Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 6 February 2013 [1]

Case C-373/11

Panellinios Sindesmos Viomikhanion Metapiisis Kapnou
v
Ipourgos Ikonomias kai Ikonomikon
and
Ipourgos Agrotikis Anaptixis kai Trofimon

(Request for a preliminary ruling from the Simvoulio tis Epikratias (Greece))

(Regulation (EC) No 1782/2003 — Article 69 — Validity — Regulation (EC) No 795/2004 — Article 48 — Common Agricultural Policy — Additional payment for specific types of farming and quality production — Implementation by a Member State — Discrimination — Articles 2, 32, 33 and 34 EC)

I – Introduction

1. In the present case, the Simvoulio tis Epikratias (Council of State of Greece) seeks clarification as to the validity of Article 69 of Council Regulation (EC) No 1782/2003 of 29 September 2003 ('Regulation No 1782/2003'), [2] which allows Member States, for a transitional period, to freely set the retention rate (between 0% and 10% of the overall national ceiling) in order to make additional payments for specific types of farming and quality production.

2. In substance, the question referred by the national court concerns the limits within which the European Union legislature is entitled to delegate to the Member States the implementation of the Common Agricultural Policy ('CAP'). In the case of the tobacco sector, the Member States have adopted different approaches regarding the introduction of single payment schemes and the levels of retention rates to additional payments provided under Regulation No 1782/2003.

3. This is, notably, one of the key aspects of the reform of the CAP which started to take shape as from the adoption of the so-called Agenda 2000 [3] at the European Council meeting in Berlin on 26 March 1999. Indeed, one of the main aims of this reform was that of rationalising and simplifying the relevant European Union rules, while achieving a greater decentralisation of policy implementation, with a larger margin being left to Member States and their regions. [4]

1 — Original language: English.

2 — Regulation 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).

3 — Communication from the Commission, 'Agenda 2000: for a stronger and wider Union', COM(97) 2000, *Bulletin of the European Union*, Suppl. 5/97 ('Agenda 2000'). See, in particular, Part III of this Communication.

4 — See Agenda 2000, p. 28.

II – Legal framework

A – *European Union law*

4. Article 64(1) and (2) of Regulation No 1782/2003 provides:

‘1. A Member State may decide, by 1 August 2004 at the latest, to apply, at national or regional level, the single payment scheme provided for in Chapters 1 to 4 under the conditions laid down in this Section.

2. According to the choice made by each Member State, the Commission shall fix, in accordance with the procedure referred to in Article 144(2), a ceiling for each of the direct payments referred to, respectively, in Articles 66, 67, 68 and 69.

This ceiling shall be equal to the component of each type of direct payment in the national ceilings referred to in Article 41, multiplied by the percentages of reduction applied by Member States in accordance with Articles 66, 67, 68 and 69.

The total amount of the fixed ceilings shall be deducted from the national ceilings referred to in Article 41 in accordance with the procedure referred to in Article 144(2).

…’

5. Article 69 of Regulation No 1782/2003 states:

‘Member States may retain up to 10% of the component of national ceilings referred to in Article 41 corresponding to each sector referred to in Annex VI. …

In this case and within the limit of the ceiling fixed in accordance with Article 64(2), the Member State concerned shall make, on a yearly basis, an additional payment to farmers in the sector or sectors concerned by the retention.

The additional payment shall be granted for specific types of farming which are important for the protection or enhancement of the environment or for improving the quality and marketing of agricultural products under conditions to be defined by the Commission in accordance with the procedure referred to in Article 144(2).’

6. By virtue of Regulation (EC) No 795/2004 (‘Regulation No 795/2004’),[5] the Commission adopted the rules for the implementation of the single payment scheme provided for in Regulation No 1782/2003.

7. According to Article 48 of Regulation No 795/2004,

‘1. The additional payment provided for [in] Article 69 of Regulation (EC) No 1782/2003 shall be granted, without prejudice to Article 37(3) of Regulation (EC) No 1257/1999 and its implementing rules, under the conditions provided for in paragraphs 2 to 6 of this Article.

2. The payment shall be made only to farmers within the meaning of Article 2(a) of Regulation (EC) No 1782/2003, irrespective whether they have applied or not to the single payment scheme or they hold payment entitlements.

5 — Commission Regulation of 21 April 2004 laying down detailed rules for the implementation of the single payment scheme provided for in Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers (OJ 2004 L 141, p. 1).

3. “In the sector or sectors concerned by the retention” shall mean that the payment may be claimed, in principle, by all the farmers producing, at the time for lodging an application for the additional payment and under the conditions provided for by this Article, the products covered by the sector or sectors referred to in Annex VI to Regulation (EC) No 1782/2003.

4. In case the payment covers types of farming or quality and marketing measures for which no specific production is identified or the production is not directly covered by a sector, payment may be provided for under the condition that the retention is done in all the sectors referred to in Annex VI to Regulation (EC) No 1782/2003 and only the farmers belonging to any of the sectors referred to in that Annex shall participate to the scheme.

