



Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 22 February 2018¹

Case C-59/17

SCI Château du Grand Bois

v

Établissement national des produits de l'agriculture et de la mer (FranceAgriMer)

(Request for a preliminary ruling from the Conseil d'État (Council of State, France))

(Reference for a preliminary ruling — Agriculture — Regulation (EC) No 555/2008 — Restructuring and conversion of vineyards — Support to vine growers — Grubbing-up premium — Unannounced on-the-spot checks — Requirement of permission to enter land — Enclosed or open land — Inviolability of the home — Right to property)

I. Introduction

1. Under Article 81 of Commission Regulation (EC) No 555/2008 ('Regulation No 555/2008'),² recipients of a grubbing-up premium are subject to controls (inspections) before and after the actual grubbing-up. One method of carrying out such controls is on-the-spot checks. Article 78(1) of Regulation No 555/2008 further specifies that, in principle, on-the-spot checks shall be unannounced.

2. A dispute has occurred between an applicant for a premium, SCI Château du Grand Bois, and Établissement national des produits de l'agriculture et de la mer (FranceAgriMer). This has led the Conseil d'État (Council of State, France) to ask the Court to determine whether Regulation No 555/2008 can be construed as authorising control officials (inspectors) to enter the vineyard in question to carry out on-the-spot checks without acquiring the permission of the applicant, while at the same time respecting the right to inviolability of the home.

II. Legal framework

A. Charter of Fundamental Rights of the European Union ('the Charter')

3. Under Article 7 of the Charter, 'everyone has the right to respect for his or her private and family life, home and communications'.

¹ Original language: English.

² Commission Regulation of 27 June 2008 laying down detailed rules for implementing Council Regulation (EC) No 479/2008 on the common organisation of the market in wine as regards support programmes, trade with third countries, production potential and on controls in the wine sector (OJ 2008 L 170, p. 1).

4. Pursuant to Article 17(1), ‘everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest’.

B. Regulation No 479/2008

5. Article 3 of Regulation (EC) No 479/2008 on the common organisation of the market in wine³ which was applicable at the relevant time stated that ‘this Chapter lays down rules governing the attribution of Community funds to Member States and the use of those funds by Member States through national support programmes ... to finance specific support measures to assist the wine sector’.

6. Article 4(2) provided that:

‘Member States shall be responsible for the support programmes and ensure that they are internally consistent and drawn up and implemented in an objective manner, taking into account the economic situation of the producers concerned and the need to avoid unjustified unequal treatment between producers.

Member States shall be responsible for providing for, and carrying out, the necessary controls and penalties in case of non-compliance with the support programmes.’

7. Article 11 dealt with restructuring and conversion of vineyards. The first paragraph indicates that ‘the objective of measures relating to the restructuring and conversion of vineyards shall be to increase the competitiveness of wine producers’.

8. Chapter III of Title V laid down the conditions under which a premium shall be given in exchange for grubbing up vines (‘the grubbing-up premium’).

9. Annex I, point 2 defined grubbing-up as ‘the complete elimination of all vine stocks on an area planted with vines’.

C. Regulation No 555/2008

10. Recital 73 of Regulation No 555/2008 reads: ‘To help the uniform application of the rules throughout the Community, Member States should take the necessary steps to ensure that the staff of the competent bodies has adequate powers of investigation to guarantee compliance with the rules.’

11. Title V of the regulation covers controls in the wine sector. Its first chapter sets out the principles of the controls to be carried out. The first provision of that chapter, Article 76, provides that:

‘Without prejudice to specific provisions of this Regulation or other Community legislation, Member States shall introduce checks and measures in so far as they are necessary to ensure the proper application of Regulation (EC) No 479/2008 and this Regulation. They shall be effective, proportionate and dissuasive so that they provide adequate protection for the Communities’ financial interests.

³ Council Regulation 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).

In particular, Member States shall ensure that:

- (a) all eligibility criteria established by Community or national legislation or the national framework can be checked;
- ...
- (d) the checks and measures are in line with the nature of the support measure concerned. Member States shall define methods and means for verification and specify who shall be subject to checks;
- (e) controls are carried out either systematically or by sampling ...
- (f) the operations admitted to Community financing are genuine and comply with the Community legislation.'

12. Article 77 reads as follows:

'1. Verification shall be by administrative and where appropriate on-the-spot checks.

...

3. Except for the cases where systematic on-the-spot checks are foreseen by Regulation (EC) No 479/2008 or by this Regulation, the competent authorities shall perform on-the-spot checks by sampling an appropriate percentage of beneficiaries/producers on the basis of a risk analysis in accordance with Article 79 of this Regulation.

...'

13. Article 78 provides that:

'1. On-the-spot checks shall be unannounced. However, provided that the purpose of the check is not compromised, advance notice limited to the strict minimum necessary may be given. Such notice shall not exceed 48 hours, except in duly justified cases or for those measures where systematic on-the-spot checks are foreseen.

2. Where applicable, the on-the-spot checks provided for in this Regulation shall be carried out in conjunction with any other checks provided for by Community legislation.

3. The aid application or applications concerned shall be rejected if beneficiaries or their representatives prevent an on-the-spot check from being carried out.'

14. Pursuant to Article 80:

'1. Every on-the-spot check shall be the subject of a control report which makes it possible to review the details of the checks carried out. As far as controls concern community financing the report shall indicate in particular:

- (a) the aid schemes and applications checked;
- (b) the persons present;
- (c) where applicable, the agricultural areas checked, the agricultural areas measured, the results of the measurements per parcel measured and the measuring methods used;

- (d) the verification whether the given area has been properly tended in the case of grubbing-up scheme;
- (e) the quantities which are covered by the check and their results;
- (f) whether advance notice was given to the beneficiary/producer of the visit and, if so, how much;
- (g) any further control measures carried out.

2. Where discrepancies are found between the information in the application and the actual situation found during the check carried out on the spot or by remote sensing, the grower shall receive a copy of the control report and shall have the opportunity to sign it before the competent authority draws its conclusions from the findings with regard to any resulting reductions or exclusions.'

