JUDGMENT OF THE COURT (Fifth Chamber)

19 September 2002 *

In Case C-113/00,

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by D. Triantafyllou, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

APPLICATION for annulment of Commission Decision 2000/237/EC of 22 December 1999 concerning an aid scheme implemented by Spain in favour of horticultural products intended for industrial processing in Extremadura in the 1997/98 marketing year (OJ 2000 L 75, p. 54),

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, D.A.O. Edward, A. La Pergola, M. Wathelet and C.W.A. Timmermans (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 24 January 2002,

gives the following

Judgment

1 By an application lodged at the Registry of the Court on 27 March 2000 the Kingdom of Spain brought an action under the first paragraph of Article 230 EC for annulment of Commission Decision 2000/237/EC of 22 December 1999 concerning an aid scheme implemented by Spain in favour of horticultural products intended for industrial processing in Extremadura in the 1997/1998 marketing year (OJ 2000 L 75, p. 54, hereinafter 'the contested decision').

Legal background

2 Article 87(1) EC provides:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

3 Article 87(3)(a) and (c) EC provides:

'The following may be considered compatible with the common market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

...

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest...

...'.

4 The first paragraph of Article 88(2) EC provides:

'If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.'

5 Finally, Article 88(3) EC provides:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

Background to the dispute and the contested decision

6 Following the adoption on 8 July 1998 of the Order of the Consejería de Agricultura y Comercio de la Junta de Extremadura establishing an aid scheme for horticultural products intended for industrial processing for the 1997/1998 marketing year (*Diario Oficial de Extremadura* No 84 of 23 July 1998, p. 5807, hereinafter 'the 1998 Order'), the Commission, which had not received notification of the scheme under Article 93(3) of the EC Treaty (now Article 88(3) EC), sent the Spanish authorities a letter on 8 February 1999 requesting confirmation of the aid and its implementation.

7 By a letter dated 26 February 1999, the Spanish Permanent Representation to the European Union sent the Commission the information it had requested. It was, amongst other things, clear from that letter and the annexes thereto that the 1998 Order was intended to implement, for the marketing year 1997/1998, Decree 84/1993 of the Junta de Extremadura of 6 July 1993 establishing, in general, a

system of aid for horticultural products intended for industrial processing (*Diario Oficial de Extremadura* No 82 of 13 July 1993, p. 2071). To that end, the 1998 Order set out the horticultural products eligible for aid, the amount of aid and the maximum quantity eligible for aid.

8 As regards the products for which aid could be paid, the 1998 Order listed, first of all, peppers for the production of ground red pepper, with or without designation of origin; secondly, industrial peppers and gherkins; and, thirdly, cabbages, onions, broccoli, cauliflower, spinach, leeks, broad beans and potatoes for dehydration and/or freezing.

9 As regards the amount of aid to be awarded in respect of eligible products, the 1998 Order provided for ESP 5 per kilogram for peppers for the production of ground red pepper with designation of origin 'Pimentón de la Vera' and industrial gherkins, and ESP 1.5 per kilogram for other products supplied for industrial processing.

10 The maximum quantities eligible for aid were set at 9 500 tonnes of red peppers for the production of ground red pepper with designation of origin 'Pimentón de la Vera', 4 000 tonnes of peppers for the production of ground red pepper without designation of origin and industrial peppers, 250 tonnes of industrial gherkins and 15 000 tonnes of each of the remaining products.

11 In accordance with the principles laid down in Decree 84/1993 on this point, the 1998 Order further stated that the beneficiaries of the aid it established were to be growers of horticultural products intended for industrial processing in Extremadura who had signed approved contracts with processors of horticultural

products from Extremadura in the 1997/1998 marketing year and that such processors had to be on the agricultural trade register. The Order stated that the maximum amount of aid per farmer could in no circumstances exceed ESP 500 000.

12 In the light of that information, the Commission had doubts as to the compatibility of the aid scheme with the rules in the Treaty, in particular Articles 28 EC, 29 EC and 87 EC, and informed the Kingdom of Spain by a letter of 14 June 1999 that it had decided to initiate the procedure provided for in Article 88(2) EC. It accordingly invited the Kingdom of Spain and other interested parties to submit any comments on the scheme within one month of, respectively, receipt of the letter of 14 June 1999 or its publication in the *Official Journal of the European Communities*.

13 Of the other interested parties, only one trade association, the European Union of the Potato Processing Industries, took up the Commission's invitation. By letter of 6 September 1999, the association made it known that it essentially concurred with the Commission's view that the Spanish Government should abolish the aid for potatoes, owing to the risk that competition might be distorted within the internal market if aid were granted by the Member States in that sector.

