OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 11 May 2010 [1]

1. In this reference for a preliminary ruling the Oberverwaltungsgericht Rheinland-Pfalz (Germany) has asked the Court of Justice questions on the interpretation of Article 44 of Council Regulation (EC) No 1782/2003. [2] In essence, the parties to the main proceedings are in dispute concerning the taking into account of land – which is used for environmental protection and for agricultural production – when fixing farm payment entitlements.

I — Legal framework

2. Regulation No 1782/2003 provides for a form of income support for farmers called the single payment scheme ('the SPS').

3. Article 2 of Regulation No 1782/2003 defines inter alia 'holding' as 'all the production units managed by a farmer situated within the territory of the same Member State' and 'agricultural activity' as 'the production, rearing or growing of agricultural products including harvesting, milking, breeding animals and keeping animals for farming purposes, or maintaining the land in good agricultural and environmental condition as established under Article 5'.

4. As regards the use of payment entitlements, Article 44 of Regulation No 1782/2003 states:

'1. Any payment entitlement accompanied by an eligible hectare shall give right to the payment of the amount fixed by the payment entitlement.

2. "Eligible hectare" shall mean any agricultural area of the holding taken up by arable land and permanent pasture except areas under permanent crops, forests or used for non agricultural activities. …

1 — Original language: English.

2 — Regulation of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) [No] 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ 2003 L 270, p. 1), as amended by Council Regulation (EC) No 2013/2006 of 19 December 2006 (OJ 2006 L 384, p. 13) ('Regulation No 1782/2003').

3. The farmer shall declare the parcels corresponding to the eligible hectare accompanying any payment entitlement. Except in case of force majeure or exceptional circumstances, these parcels shall be at the farmer's disposal for a period of at least 10 months, starting from a date to be fixed by the Member State, but not earlier than 1 September of the calendar year preceding the year of lodging the application for participation in the [SPS].

...'

5. Article 2 of Commission Regulation (EC) No 795/2004 [3] provides that 'for the purposes of Title III of Regulation (EC) No 1782/2003 and of this Regulation, the following definitions shall apply:

(a) "agricultural area" shall mean the total area taken up by arable land, permanent pasture and permanent crops;

(b) "arable land" shall mean "arable land" within the meaning of Article 2 point (1) of Commission Regulation (EC) No 796/2004;

...

(e) "permanent pasture" shall mean "permanent pasture" within the meaning of Article 2 point (2) of Regulation No 796/2004;

...'

6. At the same time, Article 2 of Regulation No 796/2004 [4] states that 'for the purposes of this Regulation, the following definitions shall apply:

"1. Arable land": shall mean land cultivated for crop production and land under set-aside, or maintained in good agricultural and environmental condition in accordance with Article 5 of Regulation (EC) No 1782/2003, irrespective of whether or not that land is under greenhouses or under fixed or mobile cover;

2. "Permanent pasture": shall mean land used to grow grasses or other herbaceous forage naturally (self-seeded) or through cultivation (sown) and that has not been included in the crop rotation of the holding for five years or longer, excluding land under set-aside schemes pursuant to Article 6 of Council Regulation (EC) No 1251/1999 [OJ 1999 L 160, p. 1], land under set aside schemes

3 — Regulation of 21 April 2004 laying down detailed rules for the implementation of the single payment scheme provided for in [Regulation No 1782/2003] (OJ 2004 L 141, p. 1), as amended by Commission Regulation (EC) No 1974/2004 of 29 October 2004 (OJ 2004 L 345, p. 85) ('Regulation No 795/2004').

