed by the Court

are an aid in assessing the existence of a situation which, irrespective of the sector-specific terminology — ‘selectivity’ in the case of the law on aid — ultimately constitutes no more than a difference in treatment between economic operators.

107. If this approach is applied *mutatis mutandis* to the present situation, the relevant reference framework for assessing the discriminatory character of the provisions in question would have to be restricted to the constituent part of a Member State whose administrative organs enjoy their own rule-making powers by virtue of the applicable constitutional provisions.

108. In this specific case, the reference framework would have to be defined as England as a constituent part of the United Kingdom, especially since, as mentioned at the beginning of this Opinion,⁶⁰ the United Kingdom Government generally acts only for England in devolved matters, in accordance with the rules on devolution and the Memorandum of Understanding. In accordance with the national rules, it is responsible for defining the minimum requirements for good agricultural and environmental condition of land pursuant to Article 5 of Regulation

57 — *Portugal v Commission* (cited above in footnote 55, paragraph 55) and Case 248/84 *Germany v Commission* [1987] ECR 4013, paragraph 17.

58 — *Portugal v Commission* (cited above in footnote 55, paragraph 62). It must also be examined whether devolution actually exists. Eisenmann, C., *Centralisation et décentralisation — Esquisse d'une théorie générale*, Paris 1948, p. 86 et seq., differentiates in turn between pure or complete and incomplete devolution. The first variant exists where a certain sovereign act is carried out solely by devolved organs. The second variant requires participation by central and devolved organs, the latter being pre-eminent.

59 — *Portugal v Commission* (cited above in footnote 55, paragraph 66).

60 — See points 10 to 13 of this Opinion. Loughlin, J., ‘The European Dimension of UK Devolution’, *La Costituzione britannica/The British Constitution*, 2005, Vol. 1, p. 483, does not examine the implementing powers of the United Kingdom Government, but the role of the regional legislatures. He points out that, with the exception of England, all other constituent parts of the United Kingdom (Scotland, Wales and Northern Ireland) have their own political organs. England does not have its own parliament or council assembly. Instead, the British Parliament functions at the same time as the parliament of the United Kingdom and of England.

No 1782/2003. In this respect it exercises the powers of a regional government, as it were, in the sphere of agriculture, comparable to those of other regional governments in other constituent parts of the United Kingdom.

110. This approach has been applied primarily in situations where individuals relied on the principle, enshrined in Article 141 EC, of equal pay for men and women. For example, in *Allonby*⁶² the Court rejected a breach of the principle of non-discrimination in a case where a female teacher demanded from her employer, an agency which provided services for a college, the same pay as male employees of that college. The Court based its decision on the ground that the agency, as an intermediary undertaking, did not form a unit with the actual employer, the college. The remuneration for the services provided did not therefore come from the same financial source.⁶³ Because the differences in pay were not attributable to the same source, it was not possible to rely on Article 141 EC.

(ii) Identification of the source of discrimination

109. In specific cases of discrimination, the Court adopts an approach based essentially on the same considerations in order to determine the relevant reference framework, focusing on the source of the discrimination. Accordingly, discrimination is ruled out if the differences established, from which there results a difference in treatment, can be attributed to a single source. In the view of the Court, in such a case there is no body which is responsible for the inequality and which could, if necessary, restore equal treatment.⁶¹

111. Nevertheless, in my opinion, this approach may be applied to the case of national implementation or transposition of Community law, to which the present case relates, as it is based on the fundamental notion that mere conditions of inequality alone cannot be the subject of alleged discrimination. Rather, conceptually, discrimination requires that the inequality can be

61 — *Allonby* (cited above in footnote 54, paragraph 46) and Case C-320/00 *Lawrence and Others* [2002] ECR I-7325, paragraph 18.

62 — *Allonby* (cited above in footnote 54, paragraph 46).

63 — In the view of Evtimov, E., 'Anmerkung zum Urteil Allonby', *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 2004, p. 214, this is the crucial reason why discrimination was ruled out in that case.

attributed to a single actor.⁶⁴ It must follow that in principle only the public authority⁶⁵ which adopts implementing and transposing measures within its sovereign territory with effect for the individuals there may be regarded as the source of discrimination. Any differences in treatment among those at whom a certain national measure is directed can be attributed only to those public authorities and can also be eliminated only by them.

112. For this reason, differences in the different national rules do not give rise to discrimination, because they cannot be attributed to the conduct of the same public authority.⁶⁶ Rather, the authorities are free to make rules in areas in which they are competent, with the result that a difference in the way a matter is regulated in two different Member States alone cannot consti-

tute a breach of the principle of non-discrimination.

113. This has long been recognised in the case-law of the Court.⁶⁷ Accordingly, in *Van Dam en Zonen and Others*⁶⁸ the Court stated for the first time that it cannot be held contrary to the principle of non-discrimination to apply national legislation because other Member States allegedly apply less strict rules.

114. This is immediately clear as the opposite interpretation would lead to an impairment of the legislative scope enjoyed by the Member States which would be difficult to justify.

