2. The Commission of the European Communities is ordered to pay the costs excluding the costs of the intervener.

Mertens de Wilmars Mackenzie Stuart O'Keeffe

Bosco Touffait Due Everling

Delivered in open court in Luxembourg on 3 June 1981.

J. A. Pompe
Deputy Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 8 APRIL 1981 [1]

Mr President,
Members of the Court,

1. This opinion concerns an action brought by a private individual under the second paragraph of Article 173 of the EEC Treaty. The applicant, Mr Cattaneo Adorno, is an Italian national and the proprietor of an agricultural estate in Piedmont which produces mainly wine; his action is for the annulment of the Commission's decision of 24 January 1980 rejecting the application for aid which he submitted on 30 January 1979 pursuant to Council Regulation No 355/77 of 15 February 1977 (concerning common measures to improve the conditions under which agricultural products are processed and marketed).

The applicant asked for financial aid from the European Agricultural Guidance and Guarantee Fund [hereinafter referred to as "the Fund"] for an investment project designed to improve and expand the manufacture and marketing of wine from the grapes produced on his farm. He proposed the construction of a wine-making centre [Enopolio] to replace the old wine-making facilities, and to modernize not only the production but also the preser-

1 — Translated from the Italian.

vation, bottling and storage of the wine (see the brief description of the project in Annex B to the application for aid). However, the Commission decided that it was unable to consider the project because "the application for aid in question falls within the scope of the Council Directive of 17 April 1972 on the modernization of farms (72/159/EEC). The measures covered by the said directive constitute common measures within the meaning of Article 6 (1) of Regulation (EEC) No 729/70. Under the terms of Article 15 (2) of Regulation (EEC) No 355/77 projects which are eligible for Community aid under other common measures do not come within the scope of Regulation (EEC) No 355/77".

That extract from the decision at issue is sufficient to indicate the central theme of the present dispute: that is, the respective spheres of application of Regulation (EEC) No 355/77 and Directive 72/159/EEC. The directive is intended to contribute towards the reform of agricultural structures, encouraging the development of farms under development plans for individual establishments covering several years (see the preamble, especially the first, fifth and sixth recitals). I consider the provision in Article 1 (1) to be particularly significant: "With a view to bringing about structural conditions conducive to a significant improvement in agricultural incomes and working and production conditions, Member States shall introduce a system of selective incentives to farms suitable for development, designed to encourage their operation and development under rational conditions". Farms eligible for aid under the directive must therefore be "suitable for development", meaning that they must fulfil the conditions set out in Article 2, which include the attainment of a certain level of earned income: the income must be lower than that received for non-agricultural work in the region, or there must be a risk, owing to the structure of the farm, of its falling below that standard (see Article 2 (2) and Article 4 (1) and (2)). That means that the incentives — financial and otherwise — are intended for farms which are not flourishing, and their aim is to help, through the modernization of facilities, to achieve a fair income and living conditions comparable to those of other occupations (see the fourth recital).

As for Regulation (EEC) No 355/77, which was adopted nearly five years after the directive, its purpose is to secure financial aid from the Fund for improving and rationalizing processing and marketing structures for agricultural products within the framework of specific programmes for various sectors drawn up by the Member States and in connection with public, semi-public or private investment projects (see the first, third and fourth recitals in the preamble and Articles 1 (1), 6 (1) and 7 (1)). Such projects may concern, *inter alia*, buildings and/or equipment for rationalizing or developing storage, market

preparation, preservation, treatment or processing of agricultural products (Article 6 (1) (a)). Since the aim is to improve marketing structures for agricultural products, it is not necessary for the undertakings seeking aid from the Fund to be agricultural undertakings; all that is required is that they be engaged in "the treatment, processing or marketing of agricultural products" (Article 1 (1), mentioned above). However, Article 9 establishes the link between the investment projects and the situation in the sector of agricultural production to which they relate: the projects must "contribute to improving the situation of the basic agricultural section in question" and must "in particular ... guarantee the producers of the basic agricultural product an adequate and lasting share in the resulting economic benefits".

