OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 13 March 1990 *

Mr President,
Members of the Court,

1. This request for a preliminary ruling concerns the validity of Commission Regulation (EEC) No 400/86, [1] which was previously considered by the Court in Case 167/88. [2] The judgment in that case provides an answer to many of the doubts regarding validity expressed in these proceedings, especially the doubts surrounding the geographical differentiation of the special intervention measure at issue. However, the task remains of examining certain matters not considered in the abovementioned judgment, concerning the specific issue of the special intervention price established by the Commission in Regulation No 400/86.

First, it is denied that the Commission is empowered to adopt the measure in question and, secondly, even if it is accepted that the Commission does have such powers, the manner in which it has exercised them is challenged.

Powers of the Commission

2. The powers of the Commission are challenged on two counts.

In the first place, the applicant argues that Regulation No 400/86 does not contain a special intervention measure of the kind envisaged by the basic regulation [3] but may rather be described as an intervention through which the Commission, by arrogating to itself powers properly belonging to the Council, altered the price structure on the cereals market.

3. In that connection, it must be explained at the outset that in the 1985/86 marketing year the Council had not been able to fix the agricultural prices for the sector. Faced with the task of dealing with the legal vacuum due to the Council's failure to act, the Commission, in order to ensure continuity in the operation of the agricultural policy, took the precautionary step of fixing the intervention price in the cereals sector by Regulation (EEC) No 2124/85. [4] The intervention price was established by retaining the price for the preceding year, subject to a slight reduction to take account of the need to control surpluses.

On the other hand, no decision was adopted on precautionary measures with regard to the reference price.

* Original language: Italian.

1 — Commission Regulation (EEC) No 400/86 of 21 February 1986 (OJ 1986, L 45, p. 22).

2 — Judgment of 8 June 1989 in Case 167/88 *Association générale des producteurs de blé* v *ONIC* [1989] ECR 1653.

3 — For the purposes of this Opinion, 'basic regulation' means Regulation No 2727/75, as amended by Council Regulation (EEC) No 1143/76 of 17 May 1976 (OJ 1976, L 130, p. 1). When reference is made to versions of Regulation No 2727/75, as amended by regulations other than Regulation No 1143/76, the particulars of the amending regulation will be cited.

4 — Commission Regulation (EEC) No 2124/85 of 26 July 1985 (OJ 1985, L 198, p. 31).

It is worth recalling that the reference price, besides being relevant for other specific purposes, serves as an essential element for the adoption of special intervention measures under Article 8(2) of the basic regulation.

Such measures are designed as a means of supporting, in adverse market conditions, the price level of common wheat of bread-making quality by reference to a target price which is, precisely, the reference price.

Thus, in providing a separate reference price for that quality of wheat, at a higher level than the normal intervention price, the basic regulation also introduced a coherent package of specific instruments — including special intervention measures — in order to 'steer' the market towards the desired goal.

In short, therefore, the adoption of special intervention measures necessarily implies that the Commission — which is empowered to apply them under Article 8(4) of the basic regulation — must make a dual assessment.

In the first place, it has to analyse the market trends, and in particular the movement and future prospects not only of prices but also of supply and demand, both within the Community and outside it; in the second place, that configuration of market conditions must be compared with the target, represented by the reference price, and a decision accordingly has to be taken as to whether or not a support programme in the form of a special intervention measure is called for.

The Commission cannot, therefore — at least, not if it is to observe the fundamental purpose of the basic provisions — introduce the special measures *without taking into account* the reference price already fixed.

4. Of course, the foregoing applies in normal circumstances. We must now consider the situation in a case such as the present one, in which the Commission finds itself obliged to carry out its task of managing the agricultural policy in a legal vacuum.

It must be borne in mind that, as a general rule, the Commission is in any event required to carry out its duties so as to avoid the risk of paralysis to the functioning of the common agricultural policy.

In practice this means that, whenever necessary, the Commission must be able to proceed with all the intervention measures that it is empowered to take, even in circumstances where it does not have at its disposal all the information which can normally be used.

Thus, should the Council fail to lay down the reference price, there is no cause to rule out a priori the possibility of the Commission's reconstructing an appropriate reference price with a view to the possible adoption of a special measure, based on its knowledge of the trends and characteristics of the market in question.

