OPINION OF ADVOCATE GENERAL MISCHO
delivered on 2 April 1998 *

1. In proceedings between Antonio Pontillo and Donatab, the Pretura Circondariale di Caserta has referred to the Court of Justice for a preliminary ruling two questions concerning the validity of Council Regulation (EEC) No 1738/91 of 13 June 1991 fixing, for the 1991 harvest, the norm and intervention prices and the premiums granted to purchasers of leaf tobacco, the derived intervention prices for baled tobacco, the reference qualities, the production areas and the guaranteed maximum quantities and amending Regulation (EEC) No 1331/90. [1]

Legal background

2. Council Regulation (EEC) No 727/70 of 21 April 1970 on the common organisation of the market in raw tobacco [2] provides for a support system based on norm prices and intervention prices fixed by the Council, before 1 August each year, in respect of Community-grown leaf tobacco for the crop of the following calendar year. Producers may either sell their products to intervention agencies, which are obliged to buy them in at the intervention price, or sell them on the market.

3. In order to encourage purchases from producers at a price which is as close as possible to the norm price, Regulation 727/70 [3] provides that, under certain conditions, a premium is to be granted to persons who purchase leaf tobacco direct from Community producers and who subject the product thus purchased to first processing and market preparation. The premium may also be granted to producers who subject their own leaf tobacco to first processing and market preparation. [4] Under Article 4(4) of that Regulation, before 1 November each year the Council is to fix the amount of the premium for each variety applicable to the crop of the following calendar year.

4. In order to curb any increase in the Community's tobacco production and at the same time to discourage the growing of varieties which are difficult to dispose of, Council Regulation (EEC) No 1114/88 of 25 April 1988 [5] added a paragraph 5 to Article 4 of Regulation No 727/70.

* Original language: French.
1 — OJ 1991 L 163, p. 13.
2 — OJ, English Special Edition 1970 (I), p. 206.
3 — Article 3(1).
4 — Article 3(2).
5 — OJ 1998 L 110, p. 35.

5. Following certain amendments, [6] the relevant provisions of Article 4(5) relating to the period concerned were as follows:

'5. The Council, acting as indicated in Article 43(2) of the Treaty, shall lay down every year, for each tobacco variety or group of varieties produced in the Community for which prices and premiums are fixed, a maximum guaranteed quantity for the following year's harvest, taking into account the market situation and the socio-economic and agricultural situation in the areas concerned. The Council shall set the maximum guaranteed quantities for the 1990 harvest at the same time as for the 1989 harvest. The overall maximum guaranteed quantity for the Community is hereby set at 385 000 tonnes of leaf tobacco for each of the 1988 to 1993 harvests.

...

Without prejudice to Articles 12a and 13, for each 1% by which the maximum guaranteed quantity is exceeded per variety or group of varieties, the intervention prices and the premiums concerned shall suffer a reduction of 1%. A correction corresponding to the reduction of the premium shall be applied to the norm price of the harvest in question.

The reductions referred to in the third subparagraph shall not exceed 5% for the 1988 harvest and 15% for the 1989 to 1993 harvests.

For the purposes of applying this paragraph, the Commission shall establish before 31 July whether production exceeds the maximum guaranteed quantity for a variety or group of varieties.

Detailed rules for the application of this paragraph shall be adopted in accordance with the procedure laid down in Article 17.'

6. The prices and premiums for the 1991 harvest were fixed for the Burley I variety by Regulation No 1738/91.

7. By that regulation the Council lowered the intervention price from 2 421 ECU/kg (1990 harvest) to 2 102 ECU/kg (harvest 1991), and the processing premium from 2 103 ECU/kg to 1 748 ECU/kg.

6 — See Council Regulation (EEC) No 1251/89 of 3 May 1989 amending Regulation (EEC) No 727/70 (OJ 1989 L 129, p. 16) and Council Regulation (EEC) No 1329/90 of 14 May 1990 amending Regulation No 727/70 (OJ 1990 L 132, p. 25).

8. By Regulation (EEC) No 2178/92 of 30 July 1992, [7] the Commission determined the quantity of tobacco from the 1991 harvest actually produced and the overrun of the maximum guaranteed quantities (hereinafter 'MGQ'). The overrun of the MGQ for tobacco of the Burley I variety, the limit for which was set at 46 750 tonnes and in respect of which the quantity actually produced was 55 843 tonnes, was 19.45%. As a result, the intervention price and the amount of the premium were reduced by 15%. So, for the 1991 harvest, the intervention price was 1 787 ECU/kg and the amount of the premium was 1 486 ECU/kg.