2. Five submissions are listed in support of the present application. The broadest of these is the first, described as "infringement and misapplication of Council Regulation (EEC) No 355/77 of 15 February 1977, in particular Articles 1, 6 and 15 (2), and also of Council Directive 72/159/EEC of 17 April 1972; misuse of powers". In my view that submission should be considered in conjunction with the third, which likewise refers to infringement and misapplication of the directive (as also to misuse of powers). In fact the aim of both the first and the third submissions is to show that, contrary to the Commission's statements in the decision at issue, Mr Cattaneo Adorno's application falls within the scope of Regulation (EEC) No 355/77 and not that of Directive 72/159 EEC.

In order to resolve this particular case I think a decision has first to be taken on the general question of the relationship between the two instruments as regards the area governed by each. The Commission's argument, already implied in the letter of 24 January 1980 and later expanded in the present proceedings, is that the two instruments are alternatives: in other words, operations which are eligible for incentives on the basis of Directive 72/159/EEC will always be different and distinct from those which are eligible for aid under Regulation (EEC) No 355/77. In support of that view the Commission points out numerous differences between the two systems of aid in question. It observes that the directive and the regulation have different aims (the improvement of agricultural production structures on the one hand, and the improvement of marketing structures for agricultural products on the other), concern different types of farms (farms with their traditional production in the case of the directive and undertakings concerned with the treatment, processing and marketing of agricultural products in the case of the regulation), have a different impact on production (which the regulation can influence only indirectly, helping to regulate it by strengthening certain market structures) and serve different socio-economic purposes (inasmuch as the directive is designed to improve the efficiency of individual farms, whereas the regulation pursues various aims

affecting whole sectors of production). Still according to the Commission, those various aims must be held to be served in cases where the processing and marketing structures of several agricultural undertakings are amalgamated, or where capital furnished by people who are not farmers goes towards activities of that kind, those being descriptions of cases which reflect the general intent of Regulation (EEC) No 355/77: whereas improving individual facilities for production, or even for processing and marketing, serves only in the interests of the proprietor of the farm without contributing towards rationalizing the market, and thus falls outside the scope of the regulation.

Nevertheless, it appears to me that the differences between the two schemes under consideration do not preclude the existence of an area of economic activity to which both schemes may be considered to apply: that is to say, a kind of overlapping, albeit purely marginal, of the two sets of rules. Indeed as far as their respective aims are concerned, if the modernization of farms which is the aim of the directive may include, as the Commission maintains, the improvement of facilities for processing or marketing agricultural products of the farm itself, similarly the improvement of marketing structure for agricultural products coincides for the purposes of the regulation with the improvement of processing and marketing structures for such products. A farm which processes its own products and puts them on sale is therefore in a position to benefit from both schemes for providing aid for its development; that is, unless it is considered that *by its very nature* a farm must be precluded from benefiting from the regulation or that the fact that its *own* products are the subject of the processing and marketing prevent it from being eligible for such benefits.

In that respect it is not difficult to appreciate that whilst it is stated in Article 1 of Regulation (EEC) No 355/77 that the regulation is intended to apply to undertakings which are "engaged in the treatment, processing or marketing of agricultural products", it leaves open the question of the character of the undertaking, whether agricultural, industrial or commercial, and therefore agricultural undertakings are clearly not excluded from its scope. Equally open in the case of the regulation, in my opinion, is the question whether the products to be processed or marketed come from the same farm or from other farms.

