IN THE SCOTTISH LAND COURT
under
THE RURAL PAYMENT (APPEALS) (SCOTLAND)
REGULATIONS 2009

Council: Angus
Appellant: Angus Growers Limited
Respondents: The Scottish Ministers
Subjects: East Seaton Farm

Record No: SLC/67/11
Form: 39

Edinburgh 14 February 2012. The Land Court have issued the following Order in the above Application:-

Edinburgh 14 February 2012. The Land Court, having heard senior counsel for the appellant and for the respondents, and having resumed consideration of the application, the documents lodged and the evidence adduced, under reference to the appended Note, (One) ALLOW the appeal; (Two) SET ASIDE the decision of the respondents to withdraw recognition of the appellant as a producer organisation with effect from 1 January 2008; (Three) FIND that the appellant is entitled to payment of all the sums that would have been paid to it in the absence of withdrawal of recognition, with interest from the dates on which such payment should have been made; and (Four) APPOINT parties to lodge motions on expenses within twenty one days of intimation of this order.

"DAVID J HOUSTON" "JAMES M McGHIE" "A MACDONALD"

Member of Court Chairman Member of Court

NOTE

[1] This is an appeal by Angus Growers Limited ("AG") under the Common Agricultural Policy Non-IACS Support Schemes (Appeals) (Scotland) Regulations 2004 against the decision of the Rural Payments Agency ("RPA") communicated by letter dated 16 March 2010 to withdraw Angus Grower's recognition as a producer organisation ("PO") with retrospective effect from 1st January 2008. It was not disputed that the Scottish Ministers had validly designated RPA as the regulatory body for supervision of bodies operating as producer associations in Scotland. The appeal followed the scheme of the 2004 Regulations through Stages 1 and 2. The decision of the Stage 2 panel was accepted by the Scottish Ministers and communicated to the appellants by letter dated 8 April 2011. The letter dismissed the appeal and the matter now comes before us. We heard parties at Edinburgh from 14 to 18 November 2011. Mr Aidan Robertson QC, of the English Bar, appeared with

Mr Craig Watson, advocate, on behalf of the appellants and Mr James Wolffe QC, with Mr Donald Cameron, advocate, appeared for the respondents.

Legislative material
European Regulations
Council Regulation (EC) No. 2200/96
Council Regulation (EC) No. 1182/2007 ("1182")
Commission Regulation (EC) No. 1580/2007 ("1580")
Commission Regulation (EC) No. 1432/2003
Council Regulation (EC) No. 1234/2007
Council Regulation (EC) No. 361/2008

Domestic Regulations
The Common Agricultural Policy Non-IACS Support Schemes (Appeals) (Scotland) Regulations 2004

Authorities
Dickie v Scottish Ministers 2003 SLCR 1

France v *Commission* case T-432/07 [2009] ECR II – 188
Fruition PO Ltd v *Minister for Sustainable Farming etc* [2011] EWHC 792 (Admin)
MMB v *Tom Parker Farms* [1999] EuLR 154
R v *CCE ex p BSkyB* [2001] EWHC 127 (Admin)
R (Speciality Produce) v *DEFRA* [2009] EWHC 45 (Admin)

Text books
Wyatt and Dashwood *European Union Law* (6th ed. 2011)

Legislative background.
[2] We have taken the following summary of the relevant European regulations from the written submissions provided by Mr Robertson. Although he referred to the material as a skeleton argument it was quite well fleshed and has proved of great assistance to us. Both parties referred to the provisions of Reg. 1182 and, in particular, arts 3 to 6 of that Regulation. Our subsequent references to arts 3 to 6 are to these articles. We were advised that Reg. 1182 had been replaced by Reg. 1234/2007 with effect from 1 July 2008 but the provisions of art 125a to 125d of the latter appear to be in the same terms as arts 3 to 6 and nothing turns on the question of which set of Regulations was in force at any specific time. Our references to arts 23 to 29 and art 116 are to articles of Reg 1580 which was a Commission Regulation of 21 December 2007 laying down implementing rules of Council Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1182. in relation to the fruit and vegetable sector. The present case concerns soft fruit.

[3] AG's recognition was withdrawn in terms of art 116(1). The basis of withdrawal was said to be breaches of EU regulatory requirements under art 25. The alleged breaches concerned AG's obligations as to:

(1) collecting members' production – art 25(b);
(2) commercial and budgetary management – art 25(c); and
(3) centralised bookkeeping and invoicing – art 25(d).

AG was recognised under Regulation 2200/96, the relevant provisions of which can conveniently be found in the decision in the *Speciality Produce* case at [19]-[22]. However,

the recognition criteria in issue in the present case were those set out in art 3 of Reg. 1182 which superseded those in Reg 2200.

Article 3(1) provides:

> *For the purposes of this Regulation, a producer organisation shall be any legal entity or clearly defined part of a legal entity which complies with the following requirements:*
>
> *(a) it is formed on the initiative of farmers within the meaning of Art 2(a) of Regulation (EC) No 1782/2003, who are growers of one or more products listed in Art 1(2) of Regulation (EC) No 2200/96 and/or of such products intended solely for processing;*
>
> *(b) it has the objective of the use of environmentally sound cultivation practices, production techniques and waste management practices, in particular to protect the quality of water, soil and landscape, and preserve or encourage biodiversity;*
>
> *(c) it has one or more of the following objectives:*
>
> *(i) ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity;*
>
> *(ii) concentration of supply and the placing on the market of the products produced by its members;*
>
> *(iii) optimising production costs and stabilising producer prices;*
>
> *(d) its articles of association provide for the specific requirements as laid down in paragraph 2; and*
>
> *(e) it has been recognised by the Member State concerned pursuant to Article 4.*

[4] In relation to these provisions Mr Robertson pointed out that although any one of the objectives set out at (c)(i) - (iii) was sufficient for recognition, AG claimed recognition under reference to all three of those objectives. Neither party made anything of this in their substantive submissions.

[5] Recognition criteria are addressed at art 4. Specific reference was made to art 4(1)(e) which provides, as one of the conditions of recognition, that POs must [demonstrate that]: *"they effectively provide their members, where necessary, with the technical means for collecting, storing, packaging and marketing their produce"*.

Article 25 (of Reg 1580) is headed "Structures and activities of producer organisations" and provides:

> *Member States shall ensure that producer organisations have at their disposal the staff, infrastructure and equipment necessary to fulfil the requirements laid down in [Art 3(1)] and ensure their essential functioning, in particular as regards:*
>
> *(a) the knowledge of their members' production;*
>
> *(b) collecting, sorting, storing and packaging the production of their members;*
>
> *(c) commercial and budgetary management; and*
>
> *(d) centralised bookkeeping and a system of invoicing.*

Article 27 provides:

For the purposes of [art 4(1)(e)], a producer organisation which is recognised for a product for which the provision of technical means is necessary shall be considered to fulfil its obligation where it provides an adequate level of technical means itself or through its members, or through subsidiaries, or by outsourcing.

Article 29 is headed "Outsourcing" and provides:

Outsourcing of an activity of a producer organisation shall mean that the producer organisation enters into a commercial arrangement with another entity, including one of its members or a subsidiary, for the provision of the activity concerned. The producer organisation shall nevertheless remain responsible for ensuring the carrying out of that activity, and overall management control and supervision of commercial arrangement for the provision of the activity.

Article 116 is headed "Non-respect of recognition criteria" and provides:

1. Member States shall withdraw the recognition of a producer organisation if a failure to respect the criteria for recognition is substantial and results from the fact that the producer organisation acted deliberately or by serious negligence.

Member States shall in particular withdraw the recognition of a producer organisation if a failure to respect the criteria for recognition concerns:
(a) a breach of the requirements of Articles 23, 25, 28(1) and (2) or 33; …

The withdrawal of recognition under this paragraph shall take effect from the date from which the conditions for recognition were not fulfilled, subject to any applicable horizontal legislation at national level on limitation periods.

2. Where paragraph 1 does not apply, Member States shall suspend the recognition of a producer organisation if a failure to respect the criteria for recognition is substantial but is only temporary.

During the period of suspension, no aid shall be paid. The suspension shall take effect from the day where the check has taken place and shall end on the day of the check which shows that the criteria concerned have been fulfilled.

The period of suspension shall not exceed 12 months. If the criteria concerned are subsequently not fulfilled after 12 months, recognition shall be withdrawn.

Member States may make payments after the deadline set out in Article 71 where this is necessary in order to apply this paragraph.

3. In other cases of a failure to respect the criteria for recognition, where paragraphs 1 and 2 do not apply, Member States shall send a warning letter stating the corrective measures to be taken. Member States may delay payments of aid until the corrective measures are taken.

A failure to take the corrective measures within a 12 month period shall be regarded as substantial failure to respect the criteria and paragraph 2 shall subsequently be applied.

Reference was also made to various recital provisions:

Recital 49 of Reg 1580 reads as follows:

> *Measures should be laid down for the checks necessary in order to ensure to proper application of this Regulation and Regulation (EC) No 1182/2007, and the appropriate sanctions applicable to irregularities found. Those measures should involve both specific checks and sanctions laid down at the Community level as well as additional national checks and sanctions. The checks and sanctions should be dissuasive, effective and proportionate. Rules should be provided for resolving cases of obvious error, force majeure and other exceptional circumstances to ensure fair treatment of producers. Rules for artificially created situations should be provided for in order to avoid any benefit being derived from such situations.*

[6] It is convenient to add that the benefit of recognition as a PO is that it provides access to community financial assistance. That assistance relates to the "operational programmes" of the organisation. These are described in art 9 of Reg 1182. It is not necessary to discuss them in detail but such programmes cover matters such as planning and improvement of members' production. This would include provision of advice on improved growing techniques and use of appropriate plant varieties. Financial assistance could match the direct contributions of members. It was capped at 4.1% of the value of marketed production: art 10 (2). It was not disputed that the PO had a proper operational programme and that arrangements for it were consistent with the necessary recognition criteria. The issues in this case related solely to the handling and marketing of members produce, matters not within the scope of the operational programme.

Factual background

[7] As part of his closing submission, Mr Wolffe provided a written statement of his proposed findings in fact and it was agreed that Mr Robertson would have an opportunity to revise this. The following material is largely based on the agreed findings. We found this procedure helpful and are grateful to counsel for this sensible approach and the work they put into it. The material covered by the agreement appeared to us to go rather beyond that relevant to the issues now arising under arts 25 and 29. However, some indication of the range of matters discussed and an indication of the various concerns raised by RPA does have a potential bearing on the issue of negligence.

Introduction

[8] The East of Scotland, and particularly Fife and Angus, is particularly suited to soft fruit production. In the passage of soft fruit from field to shop, the following are essential steps.

- the fruit requires to be picked;
- it requires to be taken to the packhouse;
- the fruit has to be prepared for market at the packhouse;
- the fruit has to be marketed – a buyer found and the fruit sold to that buyer;
- the fruit has to be transported to the buyer, supermarket depot or other market.

At the packhouse, fruit is quality controlled, checked, processed, weighed, labelled, date-coded and marked.

[9] Lochart Porter started his career as a farmer at East Seaton Farm, Arbroath, Angus, in 1990. He purchased his farm in 1994. The farm has specialized in soft fruit production, in particular production of strawberries, raspberries, blueberries and blackberries, and currently has some 200 acres in fruit production.

[10] In 1994, along with his father W H Porter and his cousin James Gray, Mr Porter set up a business intended to deal with marketing of their soft fruit and to establish closer links with the markets, and in particular with the multiples. This business was incorporated in 1998 under the name Angus Soft Fruits Limited ("ASF"). That company now sells fruit 12 months of the year to the multiples. It is responsible for marketing almost half the soft fruit grown in Scotland. It acts as marketing agent for AG. It also imports soft fruit from other countries for sale to the supermarkets outside the Scottish season. It also engages in research and development. It developed a premium strawberry brand called "AVA" which it launched in 2003. It developed a production system called "Good Natured Fruit" which it commercialized in 2007. It also developed a production system for soft fruits called the "Seaton" System.

[11] The shareholders of ASF throughout its life have been Lochart Porter (60%), WH Porter (20%) and James Gray (20%). Its Directors in the year ended 13 May 2010 were Lochart Porter, WH Porter, James Gray and John Gray. During financial year ended 30 April 2010 and the previous financial year it was effectively controlled by Lochart Porter. In financial year ended 30 April 2010 the company had a turnover of over £70 million and a profit before tax of over £150,000.

[12] In about 2002 Mr Porter had been discussing with other producers the advantages of working together. He became aware of the Producer Organisation Scheme and the benefits it could provide for growers. He took advice from Lawrence Gould, agricultural consultants who had experience in this field and the appellants, AG, were incorporated in 2002.

[13] It appears that AG followed a somewhat similar course to that taken by the PO in the *Fruition* case and it is convenient to quote from that decision, at [13], as to the underlying policy. The relevant aid scheme was described in a report by the European Union's Court of Auditors. "A new policy, the report says, was introduced in 1996 to support fruit and vegetable growers in adapting to the changing market situation. This offered aid for 50% of the costs of measures taken by growers in "operational programmes" which aimed, inter alia, to improve product quality, reduce production costs and improve environmental practices. The aid is only available to groups of growers that collectively market their produce in Producer Organisations. Member States are responsible for approving operational programmes and paying the aid." It may be observed that in this case there was no dispute about the appellants' operational programmes or the procedures they had in place to supervise and manage such programmes. The aid was paid in respect of operational programmes and not in respect of the collective marketing function. However, the critical effect of the decision to withdraw recognition with effect from 1 January 2008 was that the aid paid in the period between then and the suspension in June 2009 would have to be repaid. A substantial sum was involved.

[14] The objects of the company are as follows:-

> *3.1. To act as a co-operative organization of growers of soft fruit of all descriptions ("the Products") and in particular:-*

3.1.1. to promote the concentration of the supply of soft fruits;
to provide adequate technical facilities for presenting and marketing the Products;
to enter into contracts with such growers for the sale of the Products to the Company;
to manage the marketing and sale of the Products to wholesale and retail products (sic) ;
to collect analyse and monitor information on market trends in the soft fruit industry;
to publicise and promote the Company's activities.

[15] The Articles of Association provide for the Company to hold General Meetings. Those Articles also provide that, subject to the provisions of the Companies Act, the Memorandum of Association and the Articles, and to any directions given by special resolution, the business of the company shall be managed by the Directors who may exercise all the powers of the Company. Questions arising at meetings of the Directors fall to be determined by majority vote. In the case of an equality of votes the Chairman of a meeting of the Directors has a second or casting vote.

[16] AG Limited was recognised as a producer organization with effect from 10 December 2002. On 24 December 2002 Lochart Porter signed, on behalf of AG Limited, an acknowledgement and undertaking stating that he had read and understood Article 11 of the Council Regulation (EC) No 2200/96 and would conform to its conditions for recognition as a producer organization. For completeness it can be added that he signed a second copy in April 2003. We heard no explanation for this and nothing turns on it.

[17] When first established, AG Limited had 14 members, with an aggregate estimated turnover of £5,584,510.61. The members included Lochart Porter, whose turnover at that time was £1,101,487.32, WH Porter (turnover £532,772.59), and James Gray (turnover £728.314.90). By 2009, the company had 20 members, and a turnover of some £32 million. The members continued to include Lochart Porter (whose production comprised 14.9% of the aggregate turnover of the members), James Gray (18.3%) and WH Porter (4.7%). The shareholders of Angus Soft Fruits Limited accordingly in 2009, accounted for some 38% of the aggregate turnover of the company compared to 42% at the time of incorporation.

[18] The Directors of AG from 8 August 2002 until 17 September 2009 were Lochart Porter, James Gray, Michael Forbes and John Laird. Lochart Porter was Chairman. He and Mr Gray were both shareholders and Directors of ASF. By virtue of his casting vote, Lochart Porter, acting with Mr Gray could control the Board of AG. However, on 17 September 2009 James Gray resigned as a Director. Lochart Porter resigned as Chairman but remained a Director. John Lang was appointed Chairman and Tim Stockwell and David Stephen were both appointed Directors. Helen Pattison was appointed Company Secretary.