That is borne out by the fact — confirmed during the oral procedure — that the divergence between the reference price for common wheat of bread-making quality and

the common single intervention price had remained perfectly steady over the years preceding the marketing year in question.

That is an important factor, inasmuch as it demonstrates that the Community legislature was consistent in dealing with the production of common wheat of bread-making quality, namely in applying a specific incentive which did not vary in amount.

Furthermore, the stability of the difference between the reference price and the intervention price — despite there being a degree of autonomy between them — was a feature familiar to all the traders in the cereals sector; and this is a further reason for considering that the Commission could use it as a basis for its assessments, in order to determine whether the decline in the market recorded during the marketing year in question justified support measures.

It is common ground that at the beginning of 1986 the prices of common wheat in almost all the Member States were fluctuating around the level of the intervention price and that, as the first recital in the preamble to Regulation No 400/86 notes, there were serious risks to the stability of the market in a situation characterized by considerable stocks having no immediately foreseeable outlets.

In those circumstances the Commission, comparing current trends with the traditional reference price for common wheat of bread-making quality, and possibly also taking account of the need — as part of a more stringent overall plan [5] — to revise downwards the level of incentives for producers, was entitled to consider the application of a special intervention measure to be justified.

5. In doing so, the Commission has clearly not substituted its own findings on agricultural prices for those of the Council: it has not laid down a general definition of the reference price, even merely as a precautionary measure.

In the exercise of its powers for the supervision and administration of the agricultural markets and in the absence of any express determination by the Council, the Commission simply based its analysis on the reference price normally applied to common wheat of bread-making quality.

I therefore take the view that the measure in question is indeed a 'special intervention measure' within the meaning of Article 8 of the basic regulation, and thus falls within the Commission's powers, rather than an arbitrary amendment of the price structure of the cereals sector.

5 — A restrictive approach of that kind had already become apparent in respect of the previous marketing year, in Council Regulation (EEC) No 1019/84 of 31 March 1984 fixing cereal prices for the 1984/85 marketing year (OJ 1984, L 107, p. 4); in particular, the second recital states that the policy of caution on prices should become a policy of restriction, requiring a reduction both of the intervention price and of the reference price. As far as the Commission's practice is concerned, it should be noted that the restrictive approach is reflected in Commission Regulation (EEC) No 1810/84 of 28 June 1984 (see the fourth recital) containing a special intervention measure for the 1984/85 marketing year (OJ 1984, L 170, p. 33) and also in Commission Regulation (EEC) No 2124/85 of 26 July 1985 (OJ 1985, L 198, p. 31; see the second recital) adopting — as seen above — the precautionary pricing measures necessitated by the Council's continuing failure to act.

6. The applicants in the proceedings before the national court also took issue with the powers of the Commission in a more specific context.

During the oral procedure in particular, the applicants stressed that the Commission, in fixing the special intervention price (that is to say, the price at which the quantities of wheat qualifying for the special intervention scheme were to be bought in by the national authorities), was not empowered to apply reductions to take account of the fact that the quality of the wheat subject to the regulation was lower than the medium quality.

7. It should be pointed out that under Article 3(2) of Regulation (EEC) No 2727/75, as amended by Article 1 of Regulation (EEC) No 1151/77, the reference price is fixed for common wheat which meets *medium* bread-making quality requirements; however, since the actual aim of the special intervention measures (namely to support the market in relation to the reference price) may also be attained by means of support measures for wheat of other than medium quality, Article 8(2) of Regulation No 2727/75, as amended by Article 5 of Regulation No 1151/77, provides that the special measures may apply to wheat of a quality other than that for which the reference price has been fixed, and in particular (see the third recital in the preamble to Regulation No 1151/77) to wheat meeting the *minimum* requirements for breadmaking: in that event, however, a reduction is applied to the price which would have been fixed had the special measure related to wheat of medium quality.

From the 1981/82 marketing year onwards, the Council established annually the reference price for wheat of medium quality, indicating at the same time, in a foot-note, the reduction to be applied in the case of special measures regarding wheat of minimum quality (see Council Regulations Nos 1950/81,[6] 1452/82[7] and 1564/83[8] fixing cereal prices for the 1981/82, 1982/83 and 1983/84 marketing years respectively).

In Regulation (EEC) No 1019/84, however, the Council considered it preferable that the price to be applied in the event of special intervention measures for minimum bread-making quality should not in future be set by the annual price-fixing regulation but should be 'determined when such measures are introduced'.