15. By virtue of Article 81:

'...

2. When granting replanting rights as foreseen in Article 92 of Regulation (EC) No 479/2008, areas shall be systematically verified before and after the execution of the grubbing-up. The plots checked shall be those for which the replanting right is to be granted.

The control before the grubbing-up shall include verification of the existence of the vineyard concerned.

This control shall be carried out via a classical on-the-spot check. However, if the Member State disposes of a reliable updated computerised vineyard register, the control can be carried out administratively and the obligation of a control on the spot before grubbing up can be limited to 5% of the applications (on [an] annual basis) in order to confirm the reliability of the administrative control system. Should on-the-spot checks reveal significant irregularities or discrepancies in a region or part of a region, the competent authority shall appropriately increase the number of on-the-spot checks during the year concerned and the following year.

3. Areas receiving grubbing-up premium shall be systematically verified before and after the execution of the grubbing up. The plots verified shall be those which are the subject of an application for aid.

The control before the grubbing-up shall include verification of the existence of the vineyard concerned, the area planted determined in accordance with Article 75 and whether the given area has been properly tended.

This control shall be carried out via a classical on-the-spot check. However, if the Member State disposes of a graphical tool that allows measurement of the parcel in accordance with Article 75 in the computerised vineyard register and of reliable updated information about the parcel being properly tended, the control can be carried out administratively and the obligation of a control on the spot before the grubbing-up may be limited to 5% of the applications in order to confirm the reliability of the administrative control system. Should on-the-spot checks reveal significant irregularities or discrepancies in a region or part of a region, the competent authority shall increase the number of on-the-spot checks appropriately during the year concerned.

4. Verification that grubbing-up has actually taken place shall be done by a classical on-the-spot control or, in the case of grubbing up the entire vineyard parcel or if the resolution of the remote sensing is equal or better than 1 m², may be carried out by remote sensing.

5. In case of areas receiving grubbing-up premium, without prejudice to paragraph 3, third subparagraph and paragraph 4, at least one of the two controls mentioned in the first paragraph of paragraph 3 shall be carried out via a classical on-the-spot check.’

16. Article 83 sets out the powers of control officials:

‘Each Member State shall take all appropriate measures to facilitate the work of the officials of its competent bodies. It shall ensure in particular that such officials, where appropriate in conjunction with officials of other departments which it authorises for the purpose:

- (a) have access to vineyards, wine-making and storage installations, installations for processing wine-sector products and vehicles for transporting those products;
- (b) have access to the commercial premises (or warehouses) and vehicles of anyone holding with a view to sale, marketing or transporting wine-sector products or products which may be intended for use in the wine sector;

...

- (d) may take samples of wine-sector products, substances or products which may be used for the preparation of such products and products held with a view to sale, marketing or transport;
- (e) may study accounting data and other documents of use in control procedures, and make copies or extracts thereof;
- (f) may take appropriate protective measures regarding the preparation, holding, transport, description, presentation and marketing of a wine-sector product or a product intended for use in the preparation of such a product, if there is reason to believe that there has been a serious infringement of Community provisions, in particular in the case of fraudulent treatment or risks to health.’

III. Facts, proceedings and the questions referred

17. On 29 July 2009, SCI Château du Grand Bois (‘the Applicant’) applied for the grant of support for the restructuring and conversion of its vineyards for the 2008/2009 season.

18. By decision of 18 December 2009, the Director-General of the *Établissement national des produits de l’agriculture et de la mer* (National Institute for Agricultural and Marine Products, France) (‘FranceAgriMer’) rejected that application. It stated that on-the-spot checks carried out on 27 August and 15 September 2009 by one of its control officials on certain vineyard parcels of the Applicant’s land revealed that the grubbing-up of vines had not been carried out in accordance with the legislation in force.

19. The Applicant brought an action before the *Tribunal administratif de Nantes* (Administrative Court, Nantes, France) seeking the annulment of that decision. By a ruling of 7 May 2013, that court annulled the decision because, *inter alia*, the official that carried out the checks did not have the authorisation to do so.

20. On 5 February 2015, the *Cour administrative d’appel de Nantes* (Administrative Court of Appeal, Nantes, France) set aside the first-instance ruling and rejected the arguments that the Applicant had submitted at first instance. It held that Regulation No 555/2008 does not require the official carrying out the check to give prior notice to an applicant for a grubbing-up premium of the date when the

check will take place. The fact that no permission to enter private property had been given had no bearing on the legality of the contested decision. In addition, the fact that the control report did not indicate whether the Applicant was given notice had no bearing on the lawfulness of the operation of controls.

21. The Applicant appealed to the Conseil d'État (Council of State, France). The Applicant submits that the Cour administrative d'appel de Nantes (Administrative Court of Appeal, Nantes) erred in law in holding that the fact that the official responsible for carrying out the check had entered its property without its permission did not affect the lawfulness of the decision to reject its application for the grant of support for the restructuring and conversion of vineyards.

22. According to the Conseil d'État (Council of State), the response to that particular argument depends on whether Regulation No 555/2008 authorises the officials responsible for carrying out on-the-spot checks to enter agricultural land without the vine grower's permission. It is within this factual and legal context that the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following questions to the Court:

- 'Do Articles 76, 78 and 81 of [Commission Regulation No 555/2008] of 27 June 2008 authorise officials carrying out an on-the-spot check to enter agricultural land without having obtained the farmer's permission?
- If the first question is answered in the affirmative: must a distinction be made depending on whether or not the land in question is enclosed?
- If the first question is answered in the affirmative: are Articles 76, 78 and 81 of [Commission Regulation No 555/2008] of 27 June 2008 compatible with the principle of the inviolability of the home as guaranteed by Article 8 of the European Convention on Human Rights?

23. Written submissions were lodged by the Greek and French Governments and by the European Commission. Those interested parties also presented oral argument at the hearing held on 7 November 2017.