The agency agreement

[19] On 8 August 2002, an Agency Agreement was entered into between AG and ASF. Lochart Porter signed it on behalf of both companies, having been authorized to do so at a meeting of the Board of the appellants on that date. The Agency Agreement appointed ASF as exclusive agent of AG ("the Company") to promote and sell Produce on behalf of the Company, pursuant to the Company's obligations to the Members under the Grower's Agreements and in accordance with the terms of the Agency Agreement (cl. 2.1). The Agreement provided *inter alia* as follows:-

2.2. For the duration of this Agreement and subject to its terms, the Agent shall be the sole agent in charge of the administration of the Company and its agent for the sale of Produce. For the avoidance of doubt the Produce will remain in the ownership of the relevant Member until sold by the Agent to the buyer.

3. Administration

3.1. The Agent shall provide the Company with a full administration service including:

3.1.1 administering the activities of the Company in accordance with the articles of association of the Company, the Grower's Agreements and any directions of the Board;

3.1.2 provision of proper management and financial controls and the supply of information to the Board relevant to the Company and the operation of the Grower's Agreements;

3.1.3 provision of full and accurate record keeping in relation to all financial and other transactions.

4. Marketing

4.1 The Agent shall provide the Company with a full marketing service including:

4.1.1 market research, development and intelligence;

4.1.2 advice to Members on market prospects and intelligence;

4.1.3 facilities for storing soft fruit supplied by members for sale under the Grower's Agreements to the extent that those facilities are necessary for orderly marketing;

4.1.4 such other marketing services as are agreed from time to time.

5. Growers Agreements

5.1 The Company shall use its best endeavours to ensure that all members observe the requirements of Grower's Agreements.

5.2 The Agent shall ensure that the Company's obligations under Grower's Agreements are fulfilled insofar as those obligations are within the knowledge of the Agent.

6. Information

6.1 The Company shall furnish the Agent with all such information as the Agent reasonably requires to fulfil its obligations under this Agreement, including (but not limited to) regular information, estimates and forecasts obtained from members concerning their Produce.

7. Sales of Produce

7.1 Subject to clause 8, the Agent shall sell every consignment of Produce under such description to such persons in such manner and on such terms of contract as the Agent reasonably decides.

8. Prices

8.1 In selling Produce under this Agreement on behalf of the Company (pursuant to the Company's obligations to the Members) the Agent shall obtain the best prices reasonably obtainable taking into account medium and long term marketing strategy and the requirement to have regard to the interests of all the Members without favour or preference.

9. Records

9.1. The Agent shall keep complete and accurate records of all transactions effected by it under this Agreement and shall afford access to any authorized representative of the Company at all times during normal business hours on not less than 24 hours' prior notice to inspect those records.

10. Ownership of Produce

10.1. The property in every consignment of Produce sold under this Agreement shall not at any time pass to the Agent but shall remain with the Member supplying the consignment until it passes to the buyer under the contract of sale.

12. Proceeds of Sale

12.1. The Agent shall have authority to receive on behalf of the Company the proceeds of sale of all Produce sold under this Agreement and shall invoice the buyer of every consignment accordingly.
12.3 All proceeds of sale which are received by the Agent, under deduction of the Agent's commission in terms of Clause 13 below, shall be paid into a bank account specified by the Company for that purpose.
13. Commission
13.1. The Company shall pay the Agent commission for services rendered under this Agreement as follows-
8% of the gross payments received for the sale and supply of Class 1 Produce to supermarkets and other buyers;
2% of the gross payments received for the sale and supply of Class 2 Produce to supermarkets and other buyers.
13.2 The said commission rates will be reviewed annually on each anniversary of the Effective Date.
13.3 Such commission shall be deducted by the Agent from any monies received from buyers of the Produce before the proceeds of sale are dealt with in terms of clause 12.3 above.
14. Duration
14.1. Subject to Clauses 15 and 17.2 the duration of this Agreement shall be from the effective date until it is terminated by:-
14.1.1. the Company giving the Grower not less than one month's written notice; or
14.1.2 the Grower giving to the Company written notice to take effect on 31st December in the year next following the year in which the said notice is given.

[20] It is not disputed that "Grower" in clause 14 should read "Agent". The Agency Agreement contained other provisions for termination in the event of winding up, serious breach and the like. In particular the Company was entitled to terminate with immediate effect if there was "a change in control of the Agent;"

[21] Despite the provisions of clause 13, the commission charged by ASF in fact varied, with the amount charged in respect of the produce of each producer member of AG depending on the turnover of that member. There was no documentary evidence in the minutes of board meetings and general meetings of AG Limited, which were produced, evidencing annual review of the commission rate.

[22] ASF made and makes available to the members of AG, AVA fruit, Good Natured Fruit and the Seaton System. If AG were to terminate the agency agreement, it would be a matter for discussion between the boards of the two companies whether or not these benefits would continue to be made available to the members of AG.

Offices and staff of AG.

[23] The registered offices of AG and ASF were both East Seaton Farm. As at 16 March 2010 AG used space in a room in a portacabin at East Seaton Farm which was otherwise occupied by ASF. At that time, AG employed the following individuals.

Helen Pattison, Company Secretary. She was responsible for all administration, accounting, record keeping, liaison with RPA and submission of RPA returns, liaison with producers regarding the operational programme and management of the operational programme.

Jamie Sawday, Supply Chain Manager. He was responsible for liaison with growers to establish fruit forecast annually, weekly and daily; liaison with ASF regarding volumes of fruit available to sell on a weekly and daily basis; calculation of average prices; and management of costs across the supply chain including purchasing of packaging material.

Philippa Dodds, Agronomist.

Jan Redpath, Quality Manager and Technologist. He was responsible for liaison with supermarket customers to define fruit specifications and protocols for the full range of produce grown at and marketed by AG, and management of quality across the production cycle and investigation of rejections.

AG employed some 90 to 100 quality control staff during the picking season. They worked at all the various packhouses.

Of the above, only Helen Pattison worked for AG throughout the year. The other three were seconded to ASF outwith the season.

The packhouses

[24] Seven of the members of AG owned packhouses. Of these, four – Lochart Porter at East Seaton, James Gray of Auchrennie, WH Porter at Scryne and W Glen & Sons (D Arnot) at Mains of Errol – made their packhouses available to other members of the organization. Three members packed their own produce on their farms. Generally, individual farmers would transport their own fruit to the packhouse. Most packhouse staff are employed by the packhouse owner on a part-time or casual basis. But, in addition to the quality control staff employed by AG, some additional quality control staff were employed by ASF.

[25] In about February 2010, (after a letter to all POs from RPA dated 18 December 2009 concerning shared facilities), mutual user agreements were entered into between AG and the owners of the four "main" packhouses. The terms of the mutual user agreement were as follows:-

> *"AG agrees to employ [the specified] packhouse for the following packing services. The packhouse agrees to make available all services required by AG to enable the orderly marketing of fruit.*
>
> *These services will be made available to all members of AG irrespective of size or location at the direction of AG's Board. This service will also be extended to any new member immediately on joining the producer organization.*
>
> *The packhouse also agrees to provide the following services to members who do not normally or currently require this service from AG who may have occasional or permanent need of the service due to unforeseen circumstances. [A detailed and comprehensive list of collection, grading, storage and packaging services and services relating to liaising with AG was set out]*
>
> *The cost of these services to be agreed by the Board of AG..".*

[26] Following the introduction of these mutual user agreements, a producer member who used one of the four "main" packhouses would pay AG an additional charge for packhouse services. AG would pay the owner of the packhouse for those services at a rate which was agreed between the company and the four packhouse owners annually. The owner of the packhouse packed his own fruit and made no payment to the producer organization.

[27] These agreements were essentially a formalisation of what had previously happened informally. Before the mutual user agreements were entered into, the rates for packing were agreed "centrally" but payment was made directly to the packhouse owner by any grower who used his packhouse. There was no evidence in the minutes produced that the Board or General Meetings of AG had made a decision about packhouse rates.

Administrative systems

[28] The following is a description of the various administrative systems in place over the relevant period. There was one material change, namely in relation to the self-billing invoice.

- ASF sales team determine the total volume of fruit needed for the supermarkets the following day and calculate the quantity of each product needed from each grower.
- ASF staff notify the growers by text message of the quantities to be picked the following day.
- The volumes of each produce to be picked are entered on ASF's Freshware system and then matched to an appropriate supermarket order.
- The Freshware system generates a sequentially numbered Goods Received Note (GRN) relative to an individual grower.
- Packhouses have access to the Freshware system and can view the GRN, and print it off to ensure that the correct volumes of fruit are picked and dispatched.
- The packhouses make entries against the relevant GRN's. From this information the ASF sales team examine the stock sheets to determine how much fruit is available and along with the orders taken from ASF the EDI system allocates fruit to particular orders.
- The orders are copied from EDI to Freshware and the fruit is then allocated to actual grower stocks and packhouse stocks.
- The packhouses receive confirmation through the Freshware system from ASF of the orders filled that day which informs them of the customer, product, quantity, haulier and GRN number.
- Once all the orders have been allocated, dispatch notes are generated live across all of the packhouses but they can only view their own dispatch notes. The dispatch notes confirm details of the orders and to whom they are to be delivered.
- The haulage from packhouse to supermarket depot is organized by ASF.
- Once the sales are completed, ASF invoices the supermarkets, usually electronically.
- The supermarkets pay ASF. None of the purchase invoices raised electronically is retained by ASF in paper form.

Information was provided weekly by ASF to AG not specific to individual growers which allowed AG to calculate average prices. This information was then fed back into the Freshware system and the average prices were used as the basis for payment to individual producers.

[29] Prior to 2009, ASF printed off weekly a self billing invoice for each producer and passed these documents to Mrs. Pattison of AG. The self-billing invoice contained details of purchase from and expenses charged to that grower. The value of the produce in the self

billing invoice was the average price calculated weekly. The self billing invoice was headed "Angus Soft Fruits Ltd (Marketing Agent for Angus Growers Ltd)".

[30] In 2009 this part of the system changed (on the suggestion of Mr Payne of the RPA). The self-billing invoice was headed "Angus Growers Limited". There was some lack of clarity about who printed this off prior to March 2010. The Audit Report by Colleen Smith, an official of RPA, stated that it was printed off by ASF. It is clear that by the 2010 picking season the self-billing invoice based on the averaged prices was printed by Mrs Pattison**.** It is also clear that the self-billing invoices at all material times was generated by the Freshware system, using the averaged prices calculated by Mrs Pattison, and sent out to growers by Mrs. Pattison with a remittance advice and an AG invoice for their levy. The Freshware system was initially licensed to ASF. There was no clear evidence as to when the AG first were able to make direct use of that system. We are satisfied that it was at a time after March 2010.

[31] Mrs. Pattison would then raise an invoice from AG to ASF for the total net value of the fruit for the particular period and pass this to ASF. ASF raised an invoice to AG for charges incurred by ASF such as commission, tray costs, haulage etc. ASF paid the net value into the AG bank account.

[32] Mrs. Pattison would then calculate the levy due per grower at the rate of 4.1% of gross produce value. She would then pay the growers the net payment sending them copies of their (individual) sales and levy invoices. She would take figures from the individual growers sales invoices generated by ASF, and enter them onto a central spreadsheet to enable all data for the season/grower to be consolidated and collated.

[33] Sales, including non-ASF sales, were entered into AG's "QuickBooks" accounting system by Mrs. Pattison. The data from the spreadsheet and the Quickbook entries provided the basis of the PO's declared VMP figures.

Relationship of AG and ASF

[34] There was no contractual provision for AG to exercise control over the activities undertaken by ASF on their behalf. Accordingly, in the event of dispute, the means by which AG could exercise control over ASF would be through the provision for termination in the Agency Agreement. In practice, termination could not take place during the selling season without great disruption and expense. However, the close relationship between AG and ASF and the power to terminate at the end of the season would mean that ASF would, in practice, attempt to comply with any instructions from AG.

[35] Prior to the intervention of the RPA in June 2009, board minutes record discussion of ASF as follows:-

> *31 March 2008. John Laird emphasized the confidence AG had in Angus Soft Fruits as their marketing company and the need to maximize this for Angus Growers benefit.*
>
> *22 April 2009. Ian asked if the same confidence in Angus Soft Fruit exists and this was strongly agreed with and clearly the future lies with them as the best vehicle to promote the growers best interests.*

There was no consideration of ASF in Board minutes of 25 October 2006.

[36] Prior to the intervention of the RPA in June 2009, minutes of general meetings of growers do not record any discussion of the performance of ASF. There were also grower meetings at which presentations were given. Some of these set out benefits provided by ASF.

[37] Following the withdrawal of recognition, AG and its members were approached by another producer organisation, Berry Garden Growers. This is an organization which has its own marketing operation. AG's board considered this, receiving a presentation from a representative of ASF (though not of Berry Garden Growers), and this was followed up by consideration at a general meeting and almost unanimously rejected (sixteen growers voted against and one abstained).

[38] Producer members of AG are aware of the market. If they were in any way dissatisfied with the service provided by ASF they would express that dissatisfaction. Growers have been happy with ASF which has been a very effective marketing agent.

Relevant guidance

[39] It should be noted that in accordance with our usual practice we have been able to accept the documentary evidence as being what it purports to be. There was no relevant challenge to this. We set out the parties' agreed references to this material and shall return to it in the discussion. In revising the Respondents' proposed Findings, Mr Robertson asked that we note in particular that he took the Court to various paragraphs of the Guidance documents and the correspondence in his cross-examination of Mr Allaway and, in closing, referred in detail to passages relating to RPA's invitations to POs to seek specific guidance from RPA in relation to compliance with criteria for recognition.

[40] The PO has the responsibility of meeting the recognition criteria. Mr. Porter appreciated this. He had signed an undertaking on behalf of AG to that effect when the PO was recognised. It would be reasonable for the Board of a producer organization to make itself aware of the guidance issued from time to time on the criteria for recognition.

[41] In April 2009 a revised version of the Explanatory Booklet, "Fruit and Vegetables Scheme Guidance" was issued. This stated inter alia:-

> *Marketing: the PO must establish and retain full control of its members' produce at all times. Eligible produce must not travel directly between individual grower members and the marketing agents. …*
>
> *Invoicing: It is imperative for the PO to practice centralized bookkeeping and have a centralized system of invoicing. …*
>
> *Outsourcing: Under duly justified circumstances, and with the prior approval of the Agency, it may be permissible for recognized POs to outsource its activities.*
> *In all cases the PO must be able to demonstrate overall control of the activity in question. ...*
>
> *The PO must also provide sufficient evidence that it can carry out its activities properly and effectively, enabling its members to obtain technical assistance in using environmentally sound cultivation practices. It must be able to provide its members*

with the technical means for storing, packaging and marketing their produce (as appropriate) while ensuring proper commercial and budgetary management of their activities.

[42] Mr Porter accepted that anyone reading the Guidance could be in no doubt that in the case of outsourced activities the producer organization must demonstrate overall control of the activity in question. As then Chairman of the Board of AG, he was aware of this Explanatory Booklet. In a document submitted by him to the RPA under cover of a letter of 24 June 2009, the following statement appears: "The Directors feel that there has been a considerable change in the interpretation of the Scheme guidelines by the RPA over time, a factor evidenced by the recent (April 09) publication of new guidance". Mr Lang, who took over from Mr Porter stated that he familiarised himself with the guidance and would always refer to their professional consultant, Ian Thompson, if required. He too had seen the April 2009 guidance.

[43] Throughout the relevant period AG did employ a professional consultant to advise on a range of matters including the detail of requirement for recognition as a PO. Mr Thomson took a prominent part in discussions with RPA over recognition.