5. In case of application of Article 69 of Regulation (EC) No 1782/2003 at regional level, the retention shall be calculated on the basis of the component of the payments of the sectors concerned in the region concerned.

Member States shall define the region at the appropriate territorial level in accordance with objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortion.

6. Member States concerned shall communicate the details of the payment they intend to grant and, in particular, the eligibility conditions and the sectors concerned by 1 August of the year preceding the first year of application of the single payment scheme at the latest.

Any change to the communication referred to in the first subparagraph shall be done by 1 August of a given year at the latest and shall apply to the following year. It shall be immediately communicated to the Commission accompanied by the objective criteria justifying such changes. However, a Member State may not modify the sectors concerned nor the percentage of retention.’

8. Regulation No 1782/2003 has been repealed by Council Regulation (EC) No 73/2009 (‘Regulation No 73/2009’).[6]

B – *National law*

9. Regulation No 1782/2003 and Regulation No 795/2004 were transposed into national law by means of two Joint Decisions of the Minister for Economic Affairs and Finance and the Minister for Rural Development and Food: Joint Decision No 292464 of 9 August 2005 (‘the 2005 Joint Decision’),[7] laying down in general the additional administrative implementing measures and measures for calculating the number and value of rights of single payment beneficiaries, and Joint Decision No 49143 of 8 August 2006 (‘the 2006 Joint Decision’),[8] specifically laying down the measures (method of payment, amounts paid, supporting documentation for payment) for making the additional payment (quality retention) in the tobacco sector.

10. Article 16 of and Annex I to the 2005 Joint Decision set the percentage for the payment (quality retention) for tobacco at 2%.

6 — Regulation 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). Also Regulation No 795/2004 is no longer in force, having been repealed by Commission Regulation (EC) No 1120/2009 of 29 October 2009 laying down detailed rules for the implementation of the single payment scheme provided for in Title III of Council Regulation (EC) No 73/2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers (OJ 2009 L 316, p. 1).

7 — FEK B 1122.

8 — FEK B 1333.

III – The dispute in the main proceedings and the question referred for a preliminary ruling

11. In November 2006, Panellinios Sindesmos Viomikhanion Metapiisis Kapnou (Greek Association of Tobacco Processing Industries) (the 'Association') sought annulment of the 2006 Joint Decision before the Simvoulio tis Epikratias. In the context of these proceedings, the Association also contested the legality of the 2005 Joint Decision. According to the Association, both Joint Decisions are unlawful insofar as they constitute implementation of Article 69 of Regulation No 1782/2003 which is, in itself, unlawful since it conflicts with several provisions of the European Union Treaties.

12. It is in those circumstances that the Simvoulio tis Epikratias, which was unsure as to the validity of Article 69 of Regulation No 1782/2003, decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 69 of Regulation No 1782/2003, under which the Member States are permitted to set different retention percentages, up to the limit of 10% of the component of national ceilings referred to in Article 41, for the making of an additional payment to producers, while observing the criteria set out in the third paragraph of Article 69, compatible, in permitting this differentiation as regards the retention percentage, with Articles 2 EC, 32 EC and 34 EC and with the objectives of ensuring a stable income for producers and maintaining rural areas?'

13. The Association, the Hellenic Republic, the Council of the European Union and the European Commission have submitted written observations. They all attended the hearing held on 21 November 2012.

IV – Analysis

A – *Preliminary remarks*

14. Regulation No 1782/2003 establishes common rules for direct support schemes under the CAP and certain support schemes for farmers, and amends several previous regulations. It constituted one of the main legal texts for reform of the CAP, which aimed to enhance the competitiveness of the farm sector, promoting a market-oriented, sustainable agriculture and strengthening rural development policy. [9]

15. In essence, Regulation No 1782/2003 provides for, on the one hand, a progressive reduction, until 2012, of the amounts of direct payments to be granted to farmers (Article 11) and, on the other hand, the introduction of a single payment scheme (Articles 33 to 71).

1. Scope and subject-matter of the present reference for a preliminary ruling

16. At the outset, it is important to clarify the application *ratione temporis* of the European Union rules which are relevant in the present case. Indeed, whereas some of the parties who have submitted observations refer in their arguments to some provisions of the European Union Treaties as currently in force, the facts which gave rise to the present proceedings occurred before the Treaty of Lisbon entered into force. Moreover, as I have mentioned, Regulation No 1782/2003 was repealed before that date, even if it continued to have effects thereafter. In the light of this, I believe that the correct legal framework of the case is European Union law as it stood at the time the litigation started before the national court.

9 — See the European Commission's Proposals for Council Regulations – Explanatory memorandum – A long-term policy perspective for sustainable agriculture, COM(2003) 23 final, p. 1.

