Reports of Cases

OPINION OF ADVOCATE GENERAL
NILS WAHL
delivered on 23 April 2013 [1]

Case C-500/11

Fruition PO Limited
v
Minister for Sustainable Farming and Food and Animal Health

(Request for a preliminary ruling from the High Court of Justice of England and Wales, Queen's Bench Division (United Kingdom))

(Common organisation of the market in fruit and vegetables — Regulation (EC) No 2200/96 — Article 11 — Producer organisations — Conditions for recognition — Control over contractors)

1. By this request for a preliminary ruling, the High Court of Justice of England and Wales, Queen's Bench Division (United Kingdom), seeks guidance on the interpretation of Article 11 of Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables. [2]

2. The Court is asked, for the first time, to interpret the conditions imposed by Regulation No 2200/96 for the recognition of producer organisations (or 'POs') by Member States. The point at issue is, in essence, whether and, if so, to what degree, a PO must retain control over contractors it engages to carry out the activities essential for its recognition as a PO under that regulation ('the essential activities under Regulation No 2200/96').

3. Historically, the European Union ('EU') legislature has conceived of POs as strategic players in the agricultural markets, especially in the fruit and vegetables sector. In order to promote their formation and enable them to perform their tasks in a manner conducive to achievement of the desired results, it provided them with significant financial assistance. The relevant requirements that POs must meet in order to be able to perform their tasks effectively and to ensure that the public funding granted to them is not dissipated, lie — as we shall see — at the heart of the present reference for a preliminary ruling.

I – Legal framework

4. Article 1(1) of Regulation No 2200/96 states that the regulation sets up a common organisation of the market in fruit and vegetables.

5. Title II of Regulation No 2200/96, which comprises Articles 11 to 18, lays down the rules concerning producer organisations.

1 — Original language: English.
2 — OJ 1996 L 297, p. 1.

6. A ‘producer organisation’ is defined in Article 11(1) as any legal entity:

‘(a) which is formed on the own initiative of growers of the following categories of product listed in Article 1(2):

(i) fruit and vegetables

…

(b) which has in particular the aim of:

(1) ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity;

(2) promoting concentration of supply and the placing on the market of the products produced by its members;

(3) reducing production costs and stabilising producer prices;

(4) promoting the use of cultivation practices, production techniques and environmentally sound waste-management practices …;

(c) the rules of association of which require its producer members, in particular, to:

…

(3) market their entire production concerned through the producer organisation.

…

(d) the rules of association of which provide for:

…

(3) rules enabling the producer members democratically to scrutinise their organisation and its decisions;

…

(e) which has been recognised by the Member State concerned pursuant to paragraph 2.’

7. Article 11(2), in turn, provides that:

‘2. Member States shall recognise as producer organisations for the purposes of this Regulation all producer groups applying for such recognition, on condition that:

(a) they meet the requirements laid down in paragraph 1 and provide the relevant evidence …;

(b) there is sufficient evidence that they can carry out their activities properly, both over time and in terms of effectiveness;

(c) they effectively enable their members to obtain technical assistance in using environmentally-sound cultivation practices;

(d) they effectively provide their members with the technical means for storing, packaging and marketing their produce and ensure proper commercial and budgetary management of their activities.'

8. Those provisions must be read against the background of recitals 7 and 16 in the preamble to Regulation No 2200/96, which are worded as follows:

'(7) Whereas producer organisations are the basic elements in the common market organisation, the decentralised operation of which they ensure at their level; whereas, in the face of ever greater concentration of demand, the grouping of supply through these organisations is more than ever an economic necessity in order to strengthen the position of producers in the market; whereas such grouping must be effected on a voluntary basis and must prove its utility by the scope and efficiency of the services offered by producer organisations to their members; …

(16) Whereas to stabilise prices it is desirable that producer organisations should be able to intervene on the market, in particular by deciding not to put up for sale particular quantities at particular periods ….'

9. Commission Regulation (EC) No 1432/2003 of 11 August 2003[3] lays down detailed rules for the application of Regulation No 2200/96 as regards the conditions for recognition of producer organisations and preliminary recognition of producer groups.

10. Article 6 of Regulation No 1432/2003, concerning the structures and activities of producer organisations, provides as follows:

'1. Member States shall satisfy themselves that producer organisations have at their disposal the staff, infrastructure and equipment necessary to achieve the aims laid down in Article 11 of Regulation (EC) No 2200/96 and ensure their essential functioning …

2. Member States shall determine the conditions on which a producer organisation may entrust to third parties the performance of the tasks set out in Article 11 of Regulation (EC) No 2200/96.'

11. The preamble to Regulation No 1432/2003, in its relevant parts, reads:

'(7) A producer organisation may not be able to ensure directly in an efficient manner that all its activities take place. Member States should be authorised to lay down appropriate rules.

(8) The main and essential activities of a producer organisation should relate to the production of its members. However, producer organisations should be allowed to engage in other activities, whether or not of a commercial nature, within certain limits.'

II – Facts, procedure and the questions referred

12. The main proceedings concern a decision by the United Kingdom Rural Payments Agency (the 'RPA') withdrawing recognition of Fruition PO Limited ('Fruition') as a PO pursuant to Regulation No 2200/96.

3 — Commission Regulation (EC) No 1432/2003 of 11 August 2003 laying down detailed rules for the application of Council Regulation (EC) No 2200/96 regarding the conditions for recognition of producer organisations and preliminary recognition of producer groups (OJ 2003 L 203, p. 18).

13. The referring court states that, in its 2003 application to the RPA for recognition as a PO, Fruition provided the following information regarding its structure, decision making, assets and activities:

'[Fruition] has no parent company or subsidiaries but it has a marketing agreement with Northcourt Group Ltd, a company whose membership is very similar (but not the same as) [Fruitions's]. Northcourt Group Ltd uses Worldwide Fruit (WWF) (in which it has a 20% share) [4] as its marketing agent. WWF employs Marketing, Technical, QA, Computer, Planning and Admin staff who provide services to [Fruition].