14 The Kingdom of Spain for its part submitted its observations by letter of 19 July 1999.

15 Spain argued first of all that establishing and maintaining the food industry by means of a link between production and processing, in the form of contractual

relations, guaranteed a minimum price and the supply of quality raw materials and also helped maintain production and the rural population in the areas concerned.

16 Secondly, it argued that the development and cultivation of irrigated autumn and winter vegetables in Extremadura provided a socio-economic alternative which was very important for the development of rural areas since it had allowed a balance to be maintained between products for the fresh market and products for processing by means of maximum guaranteed quantities which had effectively limited production and marketing opportunities.

17 In those circumstances, the Kingdom of Spain considered that the aid provided for in the 1998 Order had not conferred any advantage on economic operators and that it was intended solely to achieve a particular structural objective. As soon as that had been accomplished, the aid scheme had been suspended and there were no plans to reintroduce it.

18 The Commission was not convinced by these arguments. It took the view in the contested decision that, since the aid provided for by the 1998 Order had not been notified in accordance with Article 88(3) EC, it had been granted illegally and was furthermore incompatible with the common market, with the exception of the aid for potatoes which related to a product listed in Annex I to the EC Treaty that is not subject to a common organisation of the market.

19 It found, first of all, at points 19 to 23 of the contested decision, that, in view of the considerable volume of trade in vegetables between Spain and the other Member States, the aid in question could affect trade in vegetables between the Member States because such trade is affected by aid which favours operators

active in one Member State over those in others. The Commission pointed out, *inter alia*, that the measures in question had a direct effect on the production costs of undertakings producing and processing fruit and vegetables in Spain and that they therefore conferred on them an economic advantage over undertakings which did not have access to comparable aid in other Member States. It accordingly concluded that the aid scheme in question fell within the scope of Article 87(1) EC.

20 Secondly, the Commission found, at points 26 to 37 of the contested decision, that the aid scheme in question was not covered by any of the exemptions provided for in Article 87(3) EC. In that regard it advanced three separate arguments.

21 At points 27, 31 and 32 of the contested decision, the Commission first of all took the view that the aid in question had not been granted as regional aid for new investment or to create employment, nor to provide horizontal compensation for shortcomings in infrastructures suffered by all the region's undertakings, but as operating aid for the agricultural sector. Such aid was incompatible with the common market because, firstly, it had no lasting effects on the development of the sector concerned, since its immediate effect disappeared with the measure itself, and, secondly, a direct consequence of such aid was an improvement in the production and marketing opportunities of the operators concerned compared with other operators not receiving comparable aid both within the country and in the other Member States.

22 The Commission went on to observe, at point 33 of the contested decision, that the aid provided for by the 1998 Order — with the exception of aid for potatoes — related to products subject to a common organisation of the market,

and that there were clear limits on the powers of the Member States to intervene in the operation of such an organisation since common organisations of the markets have to be considered to be comprehensive and exhaustive systems which preclude Member States from adopting derogations or measures that conflict with them.

23 Finally, at points 34 and 35 of the contested decision, the Commission held that the State aid in question constituted a restriction on the free movement of goods between Member States in so far as, in order to receive the aid, growers in Extremadura were obliged to sell their production to processors in the region. In the Commission's view, that requirement constituted a restriction on the export of those products to the other Member States, contrary to Article 29 EC.

24 In those circumstances, the Commission decided that the Kingdom of Spain should abolish the aid scheme in question and adopt all measures necessary to recover aid granted illegally from the beneficiaries thereof.

The application

25 The Kingdom of Spain advances three pleas in support of its application for annulment of the contested decision. By those pleas it alleges, first of all, infringement of Articles 87(1) EC and 253 EC; secondly, infringement of Articles 87(3)(a) EC and 253 EC; and, thirdly, infringement of Article 87(3)(c) EC.

First plea

26 By its first plea, which is divided into two limbs, the Spanish Government claims that the contested decision infringes Articles 87(1) EC and 253 EC.

First limb of the first plea: no effect on inter-State trade

27 By the first limb of its first plea, the Spanish Government argues that trade between Member States is not affected by the aid scheme in question. First of all, the total amount of aid is small and furthermore is divided among a large number of farmers. Secondly, the aid in question only indirectly constitutes aid to farmers because the purpose of the 1998 Order was not so much to encourage the cultivation of horticultural products as to ensure stability in relations between producers and processors. Thirdly, with the exception of the Kingdom of Spain itself, no State, undertaking or trade association submitted observations on the aid covered by the contested decision in the course of the procedure initiated by the Commission in respect of that aid.

