

OPINION OF ADVOCATE GENERAL

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delivered on 7 July 2011¹

I — Introduction

payment which a farmer can claim depends³ on, *inter alia*, the amount of support he received in the period before the reform, that is to say, in 2000 to 2002.

1. One of the objectives of the common agricultural policy of the European Union ('CAP') is to ensure a fair income for farmers.² For that purpose the Union makes available in its budget funds from which farmers can be granted direct income support. The original product-related support was gradually 'decoupled' after the 2003 reform and consolidated into a 'single payment'. This aimed to persuade farmers to be guided by the market, not by the aid, when choosing the products to be cultivated. The amount of the single

2. In order for newcomers to farming to be able to obtain the single payment, the Member States may grant them reference amounts from a so-called 'national reserve' which is constituted by reducing the reference amounts allocated to existing recipients of support. In that connection the Spanish Tribunal Supremo (Supreme Court) has asked the Court to clarify the question whether the Member States may regard only 'young'

3 — In the present case the relevant regulation by date is 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 L270, p. 1, 'Regulation No 1782/2003' or 'Regulation No 1782/2003 on the single payment'). That regulation was replaced by Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003 (OJ 2009 L 30, p. 16).

1 — Original language: German.

2 — Article 39(1)(b) TFEU (formerly Article 33(1)(b) EC).

farmers (less than 40 years of age) as ‘new-comers’⁴ who, when they set up their first business, were entitled to another Union support, namely the so-called ‘setting-up support’⁵ which serves rural development.

4. Recital 29 of the preamble to the regulation states that ‘in order to establish the amount to which a farmer should be entitled under the new scheme, it is appropriate to refer to the amounts granted to him during a reference period. To take account of specific situations, a national reserve should be established. That reserve may also be used to facilitate the participation of new farmers in the scheme. The single payment should be established at farm level.’

II — Legal context

5. The first paragraph of Article 33 ‘Eligibility’ of Regulation No 1782/2003 reads as follows:

A — *Union law*

‘Farmers shall have access to the single payment scheme if:

1. Regulation No 1782/2003 on the single payment

...

(c) they have received a payment entitlement from the national reserve or by transfer.’

3. Regulation No 1782/2003⁶ to a large extent consolidates the previous product-related direct payments for farmers, which were provided for under the common agricultural policy, into a single payment.

6. Article 42 ‘National reserve’ provides as follows:

4 — The German version of Regulation No 1782/2003 uses the rather general term ‘Betriebsinhaber’ where other language versions use more graphic terms such as ‘farmer’, ‘agriculteur’, ‘agricoltore’, ‘agricultor’ or ‘landbouwer’. The definition in Article 2(a) of the regulation applies to all language versions, so that it covers not only natural persons, but also legal persons and associations. I shall use the word ‘farmer’ in the following observations.

5 — Under Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2005 L 277, p. 1, ‘Regulation No 1698/2005’ or ‘Regulation No 1698/2005 on rural development’).

6 — Cited in footnote 3.

‘(1) Where necessary, a Member State shall proceed ... to a linear percentage reduction of the reference amounts ... This reduction shall not be higher than 3 %.

...

(3) Member States may use the national reserve to grant, in priority, reference amounts to farmers who commence their agricultural activity after 31 December 2002, or in 2002 but without receiving any direct payment in that year, according to objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions

(7) Member States shall proceed to linear reductions of the entitlements in case their national reserve is not sufficient to cover the cases referred to in paragraphs 3 and 4.'

2. Implementing Regulation No 795/2004

(4) Member States shall use the national reserve for the purpose of establishing, according to objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions, reference amounts for farmers finding themselves in a special situation, to be defined by the Commission in accordance with the procedure referred to in Article 144(2).

7. Article 2(k) of Commission Regulation (EC) No 795/2004 of 21 April 2004 laying down detailed rules for the implementation of the single payment scheme provided for in Council Regulation (EC) No 1782/2003⁷ provides that

(5) Member States may use the national reserve for the purpose of establishing, according to objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions, reference amounts for farmers in areas subject to restructuring and/or development programs relating to one or the other form of public intervention in order to avoid abandoning of land and/or in order to compensate specific disadvantages for farmers in those areas.

'for the purposes of Articles 37(2) and 42(3) of Regulation (EC) No 1782/2003, "farmers commencing an agricultural activity" shall mean a natural or legal person that did not have any agricultural activity in his own name and at his own risk or must not have had the control of a legal person exercising an agricultural activity in the 5 years preceding the start of the new agricultural activity

In [the] case of a legal person, the natural person(s) who has the control of the legal person must not have had any agricultural activity in his own name and at his own risk or must not have had the control of a legal

...