4 — 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 [Regulation No 1782/2003] (OJ 2004 L 141, p. 18), as amended by Commission Regulation (EC) No 239/2005 of 11 February 2005 (OJ 2005 L 42, p. 3) ('Regulation No 796/2004').

pursuant to Article 54(2) and Article 107 of Regulation (EC) No 1782/2003, areas set aside in accordance with Council Regulation (EEC) No 2078/92 [OJ 1992 L 215, p. 85] and areas set aside in accordance with Articles 22, 23 and 24 of Council Regulation (EC) No 1257/1999 [OJ 1999 L 160, p. 80];

…'

II — Factual background and the questions referred

7. The present reference for a preliminary ruling has been made in the context of a case before the referring court, in which the Aufsichts- und Dienstleistungsdirektion, Trier (Germany) (administrative body with supervisory and advisory powers; 'the ADD') is in dispute with the Landkreis Bad Dürkheim (rural district authority; 'the Landkreis') concerning the taking into account of certain land ('the land in question') when fixing Ms Niedermair-Schiemann's farm payment entitlements in the framework of the SPS for the years 2005 and 2006. Ms Niedermair-Schiemann is a sheep farmer. She is not the owner of the land in question, but she is allowed to use it on a contractual basis.

8. According to the management contract with the Land of Rheinland-Pfalz, Ms Niedermair-Schiemann is permitted without charge, but in return for taking over the contributions to the trade association, to use areas covering some 5 ha as a hay meadow and pasture subject to certain restrictions. Thus, no cutting is permitted on the land from 1 November until 15 June. The cutting may not be carried out with suction or rotary mowers. Instead of a second cut, the grazing of sheep and goats, in the form of rotational grazing or grazing in open areas supervised by the shepherd, is possible, in which case the grazing period is to be agreed with the countryside protection authority.

9. According to the maintenance and management contract with the Landkreis, Ms Niedermair-Schiemann – as the party performing the contract – is obliged to maintain and manage certain areas with a view to nature conservation, covering some 35 ha. For this she receives an annual payment of EUR 13 870. She is obliged to fulfil specific contractual obligations and to follow further instructions from the nature conservation authority – for example on how intensive the grazing should be – and is supported by maintenance measures taken by the nature conservation authority, such as preliminary cutting of sections of land and regular removal of bushes and grubbing carried out by third parties.

10. Ms Niedermair-Schiemann registered the land in question, in the context of applications for agricultural support, as permanent pasture belonging to the holding. By decision of 20 February 2006, she was allocated payment entitlements for arable land and for land under pasture. That decision was amended on ministerial instruction by decision of 14 May 2007, on the ground that the areas used on the basis of the management contracts were not eligible for support. Ms Niedermair-Schiemann lodged an objection with the legal affairs committee of the Landkreis, which annulled the above amendment decision. By judgment of 2 July 2008, the Verwaltungsgericht (Administrative Court) allowed the action against the annulment decision of the Landkreis, set aside the decision on the objection and thereby reinstated the amendment decision of 14 May 2007. That judgment was appealed before the referring court which decided it was necessary to refer the following questions to the Court for a preliminary ruling:

'1. Is there also an "agricultural area" in the sense of Article 44(2) of Regulation No 1782/2003 if that area is admittedly also used for agricultural purposes (grazing for sheep farming purposes) but the overriding objective is to achieve the aims of landscape management and nature conservation?

2. If Question 1 is to be answered in the affirmative:

Is an area used for non-agricultural activities in the sense of Article 44(2) of Regulation No 1782/2003 if the overriding purpose of the activity is nature conservation or in any case if the farmer is subject to the instructions of the nature conservation authority when fulfilling nature conservation objectives?

3. If there is an agricultural area (Question 1), which is also used for an agricultural activity (Question 2):

Does the allocation of an agricultural area to a holding (agricultural area of the holding in the sense of Article 44(2) of Regulation No 1782/2003) require:

(a) that it be at the disposal of the holding against payment on the basis of a lease or another similar temporary transaction?

(b) If (a) is to be answered in the negative: is it without prejudice to the allocation to the holding if occupation of the areas is allowed, without

charge or in return only for taking over the contributions to the trade association, for use of a specific nature and for a limited period of time in accordance with the objectives of nature conservation?