…

Ongoing policy decisions are taken by the Board of Directors who are nominated by and elected from the membership. … Members' voting rights are based upon their throughput with [Fruition] but are limited in the case of any single member to a maximum of 10% of the total.

…

Storage, packaging and marketing plans are formulated by WWF personnel and agreed by Northcourt Group and [Fruition]. Storage and packing for the 100+ members takes place in approximately 30 major storage and 10 major packhouse locations, all owned by individual members …'

14. In November 2003, Fruition applied for EU funding administered by the RPA. In December 2003, the RPA recognised Fruition as a PO pursuant to Regulation No 2200/96 and, in January 2004, the operational programme presented by Fruition was approved, with the result that it was granted the requested EU funding.

15. In 2005 and 2006, the Commission services carried out two audits in the United Kingdom which led to a finding that a number of POs had failed, in some respects, to meet the conditions for recognition under Regulation No 2200/96. Following the audits, the Commission refused to pay in full the aid which had been granted to POs located in the United Kingdom. As concerns Fruition, in a communication to the UK authorities, the Commission stated inter alia:

'The 101 members of [Fruition] own nearly 100% of Northcourt Fruit Ltd. This company owned 50% of Worldwide Fruit (WWF). The other 50% is held by a company owned by farmers in New Zealand. There is no agreement between [Fruition] and that company. WWF markets nearly 100 per cent of [Fruition's] produce. WWF is also responsible for the organisation of the movement, sorting, packing, and quality assurance of produce, including overall production control on behalf of [Fruition]. Technical services and invoicing are also carried out by WWF. Around GBP 150 000 is charged to [Fruition] for the above services by WWF. It is clear that WWF is at the heart of the whole organisation and performs all the activities that a PO should normally carry out. …

The Commission services are of the opinion that [Fruition] did not meet the conditions for recognition because the activities of the producer organisation are carried out by WWF without being entrusted by Fruition to do so. As well as this issue, there remains a problem in respect of the structure, i.e. the producer members of Fruition do not have a majority vote on decisions concerning WWF, which is in contradiction with Article 11(1)(d)(3) of Regulation (EC) No 2200/96.'

16. Following the Commission audits, the RPA first decided to suspend, and then to withdraw, the recognition of Fruition as a PO.

4 — At the time of withdrawal of the recognition, however, Northcourt held a 50% share in WWF.

17. Fruition brought proceedings contesting that decision, disputing the assertion that, under Regulation No 2200/96, producer members were required to have ultimate control over the activities which a PO may assign to a contractor.

18. In its order for reference, the High Court highlights the complex factual background to the case. In fact, the relationship between Fruition, Northcourt and WWF could not be clearly ascertained in all its aspects.

19. Between Fruition and Northcourt, there existed only a draft marketing agreement concluded on January 2004, which, however, was never executed. Pursuant to Clause 7 of that draft agreement, Northcourt was to have 'an absolute and uncontrolled discretion as to the manner in which it complies with its obligations [t]hereunder and may employ and pay such sub-agents or independent contractors as it shall in its discretion think fit'.

20. The national court was also unable to establish whether there was any contractual relationship between Fruition and WWF. With regard to the relationship between Northcourt and WWF, on the other hand, the High Court found, in contrast, that there existed an agreement, concluded in 2000, which 'gave WWF control vis-à-vis Northcourt in the same way as the terms of the draft 2004 agreement gave Northcourt control vis-à-vis Fruition.'

21. Entertaining doubts as to whether a PO must — in order to satisfy the conditions for recognition under Regulation No 2200/96 — retain control over the activities of its contractors and, if so, to what degree, the High Court decided to stay the proceedings and refer the following questions for a preliminary ruling:

'1. In circumstances where

   a. a Member State was considering recognition of a body as a producer organisation under Article 11 of Council Regulation 2200/96;

   b. the body had aims and rules of association complying with the requirements of Article 11;

   c. producer members of the body received all the services required to be provided to them by a producer organisation under Article 11; and

   d. the body had engaged contractors to provide a substantial proportion of such services

   was Article 11 to be interpreted, consistently with the principle of legal certainty, as requiring the body to have a degree of control over the contractors?

2. If the answer to question 1 is "yes", what degree of control was Article 11 to be interpreted as requiring?

3. In particular, did the body have the degree of control, if any, required by Article 11 in circumstances where

   a. the contractors were:

      (1) a company 93% of the shares in which were held by members of the body; and

      (2) a company 50% of the shares in which were held by the first company and whose constitution provided that decisions taken by the company should be taken on the basis of unanimity;

b. neither company was subject to a contractual obligation to comply with the body's instructions to them in relation to the activities in question; but

c. as a consequence of the shareholding structure described above, the body and the contractors operated on the basis of consensus?

4. Is it relevant to the determination of the above questions that:

a. Article 6(2) of Commission Regulation 1432/03, laying down detailed rules for the application of Council Regulation 2200/96 regarding the conditions for recognition of producer organisations, expressly provided at the relevant time that "Member States shall determine the conditions" on which producer organisations could entrust to third parties the performance of its tasks;

b. the Member State referred to in question 1 had at the relevant time failed to determine such conditions?'

22. Fruition, the Netherlands, the United Kingdom and the European Commission have submitted written and oral observations in the present proceedings.

III – Analysis

A – *Preliminary remarks*

23. Before commencing my legal analysis, I will undertake a brief examination of what, traditionally, has been the nature and purpose of POs within the Common Agricultural Policy ('CAP'), as this can provide important insights for interpreting the relevant provisions of Regulation No 2200/96.