[44] On 18 December 2009 the RPA issued a letter to all POs setting out Recognition criteria for the provision of technical facilities, including shared facilities. John Lang, then Chairman of AG, had seen this letter, which had been brought to his attention. It stated inter alia:

In summary the policy clarifies that POs must own or have responsibility for provision to members of all necessary facilities as defined in Council Regulation 1234/2007 Article 125b1(e). These must include facilities for the collection, storage, packaging and marketing of members' produce (subject to limited exceptions). The policy allows that these facilities may be provided through PO members but POs must be able to demonstrate their control and are responsible for any facility provided in this way.

[45] The policy stated inter alia:

Outsourcing. Note: … Care must be exercised when outsourcing activities to other members of the PO – especially where this is a historical arrangement, i.e. simply to formalize existing undocumented arrangements, especially if they were not preceded by any formal quotation or tender process for the work, or a sufficient survey of the market for such activities. … If POs are in any doubt as to the rules on outsourcing or their responsibilities in this matter then they should contact the Scheme Management Unit for advice, however the onus remains with POs to ensure they comply with regulatory requirements.

[46] Mr Porter accepted under reference to this letter that the regulatory obligation remained with the producer organization and that it needed to demonstrate control. Mr. Lang accepted that it was clear to him that the onus was on the producer organization to provide or arrange provision of technical facilities and that the producer organization must be in control.

Dealings with RPA

[47] In April and May 2009, Mrs Hughes carried out a compliance audit at the appellants' office. As a result of this a list of issues surrounding their recognition was identified. On 9 June 2009 Joanne Lockey wrote to AG, suspending them from the scheme. She stated inter alia:-

> *From the evidence initially presented to us, it appears that Angus Soft Fruits (ASF) determine how much fruit is required and advise the members of the PO directly of how much fruit needs to be picked the following day, this is not co-ordinated by the PO. ASF will raise a self billing invoice that identifies the value of produce sold for each member and passes this over to the PO, the PO will then raise an invoice for the net value of the fruit sold and pass this back to ASF. There does not appear to be an auditable system in place to show that the PO is governing the administration of day to day operations. On the face of it the system in place does not meet the requirements that a PO must maintain a centralised billing and invoicing system.*
>
> *ASF markets all of the PO's produce. Whilst we agree that ASF are best placed to fulfil this role, the close links between the individual grower members and the marketing agent do not guarantee that the PO has full control over production or marketing. Additionally failure to market under the Angus Grower name calls into question the visibility of the PO to its customers and in turn whether the PO is acting collectively. Produce is moving from grower to marketing agent to supermarkets without significant PO intervention.*

[48] It may be noted that, although there was some criticism of the fact that produce was sold without reference to AG on the label, there was unchallenged evidence to the effect that while supermarkets may wish individual grower's names to appear on labels they did not want the name of the PO.

[49] Mr Porter wrote back on 24 June 2009 enclosing a response which included a list of proposed actions. Of these, the following bear on the relationship between AG and ASF:-

- a proposal to change the way that second class fruit was marketed, with AG advertising for staff to oversee the marketing of this produce directly;
- AG to operate from a separate office from ASF staff but within the same office complex;
- Lochy Porter to stand down as Chairman of AG, and James Gray from his role as Director;
- AG to set up its own website and ensure that signage for its office is appropriate.

The RPA responded by indicating their decision to carry out a full recognition review.

[50] On 31 July 2009, Mr Allaway and other RPA staff visited AG. Following that meeting, Mr. Porter wrote on 18 August 2009 to Mr Allaway. Amongst other things, this enclosed an evaluation of a software upgrade tender completed for ASF earlier in the year. *"One of the main reasons for undertaking this tender process was to put in place the systems that will allow AG to market the class 2 fruit. ASF raised this tender as they will have to implement the changes initially."*

[51] On 15 September 2009 Mr Allaway wrote to Mr. Porter. The letter stated that:-

> *…subject to AG addressing the concerns outlined below, suspension of your recognition … can be lifted. For the present suspension will remain in force pending*

receipt of documentary evidence confirming that the necessary changes have been implemented.

You must ensure that AG's centralised billing and invoicing system is amended to make clear its independence from ASF.

As suggested in your letter date 24 June 2009 you will resign as Chairman of the PO and James Gray will resign from the Board of Directors. We will require details of your replacements and a copy of the minutes of the meeting where the change is agreed.

You must also undertake to review AG's position and capacity to operate as a stand-alone company. Prior to lifting suspension we will need to see proposals to develop the PO working together as a company and, where possible, undertaking functions currently carried out by ASF, together with an indicative timetable for introduction. ...Clearly we would not want the PO to introduce artificial situations or to spend money unnecessarily, however given the significant turnover of AG, we would expect to see a business model and activities commensurate with that.

……

Please note that this decision is based on current UK policy for recognition. We may review this policy and your recognition status at any time, in particular, but not only as a result of communications with the Commission.

We note also that AG has negligible shared facilities. Whilst this is currently acceptable under UK policy our position has been challenged by Commission auditors. As a result of this challenge there is a real possibility that in future Pos will be required to provide shared facilities for their members. In view of your current circumstances, you should be aware that any such outcome would require us to review your status as a recognized PO.

[52] On 30 September 2009 Ian Thompson emailed Joanne Lockey advising her that the change in Directors had been agreed and that changes to the invoicing procedure had been introduced. This was the change discussed under the heading of "Administrative systems" above. He requested confirmation that this met the RPA's requirements. On 1 October 2009 Mr Lang wrote to Ms Lockey stating that he believed that she was then satisfied with the procedures, advising that the changes in the Board had taken place, and setting out procedures and timetables for a series of actions. These included proposals to improve the commercial and budgetary management of AG by producing an annual business plan and monthly management reports. Both Mr. Lang and Mr. Porter accepted that these had not previously been produced. In addition it was said that a new non-executive director would be appointed. So far as the relationship with ASF was concerned, this letter reiterated that arrangements would be made to market second class produce by AG. There was no other step proposed which would enhance the control which AG could exercise over ASF.

[53] On 16 October 2009 Ian Thompson sent Joanne Lockey a copy of the minutes at which changes to the Board were implemented. He stated:-

I think (hope) this should be all the information that you require in order to lift the suspension. Please let me know if there is any other information or issues that we need to attend to

He went on to refer to shared facilities. On 26 October Ms Lockey wrote to Mr. Lang in the following terms:-

In view of the changes already made and further changes proposed, recognition of AG Ltd will be maintained, however the RPA will review the governance of the company again in early 2010.

There has been a development at European level that means we cannot lift the suspension yet, however.

[54] The letter went on to deal with the shared facilities issue and, noting that AG had negligible shared facilities, suggested that they formalised arrangements for sharing packhouses and consider what assets are owned by members individually that might otherwise be provided by or through the PO. On the same date a letter on the issue was sent to all POs.

[55] On 6 November 2009 Ian Thompson wrote to Mr Allaway. He enclosed spreadsheets setting out the shared facilities. It is apparent from the final page of the letter that it was recognized that marketing fell within the category of shared facilities. The letter identifies amongst other shared facilities *"AG members access to and use of Angus Soft Fruits (ASF) as the marketing agent as evidenced by the marketing agreement in place"*.

[56] On 15 January 2010 Ian Thompson sent a copy of the growers agreement to Joanne Lockey. On 20 January Joanne Lockey emailed Ian Thompson, saying:

In the agreement provided the onus is on the members to grade, pack and label produce and also deliver the consignment. The Agreement also states that the PO and the Grower must provide facilities for storing fruit (clause 8). Marketing arrangements as they appear in the Agreement are acceptable.

To be acceptable under the provisions of the criteria published on 18 December 2009 the PO must undertake activities for and on behalf of the members. It is not acceptable for the PO to rely on the members to do things for themselves without PO direction and control. This needs to be reflected in the Members Agreement, but the control must be real effective and capable of withstanding scrutiny as to how it works – or might – in practice. It must not be a paper exercise.

We also require mutual use agreements for the packhouses used by the PO.
Can you please also provide more information on the collection facilities provided. You have advised us the PO collects members produce using a refrigerated wagon owned by the PO. Does this vehicle collect all members produce? Do members also arrange their own transport?

In light of the above, AG will remain suspended from the scheme until these issues have been addressed.

The clause on marketing in the Growers Agreement to which this email referred, stated:-

> *The Company shall sell all fruit offered for sale under this Agreement under such descriptions to such persons and in such manner as the Company decides for the best prices reasonably obtainable taking into account considerations of medium and long term marketing strategy and the duty of the Company to have regard to the interests of all the participants without favour or preference.*

[57] On 28 January 2010 Ian Thompson emailed Joanne Lockey a revised growers agreement and a draft mutual user agreement. An internal email indicates that Ms Lockey had confirmed that the documents were fine. Later correspondence identified difficulties with the agreement.

[58] On 3 February 2010 Ms Lockey wrote to AG inter alia:

> *Once you have provided suitable evidence that your PO meets the requirements set out in the judgement and of the UK's revised policy on technical means (guidance on this issue was published on 18 December 2009) suspension can be lifted. Please note that this must be provided within twelve months from the date of suspension.*

[59] On 5 March 2010 Mr. Thompson sent Joanne Lockey a copy of "the final growers agreement". She responded on 8 March 2010 saying she would "need to seek clarification that clause 14 is acceptable" and stated that it was not acceptable that the PO did not provide any collection facilities for its members. She concluded that she would not be in a position to clarify these points until Wednesday (10 March). On 10 March 2010 there was a telephone conversation between them and Mr. Thompson subsequently sent an email seeking to address these issues. However, on 11 March Ms Lockey telephoned Mr. Thompson to tell him that AG's recognition would be withdrawn. This was followed by the letter dated 16 March 2010 withdrawing recognition. We deal in the **Discussion** below with the main details of this letter.

Submission for appellants.

[60] Mr Robertson was permitted to make a full opening statement, which was based on his "Skeleton argument", and his closing submission covered essentially the same ground. We do not attempt to repeat all the detail of the substantive argument. If more detail is required, reference can be made to the written argument, held by the Court. The main points can be summarised as follows.

[61] He submitted that the provisions of art 116(1) provided the test which the Court had to apply to the evidence before it. There were three stages: it had to be established that there was a failure to comply with relevant criteria; that such failure was substantial; and that it arose from the fact that the producer organisation acted deliberately or acted by serious negligence. The respondents had conceded that the Stage 2 panel had erred in assuming that if there was a breach of any of the particular provisions set out in Art 116(2) there was no need to consider negligence. However, the concession did not go far enough. Establishment of a particular breach did not supersede the need to deal separately with the three stages. Mr Robertson dealt with aspects of construction and further submitted that to treat any breach of the listed provisions as necessarily substantial could result in completely disproportionate

results, contrary to the general principle of proportionality under EU law, as reflected in Recital 49 of Reg 1580.

[62] On the issue of serious negligence, Mr Robertson founded strongly on the history of discussions between AG and the various representatives of RPA. He submitted that on the evidence there could be no question of negligence because the appellants had tried to take the RPA with them at every stage. In any event, in relation to the retrospective effect of the decision to withdraw recognition, he relied on the terms of a letter of 26 October 2009 from RPA as giving rise to a legitimate expectation that this would not happen.

[63] He then dealt with the facts dealing with each of the identified breaches of art 25 as set out in the decision letter. We take account of the submissions on fact in our discussion of the issues below and it is unnecessary to repeat this material. Mr Robertson pointed out that there was no relevant case law on the interpretation of Regs 1182 or 1580 although the judgment in *France v Commission* concerned the equivalent provisions of Reg 2200/96, now superseded by Reg 1182.

[64] One difficulty was that RPA had not pointed to facts demonstrating breach of any specific provision taken on its own. They founded on the cumulative effect of various shortcomings. Their main concerns had apparently been in relation to facilities for (i) packaging and (ii) collection. The respondents had conceded that the effect of the transitional provisions of Art 55 of Reg 1182 was to make it inappropriate to found on issues relating to collection. He contended that the evidence relating to packaging demonstrated that there was no breach. AG provided adequate facilities for use by members. It was irrelevant that three members chose to use their own. But, if that was a breach, it could readily have been addressed. It was not "substantial". Indeed, AG had understood that its Stage 1 Appeal had been successful on this point. The decision of the Stage 2 panel appeared to be based on a misreading of the provisions of clause 14 of the Grower's Agreement. Ultimate responsibility always remained with AG. Under the *France v Commission* decision it was clear that the PO did not require to own all the necessary technical facilities: at para [36]. The Court also made it clear that the use of technical means made available by the producer organisation was left to the discretion of the producers: at [41]. There was no obligation on growers to use the technical means made available by the PO. AG had guaranteed access to the four main packhouses. In relation to the conceded issue of collection it can simply be recorded that Mr Robertson contended that "collection" did not include transport haulage. In any event, he pointed out that Cl 18 of the Growers' Agreement showed that that transport was at the direction of AG, although, in fact, all but two of the growers used their own transport.

[65] In summary, he submitted that the respondents had misinterpreted or misapplied Art 25(b) when rejecting the appeal on the ground of lack of facilities for packaging and collecting the production of their members.

[66] In relation to Art 25(c), which bore to deal with "Commercial and budgetary management", there appeared to be four matters relied upon by the Respondents although the formal decision appeared to be based only on two findings by the RPA Appeal Panel. He addressed the evidence bearing on each. The matters were closely inter-related and depended on a proper view of the facts bearing on the relationship of AG with ASF and AG and the consultants, Laurence Gould. He contended that properly understood this was all within the

scope of the outsourcing permitted by Art 29. (As noted below, Mr Wolffe withdrew any suggestion of breach arising from use of consultants.)

[67] In relation to the issues of "Centralised bookkeeping and invoicing" under art 25(d), Mr Robertson dealt in detail with the evidence bearing on the close relationship between AG and ASF and their respective computer systems. AG made use of information from ASF but clearly had its own central bookkeeping system. There might be a question over the system of invoicing but on the evidence it was clear that, by the time of the de-recognition, AG did have a complete system for invoicing. It provided self-billing invoices for its growers. It invoiced wholesalers for goods supplied direct to them and invoiced ASF for fruit sold through it. The contention that, because the invoicing system was heavily reliant on information passed from its marketing agent AG did not have a stand alone system, was irrational because the use of a marketing agent was proper and a legitimate means of outsourcing. A marketing agent inevitably passed on information to its principal so that the principal could operate its system of invoicing. Any problem in this area had been resolved before March 2010.

[68] Counsel submitted that, on any view, the withdrawal of recognition should not have retrospective effect. He relied on the terms RPA's letter of 26th October 2009 which had to be taken in its context as part of a continuing exchange. It appeared that the decision to withdraw recognition of AG as a PO was taken as a result of a change in its policy, not a change in the Regulations. That change followed the decision in *France v Commission*. Prior to that change of policy, AG had a legitimate expectation that the RPA would continue to apply existing policy and continue to recognise it. He contended that this legitimate expectation was explicitly recognised in the letter of 26 October 2009. He founded on the letter. It was submitted that the protection of legitimate expectation was a general principle of EU law. He cited Wyatt & Dashwood at pages 331 and 332. He referred to a summary by Colman J in *MMB v Tom Parker Farms* at p164F-G. He suggested that this was equivalent to the Sheldon principle applied by HMRC in relation to VAT. This principle was set out in *R v CCE ex p BSkyB* [2001] STC 437, at [5]. The EU concept superseded domestic law. The appellants had a legitimate expectation that funding provided and due for their operational programme would not be withdrawn with retrospective effect. They were entitled under EU law to rely on the representations that it would continue to benefit from funding provided. Accordingly, Scottish Ministers could not competently uphold the RPA's decision retrospectively to withdraw that funding prior to 16th March 2010. He referred to the disparity of treatment between AG and the 17 currently temporarily suspended POs as explained by the evidence of Mr Perrott.

Submissions for respondents

[69] It should be noted that Mr Wolffe, in leading evidence from Mr Allaway, made clear his acceptance that, in taking the decision to withdraw recognition, the RPA had erroneously proceeded on the basis that, if there was a breach of the provisions listed in Art 116(2), this superseded the preceding provisions of the article. He accepted that it was necessary to show that any breach of the criteria was deliberate or due to serious negligence. He accepted that there was no deliberate breach in this case but contended that the circumstances did, indeed, demonstrate serious negligence. He maintained his position that any breach of the listed provisions was, necessarily "substantial".