17. That said, as I shall explain in more detail later, I do not believe that the changes introduced by the Treaty of Lisbon have any real impact on the legal assessment of this case. The provisions of the Treaties which are currently in force are essentially equivalent to the old ones, or they have merely codified legal principles recognised in the case-law or made explicit in other legal instruments.

18. Likewise, the fact that Regulations No 1782/2003 and No 795/2004 have, in the meantime, been repealed has no bearing on the present case. As the referring court states in its reference for a preliminary ruling, and the Commission has confirmed in its observations, Article 69 of Regulation No 1782/2003 was still producing effects at the date the present case was introduced before the national court (13 November 2006) and, in particular, the payments foreseen therein have been executed right through until June 2010.

19. Secondly, I emphasise that all parties agree that this preliminary reference does not concern the compatibility with European Union law of the measures adopted by the Greek Government to implement Regulations No 1782/2003 and No 795/2004 and, in particular, the legality of the 2005 and 2006 Joint Decisions. Indeed, the referring court does not ask this Court about the interpretation of a European Union law provision but on its *validity*.

20. Accordingly, whether the Greek authorities have correctly applied the relevant European Union rules is not an issue that arises in the present proceedings. Therefore, my legal analysis will focus exclusively on the validity of Article 69 of Regulation No 1782/2003.

21. Thirdly, it is useful to recall that European Union competence in the field of agriculture is by its nature a shared competence. In fact, in the newly introduced Article 4(2)(d) TFEU agriculture is mentioned among the areas of shared competence between the European Union and its Member States. Legal doctrine has discussed, and thoroughly, whether and to what extent the Lisbon Treaty has changed anything in this respect.[10] However, in my opinion this is not as such relevant because even before the Lisbon Treaty, the Court had consistently held that, in the areas covered by the common organisation of markets, Member States had a residual legislative power in relation to situations not governed by European Union rules, or when those rules expressly conferred implementing powers to them.[11]

22. The fact that agricultural policy is an area in which both the European Union and the Member States have the capacity to legislate and adopt legally binding acts[12] is not without importance in the case at hand. Indeed, as former Article 5 EC (replaced, in substance, by Article 5 TEU) implied, the use of European Union competences in such an area is governed by the principle of subsidiarity. Accordingly, in areas which do not fall within its exclusive competence, the European Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, and can rather be better achieved at the European Union level.

23. Importantly, devolution to the national or, as the case may be, regional or local authorities of the implementation of European Union rules is also permitted in areas of exclusive competence.[13] Nevertheless, such devolution may assume an even more prominent role when it occurs in areas of shared competence. Indeed, within those areas, the choice concerning whether and on what the European Union legislature should delegate implementation to domestic authorities must also comply with the principle of subsidiarity.

10 — See, for example, Bianchi, D.: *La Politique Agricole Commune (PAC) – Toute la PAC, Rien d'autre que la PAC!*, Bruylant, 2006, pp. 92-95.

11 — See, inter alia, Case 237/82 *Jongeneel Kaas and Others* [1984] ECR 483, paragraphs 13 and 16; Case 207/84 *De Boer* [1985] ECR 3203, paragraphs 26-29; Case 48/85 *Commission* v *Germany* [1986] ECR 2549, paragraph 12; and Case C-118/02 *Industrias de Deshidratación Agrícola* [2004] ECR I-3073, paragraph 19.

12 — This is the expression now codified in Article 2(2) TFEU.

13 — See Article 2(1) TFEU.

24. Therefore, it can hardly be contested that, in the field of agriculture, Member States still maintain some powers to act alongside the European Union. In particular, Member States' authorities can and must act, when so requested by the European Union, in order to apply or implement European Union legislation in this field.[14] On these issues, I would also refer to the Opinion of Advocate General Trstenjak in the *Horvath* case, where she highlighted how devolved and differentiated rule-making under the CAP is not *per se* incompatible with the relevant principles of the European Union Treaties.[15]

25. The issue of validity raised in the present case can, therefore, only concern the *manner* in which Article 69 of Regulation No 1782/2003 has achieved such a delegation by granting Member States some discretion to implement additional payments in the framework of the CAP reform.

2. Decoupling support from production

26. Among other things, central to this reform is the so-called *decoupling* of direct aid to farmers; save exceptions, payments are no longer connected to a specific production. As a result, farmers receive direct payments, the amounts of which are not affected by, for example, the type of crop grown, or the quantity of products produced.

27. I am explicitly mentioning decoupling since in my opinion the alleged negative effects on the tobacco industry in Greece, which the Association complains of, would, if they exist, be the result not of the measure which is provided for in Article 69 of Regulation No 1782/2003, but of the application of decoupling to tobacco.