24. Especially since the late seventies, one of the aims of the then European Economic Community was to encourage the grouping of producers,[5] with a view to overcoming certain structural deficiencies observed in the European agricultural markets. While the economic sectors of the processing and sale of agricultural products had already by that time reached a considerable level of concentration and organisation, the production sector was often fragmented and lacking in homogeneity and coordination. This situation had the effect, notably, of placing the primary sector in a position of relative subordination and weakness, as compared with the secondary and tertiary sectors.

25. Accordingly, Council Regulation (EEC) No 1360/78 of 19 June 1978 on producer groups and associations thereof[6] was adopted in order to promote greater centralisation in the supply of agricultural products in those Member States where the market was supplied by a very large number of smallscale holdings, or by insufficiently organised associations. As indicated in the preamble to that regulation, such structural deficiencies constituted an obstacle to the attainment of the CAP objectives inasmuch as they made it difficult to increase agricultural productivity, to promote technical progress, to ensure the rational development of agricultural production and optimum use of the factors of production, to ensure a fair standard of living for the agricultural community, and to stabilise markets.[7]

5 — In various legal instruments, the legislature has used the terms 'producer organisations' or 'groupings of producers' for what appears to be essentially the same concept. On this, see Olmi, G., *Politique agricole commune*, University of Brussels, Brussels, 1991[2], p. 109.

6 — OJ 1978 L 166, p. 1.

7 — OJ 1978 L 166, p. 1. See, in particular, recitals 2 to 8 in the preamble to Regulation No 1360/78.

26. Likewise, a number of regulations establishing common market organisations ('CMOs') for specific sectors of agriculture included provisions on POs: silkworm,[8] cotton,[9] bananas,[10] olive oil and table olives,[11] hops,[12] wine,[13] and — more importantly for the present case — fruit and vegetables.

27. Regulation No 2200/96, in particular, characterises POs as 'basic elements in the [CMO], the decentralised operation of which they ensure at their level'.[14] It assigns POs certain tasks and grants them the relevant powers — among which, most notably, the power to decide on the withdrawal of certain agricultural products from the market.[15] Moreover, in specific circumstances, a PO may request a Member State to make certain rules adopted by that PO also binding on producers who are established in the same area, but who do not belong to it.[16]

28. At the same time, the EU legislature has provided for significant financial aid to be granted to POs under the European Agricultural Guidance and Guarantee Fund ('EAGGF'), Guarantee Section.[17] In particular, Article 14 of Regulation No 2200/96 allows Member States to grant aid to newly formed POs to encourage their formation and to facilitate their administrative operation, as well as aid to cover part of the investment required to attain recognition, such aid being then reimbursed by the European Union. Article 15 of Regulation No 2200/96 provides, furthermore, that POs setting up an operational fund are to be granted Community financial assistance, which can then be used to finance operational programmes which have received prior approval from the competent national authorities. This latter form of financing can prove to be particularly valuable, in so far as it may, as a general rule, cover up to 50% of the expenditure incurred.

29. It thus appears that the EU legislature has traditionally given POs an important role to play within the CAP[18] and, more specifically, within the framework of Regulation No 2200/96. In order to enable them to fulfil this role in an effective manner, POs have been granted certain powers and given access to significant public funding.

8 — Council Regulation (EEC) No 707/76 of 25 March 1976 on the recognition of producer groups of silkworm rearers (OJ 1976 L 84, p. 1).

9 — Council Regulation (EEC) No 389/82 of 15 February 1982 on producer groups and associations thereof in the cotton sector (OJ 1982 L 51, p. 1).

10 — Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1).

11 — Council Regulation (EC) No 865/2004 of 29 April 2004 on the common organisation of the market in olive oil and table olives and amending Regulation (EEC) No 827/68 (OJ 2004 L 161, p. 97).

12 — Council Regulation (EC) No 1952/2005 of 23 November 2005 concerning the common organisation of the market in hops and repealing Regulations (EEC) No 1696/71, (EEC) No 1037/72, (EEC) No 879/73 and (EEC) No 1981/82 (OJ 2005 L 314, p. 1).

13 — Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organisation of the market in wine, amending Regulations (EC) No 1493/1999, (EC) No 1782/2003, (EC) No 1290/2005, (EC) No 3/2008 and repealing Regulations (EEC) No 2392/86 and (EC) No 1493/1999 (OJ 2008 L 148, p. 1).

14 — See recital 7 in the preamble to the regulation.

15 — See Article 23 of Regulation No 2200/96 and recital 16 in the preamble thereto.

16 — See Article 18 of Regulation No 2200/96 and recital 14 in the preamble thereto. Moreover, by virtue of Article 22 of that regulation, the Member State which has granted recognition and decided to extend the rules of a PO may also, in certain circumstances, decide that individuals or groups which are not members are to pay the organisation all or part of the financial contributions paid by its members.

17 — See Article 52(1) of Regulation No 2200/96.

18 — This is also true, *mutatis mutandis*, with regard to the Common Fisheries Policy: see, for example, Articles 5 to 12 of Council Regulation (EC) No 104/2000 of 17 December 1999 on the common organisation of the markets in fishery and aquaculture products (OJ 2000 L 17, p. 22).

30. A glance at the current legislation confirms that, even today, these considerations continue to hold true. In fact, the relevant provisions of the 'Single CMO Regulation'[19] — as amended by Council Regulation (EC) No 361/2008[20] (which also repealed Regulation No 2200/96) — are substantially equivalent to the provisions previously in force. The new provisions, too, confer a strong position on POs within the European agricultural markets.[21] POs are thus assigned important objectives, especially in the fruit and vegetables sector,[22] and receive major financial assistance, both from the EU budget and, as the case may be, from the Member States' budgets.[23]

31. Interestingly, the Single CMO Regulation contains rules on the outsourcing of their activities by POs. Article 125d of that regulation explicitly provides that 'Member States may permit a recognised [PO] in the fruit and vegetables sector or a recognised association of [POs] in that sector to outsource any of its activities, including to subsidiaries, given that it provides sufficient evidence to the Member State that doing so is an appropriate way to achieve the objectives of the [PO] or association of [POs] concerned'.