As to that, the Commission sought to argue the point on the basis of Article 9 of the regulation. The first paragraph of that provision stipulates, as I have already said, that investment projects must "contribute to improving the situation of the basic agricultural production sector in question", and that they must "in particular ... guarantee the producers of the basic agricultural product an adequate and lasting share in the resulting economic benefits". The second paragraph then states that evidence must be provided that the conditions of the preceding paragraph have been fulfilled and that "account may be taken *inter alia* of long-term supply contracts concluded with the producers of the basic agricultural

product, on reasonable terms for such producers". The question is whether those provisions do or do not imply a requirement that a distinction is always to be made between the processing undertaking which is applying for aid under the regulation and the producers of the basic agricultural product. It seems to me that they do not.

There is no doubt that Article 9 was drafted on the assumption that the producers of the basic agricultural products are third parties *vis-à-vis* the processing undertaking; but that is not sufficient to justify the assumption that should the two functions (that of the producer and that of the processor) be assimilated the regulation is rendered inapplicable. The principal aim of Article 9 is that the situation in different sectors of agricultural production should be improved by means of investment projects; however, it is clearly easier to achieve such an objective if the undertaking submitting the project itself belongs to the category of producers of the basic agricultural product. In that case the producer's share in the benefits resulting from the investment project for processing activities is automatic. Obviously there will not be any supply contracts between the producer undertaking and the processing undertaking where these are one and the same; but in the second paragraph of Article 9 quoted above such contracts represent only one of the possible proofs that the condition in the first paragraph has been complied with.

3. There is another aspect of the Commission's argument which merits close consideration: it concerns the "sectorial" interests which the regulation is designed to serve and which are not referred to in the directive. I wish to say here that it would be a mistake to draw a distinction between the link to collective interests which exists in the regulation and a hypothetical intention in the case of the directive to safeguard the interests of individuals: it seems clear to me that both sets of rules provide for forms of aid which benefit individual undertakings for the simple reason that any such aid redounds to the common good (one need only read the preambles to the two instruments to find confirmation of the point, which is in any case an obvious one). The problem is a different one: it must be established whether the regulation, inasmuch as it provides for contributions to be made to projects which are included in specific programmes of the Member States (Article 1 (3); Articles 2 to 5 and Article 10) and links the aims of each project with the situation in a whole productive sector (Article 9, mentioned above), precludes for that very reason all projects which are intended to aid the development of individual farms (by improving processing and marketing conditions for agricultural products, of course) but which are not expressly linked to a general plan. The Commission takes the view that projects of that kind are wholly excluded from the scope of the regulation, arguing that the undertakings involved would simply be eligible, provided that they were agricultural undertakings, to benefit from the provisions of the directive, which merely requires submission of the development plans for individual farms and does not

appear to make the grant of aid subject to the pursuit of wider aims.

In order to resolve the question, recourse must be had, in my opinion, to Article 12 (1) of Regulation (EEC) No 355/77. There it is stipulated that: "By way of derogation from Article 10 (a), until 31 December 1980 projects relating to sectors and geographical areas for which programmes have not yet been approved may receive aid from the Fund". Two conclusions may be drawn from that: (a) in the initial period of application of the regulation (from its entry into force until the end of 1980) it was possible for investment projects not included in specific programmes of the Member States to benefit from the provisions thereof; (b) that possibility was dependent on whether or not approved programmes existed. In the present case the Italian Government has not yet submitted a programme on the date of the submission of the Cattaneo Adorno investment project; consequently the exception provided for in the above-mentioned Article 12 (1) was applicable.

Next, as far as the provisions in Article 9 are concerned, the fact is that any undertaking which seeks aid from the Fund must provide proof, *inter alia*, that its project "contribute[s] to improving the situation of the basic agricultural production sector in question": but there is no justification for thinking that the project for improving the processing and marketing conditions for an agricultural product, when submitted by an individual undertaking *(a fortiori* by an agricultural one) is not capable of having a beneficial effect on the situation in the relevant production sector. It will be for the Commission, of course, when examining the merits of the project, to establish whether it fulfils the conditions in Article 9 (2) and those laid down in Articles 6, 7 (1), 10 and 11 (1); but I do not believe that the Commission may hold a project to be incompatible with Article 9, rejecting it *ab initio*, solely because it was submitted by an individual undertaking and has as its primary aim the development of that undertakings's own farm.

