OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 18 June 1991 *

Mr President,
Members of the Court,

1. The questions which have been referred to the Court for a preliminary ruling by the Pretore di Lecce are essentially concerned with the procedures for the examination of olive oil within the framework of the common organization of the market in oils and fats, of which that product forms part. Let me begin with a few observations regarding the rules applicable to that organization.

2. The pricing system is based, first, on a scheme of production and consumption aid and, secondly, on an intervention mechanism according to which the intervention agencies are required to buy olive oil offered during the last four months of each marketing year, that is from July to October. Those purchases, financed by the EAGGF Guarantee Section, are carried out at the intervention price, which varies, in particular, according to the various descriptions and qualities of the oil.

3. In that respect, according to the Annex to the basic regulation,[1] virgin olive oil is classified under four different descriptions and by reference to two characteristics. The descriptions are as follows:

— extra olive oil;

— fine olive oil;

— ordinary olive oil;

— lampante olive oil.

The characteristics to be taken into account relate to the acidity expressed as oleic acid and the flavour. The flavour must be absolutely perfect for extra and fine olive oil and good for ordinary olive oil.

4. According to the third and fourth subparagraphs of Article 3(2) of Regulation (EEC) No 3472/85,[2] which was applicable at the material time:

'With regard to edible virgin olive oil, the examination of the organoleptic characteristics [shall be] carried out according to a Community procedure.

Until such a procedure is laid down, the Member States shall carry out the above examination in accordance with national procedures.'

* Original language: French.

1 — Regulation No 136/66/EEC of the Council of 22 September 1966 on the common organization of the market in oils and fats (OJ, English Special Edition 1965-66, p. 231), last amended by Commission Regulation (EEC) No 1858/88 of 30 June 1988 (OJ 1988 L 166, p. 10).

2 — Commission Regulation (EEC) No 3472/85 of 10 December 1985 on the buying-in and storage of olive oil by intervention agencies (OJ 1985 L 333, p. 5).

5. Let me point out that the Community procedure for the examination of the organoleptic characteristics has not yet been laid down. Furthermore, according to Articles 5(3) and 9(2) of that regulation, the intervention agencies may entrust other bodies, known as storage agencies, with the intervention transactions. At the material time AIPO (Associazione Italiana Produttori Olivicoli) was one of the storage agencies in Italy.

6. According to the Commission, before the entry into force of the Community provisions, the classification of olive oil and the methods of analysis in Italy were governed by Law No 1407 of 13 November 1960[3] and a Ministerial Decree of 26 November 1963.[4] That Law contained a classification other than that adopted by Regulation No 136/66, not giving the same descriptions as that regulation and defining the chemical and organoleptic characteristics of the product according to criteria differing from those laid down by the Community rules. In particular, whereas the Community rules require a 'perfect' flavour for (fine) virgin olive oil, Article 1 of Law No 1407/60 merely requires the oil 'not to have an unpleasant smell, such as would indicate rancidity, putrefaction, smoke, must, vermin, and the like'. Furthermore, the decree lays down rules for the carrying-out of chemical analyses. As far as organoleptic examinations are concerned, the Commission pointed out in its written observations that there was no provision for these in the Italian rules; it stated at the hearing, however, that 'something' existed in that connection, referring to a decree of 1959.

7. The Italian intervention agency, AIMA, regulates intervention procedures and, for the 1987/88 marketing year, it laid down descriptions and characteristics for olive oil with express reference to Regulation No 136/66.[5]

8. In Italy, according to the Commission's observations, the storage agencies are responsible for checking whether the oil offered for intervention exhibits the characteristics required by the various descriptions, and are free to choose the laboratories that are to be entrusted with the analyses (except as regards the classification of extra virgin oil, in respect of which it is compulsory for the analyses to be carried out by the Istituto Sperimentale per l'Elaiotecnica (Experimental Institute for Oil Technology) in Pescara.

9. During the 1987/88 marketing year, AIMA informed the Commission of its doubts regarding the figures for olive oil that was the subject of intervention during the current year, stating that it intended to carry out inspections and checks at the intervention centres and seeking the Commission's participation.