(c) If (a) is to be answered in the affirmative: is it without prejudice to the allocation to the holding if the holding is obliged to carry out certain tasks on the land in return for payment?'

11. The Landkreis, the ADD, Ms Niedermair-Schiemann, the German Government and the European Commission submitted written observations. All those parties except the German Government were joined by the Polish Government at the hearing which took place on 4 February 2010.

III — Assessment

A — *Principal arguments of the parties*

12. As regards the second question, the ADD submits that the use of land assigned to nature conservation is not an agricultural activity. Concerning the third question, it contends that land covered by nature conservation rules should not constitute an agricultural area for the purpose of Article 44(2) of Regulation No 1782/2003. That would require the land – that is, production units in terms of Article 2 of that regulation – to be managed by the holding. However, the concept of management calls for an unlimited power of disposal over the land with regard to its agricultural use.

13. The Landkreis submits that land serving to preserve agricultural and environmental conditions constitutes agricultural land in terms of Article 44(3) of Regulation No 1782/2003. The instructions given by the authority responsible for environmental protection have no bearing on that conclusion. As regards the third question, the Landkreis contends that Article 44(3) of Regulation No 1782/2003 does not provide whether, and in what manner, the area in question must be legally allocated to the farmer. Neither making the land available free of charge nor compensation for grazing the land has

any bearing on its allocation to a particular holding.

a specific nature and for a limited period of time in accordance with the objectives of nature conservation, does not preclude that area from being allocated to the holding. That is because in the present situation the farmer's action is not totally determined by third parties. Finally, the fact that the holding is – contractually or under agro-environmental obligations – obliged to carry out certain tasks on the land in return for payment does not preclude the allocation to a holding in terms of Article 44(2) of Regulation No 1782/2003.

14. As regards the first question, Ms Niedermair-Schiemann contends that an area which is effectively used as 'arable land' in terms of Article 2(1) of Regulation No 796/2004 or as 'permanent pasture' in terms of that article remains an agricultural area for the purpose of Article 44(2) of Regulation No 1782/2003, even if its purpose is primarily countryside protection and nature conservation. With regard to the second question, she submits that an area is used for agricultural purposes in terms of Article 44(2) of Regulation No 1782/2003, even if the primary purpose of the agricultural activity is nature protection. It matters little that the farmer is – contractually or on the basis of legislation – subject to the instructions of the nature conservation authority. Concerning the third question, Ms Niedermair-Schiemann contends that the allocation of an agricultural area to a holding (agricultural area of the holding in terms of Article 44(2) of Regulation No 1782/2003) does not require a contract under civil law. Therefore, the area made available to a holding requires neither a lease nor another similar temporary transaction, concluded for consideration. The fact that an agricultural area is allocated to a holding without charge or in return only for taking over the contributions to the trade association, for use of

15. The German Government submits that the first question should be answered in the sense that an area remains an agricultural area in terms of Article 44(2) of Regulation No 1782/2003, when – although used as pasture for agricultural purposes – it also serves countryside protection and nature conservation. That remains valid even where the latter purposes represent its primary objective. As regards the second question, the German Government contends that the fact that the agricultural activity also – or even primarily – serves nature protection or the fact that, when fulfilling nature conservation objectives, the farmer is subject to instructions from the nature conservation authority, do not preclude an area from being considered to be allocated to agricultural activities. With regard to the third question, that government submits that to allocate to a holding (agricultural area of the holding in terms of Article 44(2)

of Regulation No 1782/2003) an agricultural area used for an agricultural activity, where occupation of the area is allowed for a limited period, it is necessary that the farmer manages the area. However, it is not necessary for the occupation to be in return for consideration. To establish whether a farmer manages an area it is necessary to undertake a global assessment of all relevant circumstances. Depending on the circumstances of the particular case – notably the extent of regulation or the contracting party's regulatory powers – permission to occupy the areas for use of a specific nature and for a limited period of time in accordance with the objectives of nature conservation may indeed point to the fact that those areas should not be allocated to the holding using them, because they are not managed by it. However, the fact that the holding is obliged to carry out certain tasks on the land in return for payment should, in principle, preclude it from being allocated to the holding.