32. The core issue raised by the questions referred for a preliminary ruling in the present case is whether Regulation No 2200/96 rests on an equivalent premiss, notwithstanding the absence of any explicit provision to that effect.[24]

B – *Question 1*

33. By its first question, the referring court essentially asks the Court whether Article 11 of Regulation No 2200/96 requires a PO which has outsourced the essential activities under that regulation to retain control over its contractors in order to ensure that those activities are carried out effectively.

34. For the reasons given below, I consider that this question should be answered in the affirmative. Essentially, and as will be elaborated further, it follows in my view from the scheme of Regulation No 2200/96 and the wording of Article 11 thereof that POs are required to retain a degree of control over their contractors in order to ensure that the conditions for recognition under that regulation continue to be fulfilled.

19 — Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ 2007 L 299, p. 1).

20 — Council Regulation (EC) No 361/2008 of 14 April 2008 amending Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ 2008 L 121, p. 1).

21 — See, generally, von Rintelen, G., in Mögele, R., and Erlbacher, F. (eds.), *Single Common Market Organisation — Article by Article Commentary of the Legal Framework for Agricultural Markets in the European Union*, C.H. Beck et al., Munich, 2011, pp. 527 to 583, at p. 538.

22 — Article 122 of the Single CMO Regulation provides that Member States are to recognise producer organisations which (among other things): '(c) pursue a specific aim which may in particular, or as regards the fruit and vegetables sector shall, include one or more of the following objectives:
(i) ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity;
(ii) concentration of supply and the placing on the market of the products produced by its members;
(iii) optimising production costs and stabilising producer prices.'

23 — See, in particular, Article 103a et seq. of the Single CMO Regulation.

24 — Similar issues have also arisen in the context of other procedures before national courts. For example, the Inner House of the Scottish Court of Session dealt with the regulations on POs in *The Scottish Ministers* v *Angus Growers Limited* [2012] CSIH 92. The main legal issue in that case was, however, different from the key issue in the present proceedings, since it was concerned with the question whether the PO's failure to respect the recognition criteria was 'substantial'. Moreover, the legal provisions which were relevant in that case are laid down in legal instruments which are not applicable to the present proceedings (Council Regulation (EC) No 1182/2007 of 26 September 2007 laying down specific rules as regards the fruit and vegetable sector, amending Directives 2001/112/EC and 2001/113/EC and Regulations (EEC) No 827/68, (EC) No 2200/96, (EC) No 2201/96, (EC) No 2826/2000, (EC) No 1782/2003 and (EC) No 318/2006 and repealing Regulation (EC) No 2202/96 (OJ 2007 L 273, p. 1); and Commission Regulation (EC) No 1580/2007 of 21 December 2007 laying down implementing rules of Council Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1182/2007 in the fruit and vegetable sector (OJ 2007 L 350, p. 1)).

35. Before turning to these issues, I must emphasise at the outset that the freedom of producers to group together and to conduct their business as they see fit is not in question. The present case concerns only producers who have voluntarily decided to form a PO and have requested recognition as such under the terms of Regulation No 2200/96.

36. There is no provision in Regulation No 2200/96 which, expressly or implicitly, prohibits or limits the types of activity that POs are permitted to outsource. On the contrary, Regulation No 1432/2003 openly envisages such outsourcing as a possibility. [25] I thus agree with Fruition that a decision by a PO as to whether and on which terms to engage a contractor to carry out some activities on its behalf is a business decision, which in principle falls within the ambit of that PO's commercial freedom.

37. That does not mean, however, that such delegation is not subject to limits and conditions, which may derive with imperative force from the rules on the recognition of POs. Indeed, such recognition, granted by the competent national authorities where the relevant conditions are fulfilled, entails a number of consequences. As mentioned above, POs recognised under Regulation No 2200/96 are assigned a specific role within the market, which may well go beyond the mere pursuit of their members' collective interests. That is the reason why, in certain circumstances, the rules adopted by POs for their members on important matters such as production, marketing and environmental protection may, if the POs so request, be made binding also upon other producers who do not belong to those organisations but who are active in the same regions. [26]

38. It can accordingly be said that there exists a specific public interest in POs carrying out specific tasks and achieving certain results. For those purposes, recognition by the competent public authorities allows POs to access significant public funding.

39. In light of the above, the EU legislature has laid down rules for organisations which aspire to recognition as POs. These rules concern, inter alia, the objects of POs, as stated in their articles of association; their internal regulations; and their main activities. Checks regarding the fulfilment of these conditions are also provided for by the legislation.

40. The overarching aim of the regulatory framework is to ensure that POs are capable of performing the essential activities under Regulation No 2200/96 in such a way that the underlying general interests can be pursued effectively and the public sums employed are not dissipated, misused or even diverted by fraud.

41. Once recognised, a PO remains the sole entity which is responsible to the national and EU authorities for the performance of the essential activities under Regulation No 2200/96, as well as for the use of the public funds received. [27]

42. If it were permissible for POs to let third parties carry out the activities entrusted to them autonomously, free from any possible interference on the part of the PO, the guarantees established by the EU legislature for the proper and effective performance of those activities would be severely restricted. The POs, of course, would still be responsible in law for any inadequacy but, de facto, they would be unable to remedy such inadequacy, since in practice they would be deprived of any means either of influencing the way in which the activities in question would be carried out, or of ensuring that the public resources granted to them would in fact be used to further the objectives sought by Regulation No 2200/96. In this context, it must be stressed that, by seeking recognition, POs enter

25 — See Article 6(2) of Regulation No 1432/2003 and recital 7 in the preamble thereto.