28 The Spanish Government argues that the average amount received per farmer in this case amounts to approximately ESP 120 000, which is significantly less than the thresholds mentioned in Community *de minimis* provisions, particularly that laid down in Commission Notice 94/C 368/05 entitled 'Community guidelines on

State aid for rescuing and restructuring firms in difficulty' published in the *Official Journal of the European Communities* of 23 December 1994 (OJ 1994 C 368, p. 12, hereinafter 'the Guidelines on firms in difficulty').

29 As to the application of Article 88(2) EC, the Spanish Government considers that the observations of the European Union of the Potato Processing Industries should not be taken into account because they relate to a product — the potato — which is in any event excluded from the scope of the contested decision. The sole purpose of the reference at point 15 of the decision to the comments submitted by that association, and of the statement at point 7 of the decision to the effect that the Kingdom of Spain failed to respond to those comments, is to convey the impression that there are third parties affected by the aid in question, which is not the case at all.

30 As regards the Spanish Government's first argument that the overall amount of aid in question is small and that it is divided among a large number of farmers, each of whom received a negligible sum in national or Community terms, it is settled case-law of the Court that the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade may be affected (see, *inter alia*, Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959 *('Tubemeuse')*, paragraph 43; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 42, and Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 86). Other factors may be decisive when assessing the effect of aid on trade, such as whether the aid is cumulative and whether the undertakings that receive it are operating in a sector that is particularly exposed to competition.

31 It is clear that the fruit and vegetable sector falls within the latter category, and that there is intense competition in the sector between growers in the Member

States whose produce is traded within the Community. Spanish growers play a major part in that competition because they export substantial quantities of vegetables to other Member States.

32 It must also be observed that on 28 October 1996, the Council adopted Regulation (EC) No 2200/96 on the common organisation of the market in fruit and vegetables (OJ 1996 L 297, p. 1), which, as is clear, *inter alia*, from the third recital in the preamble thereto, is intended to provide a reference framework that encourages fair trading and market transparency and thereby to regulate competition in that sector.

33 In those circumstances, the grant of even a small amount of aid will affect trade between Member States.

34 It is true, as the Commission itself has acknowledged, *inter alia*, in the Guidelines on firms in difficulty, and its Notice 96/C 68/06 on the *de minimis* rule for State aid, published in the *Official Journal of the European Communities* of 6 March 1996 (OJ 1996 C 68, p. 9, hereinafter 'the Notice on the *de minimis* rule for State aid'), which applied at the material time, that where the amount of aid is very small it may not have an appreciable effect on trade and competition between Member States, and is therefore exempt from the requirement of prior notification to the Commission.

35 Nevertheless, it is clear both from paragraph 2.3 of the Guidelines on firms in difficulty and from the fourth paragraph of the Notice on the *de minimis* rule for State aid that the *de minimis* rule does not apply to sectors which are subject to special Community rules on State aid, and in particular the agriculture and fisheries sectors. The Spanish Government's reliance on that rule is therefore unfounded in this case.

36 In the light of all of the foregoing considerations, the Spanish Government's argument that the aid in question is negligible must therefore be rejected as unfounded.

37 Nor can the Spanish Government's second argument that the aid in question only constitutes indirect aid to farmers be upheld, since the aid still takes the form of a reduction in the production costs borne by Extremadura growers who supply their vegetables to local processors and is therefore likely to affect trade in these goods.

38 Finally, with regard to the Spanish Government's argument that no third parties commented on the aid held incompatible with the common market, that fact is not such as to affect the validity of the contested decision.

39 Whilst Article 88(2) EC requires the Commission to seek comments from interested parties before it reaches a decision, it does not prevent the Commission from determining aid to be incompatible with the common market in the absence of any such comments, as the Spanish Government itself in fact acknowledged in its reply. That circumstance alone does not preclude the possibility that trade between Member States might be affected by the aid.