7 — OJ 2004 L 141, p. 1, 'Implementing Regulation No 795/2004'.

person exercising an agricultural activity in the 5 years preceding the start of the agricultural activity by the legal person.’

(ii) setting up of young farmers;

...’

8. Article 6(1) of that Implementing Regulation provides as follows:

‘Where a Member State makes use of the options provided for in Article 42(3) and (5) of Regulation (EC) No 1782/2003, farmers may receive, in accordance with the conditions laid down in this Section and in accordance with the objective criteria laid down by the Member State concerned, payment entitlements from the national reserve.’

10. The first paragraph of Article 22 ‘Setting up of young farmers’ of that regulation provides as follows:

‘Support provided for in Article 20(a)(ii), shall be granted to persons who:

3. Regulation No 1698/2005 on support for rural development

(a) are less than 40 years of age and are setting up for the first time on an agricultural holding as head of the holding;

9. Article 20 of Regulation No 1698/2005⁸ forms part of Title IV ‘Rural Development Support’ and provides as follows:

(b) possess adequate occupational skills and competence;

‘Support targeting the competitiveness of the agricultural and forestry sector shall concern:

(c) submit a business plan for the development of their farming activities.’

(a) measures aimed at promoting knowledge and improving human potential through:

B — *Spanish law*

...

11. Article 1(1) of Royal Decree (Real Decreto) 1470/2007 of 2 November 2007 on the application of direct payments in the

⁸ — Cited in footnote 5.

agricultural and livestock-farming sectors,⁹ which was issued by the Spanish Council of Ministers on a proposal of the Minister for Agriculture, Fisheries and Food, states that the purpose of the Decree is to adopt basic rules for, inter alia, the single payment provided for in Regulation No 1782/2003.

12. Article 9(2) of the Royal Decree is worded as follows:

‘The following shall be entitled to single payments from the national reserve, provided that they satisfy the requirements laid down:

...

- (b) Young farmers who have set up their first business under a Rural Development Programme established under Council Regulation (EC) No 1698/2005 [on support for rural development] in one of the sectors, other than seed production, included in Annex VI of Council Regulation (EC) No 1782/2003 ... and have not previously received single payment entitlements from the National Reserve.’

13. Royal Decree 1470/2007 was repealed by Royal Decree 1612/2008 of 3 October 2008, which was in turn repealed by Royal Decree

1680/2009 of 13 November 2009. However, its provisions were incorporated in both the subsequent decrees.

III — The facts of the case and the question referred

14. According to the referring court, the Unió de Pagesos de Catalunya (Catalan Farmers’ Union) is the most representative agricultural trade body in Catalonia.

15. On 27 October 2008 it¹⁰ brought an action before the Tribunal Supremo for the annulment of, inter alia, Article 9(2)(b) of Royal Decree 1470/2007 because, for young farmers who wished to obtain the benefit of the single payment, it introduced a new requirement which was not included in the directly applicable Article 42(3) of Regulation No 1782/2003, which does not provide for the possibility of young farmers obtaining a single payment to be tied to the grant of aid for setting up a first business.

16. The Tribunal Supremo agrees with the Unió de Pagesos de Catalunya that Article 9(2)(b) of Royal Decree 1470/2007 creates a situation of inequality because it has

⁹ — Published in the *Boletín Oficial del Estado*, 3 November 2007.

¹⁰ — According to the statement of the Coordinadora de Organizaciones de Agricultores y Ganaderos – Iniciativa Rural del Estado Español (Confederation of Farmers’ and Cattle Breeders’ Associations – Spanish State initiative for rural development), which took part in the main proceedings and the proceedings before the Court of Justice.

the effect of discriminating amongst young farmers and is contrary to the principle of the priority of Union law.

IV — Legal assessment

A — Admissibility of the reference for a preliminary ruling

17. As the Tribunal Supremo considered that interpretation of Article 42(3) of Regulation No 1782/2003 by the Court was necessary, it stayed judgment and referred the following question to the Court for a preliminary ruling:

‘Is Article 9(2)(b) of Royal Decree 1470/2007 of 2 November 2007, which makes the opportunity to acquire entitlement to single payments from the national reserve subject to the condition that young farmers should have set up their first business under a Rural Development Programme established under Council Regulation No 1698/2005 of 20 September 2005, compatible with Article 42(3) of Council Regulation (EC) No 1782/2003 of 29 September 2003?’