28. The thrust of the arguments submitted by the Association to challenge the validity of Article 69 of Regulation No 1782/2003 is that the European Union legislature has provided a margin of manoeuvre to the domestic authorities that is too wide. In their view the fact that the EU legislature permitted national authorities to decide freely, within the limit of 10%, the percentage of the national ceilings to be retained and used for the additional payments is incompatible with some of the basic principles of the CAP and produces undue distortions of competition. The main reason for this is that, because of this margin of discretion, it is inevitable that different Members States choose a different percentage of the national ceiling. As a result, producers of tobacco located in different Member States would receive different amounts of additional payments. The effect of this is, allegedly, that Greece is experiencing a sharp decrease of tobacco production.

29. Yet, as the Greek Government correctly points out in its written observations, this line of reasoning seems flawed insofar as it is based on an incorrect premiss. Despite what the term 'additional payments' may suggest, these payments do not come on top of the maximum amount of payments which may be executed as direct payments. In very simple terms, Article 69 of Regulation No 1782/2003 allowed Member States, instead of paying the whole of the aid to which farmers are entitled as direct payments, to pay that amount partially as direct payments and partially as additional payments. The idea behind Article 69 was that Member States could decide, if they so wished, to slightly reduce the direct payments for all producers up to 10%, and to use the resources thus liberated to make a limited extra payment to farmers having some specific characteristics.[16]

14 — See current Article 291 TFEU, which replaces in substance the third indent of Article 202 EC and codifies Declaration No 43 relating to the Protocol on the application of the principles of subsidiarity and proportionality.

15 — Opinion in Case C-428/07 *Horvath* [2009] ECR I-6355, points 90-94.

16 — Article 69 in fact speaks of aid for 'specific types of farming which are important for the protection or enhancement of the environment or for improving the quality and marketing of agricultural product'.

30. However, this division of the amount of aid between direct payments and, possibly, additional payments in no way affects the overall amount payable to the producers, insofar as the national ceilings remain unaltered.[17] For example, in economic terms it makes no difference to the sector receiving the aid if, of a given amount of monies, which corresponds to the national ceiling, 98% is distributed as direct payments and 2% as additional payments, or 90% as direct payments and 10% as additional payments, despite the fact that this may affect the distribution of the aid within the sector.

31. This is especially true in Greece, since the Greek Government took the view that the conditions for the grant of the additional payments were fulfilled by all tobacco producers located in its territory and, as such, these payments went to the same producers which would have received these monies as part of direct payments, had additional payments not existed.

32. Therefore, the arguments of the Association appear to me to be misplaced. The alleged distortions of competition or decrease in tobacco production do not appear to be a result of the challenged measure. This was, although indirectly, confirmed during the hearing by the representative of the Association.

33. In fact, I have rather the impression that they take issue with the decoupling of the aid to farmers, and for two reasons. Firstly, the partial implementation of decoupling which Article 64 of Regulation No 1782/2003 allowed would result in a difference of treatment between producers located in different Member States. Secondly, decoupling would discourage tobacco producers to continue cultivating that product and this would, in turn, lead to a fall in tobacco production in Greece, to the detriment of the interests of Greek tobacco processing industries represented by the Association.

34. However, whether these allegations are correct or not is irrelevant to the case at hand because decoupling as such, or its partial implementation pursuant to Article 64 of Regulation No 1782/2003, does not form the object of the current proceedings. Furthermore, the arguments of the Association on this point seem to miss the mark. It is not an objective of the CAP to guarantee that a production of a given agricultural product be maintained unaltered throughout the years. Actually, both before and after the reform of the CAP, the opposite may be true.[18]

35. Furthermore, according to recital 28 in the preamble to Regulation No 1782/2003, the single payment should not be conditional on production of any specific product in order to leave farmers free to choose what to produce on their land.

36. Having clarified the scope of the present reference for a preliminary ruling, I will now proceed to examine the validity of Article 69 of Regulation No 1782/2003. In this regard, I observe that the Simvoulio tis Epikratias questions the compatibility of that provision with European Union law under three distinct grounds only: (i) Article 34 EC in combination of Article 2 EC; (ii) Article 32 EC, and (iii) the objectives of 'ensuring a stable income for producers' and of 'maintaining rural areas'. In its submissions before the Court, however, the Association also develops some additional grounds in support of its contention that the provision in question is invalid.

37. I will first examine the possible grounds of invalidity raised in the decision of the referring court. I will then turn to the additional arguments put forward by the Association, insofar as they are sufficiently linked with the concerns raised by that court. However, I do not believe that the Court should address, in its judgment, arguments that were raised before the Simvoulio tis Epikratias and which have been already dismissed.

17 — See, notably, recital 31 in the preamble to Regulation No 1782/2003.

18 — For example, in *Hauer* the Court accepted that a provision which prohibited the new planting of vines for a limited period was justified by the objectives of general interest consisting in the immediate reduction of production surpluses and in the preparation, in the longer term, of a restructuring of the European wine industry (see Case 44/79 [1979] ECR 3727, paragraphs 17-33). More generally, on the European Community's efforts to combat overproduction of certain agricultural products in the 1970s and 1980s, see Usher, J.: *EC Agricultural Law*, 2nd ed. Oxford University Press, 2001, pp. 34-39.