40 In view of the foregoing considerations the first limb of the first plea must therefore be rejected in its entirety.

Second limb of the first plea: defective statement of reasons regarding the finding that there was an effect on inter-State trade

41 By the second limb of its first plea, the Spanish Government essentially argues that, even if the aid in question affects trade between Member States, the contested decision does not in any event satisfy the requirement to provide a minimum statement of reasons on this point. According to the Spanish Government, the only argument used by the Commission to attempt to show that trade is affected is that appearing at point 21 of the contested decision, where the Commission gives the figures for total quantities of vegetable production in Spain and for trade in vegetables between Spain and the other Member States in 1998. It submits that that statement of reasons is inadequate, *inter alia*, because the Commission does not take the trouble correctly to identify the market allegedly affected by the aid in question.

42 The Spanish Government points out first of all that the Commission's figures relate to green vegetables generally, including fresh vegetables, whereas the aid held illegal relates only to nine vegetables, which are moreover intended for industrial processing.

43 It goes on to argue that the Commission did not, in the contested decision, state the share that Extremadura produce represents in terms of the national market as a whole or the Community market.

44 Finally, it complains that the Commission failed to compare the figures for the number of tonnes of vegetables imported and exported by Spain during 1998 with the maximum quantities potentially eligible for the aid in question.

45 According to the Spanish Government, those omissions have distorted the accuracy of the figures used by the Commission in order to justify the applicability of Article 87(1) EC to this case.

46 The Spanish Government submits that a mere reference to the fact that a Member State imports and exports products eligible for aid is not sufficient to show that trade between Member States is affected. The statement of reasons is all the more inadequate given that the aid to farmers is merely indirect: the 1998 Order encourages not so much the growing of vegetables as the stability of relations between growers and processors by ensuring continuity of supply for processors.

47 It should first of all be observed that the obligation to provide a statement of reasons laid down in Article 253 EC is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. Accordingly, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review (see, *inter alia*, Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35 and *Italy* v *Commission*, cited above, paragraph 48).

48 Furthermore, that requirement must be appraised by reference to the circumstances of each case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the

requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see *France* v *Commission*, cited above, paragraph 36, and *Italy* v *Commission*, cited above, paragraph 48).

49 In the light of that case-law, it does not appear that the Commission failed in this case to fulfil its obligation to provide an adequate statement of reasons in the contested decision for the finding that the aid in question affects trade between Member States.

50 First of all, at point 21 of the contested decision, the Commission provides figures on the total quantity of vegetables produced in Spain and on the volume of trade in vegetables between Spain and the other Member States in 1998. It is clear from this information that a sizeable portion of Spanish horticultural goods is exported to other Member States. Whilst the Commission did not provide detailed figures on exports of those vegetables to which the aid scheme in question applies, it none the less noted that the overall context in which the scheme operates is one of a high level of trade between Member States of products in the horticultural sector.

51 Next, at point 22 of the contested decision, the Commission refers to the direct and immediate effect of the aid measures on the production costs of undertakings producing and processing fruit and vegetables in Spain, and to the economic advantage that they confer on such undertakings over those that do not have access to comparable aid in other Member States.

52 In the second citation of the legal base and at point 19 of the contested decision the Commission also refers explicitly to Regulation No 2200/96 which estab-

lished a common organisation of the market in the fruit and vegetable sector. The Spanish Government could therefore not be unaware that the Commission's assessment of the aid scheme in question, including its finding that trade between Member States was affected by it, necessarily had to be viewed in the context of the rules on the common organisation of the markets.

53 In that connection it must be pointed out that the regime under Regulation No 2200/96, which contains a set of uniform rules on production, marketing and competition between the economic operators concerned, benefits both trade in the fruit and vegetable sector and the development and maintenance of effective competition at Community level.

54 Finally, whilst it is common ground that in the statement of reasons for its decision the Commission is bound to refer at least to the circumstances in which aid has been granted where those circumstances show that the aid is such as to affect trade between Member States (Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 18), it is not bound to demonstrate the real effect of aid already granted. If it were, that requirement would ultimately favour Member States which grant aid in breach of the duty to notify, laid down in Article 88(3) EC, to the detriment of those which do notify aid at the planning stage (see, *inter alia*, to that effect, Case C-301/87 *France* v *Commission ('Boussac')* [1990] ECR I-307, paragraph 33).

55 In those circumstances the second limb of the first plea must also be rejected.

56 It follows that the Spanish Government's first plea in law cannot be upheld.

Second and third pleas

57 By its second plea, which is also divided into two limbs, the Spanish Government alleges that the contested decision infringes Articles 87(3)(a) EC and 253 EC.