IV. Assessment

24. The three questions formulated by the referring court essentially boil down to one key element: is there a legal basis granting authorisation for control officials to enter private land without acquiring explicit permission from the vine grower in order to carry out on-the-spot checks of a vineyard? The crux of the first question is whether authorisation is implied in Regulation No 555/2008. The second and third questions appear to be follow-up questions: the second question being a refinement of the first — is it relevant whether the land was open or enclosed? The third question raises the issue of the validity of Articles 76, 78 and 81 of Regulation No 555/2008 if it is found that there is no requirement for permission to be granted. The implicit suggestion of the referring court is that if construed in that way, those provisions of Regulation No 555/2008 could be at odds with certain fundamental rights.

25. All three questions are thus intertwined. The issue is one of legality and legal basis: is there a provision of EU law that allows entry onto private land, whether open or enclosed, in order to carry out such checks *irrespective* of what national law says on the matter?

26. I provide a two-layered answer in this Opinion. First, since there is no apparent legal provision that would authorise the disregarding of national rules on entering private land in either Regulation No 555/2008 or in the system and logic of EU support programmes, I suggest that rules for entry onto private land to carry out checks are a matter for national law (A). There are, however, some limits to the extent of choice available in setting those national rules, inherent in both the provisions of Regulation No 555/2008 and in the need to respect certain EU fundamental rights (B).

A. EU law as a sufficient legal basis in and of itself

27. All the parties to the written and oral procedure before the Court — the Greek and French Governments and the Commission — are of the same opinion. They find that no explicit permission is required under Regulation No 555/2008 to enter land in order to carry out the necessary checks. On-the-spot checks are a priori and generally authorised by the applicant for support. It is assumed that the authorisation to enter land derives from the system and logic of the controls carried out under Regulation No 555/2008. It can even be seen as inherent in the overall system of EU support programmes that the applicant generally consents to the steps that lead to the decision whether or not to grant the support, through the mere filing of an aid application.

28. I cannot agree.

29. There is, of course, no dispute that Regulation No 555/2008 requires the Member States to carry out on-the-spot checks. It is also true that some additional elements as to how those checks are to be carried out are provided for by the same regulation. In this way and to this extent, it can indeed be said that Regulation No 555/2008 authorises checks in general. However, it is also true that Regulation No 555/2008 does not deal with all the details of those checks. In particular, the regulation is silent on the conditions of entry and whether or not the vine grower's permission is required.

30. In a way, that is the heart of the matter: what can be *inferred from the silence* of Regulation No 555/2008 on the matter of authorisation to enter? To me, that silence together with a number of other provisions of the same regulation, which clearly state that checks are a matter for the Member States to address, means that this element is also for the Member States to regulate. By contrast, for the intervening Member States and the Commission, the fact that the regulation does not expressly require permission to be given means that no permission is needed.

31. I cannot subscribe to such an interpretative approach. The fact that something is not provided for at EU level can hardly lead to an inference that it is authorised by EU law. The correct logic, certainly in areas touching upon the rights of individuals and private property, is exactly the opposite: as no express authorisation is provided for, none has been given as a matter of EU law.

32. In the following section, I will show that neither Regulation No 555/2008, in particular its Articles 76, 78 and 81, which are the subject matter of the first question referred to the Court (1), nor the broader logic of EU support programmes that underpins that regulation (2) generally authorise control officials to enter land without the vine grower's explicit permission. It is therefore for national law to decide whether that permission is required for that purpose, also in view of the type of land in question (3).

1. Regulation No 555/2008 as the source of the authorisation to enter private land in order to carry out checks?

33. It follows from the wording and context of Regulation No 555/2008 that the latter does not regulate access to private land to conduct on-the-spot checks. It therefore cannot, *in and of itself*, be a sufficient legal basis to generally authorise entry onto land in the absence of permission from the vine grower, provided that such permission is required under national law.

34. First, it is clear on the basis of several provisions of that regulation that it is for the Member States to give specific shape to the different checks foreseen therein, including whether entry on private land in order to carry out on-the-spot checks is subject to the vine grower's permission.

35. For checks *in general*, Article 76 of Regulation No 555/2008 provides that Member States shall introduce effective, proportionate and dissuasive checks and measures in so far as they are necessary to ensure the proper application of that regulation. In particular, it is stated under Article 76(a) that Member States shall ensure that all eligibility criteria established by EU or national law can be checked. Under Article 76(d), Member States shall define methods and means for verification and specify who shall be subject to checks. In addition, Article 83 provides that each Member State shall take all appropriate measures to facilitate the work of control officials.

36. All of these provisions clearly indicate that while Regulation No 555/2008 requires the checks to be carried out, it leaves all the elements not expressly provided for in its provisions to the Member States. Thus, that regulation leaves a significant margin of discretion to the Member States to define how they shall be carried out.

37. That conclusion applies equally to the *specific* category of on-the-spot checks. Article 78(1) of Regulation No 555/2008 only provides for one actual feature of those checks: 'on-the-spot checks shall be unannounced. However, provided that the purpose of the check is not compromised, advance notice limited to the strict minimum necessary may be given. Such notice shall not exceed 48 hours, except in duly justified cases or for those measures where systematic on the spot checks are foreseen'.

38. What, if anything, does that specific provision entail regarding permission to enter private land? According to the Commission, seeking explicit permission to enter would be incompatible with the very fact that on-the-spot checks are, in principle, unannounced. Such a requirement would necessarily entail advance notice, when it should remain exceptional.

39. On a certain level, the Commission is correct: asking for permission from the vine grower to enter his land, provided that such permission is required under national law, would indeed imply communicating with that person, and thus 'announcing' the check. My impression, however, is that the Commission is making quite far-reaching arguments on the basis of a provision that simply concerns a different matter.

40. First, looking at the wording alone, 'unannounced' means 'unannounced'. The natural meaning of that word is, when applied to checks, that they can take place at any time, without advance notice being given to the vine grower. The different linguistic versions of that provision,⁴ together with the way in which Article 78 as a whole is drafted, show that 'unannounced' only means without *advance* notice. It follows that there is no obligation to inform the vine grower or his representative that a check or any part thereof is to be carried out.⁵ Thus, the control official may turn up on any day that he or she pleases without informing the vine grower of the visit.