26 — See Article 18 of Regulation No 2200/96.

27 — In this regard, recital 10 in the preamble to Regulation No 2200/96 also emphasises that POs should be given 'greater responsibility for their financial decisions'.

into a special commitment vis-à-vis the national and EU authorities and, as a consequence, those authorities regularly review compliance with the applicable regulations and, in the case of failure, may penalise a PO or impose sanctions.[28] No such powers of control or coercion accrue to those authorities, however, with respect to contractors (or subcontractors) hired by a PO.

43. It would thus seem an inherent requirement of Regulation No 2200/96 that POs retain a degree of control over the contractors (and, as the case may be, the subcontractors) they have engaged to carry out the essential activities under Regulation No 2200/96.

44. Most importantly, this condition of control applies only with regard to the activities which a grouping of producers is required to perform in order to be recognised as a PO (for example, the marketing of the entirety of their members' production and the supply of the technical means for storing and packaging their produce).[29]

45. Here one must add that, within certain limits, POs are entitled to engage in other activities — whether or not of a commercial nature — beyond those contemplated in Regulation No 2200/96.[30] It seems to me that a control requirement would not necessarily apply to such additional activities. That is to say, unless the carrying out of those activities will affect, directly or indirectly, the proper performance of the essential activities under that regulation, there is no need to restrict the commercial freedom of POs any further.

46. Finally, it is not only the scheme and objective of Regulation No 2200/96 that support my conclusion as to the existence of a control requirement under Article 11 of that regulation. Indeed, as has been argued by the governments of the United Kingdom and of the Netherlands, as well as by the Commission, such a requirement can also be deduced from a contextual interpretation of that very provision. This contention is based on two hypotheses.

47. On the one hand, Article 11(1)(d)(3) states that the rules of association of POs must 'enabl[e] the producer members democratically to scrutinise their organisation and its decisions'. This provision is difficult to reconcile with the idea that, by means of a contractual agreement, a PO might grant a contractor complete autonomy to carry out the tasks entrusted to it: because, if the PO did so, the producer members would be de facto deprived, for the duration of the agreement, of any power to scrutinise the decisions taken by the contractor on the PO's behalf.

48. It is true — as Fruition argues — that the decision whether and on which terms a contractor could be engaged would still be subject to democratic scrutiny. Yet, this would seem to be a particularly narrow reading of Article 11(1)(d)(3), since its scope would be confined to the very basic decisions to be taken by a PO. The general wording of the provision does not support such a restrictive interpretation.

49. Article 11(2) also supports the contention mentioned in point 46 above. That provision emphasises two key concepts in the scheme of Regulation No 2200/96: (i) the effectiveness of the activities which POs must perform for their members and (ii) the existence of sufficient relevant evidence thereof.

28 — See, among others, Articles 14(5) and (6), 16(5), 18(6) of Regulation No 2200/96 and Articles 13(3) and 21 of Regulation No 1432/2003.

29 — See Article 11(1)(c)(3) and 11(2)(d) of Regulation No 2200/96, as well as recital 11 in the preamble thereto. See also Article 6(1) of Regulation No 1432/2003.

30 — See recital 8 in the preamble to Regulation No 1432/2003.

50. Regarding the first concept, Article 11(2) states that POs must 'effectively enable their members to obtain technical assistance in using environmentally-sound cultivation practices', 'effectively provide their members with the technical means for storing, packaging and marketing their produce' and 'ensure proper commercial and budgetary management of their activities'.[31] Regarding the second concept, Article 11(2) requires POs to provide 'the relevant evidence [of meeting the conditions for recognition]' and 'sufficient evidence that they can carry out their activities properly, both over time and in terms of effectiveness'.

51. It would seem to me that POs would be neither able to ensure that those activities are effectively and properly performed nor, a fortiori, in a position to produce adequate evidence of this, unless they retain some possibility of oversight with regard to the activities entrusted to contractors.

52. That approach was also adopted by the General Court when interpreting the EU rules relating to the EAGGF. It upheld a Commission decision which had, among other things, stated that the marketing of production within the meaning of Article 11 of Regulation No 2200/96 implied that the PO exercised genuine control over the conditions of sale and sales prices. The General Court also held that the possibility of delegating a task to a third party constituted a particular method of performance of the obligation in question and did not have the effect of discharging the PO from its obligations.[32]

53. On the basis of the foregoing, I propose that the Court should interpret Article 11 of Regulation No 2200/96 as requiring a PO which has outsourced the essential activities under that regulation to have a degree of control over its contractors in order to ensure that those activities are carried out effectively.

C – *Questions 2 and 3*

54. The second and third questions posed by the referring court, which can be examined together, concern the degree of control that a PO must have over its contractors in order to meet the conditions laid down in Article 11 of Regulation No 2200/96. In particular, the referring court asks whether a PO exerts the required degree of control where the PO and its contractor have shareholders in common and, as a consequence, decisions are taken by consensus, even though the contractor is under no contractual obligation to comply with the PO's instructions in relation to the activities to be performed.

55. In my opinion, the answer to these questions can be inferred from a comprehensive reading of the provisions examined above. In the following, I will explain why, to my mind, the control requirement under Article 11 of Regulation No 2200/96 is not met where there is no genuine possibility for the PO to supervise its contractor's activities and, where appropriate, to intervene in order to ensure that the essential activities under Regulation No 2200/96 are carried out effectively.

56. In my proposed answer to the first question, I have tried to illustrate that a PO must have a degree of control over its contractors in order to ensure that those activities are carried out effectively.