16. The Commission proposes to reformulate the questions referred and submits, in essence, that they should be answered as follows. First, Article 44(2) of Regulation No 1782/2003 does not preclude areas from being considered to be 'eligible hectares' where, in circumstances such as those of the main proceedings, they are used to serve primarily countryside protection and nature conservation, or activity carried out on those areas has that primary purpose. Secondly, Article 44 of Regulation No 1782/2003 should, in circumstances such as those of the main proceedings, be construed as meaning that areas may be considered to belong to the holding pursuant to the SPS: (a) independently of the existence of a lease or another similar temporary transaction concluded for consideration, even if the areas are made available to the holding without charge and in return only for taking over the contributions to the trade association; (b) in spite of the fact that the farmer is subject to the instructions of the nature conservation authority or the fact that the holding is obliged to carry out certain tasks on the land in return for payment; or (c) even if the areas are subject to certain restrictions for a limited period of time.

17. The Polish Government submitted that its position is essentially the same as that of the Commission.

B — *Appraisal*

1. First and second questions

18. I consider that the first and second questions should be dealt with together. [5] By its first question, the referring court asks whether there is also an 'agricultural area' in the sense of Article 44(2) of Regulation No 1782/2003 where that area is also used for agricultural purposes (grazing for sheep farming purposes) but the overriding objective is to achieve the aims of landscape management and nature conservation. By its second question, the referring court asks whether an area is used for non-agricultural activities in the sense of Article 44(2) of Regulation No 1782/2003 if the overriding purpose of the activity is nature conservation or in any case if the farmer is subject to the instructions of the nature conservation authority when fulfilling nature conservation objectives.

19. In *Horvath*, [6] a case relating to Regulation No 1782/2003, the Grand Chamber of the Court held inter alia that 'since requirements relating to environmental protection, one of the essential objectives of the Community, must, according to Article 6 EC, "be integrated into the definition and implementation of … Community policies and activities", such protection must be regarded as an objective which also forms part of the common agricultural policy'.

20. The objectives of the common agricultural policy and those of environmental protection are not mutually exclusive; rather they should be considered to be complementary. That is important, because it arguably follows from the questions referred that the national court considered those two sets of objectives to be essentially opposed.

21. Turning now to the wording of Article 44(2) of Regulation No 1782/2003, it provides that 'eligible hectare' is to mean any 'agricultural area' of the holding taken up by 'arable land' and 'permanent pasture' except

5 — The Commission suggested that the Court reformulate the questions referred. However, I consider that in order to provide the referring court with answers which will be of use to it and enable it to determine the case before it, it is not necessary to do so.

6 — Case C-428/07 [2009] ECR I-6355, paragraph 29. See also the Opinion of Advocate General Trstenjak in that case, in particular points 43 to 53.

areas under permanent crops, forests or used for 'non-agricultural activities'.

22. The concept of 'agricultural area' is specified in Article 2(a) of Regulation No 795/2004: it is the total area taken up by arable land, permanent pasture and permanent crops.

23. It follows from a reading of the above provisions that 'eligible hectare' means all the arable land and permanent pasture – except areas under permanent crops and forests – which are used for an agricultural activity.

24. Therefore, I shall refer in turn to the concepts of (i) permanent pasture; (ii) arable land; and (iii) agricultural activity.

25. The concepts of arable land and permanent pasture are explained in Article 2 of Regulation No 796/2004. The referring court infers from those provisions that agricultural areas must be used for agricultural 'purposes'. Therefore, it raises the question whether it is sufficient, in the case of an area used for several purposes (for example also as a nature conservation area), for there to be at least one agricultural purpose, or if in such a case the overriding purpose is decisive.