The main proceedings

9. Mr Pontillo manages an agricultural undertaking in the province of Caserta, Italy. He sold his Burley I tobacco harvested in 1991 to the tobacco processing company Donatab Srl, also located in Caserta. Donatab applied to, and obtained from, the intervention agency (Azienda di Stato per gli Interventi nel Mercato Agricolo (AIMA) — Settore Tabacco) payment in advance, against a deposit, of the premium referred to in Article 3(1) of Regulation No 727/70.

10. As a consequence of Regulation No 2178/92, Donatab was obliged to make refunds to reflect the reduction in the rate of the premium. Donatab subsequently informed Mr Pontillo that he must repay a sum equal to the percentage by which the premium was reduced.

11. Mr Pontillo, considering that the reduction in the premium was illegal owing to the invalidity of the regulations concerning the fixing of the prices, premiums and MGQ for the 1991 harvest, brought proceedings before the Pretura di Caserta against Donatab for a declaration that the reduction at issue should not be passed on to him in his commercial dealings with Donatab.

12. The Pretura Circondariale di Caserta then referred a question to the Court of Justice, [8] seeking a preliminary ruling as to the validity of Regulation No 1738/91. The Pretura considered that the regulation concerned had fixed the MGQ for tobacco of the Burley I variety retrospectively.

13. The Court, in its judgment in that case, ruled that consideration of the question referred to it had not disclosed any factor of such a kind as to affect the validity of the regulation at issue: Regulation No 1738/91 did not amend the MGQ for tobacco of the Burley I variety harvested in 1991 since the MGQ concerned had already been fixed in Annex V of Council Regulation (EEC)

7 — OJ 1992 L 217, p. 75.

8 — Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, hereinafter 'the *Crispoltoni II* judgment'.

No 1331/90 of 14 May 1990, [9] that is to say before the growers concerned had had to take their decisions regarding the 1991 harvest.

14. In the course of the proceedings now before the Court, which also concern the validity of Regulation No 1738/91, the national court observes that the questions referred concern different issues and matters from those dealt with in Case C-300/93.

The questions

15. The Pretura Circondariale, Caserta, has referred two further questions to the Court, worded as follows:

'1. In the light of the principle of the protection of legitimate expectations and of the rationale underlying the quota system, is Council Regulation (EEC) No 1738/91 to be regarded as valid, in so far as it unexpectedly and unpredictably reduced the prices and the processing premium for tobacco of the variety known as Burley I (Italian) at such a late stage in the tobacco crop year that even the most prudent and alert growers were left with no room for manoeuvre?

2. Is the fact that Regulation No 1738/91 fails to give any reasons at all, whether express or implied, for its provisions concerning Burley I tobacco — which was more seriously affected than other tobacco varieties even though excess production of those varieties had been even higher — open to criticism in that it constitutes a breach of essential procedural requirements?'

The first question

16. By its first question, the national court is asking this Court to rule first on the validity of Regulation No 1738/91 in the light of the principle of the protection of legitimate expectations.

17. In its reference for a preliminary ruling, the Pretura Circondariale adopts the arguments put forward by the plaintiff in the main proceedings to the effect that the reduction in prices and premiums under the regulation at issue 'adversely affected the legal position of growers of tobacco of the Burley I variety, a development which could not have been anticipated, whether at the time when the growers

9 — OJ 1990 L 132, p. 28.

had to draw up their plans for the 1991 harvest, that is, in November 1990, or at the time when the tobacco had to be planted out, that is, in February 1991'.

18. Since the regulation concerned was dated 13 June 1991 but was not published until 26 June 1991, the Pretura considers that 'it contravenes the principle of the protection of legitimate expectations through its retrospective effect on production which was already under way and organised on the basis of irreversible choices'.

19. All the parties intervening in support of the view that Regulation No 1738/91 is invalid observe that, as regards the reference information on which they based their production choices at the beginning of the 1991 tobacco-growing year, the tobacco producers were forced to bear a double reduction: first, a reduction of 13% under Regulation No 1738/91 and, second, a reduction of 15% as a result of the Commission's finding that the MGQ had been exceeded by that percentage. [10] It is therefore indisputable that, for the growers, the profits were significantly lower than they might have legitimately expected.