B – *Possible grounds of invalidity*

1. Articles 2 and 34 EC

38. In essence, the Simvoulio tis Epikratias asks the Court whether Article 69 of Regulation No 1782/2003 is incompatible with Article 34 EC (now Article 40 TFEU) read in conjunction with Article 2 EC (now Article 3 TEU), which establish a common market for agricultural products.[19]

39. According to the Association, the application of Article 69 of Regulation No 1782/2003 would result in distortions of competition between producers of the same product in different Member States, as it would put the producers whose Member State sets a low percentage for the retention at a disadvantage vis-à-vis the producers located in other Member States in which this percentage has been set at a higher level. This would, moreover, lead to discrimination between producers and consumers located in different Member States.

40. At the outset, I would recall that Article 34(2) EC, which prohibits all discrimination in the context of the CAP, is merely a specific expression of the general principle of equal treatment, which requires that comparable situations not be treated differently and different situations are not to be treated alike unless such treatment is objectively justified.[20] In keeping with this principle, the European Union legislature has laid down, in Regulation No 1782/2003, a number of provisions aimed at providing different treatment to those situations which, because of the particular product[21] or geographical area,[22] required specific rules.

41. Now, returning to the arguments put forward by the Association, I can say from the outset that I do not find them persuasive, for the reasons I have already discussed. The overall amount of the payments to the farmers in a sector in each country remains essentially the same irrespective of whether the domestic authorities decide to make use of the possibility offered by Article 69 of Regulation No 1782/2003 to introduce additional payments and, if so, of the level of retention they set for this purpose. It is only the distribution within each country, albeit not in the Greek tobacco farming sector, which could create some more substantial differences, in that some producers might obtain only direct payments, whereas others could also receive additional payments.

42. In any event, I take the view that the alleged difference in treatment resulting from the application of the provision challenged would be objectively justified and, thus, would not constitute discrimination prohibited by European Union law, or provoke any undue distortion of competition.

43. With regard to the first aspect, I would stress that the Court has already found that the fact that the adoption of a measure in the context of a common market organisation may have different implications for some producers because of their individual production or local conditions can not be considered discrimination prohibited by the Treaty when the measurement is based on objective

19 — According to Article 2 EC 'The Community shall have as its task, by establishing a common market … and by implementing common policies or activities … to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, ... the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States'. Article 34 EC provides for a common organisation of agricultural markets taking the form of common rules on competition, compulsory coordination of the various national market organisations, or a European market organisation. The common organisation may include in particular aids for the production and marketing of the various products. The common organisation shall exclude any discrimination between producers or consumers within the Community.

20 — See, inter alia, Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 25; Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraph 35; and Case C-273/04 *Poland* v *Council* [2007] ECR I-8925, paragraph 86.

21 — See, inter alia, Article 66 (Arable crops payments), Article 67 (Sheep and goat payments), Article 68 (Beef and veal payments), Articles 76-78 (Protein crop premium), Articles 79-82 (Crop specific payment for rice), Articles 83-87 (Area payment for nuts), Articles 88-92 (Aid for energy crops), Articles 93-94 (Aid for starch potato), Articles 95-97 (Dairy premium and additional payment).

22 — For example, Articles 10(5) and 70(1)(b) laying down some special rules for farmers in French overseas departments, the Azores and Madeira, the Canary and Aegean Islands and Article 98 on special regional aid for arable crops in Finland and Sweden north of the 62nd parallel.

criteria, tailored to the overall functioning of the common market organisation.[23] Likewise, the Court has accepted that the situation in different Member States is not always comparable and, as such, this may justify divergences in the relevant legislation with regard to that Member State or to certain producers in its territory.[24]

44. Lastly, in the already-mentioned *Horvath* case, the Court firstly recalled its settled jurisprudence[25] according to which the prohibition on discrimination, which is a general principle of European Union law, is not concerned with any disparities in treatment which may result, between the Member States, from divergences existing between the legislation of the various Member States, so long as that legislation equally affects all persons subject to it. Secondly, it drew the consequences of this case-law by concluding that, where the constitutional system of a Member State provides that devolved administrations are to have legislative competence, the mere adoption by those administrations of different standards in the context of the CAP does not constitute discrimination contrary to European Union law.[26]

45. Under the circumstances of the present case, I do not find any reason to depart from these principles. In particular, I believe that the Court's reasoning in *Horvath* is, *mutatis mutandis*, applicable to the case at hand. The mere fact that in *Horvath* the different treatment was the product of legislation enacted autonomously by each Member State in order to implement European Union rules, whereas in the present case it would be the logical consequence of the margin of discretion explicitly left to Member States' authorities by the European Union legislature for that implementation does not warrant, in my view, a different conclusion.