26. However, as follows from the definition of 'eligible hectare' in point 21 above and as will also be seen from the provisions cited below, it is clear that what matters in this respect is the effective use of the area, or perhaps what is effectively planted in the area, rather than the objectives or (overriding) purposes for which it is used.

27. Indeed, it follows from Article 2(e) of Regulation No 795/2004 (which, in turn, refers to Article 2(2) of Regulation No 796/2004) that 'permanent pasture' means land used to grow grasses or other herbaceous forage naturally (self-seeded) or through cultivation (sown) and that has not been included in the crop rotation of the holding for five years or longer, excluding land under relevant set-aside schemes. Clearly what matters is the effective cultivation of grasses or other herbaceous forage, apart from the case of land under relevant set-aside schemes.

28. It should be pointed out in this respect that the referring court stated that the land in question is used for sheep farming. That means that that land is effectively used for grasses or other herbaceous forage.

29. Therefore, as long as the land in question has not been included in the crop rotation of the holding for five years or longer – which is not clear from the documents before the Court – then it would appear that the land in question certainly meets the definition of 'permanent pasture', since it is clear that it serves as sheep pasture.

30. Next, as regards the concept of 'arable land' it is also based on the effective use of the land in question: it follows from Article 2(b) of Regulation No 795/2004 (which, in turn, refers to Article 2(1) of Regulation No 796/2004) that it essentially means land effectively cultivated for crop production and land under set-aside, or maintained in good agricultural and environmental condition in accordance with Article 5 of Regulation No 1782/2003.

31. The first paragraph of the latter article provides inter alia that land maintained in good agricultural and environmental condition is 'especially land which is no longer used for production purposes'. [7] Furthermore, it essentially states that Member States are to define minimum requirements for good agricultural and environmental condition on the basis of the framework set up in Annex IV. That annex provides inter alia, under 'Issues', as follows: 'Ensure a minimum level of maintenance and avoid the deterioration of habitats'. [8]

32. As we saw at the outset, in point 23 above, the land in question must also be 'used for an agricultural activity'.

33. The definition of agricultural activity is provided in Article 2(c) of Regulation No 1782/2003: it is 'the production, rearing or growing of agricultural products including harvesting, milking, breeding animals and keeping animals for farming purposes, or maintaining the land in good agricultural and environmental condition as established under Article 5'.

34. The second question suggests that the referring court seeks to ascertain whether there is a non-agricultural activity if its 'overriding' purpose is nature conservation. In that connection, the Commission correctly submitted that, to determine whether the land in question is allocated to activities which meet the

7 — The reasoning underlying that provision is set out in recital 3 in the preamble to Regulation No 1782/2003, according to which its legislative aim is to avoid the abandonment of agricultural land. In addition, reference may also be made to recital 4, which states that since permanent pasture has a positive environmental effect, it is appropriate to adopt measures to encourage the maintenance of existing permanent pasture to avoid a massive conversion into arable land.

8 — Under 'Standards', the annex refers to minimum livestock stocking rates or/and appropriate regimes; protection of permanent pasture; retention of landscape features; and avoiding the encroachment of unwanted vegetation on agricultural land.

conditions set out in Article 2(c) of Regulation No 1782/2003, it is appropriate to note that this definition does not fundamentally envisage a primary agricultural objective. The expression 'for farming purposes' in the definition refers to breeding and keeping animals but not to the general characterisation 'the production, rearing or growing of agricultural products'. Indeed, the fact that, according to the referring court, the sheep are being reared for profit on the land in question already shows that there is an agricultural activity being carried out. It may be pointed out that the grazing of farm animals in order to earn an income is a traditional agricultural activity.

35. I also do not consider that it should be relevant in this context whether or not the farmer is, as regards the use of the land in question, subject to the instructions of the nature conservation authority when fulfilling nature conservation objectives. For the farmer to be able to declare an 'eligible hectare' it is necessary that the land in question may be considered to be allocated to her holding within the meaning of Article 44 of Regulation No 1782/2003.