[70] Mr Wolffe's submission was based on his proposed Findings in Fact, as noted above. His substantive submissions were largely directed at a consideration of the effects of the evidence and, apart from submissions in relation to the opening part of art 116 there was little direct challenge to the appellants' submissions on law. He submitted that the principal question for the Court was whether, on the evidence of the situation as at March 2010, the organisation fitted the criteria laid down by the European legislation. In assessing matters, it was important to look at the context. That could be seen from the Preamble to Reg. 1182, at Recitals 10-12. He founded strongly on the reference to producer organisations having to "take charge" of the whole of the relevant fruit and vegetable production of their members. "Production" in this context, did not simply mean the "produce" but the whole operation. He referred to the detailed provisions of arts 3 and 4. It was clear that these provisions had to be read in a purposive way. The nature of a PO was to market the entire production of its members: art 3(2)(c). He stressed that selling the product was at the heart of what a PO had to do. The important issue in the case was the relationship of AG and ASF. There was no objection to outsourcing, as such. He suggested that the key issue was whether the arrangements in place at the time demonstrated that AG retained control.

[71] He referred to arts 25, 27 and 29. The reference in art 27 to a "product for which the provision of technical means is necessary" supported the argument that art 4(1)(e) of Reg. 1182 should be read in a purposive way. It did not refer to means required by particular individual growers but to the objective needs of production. The effect of art 25 was to provide two tests. In addition to the reference to art 3(1) there was a separate test for recognition in that certain factors were necessary to "ensure their essential functioning". It was necessary to determine what the essential function of a PO was. That was made clear by the Preamble. It was to "take charge" of the growers' produce and market it and to provide essential technical means for this.

[72] He submitted that the proper starting point was to take the example of a PO which did everything itself and then consider to what extent outsourcing was properly allowed to qualify that situation. The Court in *France* v *Commission* had addressed two issues arising from the previous Regulations. The submission for the appellant State set out at [34] of the decision was rejected at paras [35] to [36]. The PO had to have adequate means available. It did not have to own them. It could hire them. But it had to be able to guarantee, to any current or future member, access to the necessary equipment. The purpose was to promote the membership of small producers to promote the objective of concentration of supply. The PO had to be in the driving seat. It had to make the means available. Whether an individual grower chose to use the means provided by the PO was a different matter. That was up to them. Mr Wolffe suggested that the Court's comments at [41] were not an essential part of the discussion: just an observation dealing with a particular argument.

[73] The respondents would contend that the references to "technical means" for collection certainly included transport. However, they no longer sought to found on the issue of collection. This was because the provisions of the transitional provisions in art 55(2) had allowed a PO until December 2010 to adapt its practices to address any change in requirements. Reg. 2200/96 at Reg. 11(2)(d) had not included a reference to "collection" so Article 4(1)(e) was properly to be taken to represent a change. This could not be the basis for an allegation of breach as at March 2010.

[74] The second issue addressed in *France* v *Commission* was clear from para [52] of the decision. The French rules had provided for POs to have an active role in marketing which

was intended to help the individual growers to obtain the best prices. But the individual growers did set their own prices in individual sales. The Court held that this arrangement did not comply with the relevant provision – which was in terms broadly equivalent to Art 3(2)(c). What was implied was "genuine control by the PO of the conditions of sale and particularly of the selling prices". This meant, for example, that an individual was not free to sell other than through the PO. It was essential that an individual should not be able to sell produce elsewhere if he remained a member. Mr Wolffe went on to observe that this was not spoken to in evidence in the present case and that the minutes of meetings did not show any consideration of this matter. We note, however, that no question of the role of individual members was raised in the decision now under challenge. We understood his main response to be that, in looking at the control which AG exercised over ASF, it was not enough to say that they had power to respond to feedback from individual members. He contended that some formal procedures should have been in place to ascertain and assess the views of members.

[75] Reference was made to the *Fruition* case. This had raised the question of whether the need for control was implicit in the earlier legislation. That question had been referred to the European Court under art 267 of the Treaty on the Functioning of the European Union. (TFEU). However, in the present case, the requirement for control was explicit in relation to outsourcing in terms of art 29. This provision could not be seen as purporting to change the law. It was simply clarifying matters. Accordingly it was not subject to any transitional provisions.

[76] Mr Wolffe made detailed submissions on the evidence relating to the issue of control. He took us through the relevant contractual provisions, which we discuss below. He contended that, in any event, it was not simply a matter of having control. It was necessary for the organisation to demonstrate it. Here there was no clear evidence of AG ever attempting to exercise control through any properly constituted organ of the company. All the main objectives of the PO were, he submitted, effectively delegated.

[77] The Court raised the question of whether, if a failure to provide evidence of formal control was a breach, it could be described as a substantial breach if the Court was satisfied that there was effective control in practice. Mr Wolffe stressed the terms of Clause 7.1 of the Agreement. In formal terms the delegation to the marketing agent was, in itself, too wide to be consistent with proper scrutiny by the PO.

[78] Dealing with the question of "serious negligence" Mr Wolffe stressed that a European Community meaning had to be given to the term. It was not appropriate to take a common law approach. The organisation had responsibility to comply with the Regulation. What had to be done was clear from the Guidance published by RPA. The obligation was clear. In his submission the breach was clear. It could not be an answer to say that the appellants had been distracted by relying on the RPA. He stressed that packing and marketing were absolutely essential functions. So, in this case, it was clear that the PO was outsourcing a very significant part of its functions. The legislation had been prescriptive over the detail of the structure of a PO. This simply emphasised the need for control by the PO. That control had to be exercised in the interests of all its members. He reminded us that until the change in October 2009, the Board of the company was controlled by two principals of ASF.

[79] Asked by the Court to define the term negligence in the European sense, he said it was necessary to consider what the PO knew or ought to have known. They had to be taken to be

aware of the terms of the Regulations and of the guidance. They were fixed with knowledge of the conditions for recognition. Whether or not their failure to comply was negligent was a matter which had to be considered at a suitable level of abstraction. It was not simply a matter for RPA.

[80] Returning to the issue of control of the agent, Mr Wolffe said that comparison with the situation where a single grower appointed a marketing agent was not conclusive. He accepted that marketing was a skilled task and that an individual might well agree to leave it all to the agent. His control would be to appoint a different agent at the end of the season. However, the position of a PO was different as it might have been expected to carry out the marketing itself. The PO had to be visibly in control of the matter. He accepted that it was use of a marketing agent by a PO as opposed to direct use of such agent by individuals which was an important part of the scheme. That was why the PO had to control use of the members' equipment.

[81] Mr Wolffe repeatedly made it clear that, in acting for Scottish Ministers, he was not prepared to enter discussion on the basis of hypothetical cases or situations. It would not be appropriate on behalf of the Ministers to say anything which might be interpreted as an assurance. So, to the question of whether it would have been sufficient evidence of control if, with the same contractual arrangements as in the present case, the Minutes had disclosed a formal review of the performance of ASF annually, he could make no answer. It was enough to say that there had been no such review. In any event, he submitted that it was implicit in any process of competitive tendering that criteria would have to be spelled out so that the tenders could be assessed against a common standard. Engaging in such a process would demonstrate a level of control. When the Court suggested that it seemed to follow from his emphasis on systems of control, that the provisions of Clause 7.1 of the Agency Agreement were not fatal to the appellants, he appeared to accept that if there was evidence of a formal process of choice of marketing agent that might be good evidence of control. The organisation had to show that it was doing what it was meant to do and recording this properly. He conceded that there was no dispute that ASF was very good at its job and that a PO might quite properly decide to stick with a competent marketing agent such as ASF, rather than search for some notional "best" agent.

[82] The question of whether there had been a failure to provide centralised billing was a separate question. But, consideration of billing arrangements was relevant to the issue of control. The evidence showed a high degree of dependence on ASF and their direct dealings with members. It was not a case of a marketing agent selling produce supplied to it by the PO. In effect, the supply to the marketing agent was direct from the growers. Counsel contended that, similarly, there was no centralised book keeping. To be "centralised" required a self standing, independent organisation. The AG arrangement was not. But, more fundamentally, he said it was important how this "played into" the question of control.

[83] Returning to the issue of negligence, counsel referred to the suspensions. It was plain from the time of the suspension that the RPA had put the matter of reliance on ASF on the table. It was for AG to deal with the problem. It could, and should, have done so long before March 2010. Their excuse was effectively equivalent to saying that they were distracted by RPA. This was not an adequate excuse. No doubt AG were taking steps in the right direction but, on proper analysis, it could be seen that these steps did not deal with the issue.

[84] On the matter of "legitimate expectation", Mr Wolffe accepted that this European concept was a relevant matter for the Court to consider in the context of the present appeal. He accepted, as substantially accurate, the summary by Colman J in *MMB* v *Tom Parker Farms*. However, he contended that the letter of 26 October 2009 could not bear the construction which the appellants sought to place on it. It was important to have regard to the divisions of art 116. The appellants' position was protected by the need to find that the breach was deliberate or due to serious negligence. Any question of application of a principle of "legal certainty" would be met by the need to prove negligence. As the letter itself made it plain that matters were subject to further review, the submission based on "legitimate expectation" did not get off the ground. In any event, it was important to note that the doctrine required evidence that AG had relied on the letter in such a way that they would be prejudiced by a change of position. There was no evidence of this. He stressed that the issue only arose in relation to the retrospective effect of the deregistration.

Response by appellants

[85] In response Mr Robertson made eight short points. 1. He dealt with his proposed revisal of the respondents' draft statement of facts to which we have referred above. 2. In relation to negligence and the extent of the appellants' knowledge, he pointed out that the Guidance Document had no statutory effect. It was simply guidance issued by RPA. The guidance itself stressed, at various points, that the preferred course for an organisation to take was direct consultation. This is precisely what the appellants had done. 3. Although Mr Wolffe had relied on the supposed obligation of a PO to "take charge" this was not an obligation to be found in the Regulation. It appeared simply in the recital. It was, no doubt, an aid to interpretation but greater weight should be placed on the preceding reference to flexibility. In any event, the Preamble could not replace art 29 which was not to be read in isolation but in context. It flowed from arts 3 and 4 and art 27. Article 29 required the PO to take responsibility for an activity but not to take charge of it. 4. He renewed his submission that art 116(2) did not convert all breaches of art 25 to substantive ones. A technical breach would not fall within art 116(1). 5. Mr Robertson stressed that, in the *Fruition* case, the question of control was thought to turn on the nature of the shareholdings in the companies. The present case was quite different. It turned on contractual relationships. He reminded us that art 29 was not in play in that case. He referred briefly to the decision in *France* v *Commission* at paras. [43] and [59]. All dicta, including [41] were entitled to full weight. 6. The Growers Agreement at Cl 2 showed the commitment by individual growers to sell their whole designated produce through AG. Under Cl 15, the company was responsible for medium and long-term marketing strategy. It was perfectly proper, he submitted, to leave ASF to deal with day to day marketing. RPA had accepted that the merits of ASF in that role were well understood. It was of significance that in their most recent Guidance the RPA had highlighted, as a key reason for EU support, that the PO arrangement should be able to achieve a better bargain than members could achieve on their own. That was precisely what use of ASF had allowed them to achieve. 7. In relation to the question of legitimate expectation – which only arose if the appellants were unsuccessful on the main grounds – counsel stressed that the letter of 26 October 2009 was not to be read in isolation but as part of a chain of communications. The implication was that AG would continue to operate, knowing that its funding was secure in that it would not be withdrawn retrospectively. 8. He returned to the issue of control and stressed the provisions for termination. AG could bring the marketing arrangement to an end on a month's notice – or less in certain circumstances. ASF had to give a year's notice. The balance of control was plainly in favour of the appellants.

Discussion

General approach to art 116

[86] We had some difficulty in being satisfied that we had properly identified the key issues in this case. There are various reasons for this. As Mr Allaway made clear, the RPA decision was taken on the basis of the cumulative effect of a range of perceived breaches which were possibly minor in themselves. This may have been the reason why the individual breaches were not spelled out clearly. A second reason is that the pleadings, the evidence and the submissions touched on a wide range of concerns which the RPA had had about the appellant organisation. Some of this range is reflected in the Factual Background above which was based on the material agreed between the parties. It was appropriate to consider this material as part of the background to the issue of negligence but it has proved distracting in relation to the merits of the present appeal. We fully understand the concern of RPA and the respondents that if the European auditors take the view that recognition has been given to an organisation which does not properly comply with the recognition criteria the Member State may face penalties. Accordingly, it is appropriate for the Court to take a broad view of pleadings. However, we are dealing with an appeal against a specific decision. Our procedures leave the respondents considerable scope to clarify and change their statement of reasons. The appeal has to be determined by reference to the grounds relied on in the written pleadings.

[87] These grounds related to the decision of the Stage 2 panel. This was not well expressed but Mr Robertson, in his opening, set out clearly what the appellants understood the grounds to be. We understood the respondents to accept the accuracy of his summation. It is plain that the substantive issues relate to the application of art 25(b) to the use of packhouses and art 25(c) and (d) to aspects of the marketing activities of ASF. We have set out these matters below in more detail. Our decision must turn on our assessment of these issues. We have tried to guard against an unduly narrow focus but some focus there must be.

[88] We recognise the desire of parties to have guidance on concerns which have been expressed and where it has seemed helpful to comment we have done so. But these comments are not intended to provide an authoritative ruling. We did not hear full submissions on the bulk of the material and, in any event, where there is doubt about the construction of the Regulations, authoritative rulings must come from the European Court of Justice. Our aim has been to give an indication of some of the wider issues raised by some of the expressed concerns rather to express a conclusion. We have attempted to limit our positive conclusions to matters necessary for determination of the present appeal.

[89] The issues arise out of the terms of European Regulations. There is a distinction between issues raising a question of construction and issues as to the application of a particular construction to a set of facts. We have not attempted the potentially difficult task of determining which issues fall into which category but have little doubt that the proper construction of arts 25 and 29 lies at the heart of most of the problems. Our decision on the matter of negligence was reached without much difficulty but we found some difficulty in relation to various other issues. Where a decision turns on a doubtful question of construction we must either refer to the European Court of Justice or leave the matter for the Court of Session to determine if there is an appeal.

[90] As we have been able to come to a clear view of the issue of negligence and understand it to be accepted that this is sufficient to determine the substantive appeal, we have not found it necessary to consider a reference to the European Court. It may be said that we would, in any event, have been influenced by the fact that a reference is already pending from the *Fruition* case. This will look at the issue of "control" and dicta in relation to the various questions referred may well go some way to answer the question of the degree of control envisaged by the relevant provisions in the present case. As some assistance can reasonably be expected from that reference we would have been reluctant to commit the parties to a reference at this point. We have therefore followed our normal course of leaving matters to appeal rather than attempting to achieve any potential saving by way of direct reference to the European Court. Where we consider it appropriate to leave matters to a domestic appeal, we are satisfied that we should approach issues of construction in the usual way, expressing our own conclusions even where we have found the issues to be narrow. The Inner House may take a different view of them and it would be for that court to determine whether issues of construction properly arose and whether it was satisfied that the meaning was tolerably clear or required elucidation by the European Court.

Article 116

[91] Before turning to the substantive grounds in terms of art 25 it is necessary to look at the terms of art 116 which provided the formal basis for the decision to withdraw recognition. In terms of the opening provisions of art 116, it is clear that, to support a decision to withdraw recognition, three factors must be established. These are that there has been a failure to respect the criteria for recognition; that this is properly to be described as substantial; and that the failure was due to serious negligence – the respondents having made it clear that there was no suggestion of deliberate actings in this case. The article goes on to specify certain breaches "in particular". Mr Wolffe accepted that the RPA's initial approach had been flawed in that they had treated these provisions as superseding all the factors in the opening provisions. He conceded that the test of negligence had not been superseded but contended that, to give content to the words "in particular", it was necessary to treat them as superseding the need for assessment of whether a breach was "substantial".