10. The Commission stated that it intended to take part in the administrative inquiry initiated by AIMA.

11. The suspicions of irregularity arose in particular from the fact that the greater part of the olive oil offered for intervention was

3 — GURI (Official Journal of the Italian Republic) No 295, 2.12.1960, p. 4411.

4 — GURI (Official Journal of the Italian Republic) No 320, 10.12.1963, p. 5850.

5 — Decision of 18 June 1988, GURI (Official Journal of the Italian Republic) No 146, 23.6.1988, General Series, p. 18.

of (fine) virgin quality and market prices were between 7% and 22% higher than the intervention price, which, moreover, was payable only after four months. That situation was even more remarkable because Italy had to import olive oil in order to cover its requirements for that product.

12. As a result of tests carried out by two bodies governed by public law, the Istituto Sperimentale per l'Elaiotecnica, Pescara, and the laboratory of the Spanish Ministry of Agriculture, it was found that almost all the olive oil which had been offered for intervention did not come within the category in which it had originally been classified. For the organoleptic examination, those two laboratories apply the method recommended by the International Olive Oil Council. I would point out that the analysis was carried out on samples from, in particular, the oil bought in by AIPO and stored in private warehouses used by that agency. Further samples were then taken and subjected to two analyses, one carried out by the private laboratory of Dr Rampino, President of the chemists' association of Lecce and Brindisi, and the other by the Spanish laboratory.

13. While the first of those tests led to the oil being classified as 'virgin olive oil' or as 'ordinary virgin olive oil', the second led to the conclusion that the oil in question was almost exclusively 'lampante' olive oil. In its observations, the Commission considers that Dr Rampino's laboratory applied inaccurate criteria, namely those included in the Italian legislation which predated the adoption of the Community rules.

14. Furthermore, the inquiry revealed serious irregularities in the transactions carried out by the storage agencies and the warehouse proprietors.

15. By letters of 20 February and 8 May 1989 signed by the Commission's Director General for Agriculture, AIMA was informed of the results of the analyses carried out by the Spanish laboratory. According to the second of those letters, the expenditure relating to the intervention transactions carried out in Italy in 1988 could not be charged to the EAGGF. On 2 November 1989 AIMA informed the Commission that it agreed that the expenditure relating to olive oil for the 1987/88 year should not be charged to the EAGGF 'inasmuch as the results of the analyses carried out by the Community laboratories had to be regarded as conclusive'.

16. By a decision of 30 April 1990 concerning advance payments from the EAGGF Guarantee Section for March 1990,[6] the Commission disallowed the expenditure incurred by Italy on intervention for olive oil during the period from 1 October 1988 to 30 September 1989. The expenditure relating to the period from 1 July to 30 September 1988 was deducted within the framework of the decision of 30 November 1990 on the clearance of the accounts of the EAGGF for 1988.[7]

17. According to the Commission, AIPO was suspended by AIMA from its function as storage agency for the 1988/89 marketing year and a procedure was set in motion to secure its permanent removal

6 — Annexed to the Commission's statement.

7 — C(90) 2337 (OJ 1990 L 350, p. 82).

from the official register of storage agencies. AIMA requested the storage agencies to repay the sums paid in respect of intervention purchases. Those agencies, in turn, sought the reimbursement of those sums from the producers who had supplied the oil in question.

18. The plaintiffs in the main proceedings, Mrs Petruzzi and Mrs Longo, are producers who had their oil collected by a producers' association (ASO) in order to sell it to the intervention agency. The association delivered the oil to the privately-owned stores used by AIPO. Mrs Petruzzi and Mrs Longo are asking the national court to declare that any claim for recovery of the amounts paid by way of intervention is 'unfounded and unlawful'.

19. Essentially, the argument developed before the Pretore di Lecce is that in the absence of a Community procedure for the examination of the organoleptic characteristics of virgin olive oil, only the procedures laid down by national law govern the methods of analysis of the oil offered for intervention. As a result, the analyses on which the Commission has relied are incompatible with Article 3(2) of Regulation No 3472/85 in that they employ methods which are not provided for in the national rules.

