REPORT FOR THE HEARING
delivered in Case C-347/87 *

I — Facts of the case

1. Italian legislation prohibits producers, importers, wholesalers and retailers, subject to penalties for contravention, from selling sugar at a price above the maximum price set by the comitato interministeriale prezzi (hereinafter referred to as 'the CIP').

2. By an act (Provvedimento No 39/1984) of 24 October 1984, the CIP reduced the maximum price of sugar, with effect from 30 October 1984, by LIT 40.09 per kg as against the price previously in force.

3. In order to maintain the level of revenue received by traders affected by the reduction of the maximum prices, the CIP's Provvedimento No 39/1984 authorized the Cassa conguaglio zucchero, from 30 October 1984, to refund LIT 37.12 per kg on the stocks of white sugar held by traders on 29 October 1984.

4. That measure was communicated to the Commission by the Italian authorities on 14 and 28 November 1984.

5. On 25 October 1986 the Commission published a communication (Official Journal 1986, C 269, p. 2), to the effect that the Commission considered the refunds pursuant to Provvedimento No 39/1984 to constitute an aid within the meaning of Article 92(1) of the EEC Treaty, and one which did not qualify for any of the exemptions set out in Article 92(3); the Commission had decided, in respect of that aid, to commence the procedure set out in the first sentence of Article 93(2) of the Treaty. The communication also contains the information that the Commission decided on 18 December 1985 that the Italian system of setting maximum prices for sugar did not constitute an infringement of the Community's price system.

6. By decision of 8 April 1987 on an Italian Government aid scheme to support Italian sugar traders, published on 4 November 1987 in Official Journal L 313, p. 24, the Commission decided that the aid, consisting of a payment to Italian traders of LIT 37.12 per kg of white sugar held in storage, was incompatible with the common market within the meaning of Article 92 of the EEC Treaty and could not be granted.

7. The applicant companies, which are Italian sugar traders, brought the present action for the annulment of that decision.

II — Written procedure and conclusions of the parties

1. The application of the applicant companies was lodged at the Court Registry on 11 November 1987.

2. Pursuant to Article 91(1) of the Rules of Procedure, the Commission raised a preliminary objection to the application. By

* Language of the case: Italian.

decision of 23 November 1988 the Court decided to consider the questions relating to admissibility together with the merits.

3. The applicants claim that the Court should:

(i) declare that the applicant undertakings have capacity to bring the proceedings;

(ii) declare void the Commission's decision of 8 April 1987 (unpublished) addressed to the Italian State, having as its object (as appears from Commission Memorandum No SG (87) D/6225 of 18 May 1987 of which the applicant undertakings have had cognizance recently) a declaration that the refunds provided for in the CIP's Provvedimento No 39/1984 (and No 41/1984) are unlawful on the ground of incompatibility;

(iii) order the Commission to pay the costs.

4. The Commission, the defendant, contends that the Court should:

(i) declare the application to be inadmissible, or

(ii) dismiss the application as unfounded;

(iii) order the applicants to pay the costs.

5. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

6. Pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court, by decision of 4 October 1989, assigned the case to the Sixth Chamber.

III — Submissions and arguments of the parties

A — *Admissibility*

1. In response to the action brought by the applicants the Commission raises an objection of inadmissibility, based in the first place on two submissions.

(a) As its first submission, the Commission contends that the action was brought after the expiry of the two-month period laid down by the third paragraph of Article 173 of the EEC Treaty. It claims that the application, having been lodged on 11 November 1987, was out of time because the applicants had had cognizance of the contested decision from 1 August 1987, even though it was neither published in the *Official Journal of the European Communities* nor notified to any of the applicant undertakings. On 1 August 1987 a notice recording the contested Commission decision of 8 April 1987 was published in the *Gazzetta ufficiale della Repubblica italiana.* It follows that this information notifying the applicants of the contested decision marked the commencement of the period allowed for bringing an action.

However, in an amending memorandum of 4 May 1988 the Commission admits that the contested decision was published in the Official Journal on 4 November 1987 and, in its statement of defence, it declares its withdrawal of this first submission of inadmissibility.