Finally, let me observe that if an investment project relates, within the meaning of Article 7 (1) of the regulation, to the production of one of the processed products set out in Annex II to the Treaty (wine, in this case), and if it really satisfies the requirement of rationalizing processing methods for the basic agricultural product, that is to say, the requirement mentioned in Article 11 (1) (d) of the regulation, then the larger the extent of the producing and processing undertaking, the greater the improvement will be in the situation in the relevant agricultural production sector. In other words, where a farm occupies a significant place in an agricultural production sector (in this case, the production of grapes for wine-making) and itself processes the basic product, the benefits for production envisaged in Article 9 will be a natural consequence of rationalizing processing methods.

4. The Commission's refusal made particular reference to Article 15 (2) of Regulation (EEC) No 355/77, which provides that: "Projects which are eligible for Community aid under other

common measures within the meaning of Article 6 (1) of Regulation (EEC) No 729/70 shall not come within the scope of this regulation". The Commission considered, on the basis of all the general considerations so far looked at, that the project submitted by Cattaneo Adorno was within the category of those which were eligible for Community aid under the provisions of Directive 72/159/EEC, which certainly represent common action within the meaning of the said Article 6 of Regulation (EEC) No 729/70 (that is acknowledged in Article 15 of the directive). Therefore, according to the Commission, the project in question fell outside the scope of Regulation (EEC) No 355/77.

The parties have disputed the nature of the provision cited: according to the applicant it is a rule against aggregation of benefits which assumes that it is possible, in the absence of such provision, for one and the same project to benefit from the provisions of both the regulation and the directive; according to the Commission, by contrast, the Community legislature merely confirmed the limits of the scope of the regulation, which derive primarily from objective factors, and confirmed the fact that excluded therefrom is any kind of project whatsoever which is eligible for other Community aid. It is plain that the differences in interpretation reflect the divergence of view already considered with regard to the question whether the relationship between Regulation (EEC) No 355/77 and Directive 72/159/EEC is one of partial overlapping or whether they are purely and simply alternatives.

I have already given my opinion on the point and no more is needed to reject the argument put forward by the Commission. Apart from that, however, there is no doubt that when Article 15 (2) is applied in practice, the first point to be settled is whether the project is eligible for other Community aid (in particular the incentives provided for in the directive): that approach was followed by the Commission itself in the impugned decision. Projects cannot be considered eligible for the aid provided for in other Community provisions if they do not fulfil the requirements laid down in such provisions. As far as Directive 72/159/EEC is concerned we know that it concerns only farms which are "suitable for development" (Article 1 (1)): they are characterized, among other things, as I said before, by a specified low level of earned income (Article 2 (2)). Hence investment projects which are submitted by farms outside that category do not meet an essential subjective criterion laid down in that directive, and accordingly they are not eligible for the benefits granted by it. That being the position in the present case, Article 15 (2) cannot be relied upon in order to deny the applicability of the regulation with regard to the applicant.

The Commission has maintained that it would be inconsistent to allow an investment project such as that in question to qualify for aid under the regulation, which is greater than that given by the directive, on the basis of the fact that the undertaking which submitted the application is a prosperous one, whilst a similar project submitted by

a different agricultural undertaking with a low income would enjoy only the lower benefits obtainable under the directive. But the simple reply to that is that the inconsistency referred to by the Commission is due to the choice of agricultural policy made by the Community institutions, in providing for more extensive aid for undertakings which process agricultural products even if they are flourishing, than for agricultural undertakings which are "suitable for development". A comparison of the projects submitted by two undertakings which process agricultural products, the one prosperous and non-agricultural (and therefore qualifying for the benefits conferred by the regulation but not for those conferred by the directive), and the other an agricultural undertaking with a low income (and therefore eligible for aid only under the directive, pursuant to Article 15 (2)), reveals the same inconsistency. I wonder, however, whether it is not equally unfair to withhold the benefits obtainable under the regulation from an agricultural undertaking which produces and processes and which is prosperous, and excluded from the aid granted under the directive, when such benefits are granted to any non-agricultural undertaking, even a flourishing one, performing the same business of processing agricultural products. I shall return to the point when considering the final submission in the application.