18. The Coordinadora de Organizaciones de Agricultores y Ganaderos – Iniciativa Rural del Estado Español (‘the Confederation’), the Spanish, German, Greek and Austrian Governments and also the Commission took part in the proceedings before the Court. The Austrian Government submitted only written observations, while the other interested parties presented oral submissions as well as written observations.

19. The Tribunal Supremo states in its order for reference that it has no doubt whatsoever that interpretation of Regulation No 1782/2003 is relevant to the decision in the main proceedings. On the other hand, it observes that the Royal Decree 1470/2007 in issue has been repealed in the meantime and its provisions incorporated in later royal decrees, so that the disputed provision is relevant for future actions which may relate to the same question.

20. This immediately gives rise to doubt as to whether it is really necessary for the outcome to the main proceedings for the Court to reply to the question referred or whether the reply could be relevant only for future actions.

21. That doubt is increased by the observations of the Spanish Government, which has stated that, as Royal Decree 1470/2007 has been repealed in the meantime, the question referred is no longer relevant for a decision in the action brought by the Unió de Pagesos de Catalunya for the annulment of that Decree and is therefore inadmissible.

22. The Tribunal Supremo has consistently held that a direct action against general provisions serves to remove from the legal system unlawful legislation enacted by a legislative authority, and does not serve to determine individual claims. Therefore, according to the case-law, a direct action has no purpose where the disputed provision has already been removed from the legal system by other means at the date of the decision.

23. The Spanish Government adds that, consistently with that case-law, a previous action for annulment which had been brought by the Unió de Pagesos de Catalunya against the Royal Decree which had preceded Royal Decree 1470/2007 at issue here and had been repealed by the latter, was held by the Tribunal Supremo to have been disposed of and that court discontinued the proceedings. In addition, the Tribunal Supremo discontinued an action for annulment brought by another farmers' association against Royal Decree 1470/2007 on the ground that it had been repealed by Royal Decree 1612/2008. Therefore, in the opinion of the Spanish Government, the main proceedings serve no purpose and the action should be discontinued.

24. The Court therefore asked the Tribunal Supremo for clarification¹¹ as to how far a reply to the question referred is necessary for the decision in the main proceedings.

25. The Tribunal Supremo replied that the repeal of Royal Decree 1470/2007 did not cast doubt on the admissibility of the question referred. First, it repeats itself in so far as the subsequent decrees contain the same provision. Secondly, the case-law in which the Spanish Government seeks support is not relevant here because the repeal did not take place during the proceedings. Consequently the action brought by the Unió de Pagesos de Catalunya remains current.

26. The Court has consistently held that the preliminary ruling procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases upon which they are called to adjudicate.¹²

27. There is a presumption of relevance in favour of questions on the interpretation of Community law referred by a national court.¹³

12 — Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 40; Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 65; order of 14 October 2010 in Case C-336/08 *Reinke* [2010] ECR I-00130, paragraph 13; and Case C-137/08 *VB Pénzügyi Lizing* [2010] ECR I-10847, paragraph 37.

13 — Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 67; Joined Cases C-188/10 and C-189/10 *Melki* [2010] ECR I-5667, paragraph 27; and Case C-45/09 *Rosenblatt* [2010] ECR I-9391, paragraph 33.

11 — Pursuant to Article 104(5) of the Rules of Procedure.

28. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.¹⁴

29. In preliminary ruling proceedings, the function entrusted to the Court is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions.¹⁵

30. In so far as the Tribunal Supremo, in its reply to the Court's request for clarification, states that the question it has referred is relevant to the outcome because the substantive rule of Article 9(2)(b) of Royal Decree 1470/2007 at issue, which has been repealed in the meantime, was incorporated in the subsequent decrees, that rather confirms the first impression that the reply to the question is not necessary for the decision in main proceedings, but could become necessary only for decisions in possible future actions

against the subsequent decrees. In those circumstances, the question referred would be hypothetical and therefore inadmissible.

31. However, the Tribunal Supremo also stated that its case-law, according to which actions for the annulment of decrees which have been repealed in another way in the meantime serve no purpose, is not relevant here because the disputed Royal Decree 1470/2007 was not repealed during the proceedings; consequently the action in the main proceedings remains current. Further information would have been desirable as to whether, in Spanish law, decrees which are repealed before an action is brought can be annulled, but that is not possible if they are repealed during the proceedings. In view of the clear statement by the Tribunal Supremo that the action brought by Unió de Pagesos de Catalunya is still current, the question referred should however be regarded as relevant to the decision and therefore admissible.