58 It argues, first of all, that the Commission failed to take account of the fact that the aid in question falls within the exemption provided for in Article 87(3)(a) EC because it was specifically intended to promote the economic development of an area — Extremadura — where the standard of living is abnormally low and where there is serious under-employment. According to the Spanish Government, those factors were sufficient for the Commission to declare the aid compatible with the Treaty because — unlike the exemption provided for in Article 87(3)(c) EC — in this case it is not necessary to show that the aid does not adversely affect trading conditions to an extent contrary to the common interest.

59 Secondly, the Spanish Government claims that, by not basing its refusal to authorise the aid in question on Article 87(3)(a) EC, despite the fact that the aid had an obvious social purpose that was apparent from both Decree 84/1993 and the 1998 Order, the Commission failed to fulfil its obligation to provide a statement of reasons as required by Article 253 EC.

60 By its third plea, which was raised in the alternative, the Spanish Government claims infringement of Article 87(3)(c) EC in that the Commission failed to take account of the fact that, even if Article 87(3)(a) EC is not applicable, the aid in question could still fall within the exemption provided for in Article 87(3)(c).

61 Since the Commission's refusal to apply the exemptions provided for by Article 87(3)(a) and (c) EC was based on the same grounds, the Spanish Government's second and third pleas should be considered together.

62 As regards, first of all, the Spanish Government's argument that the Commission did not take account of the social purpose for the aid scheme and failed to give reasons for its refusal to apply the exemption provided for in Article 87(3)(a) EC, it is sufficient to note that the Commission set out in detail at points 26 to 37 of the contested decision the reasons why the scheme could not benefit either from the exemption provided for in Article 87(3)(a) EC or from that provided for in Article 87(3)(c) EC.

63 The second limb of the second plea must therefore be rejected as unfounded.

64 As regards, secondly, the Spanish Government's arguments that it is possible to apply the exemption provided for in Article 87(3)(a) EC to the aid scheme in question, or at least that laid down in Article 87(3)(c) EC, it must first of all be noted that the Court has repeatedly held that a programme of regional aid may fall within one of the exemptions in Article 87(3)(a) and (c) EC in certain circumstances.

65 In that connection it has stated that the use of the words 'abnormally' and 'serious' in Article 87(3)(a) shows that the exemption concerns only areas where the economic situation is extremely unfavourable in relation to the Community as a whole. The exemption in Article 87(3)(c), on the other hand, is wider in scope inasmuch as it permits the development of certain areas in a Member State which

are disadvantaged in relation to the national average without being restricted by the economic conditions laid down in Article 87(3)(a), provided such aid 'does not adversely affect trading conditions to an extent contrary to the common interest' (see, *inter alia*, *Germany* v *Commission*, cited above, paragraph 19; Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 15; and *Italy* v *Commission*, cited above, paragraph 77).

66 Conversely, the fact that that condition is not mentioned in the exemption under Article 87(3)(a) implies greater latitude in granting aid to undertakings in regions which do not meet the criteria laid down in that exemption (see *Spain* v *Commission*, cited above, paragraph 16).

67 Nevertheless, the difference in wording between Article 87(3)(a) EC and Article 87(3)(c) EC cannot lead to the conclusion that the Commission should take no account of the Community interest when applying Article 87(3)(a), and that it must confine itself to verifying the specifically regional impact of the measures involved, without assessing their impact on the relevant market or markets in the Community as a whole. In such cases the Commission is bound not only to verify that the measures are such as to contribute effectively to the economic development of the regions concerned, but also to evaluate the impact of the aid on trade between Member States, and in particular to assess the sectorial repercussions they may have at Community level. As the Court has already held, Article 87(3) EC gives the Commission a discretion the exercise of which involves economic and social assessments which must be made in a Community context (see, *inter alia*, Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 24; Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18; and *Spain* v *Commission*, cited above, paragraph 18).

68 It does not appear in this case that the Commission exceeded the limits of that discretion in finding that the aid scheme in question could not benefit from any of the exemptions referred to in Article 87(2) and (3) EC.

69 Accordingly, in taking the view, first of all, that the aid in question was not conceived as regional aid for new investment or to create employment or to provide horizontal compensation for infrastructural deficiencies suffered by all the region's undertakings, but as operating aid for the agricultural sector, the Commission did not misclassify the aid. It is common ground that the aid was granted according to the quantities of particular horticultural products produced for industrial processing in Extremadura and enabled farmers in that region to avoid expenses which they would normally have had to incur as part of their day-to-day running costs.