115. The same must apply where Member State's internal constitutional arrangements provide that different devolved administrations are to have legislative competence in

64 — See Plötscher, S., *Der Begriff der Diskriminierung im Europäischen Gemeinschaftsrecht*, Berlin 2003, p. 48, in whose view discrimination requires that the inequality is attributable to one actor. Mere conditions of inequality alone cannot be the subject of alleged discrimination. Provided it cannot be established that the unequal conditions existing within a category of objects under comparison (persons, goods etc.), e.g. different competitive positions, are attributable to the conduct of a legal entity, there cannot be any question of discrimination. Discrimination therefore requires the inequality to be attributable to one organ adopting a measure. In the view of Zerr, H., *Der Begriff der Diskriminierung im Vertrag über die Europäische Gemeinschaft für Kohle und Stahl*, Heidelberg 1961, p. 4, it is necessary, if there is unequal treatment, for there to be at least two expressions of behaviour by a single person.

65 — Von Bogdandy, A., in: Grabitz/Hilf, *Das Recht der Europäischen Union*, Munich 2008, Vol. I, Article 12, paragraph 9, points out that, according to the prevailing view, discrimination is possible only if the two situations under comparison were regulated by the same public authority. A breach of the principle of non-discrimination is therefore ruled out in the case of differences in treatment stemming from the coincidence of rules adopted by different public authorities, in particular by the Union and a Member State. The opposite interpretation would lead to an impairment of the legislative scope enjoyed by the Member States which would be difficult to justify.

66 — See also Epiney, A., in: *EU/EGV Kommentar* (ed. C. Callies/M. Ruffert), Article 12, paragraph 9, p. 480, and Holoubek, M., *EU-Kommentar*, cited above (footnote 15), Article 12, paragraph 43, p. 342 et seq.

67 — See Case 14/68 *Walt Wilhelm* [1969] ECR I, paragraph 13; Case 1/78 *Kenny* [1978] ECR 1489, paragraph 18; Case 31/78 *Bussone* [1978] ECR 2429, paragraph 38 et seq.; Case 136/78 *Auer* [1979] ECR 437, paragraphs 23 to 26; Joined Cases 185 to 204/78 *Van Dam en Zonen and Others* [1979] ECR 2345, paragraph 10; Case 155/80 *Oebel* [1981] ECR 1993, paragraph 9; Case 126/82 *Smit* [1983] ECR 73, paragraph 27; Joined Cases C-251/90 and C-252/90 *Wood and Cowie* [1992] ECR I-2873, paragraph 19; Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 8; Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21; and Case C-177/94 *Perfili* [1996] ECR, I-161, paragraph 17.

68 — *Van Dam en Zonen and Others* (cited above in footnote 67, paragraph 10). This case-law was developed in the judgments, all cited in footnote 67, in Case 155/80 *Oebel* (paragraph 9), Case 126/82 *Smit* (paragraph 27), Joined Cases C-251/90 and C-252/90 *Wood and Cowie* (paragraph 19), and Case C-177/94 *Perfili* (paragraph 17).

relation to different constituent parts of that Member State,⁶⁹ especially since, as has already been seen, not only does Community law not preclude devolved implementation or transposition at regional or local level,⁷⁰ but in the case of Regulation No 1782/2003 it even calls for such implementation in order to ensure a differentiated implementation of the CAP.⁷¹ In such a case, only the public authority in the constituent part in question can therefore be the source of any unequal treatment.

means that there may be unequal situations in the individual constituent parts of the United Kingdom, but they cannot be attributed to unequal treatment imputable to the same public authority, which means that a crucial criterion for the application of the principle of non-discrimination under Article 34(2) EC has not been met.

(b) Conclusions

116. This approach also leads to the conclusion that the relevant reference framework in the present case must be restricted to England as a constituent part of the United Kingdom. For a situation like the present case, this

117. Consequently, those at whom an implementing measure adopted by a regional public authority is directed cannot, in circumstances like those in the main proceedings, claim a breach of the principle of non-discrimination under Article 34(2) EC because individual constituent parts allegedly apply less strict rules.

69 — See the dissenting opinion of Judge Matscher in the judgment of the European Court of Human Rights of 22 October 1981, *Dudgeon v United Kingdom* (Application No 7525/76), in which he stated that the diversity of domestic laws, which is characteristic of a federal State, can in itself never constitute discrimination, and there is no necessity to justify diversity of this kind. To claim the contrary would be to disregard totally the very essence of federalism.

70 — See point 98 of this Opinion. Boch, C., cited above (footnote 41), p. 57, reaches the same conclusion. The author takes the view that, where Community law leaves some discretion to a Member State and the constitutional arrangements of that Member State provide for implementation or transposition by devolved institutions, there is nothing to prevent those institutions exercising their discretion independently of one another. In connection with devolution in the United Kingdom, the author takes the view that the regions of that Member State are perfectly entitled to comply with Community law obligations in different ways, which has already happened under the CAP.

71 — See points 90 and 93 of this Opinion.

118. In the light of the foregoing, I conclude that it does not give rise to impermissible discrimination where a Member State's internal constitutional arrangements provide that different devolved administrations are to have legislative competence in relation to different constituent parts of that Member State for constituent parts to have different standards of good agricultural and environmental condition under Article 5 of and Annex IV to Regulation No 1782/2003.

VIII — Conclusion

119. In the light of the above considerations, I suggest that the Court give the following answers to the questions referred by the High Court of Justice of England and Wales:

1. A Member State can include requirements relating to the maintenance of visible public rights of way in its standards of good agricultural and environmental condition under Article 5 of and Annex IV to Council Regulation No 1782/2003.
2. It does not constitute impermissible discrimination where a Member State's internal constitutional arrangements provide that different devolved administrations are to have legislative competence in relation to different constituent parts of that Member State for constituent parts to have different standards of good agricultural and environmental condition under Article 5 of and Annex IV to Regulation No 1782/2003.