20. The Pretore di Lecce accordingly referred to the Court for a preliminary ruling three questions which I shall now proceed to examine.

21. In its first question, the national court asks the Court whether Article 3(2) of Regulation No 3472/85 must be interpreted as meaning that the examination of the organoleptic characteristics of edible virgin oil, which differ from those of lampante oil, must be carried out solely in accordance with national procedures until Community rules have been adopted.

22. Let me state, first of all, that it is apparent from the very wording of the regulation that until a Community procedure has been laid down, which is not yet the case, the examination is to be carried out in accordance with national procedures.

23. It is equally clear, however, that national procedures, whatever their methods may be, must have as their exclusive aim to verify that the criteria for classifying olive oil laid down by the Community rules have been applied. In other words, the reference to national procedures cannot mean that the characteristics required by Community law are to be ignored and the oil classified in a manner contrary to Community law.

24. Let me point out in that respect that if national law uses criteria which are different from those of the Community rules, national examination procedures must be aimed exclusively at ensuring compliance with the characteristics and descriptions laid down by Regulation No 136/66, and that conflicting national provisions must not be applied.

25. That observation is necessary because of the reference made, in particular, by the parties in the main proceedings to the descriptions and characteristics used in the

Italian Law. In that respect, the Commission quite rightly points out that a declaration that the oil is free from defects due to a rancid, sweet or slightly fruity flavour due to ageing, or again that the flavour of the oil is 'good' or 'quite good', does not suffice to classify the product in the category of (fine) virgin olive oil, since the Community rules require that, for oil to be so classified, the flavour must be perfect.

26. Finally, I would emphasize, although I shall return to this point in connection with the second question, that Article 3(2) of Regulation No 3472/85 deals with the examination of the oil *at the time when it is offered for intervention.*

27. The second question is essentially concerned with whether the results of the tests and analyses carried out according to the national procedure at the time when the oil is offered for intervention and during its storage at the intervention centre may be refuted by the results of tests carried out in accordance with procedures and methods which differ from national procedures.

28. In my view, that question has two aspects:

— first, is it possible subsequently to check the initial classification of the oil which was determined at the time when it was offered for intervention?

— secondly, on the assumption that such a check is possible, can it be based on procedures which differ from national procedures?

29. It seems to me that the answer to the first question is scarcely open to doubt. It is sufficient to state that if the initial results could not be checked, there would be ample scope for every possible abuse. The classification carried out when the oil was offered for intervention would thus be final. Is it necessary to stress that such a conclusion would in any event be incompatible with the obligations incumbent on States with regard to the verification of EAGGF transactions? It is worth recalling in that respect that:

'According to Article 8(1) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 . . . it is primarily for the Member States to satisfy themselves that transactions financed by the EAGGF are actually carried out and are executed correctly'. [8]

30. In compliance with that obligation, therefore, the Italian Republic was entitled to check the result of the organoleptic tests on which the classification of the olive oil was based. In participating in those checks, the Commission was clearly entitled to make use of the power conferred on it by Article 9 of Regulation No 729/70 [9] to verify that intervention measures are executed correctly.

31. It thus appears to be indisputable that Italy and the Commission were entitled to

8 — Case 214/86 *Greece* v *Commission* [1989] ECR 369.

9 — Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), p. 218).

check the analyses carried out when the oil was offered for intervention.

32. The second aspect of the question is concerned with whether verification procedures may differ from national procedures and methods.

33. Let me point out, by way of a preliminary remark, that the Commission, which had referred in its written observations to the absence in the Italian rules of any provisions concerning organoleptic tests, stated at the hearing that such provisions did in fact exist.

34. Quite clearly, however, the existence or otherwise of a national procedure, and whether it is the same as the procedure actually applied at the time when the check is carried out, are issues of fact which it is not in any way for the Court to determine.

35. Hence it is appropriate to give an answer to the national court that accords with the general terms used by it which seem to presuppose that there is a difference between the national procedure for the examination of olive oil and the verification procedure.