[92] We are satisfied that the words "in particular" would not normally be expected to change or contradict a preceding provision. We see the practical force of a distinction between a need to prove negligence and a need to prove that something was properly to be regarded as "substantial" but find it difficult, as a matter of ordinary English grammar, to treat the expression "in particular" as designed to supplant one of the preceding tests and not the other. We have come to accept Mr Robertson's submission that the second part of the provision should not be read as superseding the need to consider each of the listed factors.

[93] However, this particular issue does not appear to us to be of critical importance. If a breach of the requirements of the listed articles is to lead to withdrawal, it must be assumed that the legislators would not expect a finding of a breach of these articles to be made unless that breach was of some significance. As it was put by the respondents in their Answers: "to be in breach of these articles, *per se*, is by its very nature a 'substantial breach' of the recognition requirements". We would not expect a producer organisation to be found to be in breach unless there was a substantial failure, a failure going to the essence of its role. This may be illustrated by taking an example from a provision which is not in issue in the present case. Article 23 deals with minimum membership. Breach might be thought to be a matter of simple arithmetic. Its listing in art 116 shows its potential importance. But if a PO had been set up with the minimum number required by a particular Member State and had lost a

member there would be a clear breach. If they were aware of the breach but made no effort to replace the member it would not be difficult to point to circumstances where that was indicative of serious negligence. Could it have been intended that such a breach would automatically lead to deregistration? It seems clear that the question of whether particular circumstances amounted to a "substantial" breach would have to be addressed at some point in each case. It is necessary for us to take a purposive approach to construction of European Regulations. We think it makes better sense to address the "substantial" issue explicitly under the first part of art. 116 and we can, accordingly, assume that that was the intention of the legislation.

[94] We note, too, that RPA relied on the cumulative effect of individual breaches as much as the individual breaches. We see no basis in art 116 for any presumption of substantive breach if no significant breach of any of the individual specified provisions has been established. On the other hand, it might be arguable that it could properly be concluded that the failure to respect the criteria was substantial within the meaning of the opening provision if a number of individual minor breaches had been established.

RPA's earlier concerns

[95] Before turning to the grounds relied on in the pleadings as establishing a substantial failure to respect the criteria for recognition, it may be helpful to look at some of the concerns expressed by RPA over the course of the year from their decision to suspend recognition in June 2009 to the decision to withdraw recognition in March 2010. We do not attempt to express a concluded view on these matters where they are not relevant to the issues before us but our comments give some indication of the legal issues we think they raise. It is not entirely easy to identify, in the decisions or related reports, what legal issues RPA have considered or how their concerns might have related to potential breaches of specific Regulations. It seems clear that some concerns implicitly related to the question of whether the establishment of AG was in some way a sham or abuse. But Mr Wolffe made it quite clear that no suggestion of this was now being made.

[96] At the hearing it was agreed that essentially the problem was one of "control". But in relation to that matter, various criticisms of the appellants' arrangements have been expressed. In the letter of 9 June 2009, the problem was said to arise from the relationship between the growers and ASF. "The close links between the individual grower members and the marketing agent do not guarantee that the PO has full control over production or marketing". But, it may be observed that "close links" do not in themselves preclude control. In some circumstances they would make control easier.

[97] The pleadings refer to the RPA as having expressed three concerns in September 2009. First, the RPA requested that "the appellants' centralised billing and invoicing system was amended to clarify the appellants' independence from ASF". It may be observed that this could reasonably be read as an acceptance that the appellants had an adequate centralised billing and invoicing system and that the problem was one of perception – clarification – rather than substance. But, in any event, where an activity is outsourced we are not persuaded that references to "independence" provide much guidance to the underlying issues of management and control. The second concern expressed was the need for personnel changes in the appellants' Board of Directors. This change had taken place before March 2010 and it is unnecessary to say much about it. However, it may be observed that we are not persuaded that an overlap of members and directors is, in itself, a pointer to any breach of the recognition requirements of the Regulations. We accept that it might be a

relevant adminicle of evidence bearing on some more specific allegation of a breach. But, as part of an expression of general concern it did not provide much guidance as to the nature of any specific breach. Where companies have members in common, it will not necessarily be the case that one dominates the other. The interests of the companies may be quite different and one company be quite prepared to give way to the other to reflect the dominant interest. In that situation the common members would provide control for the company with the greater interest. It may be noted that in the *Fruition* case the Court appears to have accepted that in some circumstances an overlap of members might be sufficient to establish control.

[98] The third concern was a request that the appellants undertake a review of its position and "capacity to operate as a 'stand-alone' company". We have no doubt that AG was capable of operating as a "stand-alone company" and we have a feeling that repeated expression of concern about this by RPA has done little to clarify the substantive problems. AG was a separate legal persona. It had in place all systems necessary for its function as a stand-alone unit. It was an independent company capable of making its own decisions. The fact that it shared directors and members with another company has no bearing on that. It carried out a full operational programme subject to detailed audit by RPA and no significant failings appear to have been identified on that side of their business. The questions which require to be addressed relate to the specific ways in which it conducted its marketing operations. The company had entered an agreement with ASF. This latter company was not a subsidiary. It acted as an agent. We have little doubt that RPA's assessment of the facts was influenced by its awareness that ASF had been in existence before AG. Many of the practical arrangements, that is the detail of what was done and by the individual growers had, perhaps, seen little change. But there had been a complete change in the contractual relationships.

[99] Under the old system, the individual growers must have had agreements, expressed or implied, with ASF. We did not hear detail of these, but there was nothing to suggest that there was any collective arrangement prior to the establishment of AG. In other words, it can be assumed that the individual members each had direct contractual arrangements with ASF. They would each be able to decide for themselves the nature of the services they would get from ASF. This would be so even if ASF offered only an inclusive package. The grower would be able to decide whether to take it or not. The individual could properly be said to remain in overall control of the commercial arrangements he chose to make for marketing his product.

[100] It is quite plain that, by March 2010, a different legal regime was in place. There was no suggestion in the evidence that the growers had any direct contractual relationships with ASF. Their relationship was with an identifiable distinct legal persona, a stand-alone body, AG. That body, in turn, had a contractual relationship with ASF. We think that, instead of viewing the situation through the lens of the previous arrangements, it is necessary to use the viewpoint of the new company. It had responsibilities to its members. It had to provide a range of practical services. It used an agent to do so. Use of another body to carry out the practical tasks facing producer organisations is permitted by the relevant Regulations. The fog of suspicion, based on an assumption of little practical change, does not help analysis of the situation as it stood in 2010.

The initial decision – letter of 16 March 2010

[101] The pleadings assert (at Answer 11) that recognition was withdrawn "as a result of the 'recognition breaches' identified during the shared technical facilities review. It was asserted

that during this review, it became clear that the appellants had not made any of the changes requested by RPA. It may be noted that this was not established in evidence and, indeed, the formal letter of 16 March 2010 intimating withdrawal of recognition was to a different effect. It is of interest to look at some of the comments set out in that letter. It made five separate points, four under specific numerical headings which we repeat.

[102] (1) "The invoicing system [was] heavily reliant on information passed to the PO from the Marketing Agent." We think it clear that the concern thus expressed did not provide any justification for withdrawal. The PO was entitled to outsource the selling operation. While questions undoubtedly arise as to the nature and extent of management control required, it is clear that the detailed knowledge of the selling prices would inevitably lie with the agent. That was the most important element of the invoicing process. We see no reason why a PO, for practical day to day administration, should not rely entirely on information from its agents. In this case, the contractual right to examine the agents books allowed the PO to check the accuracy of information if any doubt had emerged.

[103] (2) The essence of the second point was that three individual members used their own pack houses and picked, stored, packed and delivered their own produce. There were no mutual use agreements relating to these packhouses. It was said that the appellants had limited involvement with those members and that the real benefit to the PO was simply an increase in the value of marketed produce. But if no question of sham or abuse arises, this latter point seems irrelevant. In terms of the *France* v *Commission* decision, members are entitled to choose to use their own facilities if they wish. We are satisfied that the issue for RPA ought to have been focused on the facilities which the PO did provide by way of the four shared pack houses – rather than on the fact that some members chose not to use facilities thus provided. This remains an issue in the appeal and we return to it in more detail below.

[104] It may, however, be observed that we were not directed to any regulation requiring the PO to derive a benefit from its members. The members themselves clearly benefited from the centralised invoicing system and from the services of staff employed by AG including in particular, the quality control staff. They also benefited from the services of the marketing agent. At all relevant times, the latter services were supplied to the individuals by AG through the medium of ASF. It can, no doubt, be said, that if they had not been supplied in that way, the growers would have been able to enter similar arrangements direct with ASF. However, the question to be addressed relates to the arrangements in place; not to arrangements which might have been put in place had the existing ones proved unsatisfactory to any individual member. It must be assumed that the three growers in question had joined AG because it suited them. What they might have done had it not been in existence is nothing to the point.

[105] (3) The third concern related to collection and is no longer in issue in this appeal.

[106] (4) It was said that members of the PO were not involved in decision making. This comment was supported by reference to the fact that the appellant relied heavily on an external consultant. That tends to suggest that it was the role of members in administrative matters which was the concern. It is now accepted that there was nothing wrong with reliance on an external consultant and we see no regulation which requires members to be involved in day to day decision making. Article 3(4) simply requires members to be able to scrutinise the organisation and its decisions. If the RPA comment was meant to mean that

members were, in some way, precluded from a say in the way the company organised its affairs, we do not think the observation was supported by the evidence. Members of a company would normally be expected to have a say in decision only by exercise of a majority vote at an appropriate meeting. We are satisfied that the very fact that the Regulations specify, in some detail, a company structure, makes it clear that individual members were not expected to be involved in day to day "decision making". They were to be able to "scrutinise democratically their organisation and its decisions": art 3(4)(c), but the normal expectation would be that this be done through their votes at the AGM. They could also exercise control through an EGM if occasion arose. We noted that the PO did in fact hold informal meetings of members to discuss matters of interest to them. There was nothing to suggest that a decision of members at such meeting would not be heeded by the Board. Control may mean different things in different contexts. Members of a company can be said to be in control of its affairs even though the exercise of that control is limited to annual meetings with the power to requisition special meetings where necessary. Management control may lie in the hands of the Board. Control of day to day running of the company would be expected to lie with the staff or agents. As far as control by members is concerned, it appears to us that the company was functioning in a straightforward fashion.

[107] The fifth point was not set out as a specific reason. It was introduced by the observation that RPA had requested that more steps be taken to review the PO's position and capacity to operate as a stand-alone company. The concerns then set out appear to us to reflect the confusion caused by use of the shorthand reference to a "stand-alone" company. It was said that AG did not play a significant role in the concentration of supply and marketing of members produce but used historic channels with minimum change. This criticism did not directly address any of the formal requirements of the Regulations. If the historic channels, in themselves, achieved the fundamental aims of producer organisations it is not clear why it was a subject of criticism that there had been little change. If, for example, a group of growers had previously operated in partnership and was achieving marketing objectives similar to those specified in the Regulations, it might have changed the legal format to a company structure meeting these and other requirements of arts 3 and 4 but there would have been no reason to refuse recognition simply on the basis that, in day to day operational terms, marketing activities appeared to go on much as before.

[108] The conclusion of the letter quoted art 116 as stating: *" 'Member States shall in particular withdraw recognition of a producer organisation if a failure to respect the criteria for recognition concerns: (a) a breach of the requirements of Articles 23, 25, 28(1) and (2) or 33.' The PO is in breach of this Article, specifically in its failure to address Article 25 concerning the structure and activity required of a producer organisation."* The letter did not, in fact, make any specific reference to any particular activity. The language used to describe the alleged breach did not reflect any of the terms of art 25 itself. We are not now concerned with the structure of the PO. Further, it may be noted that this conclusion reflected the erroneous assumption made by RPA that if there was any breach of art 25, it was unnecessary to give separate consideration to issues such as negligence.

[109] Following the decision by RPA to deregister, the first appeal or review stage, in terms of the 2004 Regulations, was the first stage review known as the "Stage 1" process. By that stage the focus seemed to have changed. It appears that, quite sensibly, the review was itself conducted in two stages. After the formal stage the appellants intimated their intention to take matters to Stage 2. The material they presented in preparation for that stage was taken into account by way of a review of the Stage 1 process. The decision ultimately intimated as

the Stage 1 decision included consideration of that material. It was set out as part G of the revised Case Summary dated 28 January 2011. We need not deal with the detail of this. However, it may be noted that, under reference to use of the packing houses, it was pointed out that clause 14 of the Growers Arrangement appeared to provide for "dissemination of responsibility to individual members". It is not entirely clear what that was intended to mean but we accept Mr Robertson's submission that it appears to show a misunderstanding of the clause. We think that in essence the clause does no more than cover situations where an individual has expressed a desire to use his own facilities. It does not allow the PO to compel such use. There was also some further discussion of the reasons for complaint about the way in which sales were taking place through ASF and again complaint about reliance on ASF in relation to the centralised bookkeeping. These are issues we consider further below. The complaint about reliance on use of a consultant has since been withdrawn.

[110] This brief review of the reasons expressed from time to time in relation to compliance criteria tends to confirm the view that RPA had been motivated by a general concern about the closeness of the relationship of AG and ASF. However we are satisfied that a close relationship between a PO and its marketing agent is not, in itself, inappropriate. There was no dispute that the PO was entitled to outsource matters to a marketing agent. The problem is to determine whether and, if so, to what extent, they fell foul of the Regulations in the detail of how this was done.

The Stage 2 decision

[111] Although the respondents accept that the reasons now to be considered are those expressed in the stage 2 decision and that these are to be taken as properly set out in the pleadings at para 15, it is appropriate to make brief mention of the terms of that decision. It has become apparent that no useful purpose has been served by our repeated attempts to spell out to decision makers the requirements of a process such as the stage 2 process in the present case. These requirements are the same as those formerly set out in the Agricultural Subsidies (Appeals) (Scotland) Regulations 2004 and our observations in *Dickie v Scottish Ministers* are applicable. The concept of a comprehensive statement of facts and reasons capable of being understood by a new reader – notionally, one of the Scottish Ministers – has proved elusive. Because of the need to try to ensure that decisions ultimately comply with the requirements of the underlying EU legislation, we have not felt it appropriate to try to deal with appeals by limiting ourselves to consideration of the terms of poorly expressed decisions. We allow Ministers an opportunity to set out their contentions fully in proceedings before us. However, in the present case, the decision was not only inadequately expressed but the Stage 2 panel explicitly declined to express any view on the legal questions raised by the appellants. We limit ourselves to observing that this was a misunderstanding of their role. Decision makers must make decisions and the panel was, in any event, obliged in terms of Reg 8(3) of the Appeal Regulations to make findings in fact and law. If they were unable to make a formal finding as the basis of their recommendation to the Scottish Ministers they should have set out the nature of the issues which required determination. The Ministers would then have had to take a view of the legal issues. That the Scottish Ministers should simply accept the RPA approach - that legal issues were too difficult to bother with - is beyond the scope of useful comment by us.

[112] It should, however, be stressed that our criticism of the way in which the Stage 2 panel and the Ministers have expressed themselves and the comments in our foregoing analysis of the history of RPA's concerns, are not intended as a criticism of RPA. We recognise the difficulties they face in attempting to give guidance as to the proper meaning and effect of the

Regulations. We do not consider the issues of construction of arts 25 and 29 to be straightforward and we cannot be confident that our views on all the issues would necessarily meet the approval of the European Court - which is the proper arbiter. Accordingly, we think it makes good sense for RPA and for POs to try to err on the safe side. The RPA is right to express its concerns. In the last analysis it is for the PO to decided what, if anything, to do about such concern. Where a PO can respond to concerns or comply with informal Guidance without creating artificial mechanisms or significant extra expense, it is as well to do so, even where it does not consider that there has been any breach of recognition requirements.

The formal reasons for withdrawal of recognition

[113] We turn now to the substantive items identified by the respondents in the pleadings and accepted as the basis upon which we require to make our determination. The contentions fall under the following heads:

(1) Breach of art 25(b) in relation to use of packhouses. Four packhouses are used by several members and three by individuals. The substantive point was put in a variety of different ways in course of the evidence and hearing but essentially it was that AG did not exercise sufficient control and responsibility in relation to the packhouses used by the three members.