B — Reply to the question referred

32. In essence, the question from the referring court is whether it is compatible with Article 42(3) of Regulation No 1782/2003 for a Member State to restrict to young farmers the option, pursuant to Article 42(3), of granting new farmers entitlement to single

¹⁴ — See the cases cited in footnote 13.

¹⁵ — Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 32; Case C-478/07 *Budejovický Budvar* [2009] ECR I-7721, paragraph 64; and Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 28.

payments from the national reserve, where those young farmers have set up their first business in the framework of a rural development programme on the basis of Regulation No 1698/2005.

recognised in the *Elbertsen*¹⁶ judgment the discretion of the Member States in using the national reserve.

1. Arguments of the parties

33. The Confederation and the Spanish, German and Austrian Governments propose that the answer to the question should be in the affirmative.

34. Article 42(3) of Regulation No 1782/2003 leaves it to the discretion of the Member States to grant new farmers single payments from the national reserve. If a Member State exercises that option, the scope of its discretion is restricted only in so far as it must apply objective criteria which ensure equal treatment of farmers and avoid disruption of the market and of competition. As Spain applies the criteria laid down by Article 22(1) of Regulation No 1698/2005 for granting setting-up support to young farmers, those requirements have been met. The Court has already

35. The Spanish Government also submits that interpretation of Regulation No 1782/2003 must take into account the realignment of the common agricultural policy arising from the 2003 reform. Since the reform there has been no clear differentiation between the two pillars of the CAP, namely, on the one hand, supporting market prices and incomes and, on the other, rural development. Rather, they supplement each other and overlap, but there is a clear shift of emphasis in favour of rural development.¹⁷ That is the real situation which the connection made in the contested provision aims to address.

36. With regard to the requirement of equal treatment, the Austrian Government points out that young farmers within the meaning of Article 22(1) of Regulation No 1698/2005 particularly deserve support and are therefore not in the same situation as other new farmers. In any case, unequal treatment would be objectively justified even in a similar

¹⁶ — Case C-449/08 [2009] ECR I-10241.

¹⁷ — The Spanish Government refers in particular to recital 1 of Regulation No 1698/2005, which states that 'a rural development policy should accompany and complement the market and income support policies of the common agricultural policy and thus contribute to the achievement of that policy's objectives as laid down in the Treaty'; and to recital 5 of Regulation No 1782/2003, which states that that regulation introduces a progressive reduction of direct payments and the resulting savings should be used to finance rural development.

situation, particularly because of the aim of promoting rural development. The German Government likewise sees no discrimination, which in the final analysis must be examined by the referring court.

reasons why those young farmers who first took up farming on the basis of the preceding Regulation No 1257/1999 should not have received support.

37. The German Government also points out that Article 2(k) of the Implementing Regulation No 795/2004 gives only a minimal definition of ‘farmers commencing an agricultural activity’ from amongst whom the Member States are to make their selection in accordance with objective criteria. The Member States’ discretion in laying down those criteria is also emphasized in Article 6(1) of the Implementing Regulation No 795/2004.

39. The Commission considers that Article 9(2)(b) of Royal Decree 1470/2007 is not compatible with Article 42(3) of Regulation No 1782/2003 because it is inconsistent with the principle of equal treatment. First, it takes into account only new farmers who are at the same time young farmers. Secondly, there is also discrimination among young farmers in that they are required to have begun farming on the basis of a programme for rural development and to farm in certain sectors.

2. Discussion

(a) Preliminary remarks

38. The Greek Government agrees in principle with the Confederation and the other governments and therefore considers that the Spanish provision is not compatible with Article 42(3) of Regulation No 1782/2003 because it takes account only of young farmers who received support on the basis of Regulation No 1698/2005 when they first set up, whereas there appear to be no objective

40. Article 9(2)(b) of Royal Decree 1470/2007 makes the allocation of entitlement to single payments from the national reserve subject to four conditions.

41. First, the recipients must be young farmers and, second, they must have set up

their first business under a rural development programme on the basis of Regulation No 1698/2005. As the order for reference shows, those two requirements refer to Article 22 of that regulation, which states that the support provided for in Article 20(a)(i) for young farmers¹⁸ is to be granted to persons who a) are less than 40 years of age and are setting up for the first time on an agricultural holding as head of the holding; (b) possess adequate occupational skills and competence, and (c) submit a business plan for the development of their farming activities.

42. Third, Article 9(2)(b) of Royal Decree 1470/2007 requires young farmers to work in a particular sector, namely one of those included in Annex VI of Regulation No 1782/2003, other than seed production. Fourth, young farmers must not have previously received single payments from the national reserve.