36. In that regard, Regulation No 3472/85 admittedly provides that the examination of the organoleptic characteristics is to be carried out in accordance with a national procedure until a Community procedure has been laid down.

37. However, that regulation expressly governs only the tests carried out at the time when the oil is *offered* for intervention. It does not, on the other hand, contain any indication suggesting that it should also govern the *checks* carried out by the Member State or the Commission *for the purpose of verifying that intervention transactions are executed correctly.*

38. On the other hand, there is no doubt that those checks presuppose an organoleptic examination, carried out under strict conditions of reliability, of the oil previously offered for intervention. In order to achieve that objective, the fact that the method used to carry out such a check does not merely repeat the methods initially adopted cannot be regarded as irregular.

39. It should be pointed out in the latter case that if the organoleptic examination criteria laid down by the national rules differed from those laid down by the Community rules, it would follow that 'a single method of examination and analysis' — in the words used by the plaintiffs in the main proceedings — would mean that analyses which were faulty in any case would have to be repeated, whereas a check is in fact designed to ensure that intervention transactions are executed correctly.

40. To take a specific example: if, according to the national method of analysis, oil considered 'good' is to be classified in the category of 'fine' virgin olive oil, a criterion contrary to the Community classification since, as I have already said, only olive oil of perfect flavour can come within that category, the mere repetition of analyses carried out according to such an inaccurate criterion is obviously incapable of ensuring that intervention transactions are executed correctly.

41. Hence the Member State in question and the Commission are quite entitled, for the purpose of carrying out the checks for which they are responsible, to have recourse to organoleptic tests conducted under established conditions of unquestionable reliability, even though those conditions may differ from national examination procedures carried out at the time when the oil was offered for intervention.

42. There thus appears to be no doubt as to the legal basis of the checks carried out by the Italian Republic and the Commission.

43. The third and final question referred for a preliminary ruling by the Pretore di Lecce remains to be examined, namely whether 'the decision of the Commission of the European Communities and any other decision of that institution is valid if it is to the effect that the expenditure incurred in the acquisition and management of the batches of oil referred to in AIMA's letters of 29 March 1989 and 3 August 1989 (Nos 4387 and 1120, respectively, in the plaintiff's bundle of documents) does not qualify for intervention, with an order, if necessary, for the production of the Commission's decision and any other decision of that institution'.

44. According to the grounds of the order for reference, the national court considered that 'for the purposes of any declaration that the claims for repayment are unfounded and unlawful . . . it is not sufficient to ascertain the precise interpretation of the aforementioned provision of Regulation No 3472/85, but it is also necessary to declare unlawful the order of AIMA seeking repayment of the sum in question, whose basis is the decision of the Commission of the European Communities to disallow expenditure incurred in the acquisition and management of the oil whose quality is disputed'.

45. The Pretore di Lecce thus considers that 'to enable a decision to be given on the lawfulness of AIMA's letter . . . it is also necessary to determine the validity of the Community decision which underlies the decision at national level'. The national court has accordingly referred a question to the Court couched in the terms set out above.

46. After examining the documents produced by the Commission, which are annexed to its observations, and analysing the legal situation to which they give rise, I have come to the following categorical conclusion: there was no decision of the Commission, that is to say no act giving rise to permanent legal effects, in existence at the time of the order for reference or, *a fortiori*, at the time when AIMA's letters seeking repayment of the sums at issue were sent.

47. No doubt the two letters mentioned above, which had been addressed to Italy by the Director General for Agriculture on 20 February 1989 and 8 May 1989, stated that the Commission's *officers* were unable to allow the expenditure on intervention and requested AIMA to rectify the net loss accounts by excluding all the expenditure incurred as from the date on which the olive oil was bought in. The first question which arises is whether any power had been delegated to the signatory of those letters, which expressly mention the position adopted by the Commission's *officers*, so that the Commission could be regarded as

the author. Even if that were the case, however, those letters would constitute only acts preparatory to the decision which the Commission was later to adopt.