20. The national court, supported in that respect by the written observations lodged by the Italian and Greek Governments, adds that:

'It cannot be accepted that the reduction imposed was one of the usual business risks which any prudent and well-informed producer should normally be able to anticipate. Past conditions on the Burley I tobacco market — on which the growers reasonably based their decisions regarding production policy at the beginning of the 1991 tobacco crop year — actually encouraged investment in growing. The prices and premiums for the 1990 harvest were higher than those set for the 1989 harvest and the MGQ had not been exceeded.'

21. Against that legal and factual background, it must be observed, first of all, that the behaviour of the Council and the Commission gives grounds for considerable criticism.

22. It is common ground that Regulation No 1738/91, which set the prices and premiums for tobacco varieties for the 1991 harvest, was published on 26 June 1991, namely, for tobacco of the Burley I variety, after the tobacco had already been sown in the seedbeds prepared for it, in February 1991, and after the period for planting out the tobacco plants in the fields, which had to be completed before April 1991. At the date when the regulation was published, the contracts with the first-processing industry, a condition for the grant

10 — Regulation No 2178/92.

of the premium, had already been made and recorded. [11]

23. It is therefore surprising to find that the Commission, the guardian of the Treaties, did not submit its price proposals for the 1991 harvest until April 1991. As a result, the Council was unable to fix the norm prices and intervention prices before 1 August 1990 and the premiums before 1 November 1990, as it was required to do under Regulation No 727/70.

24. There can be no doubt that the dates laid down in Regulation No 727/70 are intended to enable producers to take decisions regarding the variety of tobacco they are going to plant in full knowledge of the facts.

25. Second, it would be very tempting to apply to this case, as the Court is requested to do by the plaintiff in the main proceedings, the reasoning which the Court followed in the *Crispoltoni* judgment, [12] from which it is apparent that producers are entitled to expect that they will be notified in good time of any measures having repercussions on their investment.

26. Despite all the sympathy which I have for that argument, I am however obliged to point out that that judgment concerned the introduction of new arrangements during the course of the year, namely the MGQ system. In that instance it was a matter of changing from a system of unlimited guarantees to a system comprising a guarantee which decreased steeply according to the quantity produced. The producers of the variety concerned in that case could not foresee at the time of planting that the Council would introduce such a quota system towards the end of the year and thus amend the system which had previously applied. It was in that context therefore that the Court enjoined the Council to announce in good time any measures affecting producers' investments.

27. However, unlike the plaintiffs in the *Crispoltoni I* case, the producers of the Burley (Italian) tobacco variety should have foreseen that the Council would adopt a regulation fixing prices and premiums applicable to the 1991 harvest. Regulation No 1331/90 was, by definition, applicable solely to that particular harvest. Until the adoption of Regulation No 1738/91 there was a legal lacuna.

28. It was therefore necessary for the Council to adopt an instrument, and because of the delay, that instrument would necessarily have retrospective effect. The Council could not refrain from adopting a decision merely because such a decision would inevitably have such an effect. It was obliged eventually to fix the prices which were so long awaited.

11 — See *Crispoltoni II* judgment cited above, paragraph 67.

12 — Judgment in Case C-368/89 [1991] ECR I-3695 (hereinafter 'the *Crispoltoni I* judgment').

29. In those circumstances it was not therefore a case of retrospective application of new regulations since the Council was not amending regulations which had applied previously. It was a case of the belated fixing of prices and premiums which were valid for one harvest.

30. The delay in adopting the regulation at issue cannot, in my view, provide grounds for invalidity in that it contravened the legitimate expectations of producers.

31. First, it is beyond doubt that the Council has a discretion as regards fixing prices and premiums. The Court has consistently so held, as in the *Crispoltoni II* judgment, [13] which concerned the same regulation:

'It should be noted that whilst the protection of legitimate expectations is one of the fundamental principles of the Community, traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained; this is particularly true in an area such as the common organisation of the markets whose purpose involves constant adjustments to meet changes in the economic situation ...

It follows that traders cannot claim a vested right to the maintenance of an advantage which they derive from the establishment of the common organisation of the markets and which they enjoyed at a given time ...

A possible reduction in their earnings cannot therefore be contrary to the principle of the protection of legitimate expectations.'

32. It is clear that, even if guaranteed prices had been rising during the preceding marketing years, as the applicant in the main proceedings points out, economic operators could not expect that trend to continue or for prices to be maintained at the level of the most recent year.

33. The adoption — albeit belated — of Regulation No 1738/91 derives from the Council's obligation to fix prices and premiums annually, and, when discharging that obligation, the Council has a discretion as regards the level of prices and premiums.