4 For example in French, '*de manière inopinée*'; in Italian, '*senza preavviso*'; in German '*unangekündigt*'; in Spanish, '*sin previo aviso*'; and in Czech, '*bez ohlášení*'.

5 See, in the context of another regulation regarding support schemes for farmers, judgment of 16 June 2011, *Omejc* (C-536/09, EU:C:2011:398, paragraph 32).

41. However, ‘unannounced’ is certainly not synonymous with ‘unauthorised’. ‘No advance notice or information’ does not mean ‘permission to enter’. The aim and purpose of the lack of an announcement is of importance in this regard. It is fair to assume that the reason the EU legislature included a specific provision on the checks being unannounced was to prevent the potential temptation to present certain facts in a more favourable light ahead of the checks, and only for the purpose and duration of the checks. Thus, if the vine grower is unaware of when a control will take place, it might be assumed that the control official will always be able to see the real state of affairs.

42. If that is indeed the purpose behind that provision, I fail to see how seeking permission to enter, if required under national law for the specific type of land in question, would frustrate the overall purpose of unannounced checks. It is indeed conceivable that unannounced checks can be carried out on a certain day while at the same time asking on arrival and immediately before the check begins for permission to set foot on that land. Such a check is certainly still ‘unannounced’ in the sense of Article 78, but it would also be authorised, without the purpose of that provision being compromised in any way.

43. Second, there is the contextual argument. Apart from those provisions explicitly mentioned by the referring court, other provisions of Regulation No 555/2008 also confirm that it is for Member States to provide procedural rules relating to on-the-spot checks and that no authorisation to enter can be inferred from that regulation. In particular, Article 83(a) of Regulation No 555/2008 provides that Member States shall ensure that control officials ‘have access to vineyards, wine-making and storage installations, installations for processing wine-sector products and vehicles for transporting those products’.

44. This begs the simple question: if it was indeed the intention of the legislature to provide for ‘implicit’ authorisation to enter, why then would there be a specific provision stating that Member States shall ensure that control officials have access to vineyards?

45. A broader parallel can be made between control officials under Regulation No 555/2008 and Commission officials under Regulation (EC) No 1/2003.⁶ By virtue of Article 20(2)(a) of Regulation No 1/2003, Commission officials are empowered to enter any premises, land and means of transport of undertakings to conduct an investigation into breaches of competition law rules by those undertakings. However, under Regulation No 1/2003, the Commission’s investigative powers do not include breaking in if there is an obstruction and it must consequently seek judicial authorisation to enter in such a situation. In this context, the Court has held that although the Commission’s officials have the power to enter such premises as they choose, ‘on the other hand, they may not obtain access to premises or furniture by force or oblige the staff of the undertaking to give them such access, or carry out searches without the permission of the management of the undertaking’.⁷

46. Obviously, the nature of premises that can be entered in the context of competition law under Regulation No 1/2003 is likely to be different from vineyards.⁸ However, the argument that I make by reference to Regulation No 1/2003 is of a different nature. First, it is the analogy to the interplay between an EU regulation mandating controls and national legislation that is more relevant. Similarly to Regulation No 555/2008, Regulation No 1/2003 also requires controls or investigations to take place. However, the choice of methods to achieve this, including the issue of conditions of entry, is left to the Member States. Second, there is a certain contrast to be drawn: if permission for

⁶ Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

⁷ Judgment of 21 September 1989, *Hoechst v Commission* (46/87 and 227/88, EU:C:1989:337, paragraph 31).

⁸ Certainly if the land in question were open. However, the second question of the referring court enquires about enclosed land. In addition, a number of other scenarios are conceivable, such as a hypothetical situation of land (enclosed or not) on which there would also be a dwelling and thus the domicile of the vine grower. Those scenarios would then be much closer to Regulation No 1/2003.

Commission officials to enter cannot be inferred under Regulation No 1/2003 in order to enforce a key area of EU law policy, I fail to see, a fortiori, how more powers should or could be granted under Regulation No 555/2008, where control officials ‘merely’ check whether an applicant for support fulfils all the conditions to obtain that support.

47. All in all, in the absence of a specific provision in Regulation No 555/2008 excluding or requiring permission to enter land to be obtained, that regulation cannot constitute a sufficient legal basis authorising control officials to access agricultural land, provided that such permission is needed under national law for the specific type of land in question.

2. Authorisation to enter granted through the system and logic of EU support programmes?

48. In addition (or in parallel) to the argument that the authorisation to enter land without explicit permission is provided for by Regulation No 555/2008, the French Government and the Commission submit that authorisation derives from the very *system and logic* of EU support programmes. That argument runs as follows: checks are, in essence, carried out because there has been an application for support. Entering the land for which the support was applied for is necessary for those checks to be effective. Therefore, permission to enter has been implicitly given by the applicant through the mere filing of an aid application.

49. To buttress that position, the French Government adds another argument which refers to a statement appearing on the national aid application form in use at the material time. As maintained by the French Government, that form stated that every applicant ‘commits to provide any supporting document requested to the authorities in charge of carrying out controls and *to allow the necessary verifications*’.⁹ Therefore, the applicant consented to all the subsequent steps by signing it, including the entry of control officials onto his or her land in order to carry out on-the-spot checks without asking for permission.

50. Turning first to the specific argument made by the French Government regarding the national form, I must admit that I do not find that argument to be relevant, for two reasons.

51. First, with regard to its wording, a large number of argumentative steps (and interpretative imagination) are needed in order to turn the statement ‘I hereby commit to allow the necessary verifications’ into ‘I hereby authorise a control official to enter my land without my authorisation’. Such an extensive interpretation would be quite at odds with the general principle of how to interpret a waiver of rights, which must rely on the natural and common meaning of the words interpreted, and should not be interpreted broadly.

52. Second, and perhaps even more importantly, that form is a *national* document. Even if it perhaps could, on a generous reading of its content, be relied on to ascertain the rights and obligations of the applicant under *national* law, I have difficulty seeing how it could be used for the purpose of interpreting the content of an *EU* law measure, which ought to be the same in all the Member States, irrespective of the potential variations in the content of national forms.