36. It follows from points 19 and 20 above that there is no contradiction between agricultural area or agricultural activity, on the one hand, and aspects of nature protection, on the other. [9] Moreover, it is arguable that in the present case nature conservation is not an autonomous activity of itself but an objective that the European Union and/or the Member States seek to pursue – including in the context of agricultural activities.

37. As regards the relevance of the instructions of authorities, Article 3(2) of Regulation No 1782/2003 expressly provides that 'the competent national authority shall provide the farmer with the list of statutory management requirements and good agricultural and environmental condition to be respected'. The mere fact that the farmer is subject to instructions should not preclude him or her

9 — For illustration, I would point out that my interpretation in this Opinion is supported by the currently applicable legislation. I refer to Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, 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). According to Article 34(2)(a) of the regulation, 'eligible hectare' is to mean inter alia any agricultural area that is used for an agricultural activity or, 'where the area is used as well for non-agricultural activities, predominantly used for agricultural activities'. Then, Article 1(3) of Commission Regulation (EC) No 370/2009 of 6 May 2009 amending [Regulation No 795/2004] (OJ 2009 L 114, p. 3) provides that an area is considered to be used predominantly for agricultural activities, 'if the agricultural activity can be exercised without being significantly hampered by the intensity, nature, duration and timing of the non-agricultural activity'. Finally, it follows from Article 34(2)(b) of Regulation No 73/2009 that any area which gave a right to payments under the SPS in 2008 should remain eligible even if it no longer complies with the definition of 'eligible' as a result of the implementation of certain environmental measures referred to therein.

from carrying out in an autonomous fashion an agricultural activity on the land in question.

38. As Ms Niedermair-Schiemann and the Polish Government rightly pointed out, agricultural activity is by definition never entirely unrestricted and farmers are subject to various relevant conditions, including those pertaining to the environment, not least under cross-compliance.

39. I agree with the Commission that the circumstances of the main proceedings represent an ideal case of ecological agriculture. It is the autonomous agricultural activity of Ms Niedermair-Schiemann itself, that is sheep farming, that fulfils the objectives of nature protection. Indeed, it would be illogical if this ideal case of sustainable agriculture were qualified as non-agricultural precisely because of its ecological character. In that connection, it should be borne in mind that the whole scheme behind Regulation No 1782/2003 and the 2003 reform of the common agricultural policy in general was to make European agriculture more sustainable, competitive and market-oriented. [10] In addition, Ms Niedermair-Schiemann submitted that land used for sheep farming is often special from an agri-environmental point of view: it is land whose use is of hardly any economic interest (areas with marginal yield), which is used in the interest of the land's owner, the aim being to preserve its ecological value.

40. Finally, it may be pointed out that it is apparent from the order for reference that land used for nature conservation purposes is also taken into account in the context of farm payment support in the Austrian and French support schemes.

41. It follows from the foregoing considerations that the answer to the first question should be that there is also an 'agricultural area' in the sense of Article 44(2) of Regulation No 1782/2003 if that area is also used for agricultural purposes (grazing for sheep farming purposes) but the overriding objective is to achieve the aims of landscape management and nature conservation. As regards the second question, the answer should be that an area remains used for an agricultural activity in the sense of Article 44(2) of Regulation No 1782/2003 even if the agricultural activity serves primarily nature conservation purposes, and even if the farmer is subject to the instructions of the nature conservation authority.

10 — See further, in that connection, Norer, R., *Rechtsfragen der Reform der Gemeinsamen Agrarpolitik 2003, Einheitliche Betriebsprämie und Cross Compliance in europa-, verfassungs-, verwaltungs- und zivilrechtlicher Analyse*, NWV, Wien – Graz, 2007, p. 13 et seq.