13 — Judgment cited above, paragraph 57 et seq.

34. It is therefore apparent that the legitimate expectations of tobacco producers have not been infringed since those producers should, in the first place, have been awaiting the adoption of a regulation fixing prices and premiums and, in the second place, they could not legitimately expect a certain level of prices and premiums to be maintained.

35. This conclusion does not alter the fact that such behaviour on the part of the Commission and the Council is highly reprehensible. However, the only penalty which could be envisaged would be, if all the relevant conditions were met, an action for compensation in respect of damage sustained by producers as a result of the delay in adopting the regulation.

36. At all events, it is unacceptable for the Council and the Commission — now or in the future — to be able to ignore with impunity the dates laid down in Regulation No 727/70 and thus oblige growers to make their production choices when faced with the double uncertainty of:

— what prices will apply in principle;

— what prices will ultimately apply in practice if it is found that the MGQ have been exceeded.

37. The national court also asks the Court, in the context of the first question, to rule on the validity of Regulation No 1738/91 as regards the grounds on which the quota system was introduced, that is, as regards the grounds of Regulation No 1114/88. [14]

38. On the basis of a statistical demonstration of the variation in prices fixed annually, the plaintiff in the main proceedings seeks to prove that the Council 'totally disregarded the objectives of imposing production quotas, as envisaged in the preamble to Regulation No 1114/88 which introduced the system of maximum guaranteed quantities'.

14 — Regulation No 1114/88 was adopted on the following grounds:
'Whereas in order to curb any increase in the Community's tobacco production and at the same time to discourage the growing of varieties which are difficult to dispose of, provision should be made for a proportional reduction in the prices and premiums if production exceeds a maximum guaranteed quantity fixed for each harvest; whereas certain costs are added to the intervention price to obtain the derived intervention price; whereas the application of the reduction coefficient to the derived intervention price must not affect such costs;
Whereas the maximum quantity must be established particularly in the light of production statistics and the market situation; whereas in order to continue to implement a policy aimed at encouraging the most sought-after varieties and to take account of specific socio-economic and regional features of tobacco production, a maximum guaranteed quantity should be fixed for each variety or group of varieties; whereas provision should be made, for a limited period, for a ceiling on any reduction in the prices and premiums; whereas Regulation (EEC) No 727/70 as last amended by Regulation (EEC) No 1974/87 should be amended accordingly.'

According to the plaintiff in the main proceedings:

'It is clear and uncontestable ... that the production quota system introduced by the Council is not only based on the determination of a MGQ but also that the level of prices and premiums occupies a very important place within it and that it is, on the contrary, on that level of prices and premiums that the quota system and the operation concerned have been based. Basically, if the aim pursued is to discourage production, that can be done precisely by taking action regarding the level of prices and premiums within the MGQ.'

39. That argument is not convincing. The second recital in the preamble to Regulation No 1738/91 states that 'the norm and intervention prices for leaf tobacco must be fixed in accordance with the criteria laid down in Article 2(2) of Regulation (EEC) No 727/70 in order, in particular, to encourage producers to convert to the cultivation of those varieties which are most in demand and most competitive as well as being the least harmful to health'.

40. Regulation No 1738/91 reduced the prices of all varieties of tobacco: seven of them were reduced by approximately 13% and nine others by 6%.

41. Consequently, the allegation that there was 'no adjustment of prices with a view to encouraging or discouraging the cultivation of certain varieties and qualities' is contradicted by the disputed measure itself.

42. Lastly, if that reasoning put forward by the plaintiff in the main proceedings was intended to prove that, in fixing prices for the 1991 harvest at such a late stage, the Council was not in a position either to curb production or encourage certain production trends during the 1991 harvest, it was certainly correct. But that then takes us back to the considerations set out above.

43. I therefore conclude that examination of the first question referred by the national court has disclosed no factor of such a kind as to affect the validity of Regulation No 1738/91.

The second question

44. By its second question, the national court seeks to ascertain whether Regulation No 1738/91 constitutes a breach of essential procedural requirements in that it fails to give any reasons, whether express or implied, for its provisions concerning Burley I tobacco, which are more strict than those concerning

other tobacco varieties even though excess production of those varieties had been even higher.

45. The Greek Government observes that 'the preamble to Regulation No 1738/91 is general in scope' and acknowledges that 'it is formally similar to the preambles usually contained in regulations fixing prices and premiums for tobacco'. It maintains, however, that 'the preamble does not contain a sufficient statement of reasons to disclose the grounds which led to the adoption of the measures concerned or the objectives which they pursued'. It concludes from this that 'it is impossible to verify whether the measures adopted were necessary and appropriate'.