53. Turning next to the more general argument invoking the overall system and logic of EU support programmes, which is also said to underpin Regulation No 555/2008, I must admit that I find that argument not only unconvincing, but also very questionable on a point of principle. Two layers of that argument stand out: specific and general.

⁹ Emphasis added.

54. Considering the specifics of this case, I noted in the previous section of this Opinion that the regulation itself is *silent* on whether or not permission is required in order to enter private land to inspect it. How then could even a vine grower with truly Herculean qualities, who spends his or her evenings reading the relevant EU legislation, case-law, and any other relevant documentation, have known that such an authorisation is inherent in the system and logic of those programmes, if it is not stated anywhere? It might be added that the same is also true of the potential ‘*ex ante* general consent’ or ‘waiver’ on the application form: even if it were to be said that consenting to all ‘the necessary verifications’ were to include whatever is necessary for the subsequent steps of establishing whether or not the conditions for support to be granted have been met, it is again fair to assume that those steps would be limited to those taken in the manner explicitly provided for in the applicable legislation.

55. However, it is the more general layer of the same argument that is, in my view, deeply problematic: an authorisation which is not clearly provided for in the law as it stands should be given because it is said to be necessary to strengthen the effectiveness of the overall system. Leaving aside for the moment the question whether it is actually necessary,¹⁰ the arbitrary and open-ended nature of that argument is very disquieting in any community based on the rule of law. Do the ends justify the means, irrespective of what the law says? If that is indeed the case, then Regulation No 555/2008 not only authorises the entry onto enclosed private land in order to carry out on-the-spot checks there, but presumably also the breaking into of business premises or even the vine grower’s house in order to collect documentation confirming potential irregularities in his application for support. Following the same logic, both of these examples are implicitly provided for, as Regulation No 555/2008 is silent on both of these possibilities (it does not require the consent to be given) and such a measure would certainly strengthen the ‘*effet utile*’ of the legislation.

56. At the hearing the Commission added a subsidiary argument to this line of thought, connected to the logic of EU support programmes. The Commission suggested that in the precise context of administration of benefits (using the German term of *Leistungsverwaltung*), the requirement of a legal basis is less strict than in the criminal realm. It would therefore be less important to find the relevant legal basis to justify entry onto land without explicit permission.

57. I disagree.

58. Both of these lines of reasoning, in my view, flatly contradict the principles of legality of all public action and the rule of law. It is established case-law that ‘any intervention by the public authorities in the sphere of private activities of any person ... must have a legal basis’.¹¹ Protection against arbitrary or disproportionate intervention by public authorities is a general principle of EU law. In addition, in the EU law context, there is also the constitutional principle of attributed competence, which, if taken seriously, further limits, certainly in the areas of shared competences, the plausibility of and the necessity for functional expansion of EU competence. Finally, I believe that the argument advanced by the Commission essentially suggesting that ‘if money is being paid out, legality does not matter (that much)’ was a tentative and subsidiary one, the weaknesses of which it is not necessary to dwell on any further.¹²

10 In view of the quite robust sanctions already contained in the regulation — see further below point 71.

11 Judgments of 21 September 1989, *Hoechst v Commission* (46/87 and 227/88, EU:C:1989:337, paragraph 19), and of 22 October 2002, *Roquette Frères* (C-94/00, EU:C:2002:603, paragraph 27).

12 By way of a clear contrast in terms of approach, the judgment of 9 November 2010, *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662) might for example be mentioned. In that case, the Court appeared notably unimpressed with arguments that since EU funds are being spent, there should be maximum transparency and access to information about the recipients of monies from EU agricultural funds, which would justify providing even more information than that foreseen by the challenged Commission implementing regulation.

59. For these reasons, authorisation to enter private land without permission cannot be inferred from the system and logic of EU support programmes. Thus, neither Regulation No 555/2008 nor the broad system underpinning EU support programmes provide for the conclusion that entering private land would be authorised without permission, provided that such an authorisation is needed for that type of land under national law.

60. This brings me to the final point in this regard, inspired by the second question posed by the referring court: should a distinction be made based on whether or not the land in question is enclosed? My short answer is no: the previous conclusion is not altered depending on whether the land is open or enclosed.

61. This factual element, which is the focus of the second question posed by the referring court, may not be entirely relevant for the solution of the case before the referring court. The order for reference is silent on whether or not the land in question was open or enclosed. At the hearing, the French Government stated that the land was open land. Against this factual context, the second question could be perceived as hypothetical.

62. However, that question is indirectly important for the answer to be given to the first question. Whether the land is open or enclosed, the answer to be provided by this Court ought to be coherent with regard to both cases. It would hardly be conceivable to interpret Regulation No 555/2008 as authorising entry onto private land if the latter is open, irrespective of what national law says on that matter in terms of permission to be given, and to hold otherwise if it happens to be enclosed. Regulation No 555/2008 is *equally* silent on both of these scenarios.

63. Yet, construing Regulation No 555/2008 in such a way that control officials may enter enclosed land without needing the permission of the vine grower, thus effectively creating an EU law based ‘right to climb over a fence’ for control officials, would admittedly be incompatible with the right to property and/or inviolability of home, as understandably questioned by the referring court in its third question. In this way, the second question reinforces the answer to be provided to the first question, as the former makes it all the more obvious that the latter must be answered as *not* generally authorising entry on land without permission, provided that such permission is needed under national law.

3. (Practical) closing remarks

64. To be absolutely clear, Articles 76, 78 and 81 of Regulation No 555/2008, together with other provisions of the same regulation, clearly mandate (in principle unannounced) on-the-spot checks. However, they do not provide for checks to be carried out without the vine grower’s permission to set foot on his or her land. Regulation No 555/2008 leaves it to the Member States to decide, within certain limits (that will be presented below), whether entering private land to conduct these checks must be subject to the vine grower’s permission.

65. Accordingly, whatever the choice made by the Member States with respect to whether the vine grower’s explicit permission to enter land is required, national authorities must obviously conduct checks in full compliance with those *national* rules regarding on-the-spot checks and entry onto private property.