(b) As its second submission, the Commission argues that, whilst appearing to challenge the contested Commission

decision, which was adopted in accordance with Article 93(2) of the EEC Treaty and addressed to the Italian Republic, the applicants are in fact seeking a declaration by the Court that the Italian Republic has failed to fulfil its obligations under Community law by establishing and maintaining in force a system for setting maximum prices for wholesale and retail sales of sugar. The applicants do not dispute the conclusion of the contested decision that the payment to Italian traders of LIT 37.12 per kg of white sugar held in storage is to be regarded as aid incompatible with the common market within the meaning of Article 92 of the EEC Treaty but confine themselves to asserting that the Commission unlawfully failed to take action to obtain a declaration that the Italian legislation on minimum sugar prices was contrary to Community law. However, actions for failure by a Member State to comply with its obligations are not available to individuals, and individuals may not commence proceedings alleging failure to act in respect of a refusal on the part of the Commission to open the procedure under Article 169 of the EEC Treaty (judgment of 1 March 1966 in Case 48/65 *Lütticke* v *Commission* [1966] ECR 19). Consequently, the applicants are not permitted to circumvent those obstacles by seeking the annulment of the Commission's decision adopted in accordance with Article 93(2) of the EEC Treaty. The application is therefore inadmissible because the applicants have no capacity to bring the proceedings.

In its statement of defence the Commission emphasizes that, in their observations on the objection of inadmissiblity, the applicants have not adduced any arguments whatever which might refute the Commission's contentions.

Lastly, in its rejoinder, the Commission claims that the applicants, in their statement of reply, misrepresented the Commission's point of view by asserting that the Commission considered it essential to establish in the first place that the Italian system for fixing maximum sugar prices was illegal before the applicants could be permitted to challenge the decision at issue. The question whether or not the system is legal is quite irrelevant. Although, in its preamble, the contested decision refers to the decision of the Commission of 18 December 1985 whereby it refused to regard the fixing of sugar prices in Italy as constituting an infringement of the Community price system, it was by no means based on that legal view adopted by the Commission.

2. (a) The applicants, in reply to the first objection of inadmissibility, claim that the trade association covering the applicant undertakings had intervened during the pre-litigation procedure, in response to the Commission's communication published in the Official Journal of 25 October 1986, so that the Commission was required to inform those concerned of the outcome of the procedure commenced pursuant to Article 93 of the EEC Treaty. Moreover, the notice published on 1 August 1987 in the *Gazzetta ufficiale della Repubblica italiana,* referring to the contested decision, neither identified it nor disclosed its precise content; it cannot therefore serve to mark the commencement of the period permitted for bringing an action. Lastly, the contested decision was published in the Official Journal of 4 November 1987, and this event set the two-month period running.

In their reply, the applicants simply take note of the Commission's withdrawal of this objection.

(b) The applicants also claim that the Court should dismiss the second objection of inadmissibility, on the ground that the

Commission had misunderstood their arguments on account of its inadequate command of the Italian language. According to the applicants, a careful study of their application would allow the Commission to grasp the scope of the dispute. The application shows that the refunds ordered do not constitute aid but compensation for the damage caused to sugar dealers by Italian legislation, which the Commission had failed to recognize as contrary to Community law.

In their statement of reply, the applicants further submit that, according to the arguments of the Commission, the undertakings concerned could not challenge the disputed decision because it was first necessary to obtain a ruling that the Italian system for the fixing of sugar prices was illegal, and that issue could be raised only by the Commission in proceedings under Article 169. In the opinion of the applicants, it follows necessarily from the Commission's finding of 18 December 1985 that the Italian system was compatible with Community law that the refunds envisaged by Provvedimento No 39/1984 of the CIP were indispensable to avoid any discrimination prohibited by the second paragraph of Article 40(3) of the EEC Treaty, either between Italian traders who sold sugar prior to 30 October 1984 and those who did so thereafter, or between Italian traders and Community undertakings. It follows that the refunds in question are not aid but compensation designed to prevent discrimination arising from the application of the Italian price-fixing system, which is incompatible with Community law. The applicants conclude that it is apparent from the decision itself that, being based on the Commission's finding of 18 December 1985, it makes the classification of the refunds provided for by the CIP as aid prohibited by the Treaty subject to verification of the compatibility of the Italian system for fixing sugar prices with Community legislation. Consequently, the Court should dismiss as totally unfounded the Commission's contention that, in the circumstances of this case, the classification as 'aid' is independent of the question whether there is any incompatibility between Italian legislation and Community law and that, since the applicant's action is predicated on that incompatibility, it is therefore inadmissible.