(2) Breach of art 25(c) in respect of a failure of the PO to be able to ensure their essential functioning as a producer organisation in relation to commercial and budgetary management. The bases of the alleged failures were essentially related to the criticism of the role of ASF.

(3) A breach of art 25(d) was said to arise because the PO was alleged to have failed to have at its disposal, staff, infrastructure and equipment necessary to ensure a centralised bookkeeping and invoicing system. Attempts to identify more precisely the nature of the breach again turned on the role of ASF.

[114] The substantive requirement of art 25(c) relates to "commercial management" which might normally be taken to include "budgeting". Plainly the latter term focuses on figures and the balancing of income and expenditure including consideration of projected income and expenditure. There may be a context in which a distinction will fall to be drawn between commercial management and budgeting but nothing was made of this in the present case and we can take the latter to be implicit in any discussion of commercial management. Similarly we can refer simply to "bookkeeping" when making general reference to the requirements of art 25(d) although it will be necessary to return to the separate issue of invoicing when we turn to matters of detail.

Use of packhouses

[115] The first of these grounds raises the issue of members' use of their own facilities. Part of the reasons for rejection of the Stage 1 appeal in relation to the three packhouses included reference to the Policy update issued by RPA in light of the decision in *France v Commission.* The guidance stated that "the PO had to provide actual facilities or be ultimately responsible for arranging their provision to all its members" but it then went on to say that: "In essence the PO must be in control of arrangements". We heard no evidence that the PO was in control of the three packhouses. It appears that they employed quality control staff there and this would provide some control of the produce coming from these packhouses. However, there was no evidence of any control of the operation of the packhouses.

[116] We are not satisfied that the decision in the *France* case supports the proposition that the PO must remain in control of facilities which a member provides and chooses to use for himself. The PO had to make the necessary technical equipment available but it was up to the members whether they used such equipment or used their own: para 41. Plainly, it is necessary for a PO to have some form of control of arrangements when relying on one member to provide equipment for another. That is "outsourcing". Properly understood the arrangements for use of the four shared packhouses involved outsourcing and if there had been any stated criticism of these arrangements we would have had to consider them in further detail. However, the respondents' criticism related to the use of the other three packhouses. We are not persuaded that use by a member of his own equipment involves the concept of outsourcing. We consider that the situation can properly be described as one where the member uses his own equipment in preference to that offered by the PO rather than as one where he acts as an agent of the PO in providing that equipment for his own use. An argument was advanced in the *France v Commission* case to the effect that use by individuals of their own facilities might be permitted as an example of outsourcing. Reference was made to art 29 but the Court declined to deal with the argument as that article was not in force at the relevant time. The Court said nothing inconsistent with the view we take on this point.

[117] There was no dispute that the packing stage was an important part of the marketing process. There was no dispute that it was a technical facility which, in terms of art 4(1)(e) required to be provided by the PO. This issue was discussed in the *France* case. The contentions in that case related to situations where each of the members of a PO would have all the necessary technical equipment for storage and packaging and the PO would not provide any such equipment nor have available any means of supplying such equipment. The regulatory requirement in question was in terms essentially the same as art 4(1)(e). It was argued that the PO had met the requirement of effectively making equipment available when each producer already had the equipment: para 25 of the decision. The Court did not accept this. It held that the PO was required to guarantee access to technical means for all its members, including future members. The PO did not have to own the equipment. It was for POs to determine how they would go about being able to guarantee such access: para 36. The Court went on to draw the distinction "between the use of the technical means by the producers and the making available of them by the PO. "In fact, although the use of the technical means made available by the PO is left to the discretion of the producers, the making available of these technical means by the PO is an obligation which the latter cannot escape, even when all their members have the said technical means available": para 41. Although Mr Wolffe sought to suggest that this was an *obiter* passage rather than part of the substantive decision, we accept it as entitled to weight as part of the decision and as consistent with the overall thrust of it.

[118] In the present case, there was no dispute that three growers had sole use of their own packhouses. The respondents directed their criticism at the use of these packhouses by individual members but did not dispute that AG had entered mutual user agreements in relation to the four other packhouses which would allow these three individuals to use the shared packhouses. Seventeen out of their twenty members shared these packhouses. The packhouses were owned and operated by the four individual operators but the arrangements for this and for payment were under the control of the appellants. The packing itself was under the supervision of the quality control staff employed by the appellants. There was no evidence to suggest that these packhouses could not cope with the produce of the other three members had it been necessary for them to do so. The members who preferred to use their own pack houses could have used the other ones if they had wished. They chose not to do so.

[119] We agree with Mr Robertson's submission that the important fact is that four packhouses were provided by the PO in the sense that they had entered arrangements whereby these packhouses were available on request to all the members. They were used by all members who found it convenient to use them. There was no challenge to the evidence that the three who currently preferred to use their own facilities could have used the four.

[120] As the decision in *France* makes clear, it is not necessary for the PO to own the technical facilities to be provided for its members. It is sufficient that the PO has in place, and under their control, some arrangement which ensures that facilities are available for all members and that all individual members have right to make use of the facilities if they wish to do so. There was some suggestion in the course of cross examination that it might be necessary for a PO to have reserve facilities to cope with the requirements of growers in case of emergency. A question was posed as to what would happen if any of the packhouses burned down. However we are satisfied that the Regulations require to be approached in a practical way. A need for flexibility in approach was accepted by the Commission in the *France* case: para 27. A PO must genuinely be prepared to provide technical facilities on request. The obligation to guarantee availability cannot be taken to mean that it must have a full range of facilities on stand-by, instantly available. It must be entitled to make enquiries and ascertain the probable requirements of its members in time to make facilities available when needed. For example, the decision in the *France* case expressly contemplates the guarantee of availability to future members. A PO could not be expected to hold unlimited technical resources to provide instantly for the needs of all potential new members. It would not be normal for any business to have full duplicate reserve facilities. A commercial decision will have to be made. Our concern is not with what might happen if the facilities provided by the PO were not available but with what actually happens at present. A PO must offer technical facilities to all the members who wish to make use of them. But we are satisfied that the Regulations must be construed in such a way as to allow reasonable time for this to be done. It would not, in our view, be a substantial breach if the three users of individual pack houses suddenly decided overnight that they wished to make use of the other facilities and it proved impossible for them all immediately for them to do so. The important thing would be that the PO recognised its responsibility to provide the necessary technical means and took all reasonably practical steps to act in implement of that responsibility. It may be added, for completeness, that there was no evidence to the effect that it would be impossible immediately to accommodate the three. The evidence was that the four packhouses were available if they wished to use them.

[121] In the pleadings, the respondents asserted that the sole benefit to the PO from the membership of the three who used their own packhouses was an increase in the value of marketed production. This is relevant to the level of potential grant. We did not understand counsel to assert that other benefit to the PO was a relevant consideration. On the other hand, we are satisfied that these members derive considerable benefit from membership. Some of such benefit is, of course, attributable to services provided by ASF as an agent for AG but there are also significant direct benefits such as the services of AG staff including quality control staff as well as the benefits of the average pricing and invoicing arrangements and the operational programme.

Outsourcing

[122] When we come to look at the alleged breaches of art 25(c) and (d), we are satisfied that it is appropriate to regard the marketing side of a PO's operations as being of sufficient

importance to require arrangements for it to be assessed independently of the operational programme although we have noted that, by contrast with the provisions of art 4(1)(e) of Reg 1182, art 25 (b) does not include a reference to "marketing". The emphasis on the alleged lack of control of marketing activity is only relevant to the specific provisions of art 25 if it can be assumed that marketing of members' produce is an aspect of the commercial management of the PO. We are satisfied that a PO does not require to carry out commercial management of its members own businesses. Income from sale of produce is part of the income of the individual, not the PO itself. Equally, we think it clear that the PO has no control of members' own overall costs. The scope of budgetary management required by a PO depends its own activities. However, marketing is an essential function of a PO and giving a purposive construction of art 25 it must be accepted that the PO had to provide its members with staff, infrastructure and equipment necessary for commercial management of the provision of the marketing activity.

[123] Mr Robertson attempted to answer the challenge based on art 25(c) by reference to the systems in place to deal with the operational programme. There was no dispute that the PO had adequate commercial management of that side of things and we heard no criticism of bookkeeping arrangements for it. That might have a bearing on our overall assessment but we cannot regard it as a complete answer to the criticism of the commercial management in relation to marketing. In that regard, it is clear that AG had arrangements in place in terms of which the marketing activity work was carried out by ASF. It was an outsourced activity. ASF was responsible for the commercial decisions relating to that activity. ASF provided the day to day management functions and certain bookkeeping and invoicing services.

[124] It is quite clear that, at least by their arrangement for the services of ASF, the appellants provided their members with efficient commercial and budgetary management, centralised bookkeeping and a system of invoicing. Accordingly, the issues for determination in relation to the breaches founded on under reference to art 25(c) and (d) turn essentially on identifying which if any aspects of the functions covered were properly to be described as carried out by ASF and, in relation to any so identified, whether they fell within the scope of permitted outsourcing. Mr Robertson argued, in essence, that the evidence showed that by March 2010, AG was itself directly responsible for the commercial and budgetary management, bookkeeping and invoicing necessary for the essential functioning of AG as a PO. But to the extent that AG might be relying on ASF this was permitted outsourcing. Both sides were agreed, in broad terms, that in relation to the latter point, the issue was one of "control". AG had to demonstrate that it had adequate control of outsourced activities.

[125] Unfortunately, the acceptance of "control" as a test, has not proved helpful to us in considering the detail of how arts 25 and 29 should be applied in the circumstances of the present case. It is plain that AG does not require to be in total control of ASF as a company. We are satisfied, as discussed below, that AG did not require to exercise day to day control of marketing activities. Clearly AG could be said to have handed over to ASF the commercial management of an essential and major part of their function: namely marketing of the product. Sale of the product is a critical feature of commercial management. However, there would be no breach of art 25 if that function had been validly outsourced to ASF. The breach of art 25 depends on the validity of the outsourcing.

[126] In the Regulations, there are two articles dealing with the question of outsourcing. The first is art 6 of Reg 1182 which provides that Member States may permit a PO "to outsource any of its activities, including to subsidiaries, provided that it provides sufficient evidence to

the Member State that doing so is an appropriate way to achieve the objectives of the producer organisation concerned". We were not addressed on this provision. On the face of it any question arising would require examination of the use of the Member State's discretionary powers but it was agreed that we required to approach the present appeal on the basis of our own findings and assessment. In other words we were not limited to dealing with the matter as if we were carrying out a judicial review. It is plain that RPA were prepared to permit outsourcing. The respondents agreed that it made sense to entrust marketing to a marketing agent. There was nothing to suggest that use of ASF, as such, was an "inappropriate" way to achieve the objectives of the organisation. The parties plainly treated art 29 as the critical provision. They agreed that it was that provision which distinguished the present case from the *Fruition* case. It may be that there was an implicit understanding that, if the arrangements fell within the scope of art 29, they would be acceptable under art 6. It may be that the parties tacitly accepted the position advanced by RPA in the *Fruition* case in relation to art 6(2) of Commission Regulation 1432/2003. That article referred to the entrusting of tasks to a third party and did not use the term "outsourcing". However, like art 6 of Reg 1182, it empowered the Member State to provide conditions. It appeared that the United Kingdom had not done so and it was argued for RPA that this failure simply meant that they could not withhold recognition based on any failure to comply with the article. In any event, it is sufficient for present purposes to note that it was not contended that art 6 of Reg 1182 had any direct bearing on the issues in the present case. We have referred to it simply for completeness.

[127] Although art 29 provides the definition necessary for the purposes of art 27 there is nothing to suggest that it is limited in its application to that article. In particular there is nothing to suggest that outsourcing is only permitted where it relates to the activity of providing 'technical means' for the purposes of art 4(1)(e). Businesses routinely use agents or subcontractors to carry out parts of their business activities. There is no apparent reason of policy to suggest any necessary restriction on POs in this respect - except perhaps in relation to use of their own members where the policy of collective marketing may require some restriction on the role played by individual producers. The main role of a PO is related to the concentration of supply and the placing on the market of all the members' production of the relevant product: see art 28(1) and art 3(2(c). It is clear that a PO has to have substantive control *vis-à-vis* its members. It does not appear to be an essential part of that policy that it retain direct control of all activities which require to be carried out on behalf of the members.

Article 29

[128] The first sentence of art 29 is straightforward and presents no difficulty. Outsourcing is defined in terms wide enough to cover a wide range of agency or sub-contracting arrangements for "the provision" of an activity. We adopt the term "agent" as a convenient shorthand to describe a third party involved in this way although the arrangements might not involve agency in any technical sense. The important qualifications are in the second sentence. Giving a purposive construction, this can be taken to have the effect that outsourcing is not permitted and is therefore to be disregarded where the qualification is not met. This would have the effect of creating a breach of art 25 if the PO was dependent on ineffective outsourcing in any relevant respect. This approach to construction was, we think, implicit in the submissions of both parties. It may be added that although it is, at first sight, surprising to find a reference to a producer organisation being in breach of art 25 where the duty under that article is imposed on the member state rather than on the organisations as such, it is plain that art 116 requires us to approach art 25 in that way and this raises no particular difficulty in the circumstances of this case. We do not attempt to express a view on

the possibility of simply treating failures to meet the requirements of art 29 as a breach of that article rather than art 25.

[129] The second part of art 29 provides that, "*The producer organisation shall nevertheless remain responsible for ensuring the carrying out of that activity, and overall management control and supervision of commercial arrangement for the provision of the activity*." Again, we recognise the need for a purposive construction and that it is inappropriate to subject the text of European legislation to the strict grammatical scrutiny typically applied in a common law jurisdiction. The parties did not attempt to do so. However, we must start by looking at the language used. Under the first part the question is whether the PO can be said to have responsibility for ensuring the carrying out of the relevant activities. Entrusting the activity wholly to a reliable performer might be the best way of ensuring the carrying out of the activities. For example, it was not disputed that ASF was very good at its marketing job. It made good sense to leave marketing to them. We are satisfied that, in relation to the first part of the provision, the question of responsibility can be looked at in the context of the aim of the provisions as a whole. That aim is to ensure that responsibility for carrying out certain activities is moved from individual growers to the collective PO. If something goes wrong with the outsourced activity the members will be entitled to take their complaints to the PO. The PO is to be responsible for "ensuring the carrying out of the activity" rather than being responsible for the actual carrying out of relevant activities. If proper arrangements are in place the agent would be expected to have responsibility for carrying out the work. But the PO must bear primary responsibility to the members.

[130] The PO must also remain responsible for overall management control and supervision of commercial arrangement for the provision of the activity. This provision was not subject to detailed analysis by either side, possibly on the view that the meaning was clear and that the question was solely one of application of the provisions to the facts. However, we think the construction is not entirely free from doubt. We must keep in mind that it is to apply to all types of outsourcing but it is convenient to look at it in the context of marketing activities.

[131] If we can take the purpose of the PO to be the concentration of supply and marketing of members produce – as set out in art 3(c)(ii) or art 26 – it is tolerably clear that this aim is likely to be best achieved by making arrangements for supply and marketing to be concentrated through one efficient channel. Marketing is accepted to be a skilled task. There is no reason to assume that a producers' organisation is particularly skilled at it. Even if individuals might be assumed to have had the skills necessary to market their own produce efficiently, a wider range of skills will inevitably be required for marketing on a larger scale. This applies to outsourcing of any skilled activity. Once it has been accepted that a task is one which can properly be outsourced to a suitably skilled agent, there is no obvious reason for requiring the PO to have any input into the day to day activities. There is, in short, no need to approach art 29 on the basis that such control must have been intended. The language refers to provision of an activity rather than control of the activity itself. We are satisfied that, when construing art 29, there is no need to assume that the preferred position is that the PO could and should do the work itself. The Regulation permits outsourcing and the provisions should not be read as if there was a presumption against outsourcing.