5. The arguments developed thus far lead me to the conclusion that the first and third submissions in the application should succeed. In particular, I consider well founded the complaint of an infringement of Article 1 of Regulation (EEC) No 355/77, because of the refusal to apply it to an undertaking which also processes agricultural products, and the complaint of infringement of Article 15 (2) of the same regulation in conjunction with Article 1 (1) and Article 2 of Directive 72/159/EEC, because the impugned decision stated erroneously that the directive applied in the applicant's case. Nevertheless I should like to state that I do not agree with one of the arguments set out by the applicant in support of his first submission, namely that the project he submitted did not consist of action to improve the facilities of an existing farm, but envisaged rather the creation *ex novo* of a separate productive unit for processing and marketing (the "Enopolio", or wine centre) characterized by full market and structural autonomy. In reality it is clear that the applicant's undertaking already possesses all the facilities for processing and marketing his grape production and that his project envisages replacing them with new facilities, more modern, productive and efficient. A situation of that kind does not in the least prevent Regulation (EEC) No 355/77 from being applicable.

6. In the second submission in the application Mr Cattaneo Adorno complains of infringement and misapplication of Articles 14 and 22 of Regulation (EEC) No 355/77, of the failure to state the reasons on which it is based and of the infringement of essential procedural requirements. The infringement of those two articles is said to have lain in the fact that the Commission has given a decision on the application for a contribution without seeking the opinion of the Fund Committee on the financial aspects and of the Standing Committee on Agricultural Structure. I would point

out that Article 14 requires that the Commission first consult the Fund Committee on the financial aspects when it is about to take a decision on aid from the Fund and that the procedure for consulting the Standing Committee on Agricultural Structure is likewise required as a preliminary to decisions concerning contributions. In the case at hand the Commission decided that the investment project fell outside the ambit of Regulation (EEC) No 355/77 and therefore decided, without going into the determination of the contribution, that the project could not be taken into consideration. Besides that, the Commission has objected that both committees were consulted on the fate of the project submitted by the applicant and that the latter did not challenge its assertion (which is, moreover, borne out in the documents produced by the defendant).

As to the statement of reasons on which the decision in question is based, we have seen that it was restricted to stating that the application for a contribution fell within the scope of Directive 72/159/EEC, and that therefore pursuant to Article 15 (2) of Regulation (EEC) No 355/77 it was excluded from the scope of the latter. There was in fact no indication of the basis on which the Commission contrived to place the application within the ambit of the directive. The details only came to light in the course of the present proceedings. However, I would point out that the applicant was in a position to defend sufficiently his own point of view before this Court and that the latter's ability to review the lawfulness of the decision has not been diminished or impeded. Both limbs of the second submission are therefore to be disregarded.

7. In the fourth submission the applicant repeats the allegation of an infringement and misapplication of Directive 72/159/EEC and of lack of competence and misuse of powers, claiming that for the purposes of the directive itself the national authorities are required "to determine individually the persons who are to be covered by the system of structural aids"; and that the Commission "cannot substitute itself for those authorities through specific, *ad hoc* decisions". In the present instance the national authorities had, on the contrary, merely expressed the favourable opinion provided for in Article 13 (3) of Regulation (EEC) No 355/77 for the purposes of granting the contribution provided for in that regulation.