43. None of those four requirements is mentioned in Article 42(3) of Regulation No 1782/2003, which states that Member

States may use the national reserve to grant, in priority, reference amounts to farmers who commence their agricultural activity after 31 December 2002, or in 2002 but without receiving any direct payment in that year, according to objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions.

44. Although the referring court alludes in its order for reference to all four of the requirements in the Spanish decree, only the first two are the subject of the question referred. I shall therefore concentrate on the first two conditions, namely that the farmer must be a young farmer whose first farming business received support on the basis of Regulation No 1698/2005 for rural development. The reply to that question may render additional observations on the two other conditions either appropriate or unnecessary.

(b) Discretion as to ‘whether’

45. First of all, it must be observed that, according to Article 42(3) of Regulation No 1782/2003, the Member States have a discretion as to whether they exercise at all the option conferred by that provision, which

18 — The German version of Regulation No 1698/2005 uses in that connection the term ‘Junglandwirte’ in conformity with other language versions, and to distinguish them more succinctly from ‘new’ farmers I refer to them as ‘junge Landwirte’ (‘young farmers’).

states expressly that the Member States ‘may’ use the national reserve to grant, in priority, reference amounts to new farmers.¹⁹ That is also confirmed by Article 6(1) of the Implementing Regulation No 795/2004, which is worded as follows: ‘Where a Member State makes use of the options provided for in Article 42(3) and (5) of Regulation (EC) No 1782/2003 ...’

the main proceedings the Ministerio Fiscal²⁰ took the view that the option conferred upon the Member States by Article 42(3) of Regulation No 1782/2003 of granting entitlements from the national reserve was not limited to the target category of new farmers mentioned in Article 42(3), but priority had to be given to that category.

46. However, that does not make it clear whether and, if so, to what extent the Member States also have a discretion with regard to the rules governing the allocation of reference amounts, particularly in relation to the recipients.

48. The purpose of the national reserve and the general scheme of Regulation No 1782/2003 militate against that interpretation.

(c) The scope of Article 42(3) of Regulation No 1782/2003

47. Before the question of a discretion with regard to the ‘how’ can be considered, it is necessary to consider in more detail the scope of Article 42(3) of Regulation No 1782/2003. As appears from the order for reference, in

49. As is apparent from recital (29) of the preamble to that regulation, the national reserve serves to take account of special situations and may be used to facilitate the participation of new farmers in the single payment scheme. If Article 42(3) concerned not only new farmers, but all farmers, although new farmers were to be given priority, the special purpose of the national reserve would be disregarded. Unlike paragraphs (4) and (5) of Article 42, paragraph (3) would then contain no restriction whatever of the target category. As noted by the Greek Government, the national

19 — In *Elbertsen* (cited in footnote 16, paragraph 28) the Court held that Article 42(3) of Regulation No 1782/2003 expressly offers the Member States the possibility of using or not the national reserve in the situations referred to in that provision.

20 — Spanish Public Prosecutor’s Office.

reserve would fail in its purpose if it were initially constituted by means of a straight-line reduction in the reference amounts for all farmers and then redistributed to all farmers.

as that national provision takes into account only young farmers whose first farming business has received support on the basis of Regulation No 1698/2005 for rural development.

50. Rather, as the German Government correctly observes, the phrase 'in priority' refers to the relationship of paragraphs (3) to (5) of Article 42 of Regulation No 1782/2003 to each other. Whereas paragraph (4) imposes on the Member States a binding obligation to use the national reserve for farmers who are in a special situation, paragraphs (3) and (5) each contain an optional provision, but paragraph (3) takes priority over Paragraph (5), which relates to farmers in specific areas. Paragraph (7) requires the Member State to reduce on a straight-line basis entitlements from the national reserve if it is not sufficient to cover the cases referred to in paragraphs (3) and (4). There is no provision to that effect for the cases referred to in paragraph (5). They may be taken into account only if the national reserve is sufficient for the cases referred to in paragraphs (3) and (4).

(d) Discretion as to 'how'

52. So far as the admissibility of such a limitation of the category of persons entitled at the national level is concerned, Article 42(3) of Regulation No 1782/2003 leaves the Member State a certain discretion with regard to the actual rules for the allocation of reference amounts from the national reserve. That follows from the fact that Article 42(3) obviously needs further definition and that is a task which, at least in part, falls to the Member States.