According to the applicant, the Council did not thereby intend to leave to the Commission the task of establishing the reductions for wheat of lower than medium quality but was reserving itself the right to set those reductions, not — as before — prior to the beginning of the marketing year but when the measures themselves were adopted.

8. I do not find that line of argument convincing for a number of reasons.

First, the Commission is empowered under the management committee procedure to

6 — Council Regulation (EEC) No 1950/81 of 13 July 1981 (OJ 1981, L 198, p. 3).

7 — Council Regulation (EEC) No 1452/82 of 18 May 1982 (OJ 1982, L 164, p. 6).

8 — Council Regulation (EEC) No 1564/83 of 14 June 1983 (OJ 1983, L 163, p. 1).

take decisions regarding the nature and application of the special intervention measures (see Article 8(2) of the basic regulation).

Those powers of implementation also cover the determination of the amount of support to be granted in any given situation; consequently, it is generally for the Commission to specify the special intervention price, having regard, of course, to market requirements. The special intervention price must, however, be considered to embrace all its components parts, and hence any increases or reductions due to the quality of the product. Moreover, Article 7 of Regulation No 2727/75 provides — still with reference to the intervention price — that the detailed rules governing the minimum quality and quantity required of each cereal to make it eligible for intervention, together with the scales of price increases and reductions applicable for the purposes of intervention, are to be laid down in accordance with the management committee procedure.

It must further be noted that, in Regulation No 1151/77, the Council indicated generally that special intervention measures may cover wheat of other than medium quality, and *in particular* wheat of minimum quality; thus, although in the course of certain marketing years the Council itself undertook the fixing of the reduction applicable for the minimum quality, even during those years the Commission retained the power to apply all the price adjustments for qualities other than the minimum quality.

Consequently, when, as was seen above, the Council provided in Regulation No 1019/84 that the reductions for wheat of minimum quality were to be calculated at the time of applying the special intervention measures, it must be held to have wished to extend to that minimum quality the Commission's power to determine the appropriate adjustment.

In the light of those points the conclusion to be drawn is that the Commission was empowered to adopt the special intervention measures in Regulation No 400/86.

Improper exercise by the Commission of its powers

9. The interveners in the proceedings before the national court note an inconsistency between the special intervention measure in Regulation No 400/86 and the measure which had been the subject of Regulation (EEC) No 1810/84 during the previous marketing year. Reduced to its simplest form, the problem raised is that Regulation No 400/86 applied a greater reduction coefficient in respect of a wheat of higher quality than the wheat qualifying for the special intervention measure the previous year.

10. In this regard it must be observed that the mere fact that one act diverges from another, earlier act cannot be considered to impair its validity, especially in a situation such as this, where it was specifically provided that the prices (and the appropriate reductions) were to be calculated at the *same time* as the special intervention measure was applied.

Moreover, in assessing the validity of any given act, regard must be had to the broad margin of discretion enjoyed by the Community institutions in the exercise of

their powers over agricultural matters — a discretion such that, as the Court has stressed on several occasions, judicial review must confine itself to examining questions of strict legality. [9]

That discretion, in the context of the measures in question, covered — as I have already had occasion to observe — both the fixing of the special price level generally and, more specifically, the fixing of the quality entitled to benefit under the special intervention measure, and hence the corresponding reductions to be applied to the special price for medium-quality wheat.

11. Furthermore, it is clear from the documents before the Court that the twofold decision contained in Regulation No 400/86, namely to increase the rate of reduction and to raise the qualitative requirements, was incorporated into a more general plan, familiar to traders (and endorsed by the economic consequences of Regulation No 1810/84), designed not only to lower the general level of incentives for producers in order to control the problem of cereal surpluses, which has worsened over the years, but also to pursue a more selective policy as regards quality, by concentrating special incentives on higher-quality production.

It may therefore be concluded that the Commission exercised its powers properly when setting the level of the special price in Regulation No 400/86.

12. In the light of all the foregoing considerations, I propose that the following answer should be given to the national court:

'Consideration of the question submitted for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of Commission Regulation No 400/86.'

9 — See most recently the judgment of 14 February 1990 in Case C-350/88 *Biscuits Delacre and Others* v *Commission* [1990] ECR I-395.