B — *Substance*

1. The applicants maintain, in the first place, that the Italian system of maximum sugar prices is incompatible with certain provisions of the EEC Treaty. Thus, Article 30 of the Treaty precludes any national price-fixing laws which might, potentially, obstruct intra-Community trade. Furthermore, the second paragraph of Article 40(3) of the Treaty, which applies to discrimination by the Community institutions and the Member States alike, prohibits any discrimination against Italian traders which is due to losses incurred as a result of the unlawful action of the national authorities in matters of pricing.

According to the applicants, the Italian legislation on maximum sugar prices is also incompatible with the judgments of the Court regarding price-fixing in the context of the common organization of the agricultural markets. In that connection the applicants submit that the sugar sector is exhaustively covered by the Community provisions laid down by Council Regulation No 1785/81 of 30 June 1981 on the

common organization of the markets in the sugar sector (Official Journal 1981, L 177, p. 4), which vests the Council and the Commission with exclusive powers in the matter and prohibits the Member States from exercising parallel powers in that sector (judgments of 18 June 1970 in Case 74/69 *Hauptzollamt Bremen* v *Krohn* [1970] ECR 451 and of 30 January 1974 in Case 159/73 *Hannoversche Zucker* v *Hauptzollamt Hannover* [1974] ECR 121). As regards in particular the fixing of sugar prices, the Court had consistently held (judgments of 23 January 1975 in Case 31/74 *Galli* [1974] ECR 47, of 6 November 1979 in Case 10/79 *Toffoli* v *Regione Veneto* [1979] ECR 3301, of 6 November 1979 in Joined Cases 16 to 20/79 *Openbaar Ministerie* v *Danis* [1979] ECR 3327, of 17 January 1980 in Joined Cases 95 and 96/79 *Kefer and Delmellen* [1980] ECR 103, and of 5 June 1985 in Case 116/84 *Roelstraete* [1985] ECR 1705) that, in sectors covered by a common organization of the market — even more so when this organization is based on a common price system — Member States can no longer interfere, through national provisions taken unilaterally, in the machinery of price formation as established under the common organization. According to that case-law, the only way compatible with Community law of enabling Member States to attain, in a sector covered by a common organization of the market, the objectives sought by national legislation and intended to combat a rise in prices, is for those States to take, at the Community level, the necessary action for the purpose of prompting the competent Community authority to institute or authorize measures which are consistent with the requirements of the single market (*Galli* judgment, cited above).

With regard to the fixing of prices at the production or wholesale stage, the Court has held that national legislation designed to promote the establishment of a uniform producer price, by agreement or by authority, at the national or regional level is, by its nature, outside the bounds of the powers given to Member States (*Toffoli* judgment, cited above) and that the Community is, in the absence of express derogation, alone competent to adopt specific measures involving intervention in the machinery of price formation, in particular by limiting the effects of an alteration in the level of Community prices, whether as regards intervention prices or the rate of exchange of the national currency in relation to the unit of account (judgment of 25 May 1977 in Case 77/76 *Cucchi* v *Avez* [1977] ECR 987).