51. Consequently Article 42(3) of Regulation No 1782/2003 relates exclusively to new farmers as defined in that paragraph. It is that category which is further limited by Article 9(2)(b) of Royal Decree 1470/2007 in so far

53. Article 42(3) of Regulation No 1782/2003 requires the Member States which make use of the option provided for therein to apply objective criteria, to ensure equal treatment between farmers and to avoid market and competition distortions when granting reference amounts. It is true that Article 6 of the Implementing Regulation No 795/2004 sets

out certain rules for calculating the amount and value of payment entitlements allocated in that way. However, that provision also refers to the objective criteria to be laid down by the Member States.

54. If, therefore, the Member States have the task of laying down criteria for granting reference amounts from the national reserve to new farmers, they must logically have a certain discretion for that purpose. That is made explicit in recital 5 of Implementing Regulation No 795/2004.

55. Furthermore, there is nothing in Article 42(3) of Regulation No 1782/2003 which would indicate that the Member States are in principle prohibited from making a narrower selection from among the new farmers. The fact that Article 2(k) of Implementing Regulation No 795/2004 defines who is to be regarded as a new farmer or, to be precise, ‘farmers commencing an agricultural activity’, does not rule out the possibility that the Member States’ discretion includes the option of not allowing all farmers to share in the national reserve.

56. In exercising their discretion, however, the Member States must have regard to the requirements and rules of Regulations

No 1782/2003 and No 795/04 described above and also the relevant case-law, which states that, when adopting measures to implement Union legislation, Member States must exercise their discretion in compliance with the general principles of Union law, which include the principles of proportionality and non-discrimination.²¹ In addition, such implementing measures must comply with fundamental rights.²² Moreover, national legislation which is enacted in the framework of the common agricultural policy cannot be established or applied in such a way as to compromise the objectives pursued by that policy.²³

(i) Objective criteria

57. The criteria of Article 22 of Regulation No 1698/2005 to which the Spanish decree at issue refers, namely that the persons in question must be persons who (a) are less than 40 years of age and are setting up for the first

21 — Case C-313/99 *Mulligan and Others* [2002] ECR I-5719, paragraph 35; Case C-384/05 *Piek* [2007] ECR I-289, paragraph 34, and Joined Cases C-230/09 and C-231/09 *Etling and Etling* [2011] ECR I-3097, paragraph 74.

22 — *Etling and Etling*, cited in footnote 21, paragraph 74; also order of 1 March 2011 in Case C-457/09 *Chartry* [2011] I-819, paragraph 22.

23 — *Etling and Etling*, cited in footnote 21, paragraph 75.

time on an agricultural holding as head of the holding; (b) possess adequate occupational skills and competence, and (c) submit a business plan for the development of their farming activities, are without doubt objective criteria, so that the first requirement of Article 42(3) of Regulation No 1782/2003 must be regarded as having been met.

under Article 51(1) of the Charter, it must be taken into account by the Member States when they are implementing Union law.²⁵

(ii) Principle of equal treatment

58. More difficult is the question of whether sufficient account has been taken of the second requirement of Article 42(3), which is to ensure equal treatment as between farmers.

60. It has consistently been held²⁶ that the principle of equal treatment or non-discrimination, of which the prohibition of discrimination on the ground of age is only a specific application,²⁷ means that similar situations must not be treated differently and differing situations must not be treated in the same way unless such treatment is objectively justified. The elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the Community act which makes the distinction in question.²⁸ In addition, the principles and objectives of the field to which the act relates must also be taken into account.²⁹

59. In that connection it must be borne in mind that the prohibition of discrimination on the ground of age, laid down in Article 21(1) of the Charter of Fundamental Rights of the European Union ('the Charter') is of the nature of a fundamental right²⁴ and,

24 — Opinion of Advocate General Bot in Case C-555/07 *Küçükdeveci* [2010] ECR I-365, paragraph 77.

25 — Case C-400/10 *PPU* [2010] ECR I-8965, paragraph 51, and Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft* [2010] ECR I-13849, paragraph 30.

26 — Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 63; Case C-127/07 *Arcelor Atlantique et Lorraine and Others ('Arcelor')* [2008] ECR I-9895, paragraph 23; Case C-558/07 *SPCM and Others* [2009] ECR I-5783, paragraph 74, and Case C-236/09 *Association Belge des Consommateurs Test Achats and Others ('Test Achats')* [2011] ECR I-773, paragraph 28.

27 — *Küçükdeveci*, cited in footnote 24, paragraph 50.

28 — *Arcelor*, cited in footnote 26, paragraph 26; *Test Achats*, cited in footnote 26, paragraph 29, and Case C-221/09 *AJD Tuna* [2011] ECR I-1655, paragraph 93.