[132] Although the language used in art 29 is not entirely clear we are satisfied that it should be read as requiring overall management control of arrangements for the provision of the activity rather than control of the activities involved. We are satisfied that it would be consistent with the purpose of the Regulation to construe the expression "control and

supervision of commercial arrangement" as relating only to the stage of putting proper commercial arrangements in place to ensure that a necessary activity is provided for members. The supervision required must relate to the task of ensuring that the arrangements remained appropriate rather than supervising the day to day activities. The language used does not clearly demonstrate an intention that the PO retain control of the day to day detail or supervision of day to day activities. Such control would be impractical. It would achieve nothing because marketing is a skilled task and the skill lies with the agent. We see no purpose to be served by any such requirement and see no reason to infer it. Accordingly, we are satisfied that the commercial management required on a day to day basis can properly be outsourced. That is not to say that a PO need necessarily give up all right to give instructions even in relation to a skilled activity. In relation to marketing, for example, there might be circumstances in which it might wish to restrict its reliance on a particular supermarket or to encourage another supermarket. It might wish to give instructions to that effect. An example of the possible need for this can be found in the *Fruition* case at paras 84-85. Evidence of contractual power to do this would be positively indicative of management control but in the present case we have no reason to doubt that in practice AG would have been able to exercise such control. A request to ASF would have received effect.

[133] We note that the concept of the PO keeping control of outsourced activities was discussed at some length in the *Fruition* case. Mr Nicholas Paine QC, the deputy High Court Judge, said that what was meant was that the PO must have a contractual right to issue instructions to the agent, at least on matters which affected the growers directly, such as quantities to be grown, pricing parameters, etcetera. But he added that it was not necessary in that case to formulate the matter more precisely: para 98. While we see no reason to cast any doubt on his description of control in the context of that case our concern is not with the general concept of control but with the specific provisions of art 29. It may also be said that we accept the conclusion of the deputy judge that the decision in *France v Commission* says nothing of any assistance in relation to outsourcing or the degree of control which may be required: para 96.

[134] Although we were addressed in terms of a need for control of ASF's marketing activities, it is the commercial management which is in issue in terms of art 25. If we are correct in the view we take that art 29 does not require the PO to have control of the day to day marketing activities, it would follow that the PO does not require control of the commercial management of these activities. What is required is commercial management at a higher level and, where that is outsourced, control at some higher level. It is not easy to define clearly what such control could or should be. Plainly some control is necessary in terms of art 29. Although we consider that the main thrust of the article is to emphasise the need for responsibility for outsourced activities to remain with the PO as opposed to the members, the article is explicit in its requirement that overall management control must be exercised by the PO. But this does not mean control of the company as such. ASF is entitled to operate as an independent legal persona subject to any agreed contractual constraints. "Overall management control" of commercial management points to control at a level somewhere above the day to day activities but falling well short of full control of ASF.

[135] Mr Wolffe contended that control meant something more than that provided by a right to terminate the contract. He was unwilling to commit to what specific additional elements of control would suffice. Although he stressed his contention that there was no evidence of contractual control in the present case and nothing which might take its place, we think it fair

to say that the thrust of his submission was that if reliance was to be placed on a right to terminate, it would need to be coupled with clear evidence of a proper system of appraisal.

[136] We are satisfied that the right to terminate a contract can give effective management control in many circumstances. Where this can be done in a comparatively short period the practice level of control increases. But this depends on the nature of the activity outsourced and on the respective bargaining powers. An agent might not be unduly concerned about loss of the relationship, particularly if the need to comply with the wishes of the company would involve it in unacceptable trouble or cost. Many businesses effectively outsource collection of payment to a bank. They may have little alternative but to accept the bank's systems but a decision to choose a particular bank could well be an aspect of proper commercial management of the business even if the only practical element of control was the power to stop the arrangement and move to a different one. We think it important to recognise that a party cannot properly be said to have lost commercial control of his business simply because the options open to him are limited. In the present case there was some suggestion that because of matters such as the particular advantages provided by ASF in relation to their control of special varieties of strawberry, AG might have found it hard to move to another agent. But that is simply an aspect of commercial management. The PO has to weigh up the implications of bringing the contract to an end. There might be situations where a PO was so tied to a particular arrangement that power to terminate would have been most unlikely to be used. On the other hand, the existence of other options might well make such a power an effective one. For example, in the present case, the possibility of a move to Berry Garden Growers was seriously canvassed. But in both cases the decision would a commercial decision which the company had power to make.

[137] It may not be possible to define more accurately the scope of overall management control of provision of a particular service but possible to express a view on particular circumstances. A simple situation would be where a PO engaged a haulage contractor to provide all the transport required for individual growers. Having responsibility for the commercial arrangements for this would clearly involve the PO in agreeing the terms and conditions upon which this was done and, in particular, agreeing rates or charges for the work. But there would be no obvious failure in overall management control if the individuals were left to contact the contractor direct, as and when they required transport. It would not point to failure in management control if the haulier was left free to determine what vehicles he used, what routes he took and which drivers he employed. No doubt, in respect of such matters one PO might seek to exercise a greater degree of control by laying down parameters such as minimum vehicle capacity or minimum levels of experience in drivers. But, another might well take the view that if the haulier knew the nature of the job, such matters could be left implicit without any significant risk of impairment in performance.

[138] Another practical example might turn on the detail of the scope for useful annual appraisal. A formal review by reference to a detailed specification of expected performance might not in reality provide any mechanism for control of day to day activities going beyond a power to terminate the contract. But it would allow members a say in relation to the overall arrangements to be made for provision of the activity in question. In relation to marketing, it was suggested that setting out a bench mark for performance - as would have been necessary had the task of marketing agent been put out to tender - would have provided greater control because of the specification of the detail of what the agent was to do. Instead of leaving most matters implicit in the concept of marketing at best price, the agreement might have attempted to spell out the steps to be take by the agent to satisfy itself that it was achieving

best prices. We did not hear evidence of how marketing is carried out and it is not obvious that listing of steps to be taken in that connection would be of any positive benefit. It was not disputed that marketing was a fluid and dynamic activity best carried out by skilled agents. In any event such listing would not properly increase day to day commercial control by the PO. It must be assumed that the agent would comply with the parameters laid down and the PO would have no role other than to see that the contract was indeed being complied with. However, such steps might well be helpful indicators of the PO exercising an appropriate level of control in relation to overall management of the task of determining a suitable provider of the outsourced activity. In our example of the haulage company specification of the type of vehicle, maintenance schedules required and the like might well have provided meaningful parameters. Having such matters laid down in a tender document or indeed in a contract might well provide a meaningful increase in control in some contexts.

[139] Before looking at the detail of outsourcing arrangements in the present case, it is appropriate to consider the guidance on outsourcing published by the RPA although we have not found it to have a direct bearing on the issues of commercial management now before us. The most detailed material is in the "Additional Scheme Guidance on Recognition" issued in March 2011. Plainly this material was not available in March 2010 and it was not relied upon as creating a duty but simply as illustrating a variety of aspects of the problem. There was emphasis on issues such as democratic control by members, motivation for use of third parties, risk of dominance etc. Much of the material referred to as potentially giving rise to concern appeared to relate to issues of motive. These do not now arise in the present case. The relevant "Fruit and Vegetables Scheme Guidance" of April 2009 in relation to outsourcing simply said that "In all cases the PO must be able to demonstrate overall control of the activity in question. POs need to ensure written agreements of contracts between itself and third parties are in place and made available to the Agency". This plainly adds little to the present discussion. It might also be observed that this Guidance said comparatively little about marketing. The detailed emphasis was on the operational programme and we recognise that this might give some support for Mr Robertson's contention that evidence of commercial management of that programme was sufficient for the purposes of art 25(c). However, as discussed we have not been able to accept that submission.

[140] We turn to the detail of the alleged failures of the outsourcing arrangements in the present case. Mr Robertson attempted to pick out from the Stage 2 decision the findings relied on by RPA as implying a breach of art 25(c). These were: (a) that AG had failed to show that they had independent commercial and budgetary management separate from ASF; (b) that there was evidence of sharing office premises and personnel; (c) that AG used independent consultants; and, (d) that AG had placed too heavy a reliance on ASF as a marketing agent. Mr Wolffe did not attempt to suggest that he could properly rely on any other findings although his submissions on the need for control were expressed in wide terms.

[141] It may be said immediately that we are satisfied that, in the present case, the PO met the first part of the test in art 29. It had responsibility for the provision of the marketing services for its members. That is clear from the terms of the Growers Agreement. Although ASF had direct contact with the individual packhouses and, therefore, direct contact at least with the three who used their own facilities, there was no suggestion that this was based on any direct contractual relationship with the individuals. This was simply the most practical way of dealing with the day to day running of the marketing operation. There was no question of any arrangement with ASF which would allow AG to come out of the chain of

responsibility. As it seems to us, the substantive issue relates to the second part of the test in art 29: responsibility for management and supervision.

[142] Many of the criticisms or comments about the way the appellants ran their affairs appear now appear to have little bearing on the alleged breaches in question. In the pleadings the respondents referred to a list of factors said to be relevant in some way. It was pointed out that the appellants shared office premises and personnel with ASF; that that directors of ASF were members of the appellants; and that the majority of the benefits available to the membership of the appellants were actually provided by ASF rather than the appellants. These comments do not appear to address the question of the extent and limits of outsourcing in relation to commercial management. Other factors were that members of AG were not involved in decision making and that the company relied on the services of an external consultant in relation to operational programmes with limited involvement of members. It was said that the appellants used historical marketing channels which members had used before the PO was established and that it was ASF which had orders with the supermarkets rather than the PO. We have commented on these matters above. This material does not appear to us to be relevant to the issues in the appeal.

[143] There was some criticism of the fact that ASF obtained information direct from members or packhouses and gave detail of requirements direct to producers or packhouses. There was a contention that the PO ought to have been involved. But, here again, this seems to be an aspect of the RPA's general concern rather than a factor pointing to breach of art 25(c). It is usually seen as good practice to minimise the links in any chain of communication in order to minimise the risk of error in transmission. For AG to have created a stage where information had to be routed through it to avoid direct contact between producers and agents would not, of itself, increased management control. It would, no doubt, have allowed the PO to see exactly what produce was moving at all times and this might be said to allow an element of supervision of the activity. But supervision of the detail of how an activity is working is not an essential element of supervision of commercial arrangements for the provision of the activity.

[144] Mr Wolffe suggested that the proper approach to the whole matter was by reference to Recital 12 in the Preamble to Reg 1182 to the effect that the PO was to "take charge " of the whole of the production of the members. However, we do not think that such a broad test would present any great difficulty for the appellants in this case. It seems to us to be clearly directed at the need for a collective approach. The PO is to take over from the members in taking charge of arrangements for the marketing of the members' products. AG did so by entering agreements which required members to sell their products as stipulated by AG. That these arrangements involved use of ASF does not change the fact that *vis-à-vis* the individual members, AG had taken over the whole marketing arrangement.

[145] In any event, we think that the references to "taking charge of marketing" tended to deflect attention from the issues raised in art 25(c) and (d). We accept the view of the deputy judge in the *Fruition* case - para 72 - that some of the activities covered by these provisions are essentially administrative rather than key functions. We must have regard to the importance placed on them by article 25 but we see no reason why they should not be outsourced. As we have said, we see no need for a restrictive approach to construction of art 29.

[146] The live questions in relation to art 25(c) and (d) relate to whether AG either had commercial and budgetary management separate from ASF or had adequate management control of these particular activities when carried out by ASF on their behalf. We do not regard the sharing of office space or staff as having any real bearing on this. In so far as it is relevant it tends to support the appellants' position in that sharing would allow the appellants' staff to supervise the work done by ASF. We think that this criticism tends to indicate a suspicion that the whole arrangement whereby AG operated as a PO was, in some way, a sham or abuse. But as we have said, Mr Wolffe made it quite clear that no such concern now arose. The assertion that AG placed too heavy a reliance on ASF as marketing agent is a matter of judgment rather than a finding of fact. It is unfortunate that, expressed in this way, it applies a test which is not found in the regulations. We see no reason why a PO should not rely heavily on the service provided by an agent. The question is whether it has retained sufficient management control and supervision for the purposes of art 29.

[147] The question of provision for commercial and budgetary control of the operational programme was never in issue. AG must have had systems in place for this although they might have been quite simple in accounting terms. The real concern is in relation to systems dealing with the essential aspect of their function relating to sale of members' produce. We are satisfied that art 25(c) required the PO to provide adequate commercial management of the marketing process; either directly or by proper outsourcing.

[148] In considering the nature of AG's management control, the appropriate starting point is the terms of the outsourcing agreement. The full relevant terms are set out above but it is convenient to note certain provisions. In terms of cl 2.2 it was provided that for the duration of the agreement "the Agent shall be the sole agent in charge of the administration of the Company and its agent for the sale of Produce". However, in relation to the provision of the administration service the activities of the company were to be administered by ASF in accordance with "any directions of the Board". Provision of proper management and financial controls included "the supply of information to the Board relevant to the Company and the operation of the Grower's Agreements" and provision of full and accurate record keeping in relation to all financial and other transactions. In terms of cl 9, the Agent had to keep proper records of transactions and allow access to the Company to examine them. In terms of cl 14 the Company had power to terminate the agreement on one month's notice. ASF could only terminate on at least one year's notice.

[149] The respondents laid their main emphasis on cl 7.1 which provided: " Subject to Clause 8, the Agent shall sell every consignment of Produce under such description to such persons in such manner and on such terms of contract as the Agent reasonably decides." Clause 8 provided that the agent was to obtain "the best prices reasonably obtainable" taking into account medium and long term marketing strategy. The respondents took the agreement, and in particular the provisions of cl 7, as the start point of the submission that the PO did not have control over ASF. It is plain that this clause shows that the PO had no explicit contractual control over the day to day marketing activities. However, it was not suggested that there was any reason why the day to day marketing activity could not be outsourced. The respondents did not suggest any positive way in which the PO could have been expected to exercise any useful control on a day to day basis. They did not suggest positively how some intermediate control of pricing could have been put in place. As discussed above, we are satisfied that there was no need for control of day to day marketing to be reserved to the PO. The question is as to what higher level of overall management control was required.

[150] As the Factual Background shows, the parties appeared to be agreed that there was no contractual provision for AG to exercise control of the activities undertaken by ASF on their behalf. We think that is plainly correct in relation to the day to day marketing although it was not disputed that, in practice, ASF would try to comply with the wishes of AG. But although the day to day administration was left to the agent, the right of the Board to give directions and the right to examine the records, gave some scope for control and supervision. The administrative service provided by ASF was subject to the control of directions by the Board.

[151] However, we accept that the arrangements for the provision of marketing can be seen to depend essentially on the power to terminate. We are satisfied that the power to terminate the arrangement on short notice was a powerful indicator of control but we have come to conclude that this required to be augmented by a proper system of assessment so that, in effect, the management was actually exercised. If the PO had been able to demonstrate that it had carried out an analysis of what was required of its marketing agent and had set this out formally, it might have identified aspects of the task in respect of which it could properly have issued directions. This might have been indicative of control. But the essential element which we think was missing was evidence of any positive decision as to whether or not the right to terminate the contract should be exercised. If there had been a formal appraisal after the season, it might have identified ways in which the marketing or the accounting could have been more efficiently performed. If ASF had not been willing to make changes, AG could have given active thought to the question of finding another agent. If there had been any evidence of AG having given active consideration to the possibility of using a different agent – such as Berry Garden – this might well have added up to an effective system of commercial management of the marketing service. As it was the whole evidence seemed to us to support Mr Wolffe's contention that in this case there was little sign of control beyond the contractual right to terminate.

[152] We share the respondents' unwillingness to attempt to lay down in abstract the type of control which might be required where the provision of marketing operations has been outsourced and we say nothing of the controls which might be needed in relation to the provision of other outsourced activities. It is sufficient to say that for the reasons just discussed, we have come to the view that AG did not have in place an adequate system of management control of the marketing activity. Under the contract, they left it to ASF without any power to impose any constraints or parameters on the marketing activity.