66. In practical terms, however, in spite of a number of allegations to the contrary in the course of these proceedings, such a procedural framework is unlikely to impede the effective carrying out of the checks in any tangible way.

67. First, it is, of course, entirely logical that the control official can use national measures at his disposal to enter private agricultural land. Rules across Member States differ in this regard. However, in a number of Member States, there is a public right of entry or the right of passage over open agricultural land subject to conditions. For example, as follows from the written submissions of the French Government, French law does not penalise entry onto open private land as long as property has not been damaged. It would appear that in rural areas entry onto agricultural land is often allowed without the vine grower's explicit permission. Hence, if national law authorises anyone to enter private land under these conditions without permission, the same also applies to control officials.

68. Second, provided that it is possible to carry out the necessary checks effectively *without* entering land if permission to do so is required under national law, that option is obviously preferable to what could amount to trespassing. On-the-spot checks may not always require entry onto the land. Presumably, verifying that grubbing-up has taken place can sometimes be done from certain distance, for instance by peeking over the fence from a public road or other plot of land. That appears all the more likely with the development of new technologies. Regulation No 555/2008 even expressly sets out that controls can be carried out by remote sensing, which does not require presence on the land being investigated.¹³

69. Third, on-the-spot checks should be carried out in a proportionate manner. That idea is apparent from a number of provisions of Regulation No 555/2008, including the already discussed Article 78(1). That provision indeed carves out exceptions to the 'unannounced' character of checks which, incidentally, has been considerably qualified in the latest embodiment of that provision.¹⁴ The existence of exceptions, together with this qualification, shows that there is quite some room in that provision for perhaps some courtesy towards the person subject to the checks, without in any way impeding the effectiveness of those checks.¹⁵ However, it shall also be clearly acknowledged that there is no *legal* obligation deriving from Article 78(1) for control officials to act in such a manner.

70. Fourth and final, it should be stressed that seeking the vine grower's prior permission to enter his land in cases in which such permission is needed for that type of land under national law would in no way endanger the objective of Regulation No 555/2008 to safeguard the financial interests of the Union.

71. Pursuant to Article 78(3) of Regulation No 555/2008, the aid application shall be rejected if beneficiaries prevent an on-the-spot check from being carried out. In the context of other regulations concerning agricultural support programmes,¹⁶ the Court has already held that preventing checks from being carried out cannot but lead to serious legal consequences, such as the rejection of the aid applications concerned. Such rejection is the legal consequence of the fact that it is impossible to carry out an effective check as to whether the conditions required for the grant of the support have been complied with.¹⁷ That impossibility can notably be the result of deliberate conduct on the part of

¹³ See Article 81(4) of Regulation No 555/2008.

¹⁴ Article 78(1) of Regulation No 555/2008 has been replaced by Article 31(2) of the Commission Implementing Regulation (EU) 2016/1150 of 15 April 2016 laying down rules for the application of Regulation (EU) No 1308/2013 of the European Parliament and of the Council as regards the national support programmes in the wine sector (OJ 2016 L 190, p. 23). That latest provision demonstrates quite a considerable change of spirit as it is no longer the rule that on-the-spot checks are unannounced, that first sentence having disappeared from the provision. Besides, advance notice can now be given within a 14-day period.

¹⁵ See above, point 40 to 42 of this Opinion.

¹⁶ Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (OJ 1999 L 160, p. 80); Commission Regulation (EC) No 796/2004 of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system provided for in Council Regulations (EC) No 1782/2003 and (EC) No 73/2009, as well as for the implementation of cross-compliance provided for in Council Regulation No 479/2008 (OJ 2004 L 141, p. 18).

¹⁷ See judgments of 16 June 2011, *Omejc* (C-536/09, EU:C:2011:398, paragraph 27), and of 24 May 2012, *Hehenberger* (C-188/11, EU:C:2012:312, paragraphs 33 and 34).

the farmer but also of ‘any act or omission ascribable to the negligence of the farmer or his representative that has the consequence of preventing an on-the-spot check from being carried out in full, where the farmer or his representative has not taken all measures which may reasonably be required of him in order to ensure that that check may be carried out in full’.¹⁸

72. In view of such radical consequences attached to obstruction, which would naturally include unjustified refusal to enter the land that has to be inspected, I fail to see why it would be necessary, *in the name of effectiveness of the checks*, to conjure up a general authorisation to enter (open or enclosed) agricultural land without the vine grower’s permission in disregard of the nationally applicable rules. In case of an unjustified refusal, the aid application will in any event be rejected and the applicant will bear the consequences thereof.

73. In short, neither the provisions of Regulation No 555/2008, nor the broader system and logic of EU support programmes can be interpreted as authorising officials carrying out on-the-spot checks to enter agricultural land, be it open or enclosed, without having obtained the vine grower’s permission, provided that one is needed under national law. The modalities of entry, including the issue of whether or not permission to enter the given type of land is needed, are governed by national rules.

B. EU law limits to Member States’ autonomy as to how checks are to be carried out

74. The fact that EU law itself does not provide for authorisation to enter private land in disregard of national rules on entry naturally does not mean that EU law would be entirely irrelevant. While not granting that specific authorisation, EU law provides some limits to Member States’ autonomy on how checks, required by Regulation No 555/2008, are to be carried out.

75. Two such types of limits will be briefly outlined in this closing section: those resulting from Regulation No 555/2008 itself (1), and those stemming from fundamental rights — specifically, the right to property and the inviolability of the home (2).

1. Limits flowing from Regulation No 555/2008

76. First, as in many other areas of EU mandated implementation and enforcement of Union law at national level,¹⁹ and also in the context of Regulation No 555/2008 as clearly stated by its Article 76, checks shall be effective, proportionate, and dissuasive. However, as the previous section of this Opinion sought to explain, ‘effective’ does not mean that ‘anything goes’, in disregard of the principle of legality.²⁰

77. Second, Article 80(2) of Regulation No 555/2008 arguably provides for a(n albeit limited) right to be heard. Article 80(1) of the regulation states that every on-the-spot check shall be the subject of a control report which makes it possible to review the details of the checks carried out. The report must contain a number of data, such as who was present, verification as to whether the given area has been properly tended in the case of a grubbing-up scheme, whether advance notice was given and, if so, how much. Pursuant to Article 80(2) of the regulation, where *discrepancies are found* between the information in the application and the situation as it was during the check, the vine grower shall *receive a copy* of the control report and shall have the *opportunity to sign it* before the competent authority draws its conclusions.