48. Because the Italian intervention transactions had not been executed correctly, the Commission adopted, first, the aforementioned decision of 30 April 1990 and, secondly, the decision of 30 November 1990 on the clearance of the EAGGF accounts for 1988. I would point out, moreover, that the second of those decisions is the subject of an action for annulment brought by the Italian Republic which is currently pending before the Court. [10]

50. There is thus, to my mind, no doubt that if the checks which revealed those irregularities were to be regarded as contrary to the Community rules, that interpretation would be sufficient to render AIMA's claims for repayment unlawful.

51. Hence it is clear that the letters of 1989 referred to above, on the assumption that they are acts of the Commission, constitute merely acts preparatory to decisions adopted at a later date. In my view, only acts giving rise to conclusive legal effects are capable of review as to their validity in proceedings for a preliminary ruling. As the Court has stated,

'the scope of the Court's jurisdiction to review the validity of an act cannot vary according to whether it is dealing with a direct action for annulment or with a reference for a preliminary ruling on the validity of an act' [11]

and

'only acts which can be challenged by an application for annulment should be capable of forming the subject-matter of a reference for a ruling on their validity'. [12]

52. That, I believe, is the inevitable consequence of the structural cohesion of the review of legality in Community disputes. It serves no purpose, in my view, to argue that a refusal to examine the validity of preparatory acts would be tantamount to disregarding the powers of a national court which is seeking a preliminary ruling. It is by no means a matter of assessing the relevance of the question submitted by the national court, but of determining whether the act in question is one of those whose validity the Court may examine pursuant to Article 177. From that point of view, 'the concept of "act" in Article 177 must be the same as that provided for in Article 173'. [13]

10 — Case C-55/91.

11 — Joliet: *Le droit institutionnel des Communautés européennes, Le contentieux*, 1981, Faculté de Liège, p. 196; see also Vandersanden, Barav: *Contentieux communautaire, Bruylant*, Brussels, 1977, p. 304; Isaac: *Droit communautaire général*, Mason, Paris, Third Edition, p. 271; *contra*, Waelbroeck, Louis, Vignes, Dewost: 'Le droit de la Communauté économique européenne', vol. 10, *La Cour de Justice*, part 1, p. 190.

12 — Vandersanden, Barav, ibid.

13 — Vandersanden, Barav, ibid.

53. I therefore propose that the Court declare that, at the time when the question was raised before it, there was no Commission decision whose legality was open to review concerning the eligibility for intervention of the expenditure incurred in the acquisition and management of the batches of olive oil at issue in the main proceedings. Accordingly, there is no need to answer the third question referred by the national court.

54. However, in case the Court should take the view that it must examine the Commission's letters on the subject, I wish to make the following observations, very succinctly because the ground of illegality relied upon by the plaintiffs appears to me to be unfounded in any event.

55. The illegality is alleged to have arisen because the analyses carried out at the time of the check were said to be contrary to the Community rules. It is sufficient in that respect to point out that, as has been established, the check to which the classification initially carried out at the request of the storage agency was subjected was not contrary to Community law, so that it cannot in any event follow from that fact that there was any irregularity affecting the 'decisions' disallowing the expenditure in question.

56. One final remark: I share the Commission's view that the fact that an intervention transaction was not executed correctly not only leads to Community financing being disallowed in respect of the expenditure involved; it also places the Member State under an obligation to draw the appropriate consequences with respect to the producers who benefited therefrom, as a result of the principle of equal treatment. There does not seem to me to be any purpose in going into the matter in greater depth, since the national court has not expressly raised it.

57. Accordingly, I suggest that the Court should rule as follows:

— under Community law in its present state, Article 3(2) of Commission Regulation (EEC) No 3472/85 of 10 December 1985 must be interpreted as meaning that the organoleptic examination of virgin olive oil at the time when it is bought in by the intervention agency is to be carried out according to national procedures which must be intended solely to establish the characteristics laid down by the Community provisions for determining the purchase price in accordance with the designations provided for by those provisions;

— the Member States and the Commission are entitled to check the organoleptic characteristics of olive oil bought in by the intervention agency; that check may be carried out in accordance with examination procedures conducted under strict conditions of reliability which may, where necessary, involve the use of methods which differ from those laid down by the national procedure.