2. Third question

42. By its third question, the referring court asks whether the allocation of an agricultural area to a holding (agricultural area of the holding in the sense of Article 44(2) of Regulation No 1782/2003) requires: (a) that it be at the disposal of the holding against payment on the basis of a lease or another similar temporary transaction; (b) if not, whether it is without prejudice to the allocation to the holding if occupation of the areas is allowed, without charge or in return only for taking over the contributions to the trade association, for use of a specific nature and for a limited period of time in accordance with the objectives of nature conservation; and (c) if (a) is to be answered in the affirmative, whether it is without prejudice to the allocation to the holding if the holding is obliged to carry out certain tasks on the land in return for payment.

43. Since, as we have seen above, in the present case there is an agricultural area, which is also used for an agricultural activity, the referring court seeks certain information on the question of allocation of an agricultural area to a holding.

44. In principle, the question of allocation of an area to an agricultural holding may pose problems especially in situations where one area is put forward by several farmers, although there is no common use of that land. That is, however, not the situation in the present case. Here the question of allocation of an area to a holding was raised by the referring court in connection with the conditions of the use of the area.

45. It follows from Article 44(2) of Regulation No 1782/2003 that 'eligible hectare' is an agricultural area 'of the holding'.

46. Next, Article 2(b) provides that 'holding' means all the production units 'managed' ('verwaltet' in German) by a farmer situated within the territory of the same Member State.

47. Finally, Article 44(3) states that the agricultural area 'shall be at the farmer's disposal for a period of at least 10 months'.

48. Neither Regulation No 1782/2003 nor Regulations No 795/2004 and No 796/2004 contain a definition of the term 'managed' or of the expression '[to] be at the … disposal'.

49. As the German Government pointed out, it follows from Article 44 of Regulation No 1782/2003 that the area (the parcels corresponding to the eligible hectare) must be used; and they must be subject to agricultural use by the farmer. A production unit is managed by the farmer if he or she makes agricultural use of it in his or her own name. Therefore, in principle, the contracting parties are free to arrange the legal relations which serve as the basis for use of an area. Whether there is agricultural use in the name of the farmer should be verified by the referring court by taking into account all the relevant circumstances of the case.

50. I also agree with the Commission that the details of ownership or the given contractual regime, for instance the existence of a lease or remuneration in return for which the farmer may declare the area, are not decisive in this respect. In addition, it may be opportune to point out that in Article 46(2) of Regulation No 1782/2003, which belongs to the same section of the regulation as Article 44, the Community legislature expressly provided, in the context of transfer of payment entitlements, for certain contractual regimes, that is lease or similar types of transactions, as well as definitive transfer. [11]

11 — In that connection, see Case C-470/08 *van Dijk* [2010] ECR I-603, and my Opinion in Case C-434/08 *Harms* [2010] ECR I-4431.

51. However, Article 44 of Regulation No 1782/2003 is clearly not aimed at those aspects. Hence I agree with the referring court that the holding's power of disposal should not exist only where there is a lease or similar transaction.

52. Finally, as was rightly pointed out by the Polish Government, legal title to the land is a civil law question and will differ between the Member States. If it were relevant in the context of interpretation of Article 44 of Regulation No 1782/2003 there would be a risk that it would be applied in a non-uniform manner across 27 Member States.

53. Next, the referring court raises the question whether an area is an area of the holding where it is put at the disposal of the holding free of charge or in return only for taking over the contributions to the trade association for agricultural use which is restricted in time and nature.

54. In that connection, but also with regard to the above question of a lease, the referring court pointed out that shepherds in particular traditionally often use agricultural areas extensively and free of charge on the basis of

the owners' toleration based on customary law. [12]

55. As regards the fact that the occupation of the areas is allowed for a limited period of time in accordance with the objectives of nature conservation, the Commission is right when it submits that the 10 months required by Article 44(3) of Regulation No 1782/2003 imply that the farmer should be able to use the land in question for her agricultural activity for at least 10 months. That, however, includes the maintenance of the land in good agricultural and environmental condition. Therefore where use is restricted it is necessary that, during the time of restriction, the land still serves the agricultural activity, without which the element of functional allocation to a holding would not exist.