46. In that regard it should be pointed out that the duty to provide a statement of reasons for Community acts is, of course, intended to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise effectively its power of review. [15] However, the extent of the duty to provide a statement of reasons depends, as the Court has consistently held, on the nature of the measure in question. [16]

47. In that connection, the Court has ruled that 'as far as concerns general acts, especially regulations, the requirements of Article 190 of the Treaty are satisfied if the statement of reasons given explains in essence the measures taken by the institutions and that a specific statement of reasons in support of all the details which might be contained in such a measure cannot be required, provided such details fall within the general scheme of the measures as a whole'. [17]

48. The five annexes to Regulation No 1738/91 give details for each of the 34 tobacco varieties:

— the varieties and their reference qualities (for both leaf tobacco and baled tobacco)

— the recognised production areas;

— the norm and intervention prices;

15 — See for example Case 250/84 *Eridania and Others* [1986] ECR 117.

16 — See for example Case 87/78 *Welding* [1978] ECR 2457.

17 — Case 166/78 *Italy v Council* [1979] ECR 2575, paragraph 8.

— the premiums;

— the derived intervention prices for baled tobaccos;

— the MGQ for each variety and group of varieties.

49. Without wishing to detract from the importance of prices and premiums, I feel it would be excessive to require the Council to state specific grounds for each of the numerous measures adopted under Regulation No 1738/91. That would have been impossible in practice.

50. The Council is therefore correct in considering in its written observations that 'it is sufficient if it explains, first, why it fixed the norm and intervention prices, which it did in the first three recitals, and that it gives reasons for the MGQ system ...'. Similarly, as the Commission points out, 'the Community legislature clearly indicated in the preamble to the regulation the basic criteria used in fixing prices in the raw tobacco sector for the 1991 harvest'.

51. I consider that the two recitals [18] relating to the fixing of prices in general and the seventh recital in the preamble relating to the fixing of premiums [19] constitute a sufficient and adequate statement of reasons in view of the nature and scope of the act concerned.

52. According to the plaintiff in the main proceedings, the second question referred by the Pretura not only relates to a breach of essential procedural requirements as a result of failure to state the grounds on which the regulation is based but also raises the issue of a possible breach of the principle of equal treatment as between the different varieties. It therefore wonders whether 'the growers of Burley tobacco have been subject to discrimination, particularly if it is considered that that variety was penalised without any explanation being given'.

53. In that connection it should be mentioned that, in the absence of proof of any misuse of

18 — 'Whereas, when the prices for raw tobacco are fixed, account should be taken of the objectives of the common agricultural policy; whereas the objectives of the common agricultural policy are, in particular, to ensure a fair standard of living for the agricultural community, to assure the availability of supplies and to ensure that supplies reach consumers at reasonable prices;
Whereas the norm and intervention prices for leaf tobacco must be fixed in accordance with the criteria laid down in Article 2(2) of Regulation (EEC) No 727/70 in order, in particular, to encourage producers to convert to the cultivation of those varieties which are most in demand and most competitive as well as being the least harmful to health.'

19 — 'Whereas the premium granted to purchasers of Community tobacco is intended to enable them to pay producers of leaf tobacco a price which is at the level of the norm price, account being taken of the trend in world market prices, and the level of prices established by the interaction of supply and demand on the Community market.'

power, the Council's decision to reduce premiums and prices for Burley I tobacco constitutes an expression of a policy choice, made by virtue of a discretionary power, and that decision cannot therefore be regarded as a penalty for that variety. Moreover, the choice made by the Council in promoting the production of certain varieties involves necessarily and by definition differentiation between varieties.

54. Thus, consideration of the second question likewise discloses no factor of such a kind as to affect the validity of Regulation No 1738/91.

Conclusion

55. In the light of the foregoing I propose that the Court give the following answer to the two questions referred by the Pretura Circondariale di Caserta:

Consideration of the two questions submitted has disclosed no factor of such a kind as to affect the validity of Council Regulation (EEC) No 1738/91 of 13 June 1991 fixing, for the 1991 harvest, the norm and intervention prices and the premiums granted to purchasers of leaf tobacco, the derived intervention prices for baled tobacco, the reference qualities, the production areas and the guaranteed maximum quantities and amending Regulation (EEC) No 1331/90.