31 — For completeness, I note that this requirement of effectiveness is also mentioned in recital 7 in the preamble to Regulation No 2200/96 and in Article 6(1) and in recital 6 in the preamble to Regulation No 1432/2003.

32 — Case T-432/07 *France* v *Commission* [2009] ECR II-188, paragraphs 56 to 59.

57. In this respect, the legal requirements established by Article 11 must be complied with not only at the time when a PO applies for recognition, but throughout its entire existence. The only exceptions to this rule are specifically provided for in the regulation. [33]

58. To this end, POs must be able to provide, at any time, proof that they satisfy the relevant conditions. Article 11(2)(b), in fact, makes it clear that there must, for example, be sufficient evidence that POs carry out their activities properly 'over time'. Article 12 of Regulation No 2200/96, in addition, provides that Member States are to carry out checks at regular intervals in order to ascertain that recognised POs continue to comply with the terms and conditions set out in the regulation. Those checks may even, in the event of non-compliance, entail the imposition of penalties which can be as severe as the withdrawal of recognition. [34]

59. For these reasons, I take the view that a PO cannot possibly comply with the terms of Article 11 of Regulation No 2200/96 unless it remains capable of intervening vis-à-vis its contractors (and subcontractors) at all times, in order to ensure the proper performance of the activities outsourced.

60. It would seem to me that there are two ways in which such powers of supervision and intervention on the part of POs can be ensured: first, where a contractor is wholly owned by the PO and this ownership structure remains unaltered for the entire period in which the contractor carries out the tasks conferred upon it by the PO. In this case — subject to verification that, under national laws, the PO is actually capable, by dint of such ownership, of exerting immediate and decisive influence over its subsidiary — I would consider that the criterion of control is fulfilled. In that situation, the contractor would act as a *longa manus* of the PO and the allocation of tasks between the different levels of the corporate structure would merely constitute an issue of internal organisation. The contractor would necessarily execute the will of the PO, and there would be no risk of disagreement or diverging commercial interests between the two entities. Second, a PO can have the required degree of control by means of a contractual arrangement. Indeed, in my view, an explicit agreement between the parties would have the beneficial characteristics of stability and legal certainty, which are important to ensure that, for the entire duration of the contract, a PO will maintain the relevant powers of supervision and, if necessary, of intervention.

61. The form of such an arrangement and the degree of control to be regarded as sufficient depend on the specific circumstances of each case and thus cannot be described a priori and in general terms.

62. In my opinion, there is no specific form of agreement which is required under the EU rules. In fact, it is not even necessary for such a contractual arrangement always to be incorporated in a written document. An oral contract, if valid under national law, may indeed suffice, although there may be difficulties in providing adequate evidence of its existence. [35]

63. In any event, irrespective of the form of the agreement, a sufficient degree of control cannot be established unless it is possible under the agreement for the PO to issue binding instructions to its contractors, at least with regard to the essential activities under Regulation No 2200/96. In the absence of such a right, the PO would have no means of intervening, in due time, to ensure the

33 — See, for example, Article 13 of the regulation which allows POs recognised under the previous legal instrument (Regulation (EEC) No 1035/72 of 18 May 1972 on the common organisation of the market in fruit and vegetables (OJ, English Special Edition 1972 (II), p. 437)) to continue operating for a transitional period, even though they do not comply with all the conditions set out in Article 11. In addition, Article 14 provides a transitional period for newly formed POs and POs previously not recognised under Regulation No 1035/72.

34 — See, to this effect, also Articles 20 and 21 of Regulation No 1432/2003.

35 — On this issue, Fruition, in its 2003 application for recognition, referred to an existing marketing agreement with Northcourt. The High Court of Justice, however, only found evidence of the (non-executed) draft agreement of January 2004 between the two parties. It remains for the national court to establish the existence and content of the marketing agreement mentioned in the 2003 application lodged by Fruition.

continued fulfilment of the requirements imposed upon POs by the relevant EU rules. As Fruition itself acknowledges in its observations, the powers left to the POs would be merely those of *ex post* intervention: for example, non-renewal or early termination of the contract, or, if applicable, judicial proceedings for damages in breach of contract or tort.

64. The means of redress referred to by Fruition cannot, therefore, be considered adequate. In the first place, they can at most limit the negative consequences stemming from conduct on the part of a contractor who is in breach of contract or of the law. Neither the producer members nor the management of the PO, in fact, would be capable of *preventing* wrongdoing by a contractor, even if they were aware of the contractor's proposed course of action and were openly opposed to it. In the second place, any compensation which could be obtained by the PO through legal proceedings could perhaps compensate it for its losses, but would never be able to remedy the harm which might have been inflicted on the market as such. As mentioned above, POs do not only pursue the collective interests of their members: they are also meant to implement certain activities to the benefit of the market as a whole.

65. As concerns the actual degree of control that a PO should retain, it is my contention that this depends very much on the nature and scope of the outsourced activities, as well as on all the relevant circumstances of the case (such as the market situation, business strategies and needs, length of the contract, and so on). Nevertheless, I see no reason why a PO need necessarily concern itself with the specific details of the day-to-day commercial operations entrusted to contractors. Under normal circumstances, a simple power to intervene in the (most) fundamental choices to be made with regard to the outsourced activities can be considered sufficient to fulfil the requirements of Article 11 of Regulation No 2200/96.

66. I consider that it is for the national court, in each case, to verify, after having reviewed all the relevant facts, whether a PO has retained a degree of control which is sufficient under Article 11 of Regulation No 2200/96.

67. That said, since the crucial issue raised by the referring court in its second and third questions is whether the degree of control required under Article 11 of Regulation No 2200/96 is fulfilled in circumstances such as those of the case before it, I will seek to assist the court in this respect.