56. Indeed, as follows from recital 2 in the preamble to Council Regulation (EC) No 146/2008, [13] Article 44(3) of Regulation No 1782/2003 seeks to ensure that double claims are not made for the same land. It would appear from the order for reference, however, that the land in question is used by only one farmer, that is Ms Niedermair-Schiemann and that she is the only party entitled to use that land.

57. The area cannot admittedly be used for 10 months of the year, because the use is limited in time. However, it is sufficient that there is no other agricultural use in that period and the holding can use the 10-month plant growth as animal feed. The referring court is right in holding that it follows that in the present case, notwithstanding the restriction on use, an agricultural use remained possible. Therefore the land in question served the agricultural activity even during the time where use was restricted.

58. In conclusion, I agree with Ms Niedermair-Schiemann that, for the purposes of allocation of an area to a holding, it suffices that the farmer effectively using the area (1) has the possibility to exclude concurrent use by third parties; (2) may dispose of the fruits of her work; (3) without being totally subject to decisions taken by a third party.

12 — See, in this connection, also point 39 above.

13 — Regulation of 14 February 2008 amending [Regulation No 1782/2003] and Council Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2008 L 46, p. 1).

59. Therefore, to answer the first and second branch of the third question (under (a) and (b)), I consider that the allocation of an agricultural area to a holding does not require that it be at the disposal of the holding against payment on the basis of a lease or another similar temporary transaction. Moreover, it is without prejudice to the allocation to the holding if occupation of the areas is allowed, without charge or in return only for taking over the contributions to the trade association, for use of a specific nature and for a limited period of time in accordance with the objectives of nature conservation.

60. Since the first branch of the third question (under (a)) was answered in the negative it is, in principle, not necessary to answer the third branch (under (c)). However, for the sake of completeness I will deal with it and will set out the following considerations. As we have seen above the formal contractual relations are not relevant in this context and what matters are the effective rights of use which the farmer has. The fact that the farmer is designated as 'the party performing the task' ('le mandataire' in French) is not decisive. Therefore, as long as the farmer carries out an agricultural activity in an autonomous manner on the land in question, whether or not she receives supplementary remuneration, that land is allocated to the holding. It would appear from the order for reference that the remuneration is not a salary for the grazing activity but a hardship allowance, because the land has for environmental reasons to be managed in a specific costly way; apparently the amount in question more or less covers the additional costs resulting from use of areas with marginal yield. The grazing itself however serves the purpose of the farm, as the sheep would otherwise have to be fed elsewhere.

61. I consider that it does not follow from the order for reference that in the present case the farmer was not able to practise sheep farming in an autonomous fashion on the land in question.

62. Therefore, in answer to the third branch of the third question (under (c)), I consider that it is without prejudice to the allocation to the holding if the holding is obliged to carry out certain tasks on the land in return for payment.

IV — Conclusion

63. I suggest that the Court give the following answers to the questions referred by the Oberverwaltungsgericht Rheinland-Pfalz:

'(1) There is also an "agricultural area"in the sense of Article 44(2) of Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, and amending Regulation (EEC) No 2019/93 and various other regulations if that area is also used for agricultural purposes (grazing for sheep farming purposes) but the overriding objective is to achieve the aims of landscape management and nature conservation.

(2) An area remains used for an agricultural activity in the sense of Article 44(2) of Regulation No 1782/2003 even if the agricultural activity serves primarily nature conservation purposes, and even if the farmer is subject to the instructions of the nature conservation authority.

(3) The allocation of an agricultural area to a holding does not require that it be at the disposal of the holding against payment on the basis of a lease or another similar temporary transaction. Moreover, it is without prejudice to the allocation to the holding if occupation of the areas is allowed, without charge or in return only for taking over the contributions to the trade association, for use of a specific nature and for a limited period of time in accordance with the objectives of nature conservation. Finally, it is without prejudice to the allocation to the holding if the holding is obliged to carry out certain tasks on the land in return for payment.'