¹⁸ Judgment of 16 June 2011, *Omejc* (C-536/09, EU:C:2011:398, paragraph 30).

¹⁹ See, for instance, judgments of 11 June 2015, *Pfeifer & Langen* (C-52/14, EU:C:2015:381, paragraph 32); of 16 July 2015, *Chmielewski* (C-255/14, EU:C:2015:475, paragraph 25); and of 11 November 2015, *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraph 45).

²⁰ See, in this sense also, the recent judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraphs 51 to 58).

78. One may wonder what precisely an ‘opportunity to sign it’ may mean, but it is clear that the applicant for support has the right to be informed about negative factual findings resulting from an on-the-spot check. Moreover, since all this is supposed to happen *before* the competent authority draws its conclusions from the findings with regard to its ultimate decision, it is only logical that the applicant shall be given the possibility to contest the adverse factual findings of the competent authority.

79. Article 80(2) of Regulation No 555/2008 appears to be a context-specific expression of the right to be heard, as a component of the general principle of respect for the rights of the defence. It is established case-law that, ‘in accordance with that principle, the addressees of decisions that significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of EU law, even if the EU legislation applicable does not expressly provide for such a procedural requirement’.²¹

80. How exactly such a right to be heard will be realised in the national procedure is a matter for the Member State. On the one hand, it is certainly possible to provide the vine grower with the report some days *after* the check. Such an option would not require the presence of the vine grower during the checks, but would require the competent authority to wait before drawing any conclusions from that report until the applicant has signed it. On the other hand, it is equally possible for Member States to ensure compliance with the right to be heard at an earlier stage, notably during the check itself or, more precisely, *immediately after* it has been carried out. It would indeed be sensible — and perhaps even more efficient — to allow the vine grower to be present during the check and eventually ask him to sign the report at the end of the inspection. To that effect, it would be logical for the control official to seek the vine grower’s explicit permission to enter beforehand, as he is present.

81. However, no such obligation is explicitly foreseen in Regulation No 555/2008. It is therefore for national law to shape the right to be heard as it deems appropriate. In any event, Member States must ensure that in case of discrepancies found between the information in the application and the actual situation identified during the on-the-spot check, the vine grower is effectively given the right to be heard *before* any formal decision affecting him is taken. To that end, the control report must contain all the necessary information described in Article 80(1) of the regulation, which is for the referring court to assess.

2. Fundamental rights limits

82. Regulation No 555/2008 leaves it to the Member States to decide how on-the-spot checks are conducted with regard to the conditions to enter private land, specifically whether explicit permission from the vine grower is required with regard to a given type of land (open or enclosed). As EU law does not constitute a sufficient legal basis to enter land without permission, it is no longer necessary to address the third question regarding the compatibility of Articles 76, 78 and 81 of the regulation with the principle of inviolability of the home. Indeed the third question presupposes a *positive* answer to the first question, which is not the answer that is advocated in this Opinion.

83. However, the issue of fundamental rights as limits to the way in which on-the-spot checks may be carried out remains partially relevant from a different angle, as EU law imposes limits to Member States’ autonomy in providing for conditions of entry to private land. It is in consideration of this latter dimension that I will give a very concise account of those limits in this closing section.

²¹ Judgments of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678, paragraph 38); of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 84); and of 9 November 2017, *Ispas* (C-298/16, EU:C:2017:843, paragraph 26).

84. In its third question, the referring court has only raised the fundamental right of inviolability of the home (Article 7 of the Charter). However, another right is also potentially relevant in the present case: the right to property (Article 17(1) of the Charter).

85. According to Article 51(1) of the Charter, the provisions of the latter are addressed to the Member States only when they are implementing EU law. In the case at hand, there is no doubt that Member States act within the scope of application of EU law when carrying out checks explicitly required by Regulation No 555/2008. Thus, EU fundamental rights, in particular the Charter and general principles of EU law, are applicable to the case at hand.

86. That conclusion is not altered by the fact that, as raised by the French Government, the Charter would not be formally applicable *rationae temporis* to the facts of the case. To a great extent, certainly with regard to the right to property and the inviolability of home, the Charter represents a mere codification of fundamental rights already recognised as general principles of EU law.²² Thus, the Charter can be of guidance in the present case as it can be relied on for interpretation purposes despite its not being in force at the material time.²³

87. By the same token, it is immaterial that, in its order, the referring court has not referred to the Charter but to the European Convention on Human Rights ('the Convention'). Pursuant to Article 52(3) of the Charter, in so far as the Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the said Convention — although EU law can provide more extensive protection. Since the inviolability of the home and the right to property are protected under EU law *and* under the Convention, the Convention and the case-law of the European Court of Human Rights ('the ECtHR') are naturally relevant for the purposes of the present case.²⁴

88. As for the *right to property*, out of the three types of potential interference with that right, it is likely that the peaceful enjoyment of property could potentially come into question.²⁵ Such considerations would naturally be for the national court to make, but it is quite likely that trespassing by entering *open* private land to perform those checks without having the authorisation needed under national law, but also without causing any damage to the property, would be unlikely to amount to a fundamental rights violation. That kind of interference would probably be justified as it would be unlikely to go beyond what is necessary to carry out the checks effectively. Thus, although potentially illegal, that way of carrying out checks would be unlikely to amount to the violation of the fundamental right to property.

89. By contrast — and in connection with the second question — if the land in question happens to be *enclosed*, entering private land without the vine grower's permission would constitute a more significant interference with the right to property as that would effectively involve breaking in. It would again depend on the facts of the individual case, but it appears in general much less likely that such interference could be justified.