46. With regard to the second aspect relating to distortions of competition, I would observe that the Court, on the basis of consistent jurisprudence, in the *Vodafone* case has held that 'in the exercise of the powers conferred on it the Community legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. … However, even though it has a broad discretion, the Community legislature must base its choice on objective criteria. Furthermore, in assessing the burdens associated with various possible measures, it must examine whether objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators.'[27]

47. In the present case, even if some negative consequences for some producers were to be created by the measure in question, I see nothing to suggest that the European Union legislature has not based its decision to grant some discretion to Member States in the implementation of Article 69 of Regulation No 1782/2003 on solid and objective grounds, or that those negative consequences could not be justified by, for example, the aim to ensure a smooth transition between the two CAP systems, or to provide aid adapted to national conditions or needs.

48. In this regard, I observe that recitals 33 and 34 in the preamble to Regulation No 1782/2003 explain the reasons for which the European Union legislature has introduced some specific rules on regional and optional implementation, in particular Article 69 thereof. Furthermore, the Association has not put forward any argument which seriously challenges the objectives pursued and the logic and criteria relied on by the legislature in establishing those rules.

23 — See Case C-179/84 *Bozzetti* [1985] ECR I-2301, paragraph 34.

24 — See, for example, *Spain* v *Council*, paragraphs 25-30; Joined Cases C-267/88 to C-285/88 *Wuidart* [1990] ECR I-435, paragraph 30; Case C-22/94 *Irish Farmers Association and Others* [1997] ECR I-1809, paragraphs 32-37; and *Poland* v *Council*, paragraphs 86-88.

25 — See, to that effect, Joined Cases 185/78 to 204/78 *Van Dam and Others* [1979] ECR 2345, paragraph 10; Case C-177/94 *Perfili* [1996] ECR I-161, paragraph 17; and Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 34.

26 — Paragraphs 47-58.

27 — Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, paragraphs 52-53.

2. Article 32 EC

49. The Association also argues, in substance, that Article 69 of Regulation No 1782/2003 conflicts with Article 32 EC[28] (now Article 38 TFEU). This would be so because, by allowing the Member States to freely set, without criteria or preconditions, the percentage for the retention from the national ceiling that they will have available to support a product which, like raw tobacco, is subject to a common organisation of the market, it essentially brings an end to the common organisation of the market for that product. In other words, Article 69 of Regulation No 1782/2003 would, in essence, 're-nationalise' agricultural policy, thereby circumventing the fundamental principles governing the internal market and the CAP.

50. I am not convinced by such an argument. For me it is inconceivable that the discretion that Member State authorities have been granted regarding the possibility to award additional payments and the related level of retention, within 10% of the national ceiling, could undermine any of the fundamental principles governing the CAP or the internal market.

51. On the contrary, the grant of a certain margin of manoeuvre to the national authorities to decide on measures which may be appropriate to ensure a smooth transition in a delicate period for European agricultural markets appears to me to be in full conformity with the legal principle now incorporated in Article 39(2) TFEU. This provision requires the legislature to take into account, among other things, 'the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions'. The necessity of allowing Member States such discretion is in fact highlighted in recital 33 in the preamble to Regulation No 1782/2003.

52. On this basis, I think that it cannot be held to be manifestly erroneous to consider that the domestic authorities are better placed to take decisions which may concern, for example, the retention rate for the additional payments, or the designation of the specific types of farming requiring those payments in its territory. This does not amount to 're-nationalisation' of the CAP, but only to a limited delegation to national authorities of the powers to implement certain rules which the European Union legislature considered appropriate in the course of the transition between the old CAP and the revised version.

53. In the overall scheme of the reform introduced by Regulation No 1782/2003, Article 69 could be considered to be of secondary importance. It merely introduces the possibility of combining the direct payments with some limited additional payments. Furthermore, this possibility is subject to a number of conditions of both a procedural and substantive nature that are laid down in Article 69 itself and in Article 48 of Regulation No 795/2004.

54. In particular, Article 48 of Regulation No 795/2004 provides important safeguards by requiring that Member States take decisions according to objective criteria and act 'in such a way as to ensure equal treatment between farmers and to avoid market and competition distortion'. Furthermore, that provision empowers the Commission to closely monitor how Member State authorities carry out additional payments, by placing upon these a number of notification obligations.[29]

55. The powers exercised by Member States pursuant to Article 69 of Regulation No 1782/2003 are, therefore, both limited *ex ante* and subject to controls *ex post*.

28 — According to Article 32 EC the operation and development of the common market for agricultural products must be accompanied by the establishment of a common agricultural policy, the scope of which in terms of activities and products is defined in the same Treaty provision.

29 — It should also be mentioned that Article 64(3) of Regulation No 1782/2003 requires the Commission, within a specific time frame, to 'submit a report to the Council, accompanied, if necessary, by appropriate proposals, on the possible consequences, in terms of market and structural developments, of the implementation by Member States' of, among others, the option provided for in Article 69 of the same regulation.