[153] We do not accept that lack of power to impose any such constraints was, in itself, enough to indicate a breach, but we do consider that it required to be balanced by some identifiable system for assessment of the commercial arrangements under which the outsourced activity was to operate. For example, it is clear that an important aspect of the commercial arrangement for provision of an activity is the cost. In this case that was, in effect, the rate of commission charged by the agent. We heard no evidence of any formal assessment or scrutiny of these rates by the PO. They appear to have accepted a scheme of payment of differential rates between members depending on volume. There was no evidence that they had attempted to exercise any control in the fixing of these levels. There was no evidence that they had carried out any investigation of comparative charges. We have come to be of the view that on a proper understanding of the requirements of art 29 the appellants had not retained sufficient control and accordingly that there was a breach of the requirements of art 25 as regards the matters set out at head (c) of that article.

[154] However, we are not persuaded that the deficiencies in this case pointed to a substantial breach of art 25(c). We note that Mr Allaway did not found on any specific breach as serious. He contended that the breaches were substantial "taken in the round". As we see it, the underlying breach might possibly have been treated as a breach of art 29 rather than art 25. The members had the benefit of a system of commercial and budgeting management which clearly produced an effective marketing service for them. We are not persuaded that a formal system of appraisal over the period in question would have led to any significant changes. The activity in question, marketing, was open to scrutiny by the members at all times. There was evidence of discussion of the performance of ASF at board meetings in spring of 2008 and 2009. This indicates that the board did not see itself as simply locked into an existing scheme. The inference is that they were considering whether any change or changes were necessary. We are satisfied that, in practical terms, a continuing tacit informal review was effectively in place. Farmers are primarily business men. They had an opportunity at every annual meeting to voice any concern about the service provided by ASF as marketing agent. We have no doubt that members would have had no difficulty in making any concerns known. They would not have felt impeded by the lack of a formal system for doing so. Had there been cause to carry out careful assessment of the performance and cost of the service provided by ASF, then such scrutiny would, in practice, have taken place. It was agreed that there was no requirement for a PO to find the very best possible marketing agent. They would have been entitled to stick by a competent performer. The evidence suggested that ASF was, in fact, a very competent performer. There was no criticism of them from any source and there was positive evidence of their superior level of performance. It can be said that having an explicit item on the agenda would have provided a clear paper trail showing satisfaction with ASF. We do not consider that this would have added anything. Accordingly we are not satisfied that the breach was properly to be described as substantial in the particular circumstances of this case.

[155] It should be said, for completeness, that it is not every outsourced activity which would be open to such tacit control by members. As we have said, the proper approach to arts 25 and 29 should not be limited by reference to marketing or the particular circumstances of the present case. If, say, the PO had engaged a specialist accountant firm to carry out the work of keeping accounts and preparing and sending invoices, the arrangement might have left no room for doubt that the PO was providing their members with centralised bookkeeping and an efficient system of accounting. But if questions of management control of the provision of such services had arisen, evidence of a more elaborate process of assessment might have been required because the members would not have the knowledge to be expected to exercise any tacit review in such circumstances.

Article 25(c)

[156] We turn to the alleged breach of art 25(d). Mr Robertson's submission was that the evidence showed that the PO itself had an adequate system. If the PO did require to rely on systems provided by ASF a question would arise as to whether that was beyond the scope of permitted outsourcing. The bookkeeping and invoicing plainly related to day to day marketing activity and, for reasons discussed, we are satisfied that this did not require to be controlled by the PO. However, we think that on proper analysis the question can be seen to turn, essentially on the same considerations as we have discussed in relation to art 25(c). If the provision of the marketing activity was not subject to proper control, the whole outsourcing would be invalid. However, it is still necessary to consider the extent to which the bookkeeping and invoicing in question was required for the operations of the PO.

[157] Mr Robertson contended that although the PO did take advantage of the ASF systems this was because it plainly made sound commercial sense to do so. However, he contended that they were in direct control of this and in fact had an adequate centralised bookkeeping and invoicing system of their own. Plainly AG did have a system which was adequate for their operational programme. It may be noted, as a matter of passing interest, that the emphasis on central invoicing originally appeared to relate to the operational programme rather than the marketing, as such. The policy guidance issued on 30 November 2004 under the heading "Central invoicing" was directed at the need to ensure that all payments went through the PO rather than being made direct by members. However, marketing clearly is an important function and there was no dispute that the requirements of art 25(d) applied to the bookkeeping needed in connection with that the provision of that activity. The importance of the evidence relating to the operational programme is that it shows that there was a bookkeeping system in place for that purpose. This was not a PO which had left all bookkeeping to a third party, far less leaving it to its members. Here again we think it clear that the primary aim of the Regulation was to ensure that bookkeeping was done collectively in a "centralised" system rather than left to individual growers.

[158] We did find some confusion as to precisely what systems were in place in March 2010. We are not satisfied that there was any breach of art 25(d) but in any event are satisfied that any breach cannot be seen to be a substantial one. The evidence appeared to us to demonstrate an adequate degree of practical control. There was positive supervision even of the day to day accounting because AG staff had a direct involvement in the detailed figures for the stage of calculation of average prices. Although Mrs Pattison did not give evidence, we heard enough of her role to persuade us that she would necessarily know enough of the detail of accounts to detect inadequacies in the system in so far as it dealt with the major issues: namely amounts of produce sold and prices obtained.

[159] The arrangements for the preparation of invoices show that AG had control. When it was seen to be necessary to change the way the invoices were dealt with the change was made at the instigation of AG. They were able to bring about the change without apparent difficulty. There was no dispute that the new system involved them directly and we are not satisfied that there was any substantial breach of art 25(d) in relation to invoicing at the time of the decision to withdraw recognition.

Serious negligence

[160] But, in any event, even if we were mistaken in our assessments of breach, we are satisfied that no question of serious negligence has been established. We say that without requiring any close definition of the meaning of that expression in the present context. We accept that it is not to be governed by common law concepts of foreseeability and reasonable care. Mr Wolffe attempted an alternative exposition based on the elements of knowledge which the PO was to be taken to have of the detailed requirements of the regulations and an objective view of whether they took enough care to comply. He suggested that their reliance on RPA should be viewed only as a distraction and that it should not be accepted as an adequate explanation for the breaches. We need not attempt to comment on that analysis. We are satisfied that the concept of carelessness is an essential element in negligence. We think some element of disregard of the need to comply would be found to lie at the heart of any definition. But we are satisfied that in the present case the close relationship with the RPA and the apparent attempts of the PO to deal with their concerns cannot simply be viewed as a distraction. The PO was positively attempting to identify areas where it fell short and deal with them. They were doing so with the active assistance of RPA whom they were

entitled to regard at least as skilled specialists. We did not find it surprising that Mr Wolffe did not attempt to illustrate his definition by reference to any specific allegation of negligent breach.

[161] When we come to address the particulars of negligence we must have regard both to the nature of the breaches in question and the attitude of the PO in relation to such breaches. As we have discussed, we have not been persuaded that the appellants were in "substantial" breach of any requirement. This, however, involved careful consideration of issues of construction which we have not found to be easy. This has a bearing on assessment of negligence. We think that there are various factors in favour of the appellants' position. When looking at the issue of negligent breach, it seems to us necessary to have regard to the fact that the breaches now founded on were not very clearly focused until, at least, the stage of written pleadings in this appeal.

[162] We are satisfied that the appellants did have a stateable answer to the various allegations of breach. It cannot be said that they knowingly shut their eyes to any obvious failures to respect the criteria. As we have seen they had to face a wide range of expressions of concern. They either dealt with these or, expressly or implicitly, persuaded the RPA that they were not matters of any great significance. The breaches now alleged against them had not been clearly spelled out before the decision in March. We think that the close communication which the appellants had with RPA and their willingness to co-operate with them makes it impossible to conclude that any breaches were attributable to serious negligence. Indeed it must be said that it does not appear that RPA at any time took a formal decision that serious negligence existed. As we have seen the Stage 2 panel washed its hands of any issue of law raised by the appellants. It is not disputed that at that stage the position of RPA was that if there was a breach of any of the particular provisions specified in article 25 there was no need to consider negligence as a separate issue. As an assertion of serious negligence was insisted in before us, it must be assumed that after learning of the change in RPA's position in relation to the proper construction of art 116, Scottish Ministers at some point took a formal decision that serious negligence had been established in this case. The detail of such decision and the reasons for it were not disclosed to us.

[163] It is sufficient to say that we accept Mr Robertson's submissions on this matter. Mr Wolffe accepted that full consideration of the detail of the appellants' dealings was necessary to allow the issue of negligence to be properly considered. We can accept that there may be circumstances where the nature of a breach justifies an inference of negligence even where the RPA has had involvement and discussion about the issue. We do not wish to express matters more widely than is necessary for the circumstances of the present case. The Regulations cover a wide range of activities. However, in the present case, there were full inspections and extensive detailed discussion of the whole arrangements involving both the RPA staff and an expert consulted by the company to advise on steps necessary to ensure compliance. The detail of the communings has been disclosed to us. It is clear that the appellants were in close contact with officials from at least June 2009 right up to the time of the decision to deregister. There was no suggestion of any significant failure in disclosure by the appellants, far less any hint of conscious concealment. It was not suggested that the decision in March 2010 was precipitated by any new revelation although there was some misleading reference to the findings of the then unpublished report. It appeared, simply, that some officials thought progress was being made. Indeed the letter of 26 October 2009 which we discuss further below, indicated that the officials were satisfied with the progress of discussion. In March Mr Allaway reviewed matters and took a different view. We need not

repeat the detail of the correspondence with RPA which had preceded this or the detail of guidance issued by RPA. But it is clear that the RPA literature at all stages stressed that if any PO was in doubt as to what was required they should take advice direct from staff. That was what they tried to do at every point.

[164] In relation to advice, the Guidance material does make the point that it is for the PO itself to be sure of the requirements and to comply with the relevant Regulations. We have no doubt that reliance on RPA would not avoid a finding of a breach if there was an identified failure to comply. However, the question of negligence raises quite different issues. It is clear that the appellants were paying attention to the advice they were given and attempting to comply with that advice.

[165] We recognise that it can be said that they do not appear, at any stage, to have tried to do more than meet the requirements as discussed with the staff. Where their recognition was suspended we might have expected a more pro-active approach. There was, for example, no evidence of their taking independent legal advice at that stage. It is not clear that Mr Thomson, their expert adviser, ever gave positive advice as to his view of the requirements of the Regulations. That said, the fact that the appellants did not initiate any significant change was understandable. It is not in dispute that the arrangements worked efficiently as far as the members were concerned. The work of the PO and its agent ensured that the members produce was sold at satisfactory prices and that no significant amounts were left unsold. As we have discussed, it was not suggested that there was any identifiable scope for improvement in either respect. We have identified a need for some formal system of monitoring as an aspect of proper management control but accept that it might make little practical difference in the particular circumstances. The appellants were no doubt aware of the general suspicion that they were in some way simply a cover for ASF. They did not see a need to take any major steps to change that perception and they have been vindicated in that approach by the fact that such a suggestion is no longer a live issue. We have not identified any aspect which could be taken to be indicative of serious negligence.

Legitimate expectation

[166] In light of our conclusion as to negligence it is unnecessary for us to deal with the submissions made on the basis of the concept of "legitimate expectation". It was not disputed that it was appropriate for us to give effect to submissions based on this concept in the context of the appeal. This was an aspect of proper application of European Regulations. It was also conceded that the argument was based on "legitimate expectation" and not the distinct but related concept of legal certainty. In short, there was no attempt to argue that the very fact of having been accepted as a producer organisation and paid money on that basis, gave a right not to have to return the money. The argument focused on the terms of the letter of 26 October 2009 - taken in the context of the exchange of letters which had preceded it.

[167] The parties were agreed that the concept "legitimate expectation" was as set out by Colman J in *MMB v Tom Parker Farms* at 164G and we do not seek to undermine that agreement. It must be noted, however, that the dictum appeared in the context of the question of whether there was any reason of policy under which a right based the Community law principle of legitimate expectation should not be waived by agreement. The Court explained the principle as resting on "the avoidance of prejudice to a party who has justifiably relied on the continuance of the party's anterior position, but where the latter party has changed that position to the detriment of the other. The projection afforded by the principle is only to those who, because of their circumstances and their reliance, have been prejudiced. Its

conceptual function is not the furtherance of consistency of conduct by public bodies but avoidance of prejudice by inconsistency of conduct."

[168] The Court was drawing a distinction necessary for the purpose of that case and we think it would be wrong to read too much into his summary of the principle. He did not require to address issues such as when reliance is justifiable or the degree of prejudice required. In that case the Milk Marketing Board had not charged levy in respect of a certain type of milk and had allowed the industry to assume no levy was due. In reliance on this, substantial capital had been invested on equipment for the processing of that type of milk. In the present case there was no attempt to prove any explicit reliance. No representative of the appellants said that up until receipt of the letter they had been conducting their affairs in the knowledge that there was a risk of having to return funds and after the letter, they made some different arrangements or that they ever sat down to consider their budgets conscious of the risk having been lifted.

[169] We recognise that there will be circumstances where a particular type of representation so obviously has consequences that it may be unnecessary to seek specific evidence of subsequent actings in reliance on it. However, where the representation is not explicit, we are not satisfied that we should assume consequences without evidence.

[170] Essentially the circumstances in this case can be described as being a situation where RPA had raised concerns and engaged in discussion as to how the concerns could be met. In that situation the company would be hoping to find an identifiable point when they could breath a sigh of relief and relax in the knowledge that they had no more to worry about. The letter of October 2009 is said to be that point. However, we are not persuaded that the letter can properly be said to have been a sound basis for any such reaction. There is no evidence that it was treated as such by the recipients. The situation was complicated by the fact that the primary focus was suspension. There had not been a de-registration and so there was no clearly focused risk in respect of which there might have been any real sigh of relief.

[171] The letter said that in view of various changes "recognition ....will be maintained". This was hardly an explicit assurance as to status because the letter was written at a time when recognition was, in fact, suspended. It might well be taken as meaning no more than "maintained meantime". That would make sense of the phrase which followed to the effect that RPA would review the governance of the company again in early 2010. In any event, this was a wide, unqualified, phrase. It was to be a "review" and not simply a check to see whether the promised changes had been made.

[172] In our view the concept of legitimate expectation must be applied sparingly. Administrators require to administer the law properly. Where they have given unqualified assurances and people have acted on them to their clear prejudice the protection of legitimate expectations is appropriate. But against that it must be recognised that where the primary provisions of European legislation provide a specific penalty it is only in situations clearly indicative of prejudice that there can be any constraint in giving effect to a proper view of the law as they understand it to be. If they have given misleading information, they should be free to correct that except in circumstances where to do so would clearly give rise to clearly identified prejudice.

[173] In the present case the need for a determination of the issue has been removed by the decision on the issue of negligence. The two concepts may well require consideration of

similar facts. It may be said that if a PO was, indeed, obliged to go behind the advice of officials and satisfy itself as to the proper position in law to avoid a finding of negligence, there would seem to be little scope for the concept of reliance on the officials as giving a legitimate expectation. However, it is unnecessary to examine this further for the purposes of the present case.

Decision

[174] In light of our finding that there was no substantial breach of art 25 and, in any event, no serious negligence, we are satisfied that the appeal should be allowed and the decision to withdraw recognition with effect from 1 January 2008 should be set aside. It would seem to follow in principle that the appellants should be found entitled to payment of all the sums that would have been paid to it in the absence of withdrawal of recognition as craved at (a) 4. of the grounds of appeal. Our understanding is that the appellants' concern related to the possibility of having to repay monies given over the period from 1 January 2008 to June 2009 and there may be no question of interest. However, as the submission on this head was not opposed we see no reason not to grant the order craved. We expect parties to be able to agree an appropriate rate of interest if this does arise but will hear any necessary submission on that matter if made before a final decision on expenses.