²² For the right to property, see, for example, judgments of 14 May 1974, *Nold v Commission* (4/73, EU:C:1974:51, paragraphs 12 to 14), and of 5 October 1994, *Germany v Council* (C-280/93, EU:C:1994:367, paragraph 78); for inviolability of the home, see, for example, judgment of 21 September 1989, *Hoechst v Commission* (46/87 and 227/88, EU:C:1989:337, paragraph 17).

²³ See, for instance, referring to the Charter even before its entry into force, judgments of 18 December 2007, *Laval un Partneri* (C-341/05, EU:C:2007:809, paragraph 91); of 14 February 2008, *Varec* (C-450/06, EU:C:2008:91, paragraph 48); and of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 335).

²⁴ See, to that effect, judgments of 18 June 2015, *Deutsche Bahn and Others v Commission* (C-583/13 P, EU:C:2015:404, paragraph 20), and of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraph 49).

²⁵ Judgment of 13 December 1979, *Hauer* (44/79, EU:C:1979:290, paragraph 19). For further examples of interferences with the right to property, see for instance, in case of an economic loss, judgments of the ECtHR of 29 November 1991, *Pine Valley Developments Ltd and Others v. Ireland* (CE:ECHR:1991:1129JUD001274287), and of 23 January 2003, *Kienast v. Austria* (CE:ECHR:2003:0123JUD002337994). See, in other circumstances relating to French rules allowing entry onto private land for the purpose of hunting, judgment of the ECtHR of 29 April 1999, *Chassagnou and Others v. France* (CE:ECHR:1999:0429JUD002508894).

90. As regards the inviolability of the home, it is true that over the years, the ECtHR has gradually expanded the notion of ‘home’ to include certain business premises, such as professional offices or branches.²⁶ However, more recently, that evolution seems to have found its natural limits in *Leveau and Fillon*²⁷ and in *Khamidov*.²⁸

91. *Leveau and Fillon* concerned the entry of an official into a pig farm in order to ensure that the farmers complied with the rules applying to such holdings. The ECtHR held that pig farms could not be considered as covered by the notion of ‘home’. The ECtHR further underlined that the meaning of ‘home’ should not be subverted and fly in the face of common sense.²⁹ In *Khamidov*, the ECtHR also refused to recognise industrial premises such as mills, bakeries and storage facilities as falling under the notion of ‘home’ for the purpose of Article 8 of the Convention.

92. This Court, following the lead of the ECtHR, has also acknowledged in the context of dawn raids that protection of the home could be extended to business premises.³⁰ The Court has also explicitly recognised ‘the fundamental right to the inviolability of the home’ as a general principle of EU law ‘as now expressed in Article 7 of the Charter, which corresponds to Article 8 of the ECHR’.³¹

93. As the case-law currently stands, it would therefore appear that apart from clearly private dwellings of whatever nature, there is a second category of ‘home’, covering certain types of business premises. The latter category is limited, however, to places in which the private and professional life of the persons concerned becomes so intermingled that there is no possibility of effectively distinguishing them. To put it simply, such protection has so far been extended to white-collar working environments — for people effectively living in their offices, where a considerable part of their private life also unfolds.

94. By contrast, mere places of production, whether industrial or agricultural, where such a mix of profession and private life does not exist, are unlikely to be qualified as ‘homes’. In no way do I wish to cast doubt on the close, almost intimate relationship a vine grower is likely to have to his vineyard. Still, the above-outlined logic that led to a limited extension of the notion of ‘home’ to include some business premises is simply not applicable with regard to open production sites, such as vineyards. In addition, in view of the logic and purpose of the notion of ‘home’ in the context of its protection under Article 7 of the Charter, I see no reason for seeking a further extension of that notion.

95. For these reasons, I do not think that an open vineyard could be qualified as part of the notion of ‘home’, unless of course some other factual elements warranting a different conclusion were present in a given case, such as for example that the vineyard at issue was immediately adjacent to a person’s private dwellings or professional office.³²

26 Judgments of the ECtHR of 16 December 1992, *Niemietz v. Germany* (CE:ECHR:1992:1216JUD001371088) concerning the searching of a lawyer’s office, and of 16 April 2002, *Société Colas Est and Others v. France* (CE:ECHR:2002:0416JUD003797197) about inspections carried out without judicial authorisation in companies’ head offices and branches.

27 Decision of the ECtHR of 6 September 2005, *Leveau and Fillon v. France* (CE:ECHR:2005:0906DEC006351200).

28 Judgment of the ECtHR of 15 November 2007, *Khamidov v. Russia* (CE:ECHR:2007:1115JUD007211801).

29 Decision of the ECtHR of 6 September 2005, *Leveau and Fillon v. France* (CE:ECHR:2005:0906DEC006351200).

30 Judgment of 22 October 2002, *Roquette Frères* (C-94/00, EU:C:2002:603, paragraph 29).

31 Judgment of 18 June 2015, *Deutsche Bahn and Others v. Commission* (C-583/13 P, EU:C:2015:404, paragraph 19).

32 See, by analogy, for example, judgment of the ECtHR of 7 June 2007, *Guțu v. Moldova* (CE:ECHR:2007:0607JUD002028902, § 65), where it was held that the unauthorised entry of police officers onto the applicant’s premises —her front garden —was an interference with her right to respect for the home.

V. Conclusion

96. In the light of the aforementioned considerations, I propose that the Court answer the questions posed by the Conseil d'État (Council of State, France) as follows:

Articles 76, 78 and 81 of Commission Regulation (EC) No 555/2008 of 27 June 2008 laying down detailed rules for implementing Council Regulation (EC) No 479/2008 on the common organisation of the market in wine as regards support programmes, trade with third countries, production potential and on controls in the wine sector cannot be interpreted as authorising officials carrying out on-the-spot checks to enter agricultural land, be it enclosed or not, without having obtained the vine grower's permission, provided that such permission is needed under national law for entering the type of land in question. It is for national law to provide for how land can be entered for the purpose of on-the-spot checks and to determine how these checks are to be carried out within the limits deriving from EU law, in particular respect for fundamental rights.