56. On this basis, I consider that Article 69 of Regulation No 1782/2003 does not breach Article 32 EC.

3. The objectives of 'ensuring a stable income for producers' and of 'maintaining rural areas'

57. The national court also asks whether Article 69 of Regulation No 1782/2003 violates the objectives of 'ensuring a stable income for producers' and of 'maintaining rural areas'. In fact, the Association contends that the provision in question deprives farmers of a stable income which, in turn, leads to a sharp decrease in the cultivation of tobacco and to the abandonment of cultivable land.

58. As it concerns the first objective mentioned by the national court, I assume that that court intended to refer to the objective, laid down by Article 33(1)(b) EC (now Article 39(1)(b) TFEU) to 'ensure a fair standard of living for the agricultural community'.

59. In this regard, I would first of all observe that the term 'stable', used by the referring court, is not equivalent to the term 'fair', which appears in the text of the Treaty. [30] This different terminology is not unimportant because the European Union legislature is not obliged to guarantee that farmers' standard of living remains unaffected over time. Otherwise the margin of manoeuvre of the legislature to introduce any policy change in the CAP would be severely limited. [31]

60. Moreover, the Treaties do not require that a fair standard of living must be ensured through the unwavering cultivation of one and the same product. In other words, there is no necessary connection between living standards and the cultivation of any specific product.

61. Therefore, Article 33 EC does not guarantee that a production of a given agricultural product should be maintained unaltered year after year, let alone on the market of one specific Member State.

62. Incidentally, I observe that also the objective to stabilise markets mentioned in Article 33(1)(c) EC does not imply that production must be always stable. [32] In fact, this provision has a broader meaning and is not confined to the quantities produced but, more generally, to the economic situation of agricultural products. [33]

63. In its arguments, the Association refers to an alleged legal protection that tobacco would enjoy as a result of being listed in Annex I to the EC Treaty (now Annex I to the FEU Treaty). [34] However, the fact that tobacco figures on the list of products appearing in Annex I only means that it is subject to the CAP. Annex I does not grant any special status or protection to the products mentioned therein.

30 — The same term appears also in recital 21 in the preamble to Regulation No 1782/2003.

31 — See, to this effect, Case C-331/88 *Fedesa* [1990] ECR I-4023, paragraph 26.

32 — See, for example, Joined Cases 63/72 to 69/72 *Hansamühle and Others* v *Council* [1973] ECR 1229, paragraph 12; and Joined Cases 56/74 to 60/74 *Kampffmeyer Mühlenvereinigung and Others* v *Commission and Council* [1976] ECR 711, paragraph 13.

33 — For example, in *Crispoltoni*, the Court held that measures which would curb the production of tobacco, in a market that was characterised by overproduction, would in fact pursue the aim to stabilise the relevant market (Joined Cases C-133/93, C-300/93 and C-362/93 [1994] ECR I-4863, paragraph 33).

34 — Article 32(2) and (3) EC provides:
'2. Save as otherwise provided in Articles 33 to 38, the rules laid down for the establishment of the common market shall apply to agricultural products.
3. The products subject to the provisions of Articles 33 to 38 are listed in Annex I to this Treaty.'

64. I conclude that none of the objectives pursued by the CAP implies that the production of, or support to, a given product must be constant. On the contrary, I note that one of the objectives of the CAP reform is precisely to promote a more market-oriented and competitive agricultural industry. Since aid to farmers is no longer connected to the production of a specific product, farmers are able to change production in order to follow market trends and respond more quickly and efficiently to the changing needs and demands of EU and non-EU customers. [35]

65. On the second aspect, which concerns maintaining rural areas, I observe that Regulation No 1782/2003, in its third recital, includes avoiding the abandonment of agricultural land among the aims pursued by it. Such an objective is, in my view, wholly compatible with those listed in the already mentioned Article 33 EC, and seems to be an almost natural consequence of the said objective of ensuring a fair standard of living to the agricultural community. [36]

66. However, I am again compelled to recall that the measure provided for in Article 69 of Regulation No 1782/2003, and the flexibility granted by the European Union legislature to the domestic authorities to implement it at national level, does not seem to have any bearing on the alleged abandonment of the land in Greece. It is clear that the tobacco farmers concerned would have received, essentially, the same amounts of funds, with or without additional payments, and irrespective of the retention rate chosen by the Greek Government.

67. An additional argument, developed in the written observations submitted by the Association, but not mentioned in the request for a preliminary ruling submitted by the Simvoulio tis Epikratias, also concerns Article 33 EC.

68. The Association claims that, insofar as it provokes a significant reduction of the cultivation of tobacco in Greece, Article 69 of Regulation No 1782/2003 would create long-term structural imbalances in the market. This would violate the principle according to which, within the framework of the CAP, the legislature must reconcile all the objectives set out in Article 33 EC, and can give prominence to one of them at the expense of others only in temporary measures.