29 — *Arcelor*, cited in footnote 26, paragraph 26.

— Similarity of situation

61. The single payment scheme introduced by Regulation No 1782/2003, like the product-related support schemes which it combined, serves primarily to ensure a fair standard of living for the agricultural community³⁰ which, pursuant to Article 39(1)(b) TFEU (formerly Article 33 EC) is one of the objectives of the common agricultural policy.

62. In view of the aim of Article 42(3) of Regulation No 1782/2003 of allowing new farmers to share in the single payment scheme and in that way to ensure a fair standard of living for them, the situation of young farmers who set up their first farming business in the framework of a rural development programme on the basis of Regulation No 1698/2005 is no different from that of other new farmers.

63. Article 9(2)(b) of Royal Decree 1470/2007 serves to implement Article 42(3) of Regulation No 1782/2003 and must therefore, in principle, have the same purpose.

64. In that connection the Spanish Government submits that Article 9(2)(b) of Royal Decree 1470/2007 is intended take account of the fact that the national reserve is running low, so that any share in it must necessarily be limited. As the Decree imposes that limitation by referring to the criteria of Article 22 of Regulation No 1698/2005, it corresponds to the realignment of the common agricultural policy, whereby there is no longer any clear differentiation between the two pillars of the CAP, namely, on the one hand, supporting market prices and incomes and, on the other, rural development. Rather, they supplement each other and overlap, but there is a clear shift of emphasis in favour of rural development.

65. The resulting attention given to rural development objectives must not however lead to making a distinction between the situation of young farmers who first set up business in the framework of a rural development programme on the basis of Regulation No 1698/2005, in view of the need to obtain income support upon which Regulation No 1782/2003 concentrates, and the situation of other new farmers. Those objectives are to be taken into account only in relation to the question of whether there are objective grounds for different treatment, which will be discussed below.

³⁰ — Recitals (25) and (27) of the preamble to Regulation No 73/2009, cited in footnote 3.

— Objective grounds for different treatment

and so that the farm can be managed as a sustainable operation.

66. As the Spanish and German Governments correctly point out, the national reserve is running low. Article 42(1) and (2) of Regulation No 1782/2003 show that the funds available for that purpose are not to exceed a specified upper limit. Furthermore, their use is not limited to supporting new farmers, as shown by Article 42(4) and (5). Regardless of the priority and reduction provisions of Article 42, it may therefore be expedient to limit to a selected category of individuals the option under Article 42(3) of allowing new farmers to share in the single payment scheme.

67. As the Austrian Government points out, farmers who have already received support for setting up under Articles 20(a)(ii) and 22 of Regulation No 1698/2005 particularly deserve support because they possess the personal and professional characteristics that lead to an expectation of serious and sustainable farming.

68. Age is one such characteristic because young farmers can be expected to manage their newly established farm long enough to pay off the considerable investments needed

69. So far as the specific age of under 40 is concerned, the legislature must be allowed a broad discretion, just as in the field of employment and social policy³¹ and it may be reviewed only to determine whether the age limit in question is manifestly inappropriate. That is not the case here. It may be presumed that a farmer of less than 40 will continue his farm long enough to be able to contribute to sustainable agriculture and rural development.

70. The fact that Article 9(2)(b) of Royal Decree 1470/2007 links up with the support criteria of Article 22 of Regulation No 1698/2005 on rural development also conforms with the new alignment of the common agriculture policy, as the Spanish, German and Austrian Governments observe. It appears from recital 21 of the preamble to Regulation No 1782/2003 that the objective of ensuring a fair standard of living for the agricultural community is closely related to the maintenance of rural areas. In addition, that regulation provides for a switch of support funds to rural development. It introduces an obligatory system for a progressive reduction in direct support (so-called 'modulation') in

31 — Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 68, and Case C-341/08 *Petersen* [2010] ECR I-47, paragraph 70. See also my opinion in Case C-499/08 *Andersen* [2010] ECR I-9343, paragraph 54.

order to make savings with which to finance rural development measures.³²

a rural development programme on the basis of Regulation No 1698/2005, but not to young farmers who did so on the basis of Regulation No 1257/1999, which contains the same conditions. The Commission concurred with that objection at the hearing.

71. As the Spanish scheme allows only young farmers who have already received support for setting up under Regulation No 1698/2005 to share in the national reserve, it is making a further contribution to rural development in conformity with the general objectives of the common agricultural policy. This further improves the chances of success of farmers who deserve support and who have already received support when first setting up. At the same time it ensures the appropriate and consistent use of EU support funds.