70 As the Spanish Government has provided no evidence that the aid in question was by its nature likely to make an effective and lasting contribution to the economic development of Extremadura, the Commission did not exceed the limits of its discretion in finding, on that basis, that the aid in question was incompatible with the common market. It must in particular be pointed out that, in a case where the Court was asked to rule on an aid scheme in the wine sector in Italy, it held that the Commission had shown that the aid in question, which was granted without any specific conditions and solely according to the quantities used, had to be regarded as operating aid to the undertakings concerned and that, as such, it affected trading conditions to an extent contrary to the common interest (Case C-86/89 *Italy* v *Commission* [1990] ECR I-3891, paragraph 18).

71 That approach also finds support in the Information from the Commission 2000/C 28/02 entitled 'Community guidelines for State aid in the agriculture sector', published in the *Official Journal of the European Communities* of 1 February 2000 (OJ 2000 C 28, p. 2). Although these guidelines were not in force at the time when the aid in question was granted, they clearly confirm that operating aid to the agricultural sector is in principle prohibited; paragraph 3.5 expressly states in that connection that, in order to be considered compatible with the common market, any aid measure must contain some incentive element or

require some counterpart on the part of the beneficiary and that, unless exceptions are expressly provided for in Community legislation or in the guidelines, unilateral State aid measures which are simply intended to improve the financial situation of producers but which in no way contribute to the development of the sector, and in particular aids which are granted solely on the basis of price, quantity, unit of production or unit of the means of production are considered to constitute operating aids which are incompatible with the common market.

72 In the contested decision the Commission goes on to state that the aid provided for by the 1998 Order, with the exception of aid for potatoes, related to products subject to a common organisation of the market, and thereby explains the context in which the aid was granted and the limits laid down as regards the Member States' right to intervene.

73 It is settled case-law that, once the Community has, pursuant to Article 34 EC, legislated for the establishment of a common organisation of the market in a given sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it (see, *inter alia*, to that effect, Case 83/78 *Pigs Marketing Board* [1978] ECR 2347, paragraph 56, and Case 177/78 *McCarren* [1979] ECR 2161, paragraph 14).

74 As stated at paragraph 32 above, on 28 October 1996 the Council adopted Regulation No 2200/96 on the common organisation of the market in the fruit and vegetable sector. Since that regulation established an integrated regulatory framework that already contains measures of financial support for the sector concerned, a Member State may not unilaterally award aid related to production, even if the aid is limited to certain specific products intended for industrial processing and even though the quantity is subject to a ceiling. According to

settled case-law, it is for the Community to seek solutions to the problems which might arise in the context of the common agricultural policy once, as in this case, it has established a common organisation of the market in a given sector (see, *inter alia*, to that effect, Case 90/86 *Zoni* [1988] ECR 4285, paragraph 26, and *Italy* v *Commission*, cited above, paragraph 19).

75 Nor, finally, did the Commission err in stating that the aid scheme in question constituted an actual restriction on the free movement of goods and, more particularly, an infringement of Article 29 EC.

76 Whilst farmers in Extremadura are entitled to sell their horticultural products to processors in other countries or areas or to sell them themselves as fresh produce — just as farmers in other parts of the Community are entitled to sell their products to processors in Extremadura — the 1998 Order does not provide for the award of aid in such circumstances.

77 The aid scheme in question therefore establishes a financial incentive to sell horticultural products from Extremadura to local processors. In those circumstances it must be regarded as a measure having equivalent effect to a quantitative restriction on exports, which is prohibited by the Treaty (see, to that effect, in regard to quantitative restrictions on imports, Case 249/81 *Commission* v *Ireland* [1982] ECR 4005, paragraphs 20 to 30).

78 In the light of the foregoing considerations it must be held that the Commission did not exceed the limits of its discretion in finding that the aid scheme in question could not benefit from any of the exemptions provided for in

Article 87(2) or (3) EC. It is settled case-law that State aid, certain conditions of which contravene other provisions of the Treaty, cannot be declared by the Commission to be compatible with the common market (see, *inter alia*, Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889, paragraph 20; Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 78; and Case C-204/97 *Portugal* v *Commission* [2001] ECR I-3175, paragraph 41).

79 It follows that the Spanish Government's second and third pleas cannot be upheld.

80 Since the Kingdom of Spain has been unsuccessful in all of its pleas, its action must be declared unfounded.

Costs

81 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for. Since the Commission has applied for costs, the Kingdom of Spain, which has been unsuccessful, must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the Kingdom of Spain to pay the costs.**

Jann Edward La Pergola

Wathelet Timmermans

Delivered in open court in Luxembourg on 19 September 2002.

R. Grass P. Jann

Registrar President of the Fifth Chamber