69. I will address this argument only for reasons of exhaustivity. Preliminarily, I would recall the established case-law according to which the European Union legislature enjoys a wide discretion in matters concerning the common agricultural policy, corresponding to the political responsibilities given to it by current Articles 40 to 43 TFEU. Accordingly, judicial review must be limited to verifying that the measure in question is not vitiated by any manifest error or misuse of powers and that the authority concerned has not manifestly exceeded the limits of its power of assessment. [37] Moreover, the Court has made it clear that it is not necessary that the objectives of the CAP set out in Article 33 EC are pursued at the same time, and in equal fashion, by all the measures adopted in the framework of the CAP. [38] The Court has also held that in pursuing the objectives of the CAP European Union institutions must secure the permanent harmonisation made necessary by any conflicts between those objectives taken individually, on condition, however, that such harmonisation does not have the effect of rendering impossible the realisation of the other objectives. [39]

70. Turning now to the case at hand, in my opinion there is no basis on which Article 69 of Regulation No 1782/2003 could be considered to be in conflict with any of the objectives listed in Article 33 EC. Nor is there any basis for concern that these objectives could not be reached. In addition, I found no grounds for concern that the European Union legislature has exceeded the limits of its discretion in

35 — See, for example, recitals 24 and 28 in the preamble to Regulation No 1782/2003.

36 — See the already-mentioned recital 21 in the preamble to Regulation No 1782/2003.

37 — See, to that effect, *Fedesa*, paragraphs 8 and 14; Case C-189/01 *Jippes* [2001] ECR I-5689, paragraph 80.

38 — Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 133 and case-law cited therein.

39 — See Case C-311/90 *Hierl* [1992] ECR I-2061, paragraph 13; Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 47; and Case C-324/96 *Petridi* [1998] ECR I-1333, paragraph 30.

balancing those different aims, when it came to its decision concerning the regulation of additional payments. Moreover, Article 69 was from the beginning supposed to be a measure of a temporary nature [40] and was in fact repealed when Regulation No 1782/2003 as a whole was replaced by Regulation No 73/2009.

71. Lastly, in its written observations, the Association contends that Article 69 of Regulation No 1782/2003 infringes basic general principles of EU law, such as the principle of proportionality and the principle of the protection of legitimate expectations.

72. Again, I will address this issue only for reasons of completeness. According to well-established case-law, the principle of proportionality requires that measures adopted by European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question. When there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. [41] So far as concerns judicial review of compliance with the abovementioned conditions, in matters concerning the CAP, the European Union legislature has a wide discretionary power. Consequently, as already mentioned above, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. [42]

73. However, this is not the case as regards Article 69 of Regulation No 1782/2003. As already explained, neither the regulation nor that particular provision pursues the aim of ensuring the continued production of tobacco in Greece at the level that preceded its entry into force. Neither does that provision appear to be manifestly inappropriate to pursue either the general objectives assigned to the CAP by the Treaties, or those specifically indicated by the regulation itself. Finally, the provision at issue does not seem to have any bearing on the abandonment of agricultural land.

74. As it concerns the principle of protection of legitimate expectations, the Court has clarified that traders are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the European Union institutions in the exercise of their discretionary power will be maintained, particularly in an area such as that of the common organisation of the markets, the objective of which involves constant adjustment to reflect changes in economic circumstances. [43] Moreover, the Court has also pointed out that the principle of the protection of legitimate expectations may be invoked as against European Union rules only to the extent that the European Union itself has previously created a situation which can give rise to a legitimate expectation, [44] having given precise assurances to the person concerned. [45]

75. In the case at hand, it is obvious that no assurance of any sort had been given by European Union institutions to Greek tobacco processing operators on the continuation of the previous system of aids to producers or, more specifically, on the manner in which the additional payments would be regulated. It is equally clear that a choice made by the European Union legislature with regard to one specific agricultural product, namely, cotton does not imply that the same choice would be done with regard to any other product, including tobacco.

40 — See, in particular, recitals 33 and 34 of Regulation No 1782/2003 as well as its Article 64(3).

41 — See *Crispoltoni*, paragraph 41; Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 60; and Case C-375/96 *Zaninotto* [1998] ECR I-6629, paragraph 63.

42 — See *Crispoltoni*, paragraph 42; *National Farmers' Union and Others*, paragraph 61; and *Zaninotto*, paragraph 64.

43 — Case C-104/97 *Atlanta* v *European Community* [1999] ECR I-6984, paragraph 52.

44 — Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 14; and *Zaninotto*, paragraph 50.

45 — Case C-213/06 P *EAR* v *Karatzoglou* [2007] ECR I-6733, paragraph 33; Case 111/86 *Delauche* v *Commission* [1987] ECR 5345, paragraph 24; Case C-82/98 P *Kögler* v *Court of Justice* [2000] ECR I-3855, paragraph 33; and Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 147.

V – Conclusion

76. In the light of the considerations developed above, I suggest the Court answer the question referred by the Simvoulio tis Epikratias as follows:

Consideration of the question referred for a preliminary ruling has disclosed nothing to affect the validity of Article 69 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 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.