68. I would say that the circumstances described by the referring court are not, in themselves, sufficient to satisfy the condition of control required under Article 11. Indeed, it is my understanding that neither Northcourt nor WWF is wholly owned by Fruition; nor are those companies contractually obliged to follow the instructions given to them by the PO.

69. Concerning the first issue, the mere fact that the contractor and the PO have shareholders in common and/or interlocking directorates does not — unlike full ownership by the PO — constitute a sufficient guarantee in this regard. As a matter of fact, corporate structures and shareholdings may vary over time, and the interests of the two undertakings, which at a given moment might perfectly coincide, may well diverge in the future. More importantly, even when (some or all of) the producer members hold a majority stake in the contractor, there is still no certainty that the final decision taken by the latter will always reflect the will of the majority of the producer members. As the referring court rightly observes, because of the different memberships between the two entities,

depending on the different quotas that each producer may have in the two entities,[36] and of the possibility of diverging interests among the various members, there may be cases in which the position expressed by the majority of the producer members becomes a minority opinion among the contractor's shareholders.[37]

70. Furthermore, a simple practice, adopted by a PO and its contractor, of taking decisions by consensus does not provide any assurance that this decision-making system will be followed at all times. I doubt that, even with a binding contractual rule between the parties prescribing unanimity, the control retained by the PO could be considered sufficient under Regulation No 2200/96. As the referring court correctly points out, clauses requiring unanimity may lead to the paralysis of the entity: the status quo is prolonged unless all the parties agree with another course of action. In such circumstances, the PO would be unable to act to ensure compliance with the relevant legal and contractual rules unless the contractor itself agrees with the action demanded by the PO. Rules prescribing consensus or unanimity have the effect, in substance, of placing two entities in a symmetrical position, whereas the relationship between a PO and its contractor should be asymmetrical. Under Regulation No 2200/96, it is the PO that should retain powers of control over the contractor and not vice versa. In other words, as the United Kingdom pointed out during the hearing, in the event of disagreement between the two entities, it must be the PO which is empowered to take the ultimate decision.

71. On the second issue, regarding the existence of a contractually binding agreement between the parties, I would observe that an arrangement as found in Clause 7 of the draft marketing agreement between Fruition and Northcourt would certainly fall short of the degree of control required under Article 11 of Regulation No 2200/96. Pursuant to that clause, Northcourt would have 'an absolute and uncontrolled discretion as to the manner in which it complies with its obligations [t]hereunder and may employ and pay such sub-agents or independent contractors as it shall in its discretion think fit'. Such absolute and uncontrolled discretion in the execution of a contract is manifestly at odds with the concept of control imposed by Article 11. Moreover, an unfettered discretion to hire subcontractors might at times prove problematic, unless some form of control by the PO also over those subcontractors is provided for. Indeed, there is a substantial risk that the existence of a chain of contractors and subcontractors would further reduce any actual possibility of supervision and intervention by the PO.

72. Fruition contends, nevertheless, that such an interpretation of Article 11 of Regulation No 2200/96 would essentially ignore market reality in so far as a PO cannot in practice, in the fast-paced sale of fruit and vegetables, control all the details of every commercial transaction. Fruition further argues that such a reading of the regulation would negate the authority of the agent to bind its principal, thus disregarding standard contractual practice.

36 — In this context, I note that, under Article 14(2) of Regulation No 1432/2003, '[n]o member of a producer organisation may have more than 20% of the voting rights. However, the Member State may increase this percentage up to a maximum of 49% in proportion to the member's contribution to the value of the marketed production of the [PO]'.

37 — In this regard, Article 14(1) of Regulation No 1432/2003, bearing the title 'democratic accountability of producer organisations', states that 'Member States shall take such measures as are required to avoid any abuse of power or influence by one or more members over the management and operation of a producer organisation.' This rule is echoed in recital 14 of the preamble to that regulation, according to which 'Member states should take steps to ensure that a minority of members who may account for the bulk of production in the producer organisation do not unduly dominate its management and operation'. I read these provisions as implying a fortiori that a majority of the producer members cannot become a minority when it comes to taking crucial decisions concerning the operations of a PO.

73. I am not persuaded by these arguments. To begin with, Regulation No 2200/96 requires only such a degree of control as is essential to ensure that POs can comply with the conditions stated in the regulation. This does not mean that POs must be able to interfere on all aspects arising in the ordinary course of their contractors' business; nor that contractors cannot enjoy a (more or less) ample margin of discretion in fulfilling the tasks assigned to them (such as the determination of sales prices and the choice of buyers). Equally, it is not implied that a contractor cannot be granted the authority of agent, and as such conclude contracts on behalf of its principal, thereby binding the PO.

74. In fact, for POs to fulfil the control requirement under Article 11, it is not even necessary for them actually to have recourse to their powers of control: the very fact that they could do so would, in my view, suffice in order to satisfy the requirement. It is, however, crucial that POs retain the possibility of intervening, where appropriate, to ensure the effective performance of the essential activities under Regulation No 2200/96.

75. Therefore, I conclude that the degree of control required under Regulation No 2200/96 is fulfilled either where the contractor is wholly owned by the PO for the entire duration of the contract, and the PO, by dint of such ownership, is actually capable of exerting immediate and decisive influence over its subsidiary; or where a contractual agreement exists allowing the PO to issue binding instructions vis-à-vis its contractor.

76. In light of the foregoing, I suggest that the Court reply to the second and third questions that Article 11 of Regulation No 2200/96 requires a PO to retain the power to supervise its contractors and, where appropriate, to intervene in order to ensure the effective performance of the essential activities under that regulation. It will be for the national court to determine in each case whether the degree of control retained by a PO fulfils this requirement. The mere fact that a PO and its contractors have shareholders in common and that, as a consequence, decisions are taken by consensus does not meet the condition of control under the above provision.