I do not consider that submission well founded. In the present case the Commission did not in fact take any "specific *ad hoc*" decision approving a development plan and an application for aid submitted at the same time, that being clearly the task of the national authorities pursuant to Articles 5 and 7 of the directive. The Commission restricted itself to applying (though quite erroneously, as I have said) Article 15 (2) of the regulation and in order to have recourse to that provision it has to state that the project submitted by the Cattaneo Adorno undertaking was eligible for aid under the scheme in the directive. That statement is clearly not the same as a decision adopted under the directive, such as the decision which is referred to in Articles 5 and 7 of the latter; moreover, it is wrong to speak of the powers retained by the State when all that is being done is to ascertain whether the conditions for applying Article 15 (2) of the regulation are met. Lastly, as to the opinion expressed by the authorities of the Member States for the purposes of granting the contribution provided for in Regulation (EEC) No 355/77, there is

nothing to justify considering it as being binding on the Commission when it seeks to pronounce on the applicability or otherwise of the regulation.

8. The fifth and last submission in the application concerns an alleged breach of the principle of non-discrimination which the Commission is said to have committed in rejecting the application for a contribution submitted under Regulation (EEC) No 355/77 by the applicant, an agricultural undertaking, and in rejecting it precisely because of that last-mentioned characteristic, when the same application "if it had been submitted by someone who was not a farmer would certainly have been accepted". Consequently the agricultural undertaking, being eligible only for the benefits conferred under Directive 72/159/EEC, has been discriminated against in comparison with other market operators in similar positions. During the proceedings the applicant was able to amplify that complaint, claiming that an investment project similar to that submitted by him would have been considered admissible even if it had been submitted by an association of agricultural producers, according to the view taken by the Commission, which is that in order to benefit from the contributions provided for in the regulation projects must bring benefits to several producers. Therefore the applicant has been the victim of treatment discriminating against him in favour of associations of producers.

As I have already had occasion to say, there is no reason to deny the benefits available under the regulation to an agricultural undertaking which produces and processes its own products, while granting them to an undertaking which processes the same products and which is non-agricultural; all the more so since if they were both profitable undertakings, neither would be eligible for aid under the directive (the first undertaking because of its level of income and the second because of its non-agricultural character). It is therefore correct to say that the interpretation of the regulation advanced by the Commission leads to discrimination inasmuch as it introduces a distinction within the category of those to whom the provision is addressed (described in Article 1 (1) thereof) which is not envisaged in the latter and is not justified. The Commission sought to support its interpretation with the arguments which I have discussed above; but those arguments do not appear to me convincing. I shall therefore confine myself to referring the Court here to the considerations already set out, adding only that the complaint that the regulation has been infringed should likewise be accepted because the decision challenged was based on a discriminatory conception of the Community scheme for aiding the processing of agricultural products. Although the Commission referred to the nature of the investment project submitted by the applicant as a ground for refusing to take the application into consideration, there is no doubt that the fact that Mr Cattaneo Adorno is an individual farming on his own had a decisive influence on the decision which was adopted (and the Commission has made that clear particularly in the course of these proceedings).

As to the complaint that there was discrimination between individual producers and associations of producers that, too, is naturally linked to the interpretation which the Commission has

given to Regulation (EEC) No 355/77. Incidentally I note here that after emphasizing primarily the criterion that a project must benefit several producers in order to be given the contributions provided for in the regulation the Commission finally admitted that an agricultural undertaking may, if it is in the nature of an association, come within the category of beneficiaries. That refutes the argument that a distinction is always drawn between producing undertakings and processing undertakings, and hence seriously undermines the interpretation of Article 9 advanced by the Commission. Apart from that it remains to be seen whether the distinction between individual agricultural producers and associations of producers is objectively justifiable, or whether it is arbitrary and therefore discriminatory; and from my own point of view, if Article 9 of the regulation is given the meaning explained above, there is indubitably an arbitrary distinction. Therefor, in my opinion, the last submission in the application must be considered to be well founded.

9. In conclusion I suggest that the Court rule that the application brought by the Cattaneo Adorno undertaking and lodged on 3 April 1980 is admissible, declare void the decision adopted by the Commission on 24 January 1980 with regard to that undertaking and order the defendant to pay the costs.