72. Consequently there are objective grounds which must be acknowledged and which, in principle, may justify the different treatment of farmers who first set up in the framework of a rural development programme on the basis of Regulation No 1698/2005, as compared with other new farmers.

73. However, the Greek Government considers that there is unequal, and unlawful, treatment in the fact that Article 9(2)(b) of Royal Decree 1470/2007 applies only to young farmers who first set up in the framework of

74. The support scheme provided for by Regulation No 1698/2005 replaced that under Regulation No 1257/1999 with effect from 1 January 2007.³³ Therefore in 2007 there would have been farmers who were new and also young and who received support on first setting up in the framework of the EU support scheme for rural development, but pursuant not to Regulation No 1698/2005 as required by Article 9(2)(b) of the Royal decree, but to the preceding Regulation No 1257/1999, which to a large extent contains the same criteria. It must be conceded in favour of the Greek Government that it is not clear how far the date of first setting up could be an objective ground for not allowing such farmers to share in the national reserve.

75. When asked, the Spanish Government explained at the hearing that, under national law, the Spanish legislature had to refer to the current Union regulation, but that there was no unequal treatment with regard to the

³² — Recital 5 of the preamble to Regulation No 1782/2003 and recitals 8 and 9 of the preamble to Regulation No 73/2009 (cited in footnote 3).

³³ — Articles 93(1) and 94(1) and recital 70 of the preamble to Regulation No 1698/2005.

date of setting up. That was confirmed by the Confederation.

(iii) Avoidance of market and competition distortions

76. It is for the national court to determine whether Article 9(2)(b) of Royal Decree 1470/2007 leads to the unequal treatment in question here. First, it is conceivable that the relevant cases were taken into account by earlier decrees. Secondly, the possibility cannot be ruled out that that provision is applied in such a way that the reference to Regulation No 1698/2005 is construed as referring also to Regulation No 1257/1999.

79. Finally, with regard to the third requirement of Article 42(3) of Regulation No 1782/2003, namely the avoidance of market and competition distortions, it does not appear, nor has it been alleged, that Article 9(2)(b) of Royal Decree 1470/2007 leads to such distortion.

77. Irrespective of that, it is also for the referring court to ascertain whether there are circumstances which indicate that it is disproportionate to restrict new farmers sharing in the national reserve to young farmers who first set up in the framework of a rural development programme on the basis of Regulation No 1698/2005 (or possibly Regulation No 1257/1999). There is nothing in the file to suggest that that is the case.

(e) Conclusion

78. Therefore, subject to the review to be carried out by the referring court, it must be found that Article 9(2)(b) of Royal Decree 1470/2007 conforms with the principle of equal treatment.

80. As the other requirements, arising from the case-law, concerning the exercise by the Member States of their discretion in implementing Union law, have been considered in the present discussion, it must be concluded that, subject to the review to be carried out by the referring court, it is compatible with Article 42(3) of Regulation No 1782/2003 for a Member State to restrict to young farmers the option under that provision to grant entitlement to single payments from the national reserve to new farmers who have set up their first business in the framework of a rural development programme on the basis of Regulation No 1698/2005.

(f) The further conditions of Article 9(2)(b) of Royal Decree 1470/2007

81. As already mentioned, Article 9(2)(b) of Royal Decree 1470/2007 requires young farmers to be working in one of the sectors, other than seed production, included in Annex VI of Regulation No 1782/2003. In addition, young farmers must not yet have received single payments from the national reserve.

82. I have shown that Article 42(3) of Regulation No 1782/2003 leaves it to the discretion of the Member States to lay down the actual

rules for the allocation to new farmers of entitlement to single payments from the national reserve. Therefore, *prima facie*, there is nothing to prevent a Member State from taking into account only specified agricultural sectors. It is for the referring court to determine, if necessary, whether that could constitute an infringement of the principle of equal treatment. The documents in the file do not refer to the point.

83. With regard to the further requirement that a young farmer should not yet have received single payments from the national reserve, it appears to conform with the meaning and purpose of the national reserve that a young farmer who has already been included in the single payment scheme may receive no further entitlement from the national reserve as a ‘new’ farmer.

V — Conclusion

84. I therefore propose that the Court reply as follows to the question from the Tribunal Supremo:

‘Subject to the review to be carried out by the referring court, it is compatible with Article 42(3) of Regulation (EC) No 1782/2003 for a Member State to restrict the option under that provision to grant entitlement to single payments from the

national reserve to new farmers to young farmers who have set up their first business in the framework of a rural development programme on the basis of Regulation No 1698/2005.'