D – *Question 4*

77. By its fourth question, the national court seeks to ascertain whether the fact that a Member State has failed to implement Article 6(2) of Regulation No 1432/2003 — requiring it to determine the conditions on which POs could entrust the performance of their activities to third parties — has any bearing on the reply to the previous questions.

78. This question goes back to the fact that the United Kingdom did not issue any implementing rule to that effect before December 2009, which was well after the RPA had decided to withdraw recognition from Fruition.

79. I take the view that absence of any domestic rule implementing Article 6(2) of Regulation No 1432/2003 has no bearing on the interpretation or application of Article 11 of Regulation No 2200/96.

80. As already stated, the requirement that a PO should have a degree of control over its contractors stems directly from the scheme and — even if only implicitly — the wording of Article 11 of Regulation No 2200/96.

81. The degree of control required by Regulation No 2200/96 represents the minimum threshold considered essential by the EU legislature in order to ensure compliance with the rules laid down in that basic regulation with regard to the functioning of POs.

82. Article 6(2) of Regulation No 1432/2003, in turn, allows Member States to introduce further rules requiring a more stringent degree of control, and to lay down provisions of a procedural nature or concerning evidence. In other words, Member States can go beyond the minimum imposed by Article 11 of Regulation No 2200/96, or merely clarify and define the scope and limits within which POs are permitted to outsource the essential activities under Regulation No 2200/96. This possibility for Member States to introduce further implementing rules is consistent with the fact that the system established by Regulation No 2200/96 is partially decentralised. Among other things, Member States are required to examine and decide on requests for recognition submitted by POs, to approve the funding requested by POs, and regularly to carry out controls to ensure compliance with the relevant rules.

83. However, since Article 6(2) is laid down in an implementing regulation, it cannot affect any obligation imposed by a provision laid down in the basic regulation; such as Article 11 of Regulation No 2200/96.[38] In addition, it is settled case-law that an implementing regulation must, if possible, be given an interpretation consistent with the basic regulation.[39]

84. Contrary to what is argued by Fruition, it thus cannot be inferred from the use of the prescriptive mode ('shall') in Article 6(2) of Regulation No 1432/2003 that that provision formally imposes a mandatory obligation on Member States, failure to fulfil which would nullify the obligation imposed on POs by the basic legislative instrument.

85. There is, furthermore, nothing in Regulation No 2200/96 to suggest that the control requirement is dependent on the adoption of implementing rules by the Member State concerned. More importantly, a different reading of Article 6(2) of Regulation No 1432/2003 could not be reconciled with the spirit and scheme of Regulation No 2200/96, as described above.

86. Finally, I am not persuaded by Fruition's argument that the interpretation proposed here would constitute an impermissible retrospective application of the guidance rules issued by the UK authorities in December 2009 and, as such, would run counter to the principle of legal certainty.

87. It is sufficient to note, once again, that the requirement of control is inherent in Article 11 of Regulation No 2200/96: a provision laid down in a legislative act of the European Union and, in consequence, by virtue of Article 288 TFEU, binding in its entirety and directly applicable in all the Member States. Moreover, Regulation No 2200/96, duly published in the *Official Journal of the European Union*, pre-dates the facts at issue in the main proceedings. Incidentally, I note that Article 21(2) of Regulation No 1432/2003 affords some legal protection to those organisations from which, despite the fact that they have acted in good faith, recognition is withdrawn.[40]

88. For these reasons, I propose that the Court state in answer to the fourth question posed by the national court that failure by a Member State to implement Article 6(2) of Regulation No 1432/2003, requiring it to determine the conditions on which POs may entrust the performance of their tasks to third parties, does not have any bearing on the replies to the previous questions.

38 — In this respect, see among many, Joined Cases 6/88 and 7/88 *Spain and France* v *Commission* [1989] ECR 3639, paragraph 15, and Case C-303/94 *Parliament* v *Council* [1996] ECR I-2943, paragraph 23.

39 — Case C-90/92 *Dr Tretter* [1993] ECR I-3569, paragraph 11, and Case C-32/00 P *Commission* v *Boehringer* [2002] ECR I-1917, paragraph 53.

40 — The provision, in its relevant part, reads: 'A recognised producer organisation which has acted in good faith shall wholly retain the rights which devolve from its recognition right up to the moment that its recognition is withdrawn and, in the case of the aid schemes referred to in Council Regulation (EC) No 2201/96, Articles 2 and 6a, and also Article 1 of Council Regulation (EC) No 2202/96, until the end of the current marketing year.'

IV – Conclusion

89. In light of the foregoing, I propose that the Court answer the questions referred for a preliminary ruling by the High Court of Justice of England and Wales, Queen's Bench Division (United Kingdom) as follows:

(1) Article 11 of Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables must be interpreted as requiring a producer organisation which has outsourced the activities essential for its recognition under that regulation to have a degree of control over its contractors in order to ensure the effective performance of those activities.

(2) Article 11 of Regulation No 2200/96 requires a producer organisation to retain the power to supervise its contractors and, where appropriate, to intervene in order to ensure the effective performance of the activities essential for its recognition under that regulation. It is for the national court to determine in each case whether the degree of control retained by a producer organisation fulfils this requirement. The mere fact that a producer organisation and its contractors have shareholders in common and that, as a consequence, decisions are taken by consensus does not meet the conditions of control under that provision.

(3) Failure by a Member State to implement Article 6(2) of Commission Regulation (EC) No 1432/2003 of 11 August 2003 laying down detailed rules for the application of Council Regulation (EC) No 2200/96 regarding the conditions for recognition of producer organisations and preliminary recognition of producer groupings, under which Member States are required to determine the conditions on which a producer organisation may entrust to third parties the performance of the tasks set out in Article 11 of Regulation No 2200/96, does not have any bearing on the replies to the previous questions.