With regard to the fixing of prices at the retail stage, the applicants point out that the Court has consistently held that provisions of a Community agricultural regulation which comprise a price system applicable at the production and wholesale stages leave Member States free — without prejudice to other provisions of the Treaty — to take appropriate measures relating to price formation at the retail and consumption stages, on condition that they do not jeopardize the aims or functioning of the common organization of the market in question, in particular its price system (*Galli*, *Danis* and *Kefer* judgments, cited above). Thus Community law does not prohibit the unilateral fixing by a Member State of a maximum gross profit margin for the retailing of the product in question which is calculated essentially on the basis of the purchase prices charged at the previous marketing stages and which varies according to those prices, provided that the purchase prices used in the calculation of the profit margin are increased by the marketing and import costs actually borne by the retailer at the supply stage and at the stage of sale to consumers, and that the

margin is fixed at a level which does not impede intra-Community trade (*Kefer* judgment, cited above) and allows the retailers to obtain fair remuneration for their activity (*Roelstraete* judgment, cited above).

The applicants conclude that national laws on the fixing of prices for products covered by a common organization of the market are illegal at the production and wholesale stages, but that the Court, whilst conceding that Member States are empowered to take action in controlling the prices of products sold to the end consumer, has set definite limits on the power of Member States to intervene in the matter. The only manner in which national authorities may lawfully intervene in the determination of retail prices for agricultural products covered by Community legislation is to take account of all the factors which normally contribute to the formation of the price of products on the open market, namely the purchase price of the raw material, the costs of processing and marketing, and a reasonable profit margin. Any other system of calculation, and especially one which refers solely to the rate of devaluation of the currency, is incompatible with Community law.

In spite of the stage reached by the case-law of the Court, however, the Commission has never, in the 20 years during which EEC legislation has applied to the sugar sector, set out its views on the Italian price-fixing system for sugar. In spite of the many cases before the Court in which Italian legislation has been called in question, the Commission has invariably failed to seek the abolition of the system prevailing in Italy, thereby allowing it, in breach of Community law and at the expense of the economic agents involved, to fix sugar prices at all the stages of marketing. Moreover, in its communication of 25 October 1986 and the preamble to the contested decision, the Commission even cited a decision of 18 December 1985 whereby it had decided not to regard the principle of national price-fixing for sugar in Italy as a breach of the Community price system.

In those circumstances the Commission is not now entitled to take issue with the refunds ordered by the CIP in 1984. Provvedimento No 39/1984 of the CIP, lowering the maximum prices for sugar, had seriously injured the economic agents involved. The refunds ordered were necessary to offset the loss incurred by traders. Consequently, what the Commission considers a State aid prohibited by the Treaty is in fact compensation from the Italian authorities for the harm caused to those concerned by the national legislation on the fixing of maximum prices. Since the Commission had failed to obtain a declaration that this legislation was contrary to Community law, it has no grounds for regarding the refunds, the purpose of which was to repair the detrimental effects of an unlawful measure, as aid prohibited under Community law. It follows that the contested decision is illegal and must be annulled.

According to the applicants, the baseless nature of the Commission's contentions is shown still more clearly by the fact that about 20% of the sugar in storage on 29 October 1984 originated from within the

Community, which demonstrates that the refunds ordered did not serve any protectionist aims designed to promote Italian sugar to the detriment of sugar from the other Member States.

The applicants further argue that, by defending the Italian system of fixing sugar prices, the Commission is confusing the case-law of the Court regarding wholesale prices and its case-law on consumer prices. The present case is concerned with the fixing of wholesale prices and, at the wholesale stage, Member States have no powers, since only the Commission is permitted to fix the prices of agricultural products (judgment of 1 July 1987 in Case 216/86 *Antonini* v *Prefetto di Milano* [1987] ECR 2919). It follows that Italian legislation, which involves a systematic freezing of prices at all the marketing stages, is absolutely incompatible with Community law. Lastly, the Commission cannot derive any arguments from the judgment of 26 February 1976 in Case 65/76 *Tasca* [1976] ECR 291, in view of the consistent case-law of the Court cited by the applicants.

2. According to the Commission, the line of argument followed by the applicants, who do not challenge the aid as such but claim that the refunds are designed to provide compensation for the losses incurred on account of the application of a national price system which is contrary to Community law, and who accuse the Commission of not bringing an action against the Italian Republic for failure to fulfil its obligations under the EEC Treaty, is legally incorrect.

The Commission argues that the Italian legislation on price-fixing for sugar is not incompatible with Community law. It is apparent from the case-law of the Court that a national system of price-fixing for the wholesale and/or retail stages — as opposed to price-fixing at the production stage — is not in itself incompatible with Community law, even in the agricultural sectors governed by regulations setting up a common organization of the market for the products in question, unless it can be demonstrated that the national system in question is liable to jeopardize the objectives and functioning of the common organization, and in particular its price system (*Tasca* judgment, cited above). The Commission goes on to argue that the *Kefer* judgment (cited above) cannot be relied upon in support of the thesis put forward by the applicants, but rather serves to confirm the consistent case-law of the Court according to which, on the one hand, Member States can no longer interfere through national provisions in the machinery of price formation as established under the common organization of the market, and, on the other hand, a Community regulation involving a system of prices applying to the production and wholesale stages leaves Member States free — without prejudice to other provisions of the Treaty — to take the appropriate measures relating to price formation at the retail and consumption stages, on condition that they do not jeopardize the aims or functioning of the common organization of the market.

As far as the decision contested by the applicants is concerned, the Commission claims that its legality is apparent from the reasons it recites. Thus it is clear from paragraph 1 of Section IV of the contested decision that the crucial element in the reasons given for it is that the refunds ordered constitute State aid liable to distort competition in intra-Community trade. Aid is granted to Italian traders holding stocks

of sugar on 29 October 1984, whereas their competitors in other Member States do not qualify for it, so that the provvedimento has the effect of giving Italian sugar traders an advantage over their opposite numbers in the other Member States. Furthermore, the refunds also affect the trade in sugar between Italy and the other Member States from which it imports the product. It necessarily follows that the refunds ordered in 1984 constitute aid within the meaning of Article 92(1) of the EEC Treaty and that, as the Commission explained at paragraph 2 of Section IV of the preamble to the decision, none of the exceptions under Article 92(2) and (3) apply in this case.

The applicants, on the other hand, had not adduced the slightest argument such as might refute the reasoning of the Commission. They confined themselves to alleging that the Italian system of fixing sugar prices was contrary to Community law and that the refunds ordered were intended to offset the effects of reducing the maximum prices.

Turning to the first point put forward by the applicants, the Commission submits that, even in the highly unlikely event of the Court's holding the Italian system to be incompatible with the requirements of Community law, there is still no connection between the Italian legislation and the contested decision which might justify the annulment of that decision, since it is in no way based on the contention on the Commission's part that the Italian legislation on the fixing of sugar prices is not contrary to Community law. The preamble to the decision gives only a hint of the Commission's intention not to commence the procedure under Article 169 of the EEC Treaty against the Italian Republic, but this was not an integral and legally necessary element in the essential reasoning of the decision.

As for the applicant's second argument, the determining factor in the reasoning of the contested decision is that the refunds in question constitute aid liable to distort competition, and the question whether the payments ordered by the Italian authorities were designed to lessen the effects of national measures fixing sugar prices is hardly relevant. Moreover, even had there been no aid, the CIP's Provvedimento No 39/1984 would have had the effect of reducing the profit margins on stocks held by Italian traders, but without causing any loss in absolute terms. Consequently, the mere existence of the Italian system for controlling sugar prices is quite irrelevant for the pupose of determining whether the refunds at issue are to be regarded as 'aid' within the meaning of Article 92(1) of the EEC Treaty, with the result that the question whether that aid scheme is legal according to the norms of Community law, and in particular the rules relating to the common organization of the market in the sector concerned, is beside the point. Even if the Commission had taken the view that the Italian sugar pricing system was incompatible with Community law and had commenced the procedure under Article 169 of the EEC Treaty against the Italian Republic, it could still legitimately have adopted the contested decision.

Finally, the Commission adds that the reference to Article 40(3) of the EEC

Treaty is quite irrelevant. The discrimination alleged by the applicants operates not between producers or categories of producers but between those dealers who held stocks of sugar in Italy on 30 October 1984 and those who did not. Article 40(3) is therefore inapplicable in this case.

F. A. Schockweiler
Judge-Rapporteur