OPINION OF ADVOCATE GENERAL MISCHO

delivered on 15 February 2001 [1]

1. The dispute between Eridania SpA (hereinafter 'Eridania'), a sugar producer in Italy, and Azienda Agricola San Luca di Rumagnoli Viannj before the Giudice di Pace di Genova (Magistrate's Court, Genoa), concerning the sum payable by Eridania to Azienda Agricola San Luca for sugar beet purchased during the marketing year 1996/97, which the Court was called upon to help settle by means of a preliminary ruling, resulting in the judgment of 6 July 2000 in Case-289/97, *Eridania*, [2] re-emerged in the marketing year 1997/98 and gave rise to new proceedings before the same national court.

2. Apart from the amount of compensation sought by Eridania and the Community regulation under which Eridania has had to pay a sum it claims is unjustified, these new proceedings do not differ in any way from the previous ones, including the conduct of the court in the main proceedings, as it has proceeded once again to make a reference for preliminary ruling, registered as Case C-160/98. As in Case-289/97, the national court has referred two questions. The first relates to the validity of the Council Regulation (EC) No 1188/97 fixing for the 1997/98 marketing year a derived intervention price for white sugar and, consequently, an increased price for sugar beets. [3] The second question concerns the validity of Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector [4] (hereinafter 'the basic regulation'), amended by Council Regulation (EC) No 1101/95 of 24 April 1995, [5] which provides for a system of derived intervention prices and higher prices for sugar beet in deficit areas, a system known as regionalisation.

3. When the national court made its reference to the Court of Justice, the latter had not yet delivered its judgment in Case C-289/97.

4. Since then, that judgment has been delivered and communicated to the Giudice di Pace di Genoa so as to allow that court to decide, in the light of the answers by the

1 — Original language: French.

2 — Case C-289/97 *Eridania* [2000] ECR I-5409.

3 — Regulation of 25 June 1997 fixing, for the 1997/98 marketing year, the derived intervention prices for white sugar, the intervention price for raw sugar, the minimum prices for A and B beet, and the amount of compensation for storage costs (OJ 1997 L 170, p. 3).

4 — OJ 1981 L 177, p. 4.

5 — OJ 1995 L 110, p. 1.

Court to the questions referred, whether it should maintain all the questions for preliminary ruling referred in the context of the dispute regarding the marketing year 1997/98 or, instead, withdraw all or some of them.

5. The referring court answered that it had no intention of withdrawing the questions referred to the Court, stating that the questions submitted to the Court in Case C-160/98 refer to a different marketing year and, accordingly, to a different regulation. Indeed, it is undeniable that the validity of Council Regulation (EC) No 1580/96 of 30 July 1996 fixing, for the 1996/97 marketing year, the derived intervention prices for white sugar, the minimum prices for A and B beet, and the amount of compensation for storage costs, [6] does not automatically mean that Regulation No 1188/97, which has the same purpose, but for the marketing year 1997/98, is also valid.

6. Simply because it sets out measures for the marketing year 1997/98 which are strictly identical to those adopted for the previous marketing year, Regulation No 1188/97 cannot be said to be free from defects such as might affect its validity. For example, it might well be that conditions which forecast a deficit in the sugar supply in Italy — which required a derived intervention price to be set for that Member State for white sugar — which were met in the marketing year 1996/97, were no longer met in the marketing year 1997/98. However, I see no reason for the national court to insist that the Court should once again consider claims regarding Regulation No 1188/97, such as those pertaining to the date of adoption of the regulation fixing the derived intervention prices for white sugar for a particular marketing year and to the statement of reasons which must accompany a regulation of this kind, which are in no way linked to economic conditions affecting the market, claims which were held to be unfounded when the Court, following a request by that same national court, examined the validity of the regulation governing the same system of fixing prices for the previous marketing year.

7. All the more reason, in my view, for considering that the claims against even the establishment of the system of derived price intervention under the basic regulation which the Court set aside in *Eridania*, cited above, do not merit further examination.

8. It must be noted that, were it not for the claim concerning whether Italy could be classed as a deficit area for the marketing year 1997/98, the Court would, in the face of these repeated questions to which it had already replied, have had every reason to

6 — OJ 1996 L 206, p. 9.

consider itself to be dealing with a situation covered by Article 104(3) of its Rules of Procedure.

9. According to that provision:

'Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the answer to such a question may be clearly deduced from existing case-law or where the answer to the question admits of no reasonable doubt, the Court may, after informing the court or tribunal which referred the question to it, hearing any observations submitted by the persons referred to in Article 20 of the EC Statute, Article 21 of the Euratom Statute and Article 103(3) of these Rules and hearing the Advocate General, give its decision by reasoned order in which, if appropriate, reference is made to its previous judgment or to the relevant case-law.'

10. The two questions referred by the national court to the Court for a ruling are as follows:

'(1) Is Regulation (EC) No 1188/97 of 25 June 1997 (OJ 1997 L 170, p. 3), in particular Article 1(f) thereof, valid, especially in the light not only of Article 3(4) and (5) of Regulation (EEC) No 1785/81 and Article 190 of the EC Treaty (now Article 253 EC), but also of the correct appraisal of the facts as more fully set out in part I — "The principal plea in law" of the section of this order entitled "Law"?

(2) If the answer to the first question is in the affirmative, is Regulation (EEC) No 1785/81 of 30 June 1981 (OJ 1981 L 177, p. 4), as subsequently amended, and in particular Articles 3(1), 5(3) and 6(2) thereof, valid, and consequently is Article 1(f) of Regulation (EC) No 1188/97 valid, in the light of the arguments more fully set out in part II — "The alternative plea in law" of the section of this order entitled "Law"?'

11. For the reasons set out above, I consider that it is appropriate to examine only the first question which seeks to establish whether the Council was justified in classing Italy as a deficit area for the marketing year 1997/98 in Regulation No 1188/97.

12. All the other points included in the questions referred by the Giudice di Pace di Genoa in *Eridania* cited above have been answered; I have no reason to believe that the judgment is not well founded and, in

my view, the Court, when giving its ruling in this case, should invite the national court to refer thereto.

13. Did the Council act unlawfully when it stated, in the preamble to Regulation No 1188/97, that 'a deficit supply situation is to be foreseen in the areas of production in Italy' and in deciding, in Article 1 of that regulation that, '[f]or the deficit areas of the Community, the derived intervention price for white sugar shall be fixed, per 100 kilograms, at: [...] (f) ECU 65.53 for all the areas in Italy', with the result that, as provided by Article 6 of the basic Regulation, Italian sugar producers would have to buy beet at a price upwardly adjusted in accordance with Article 5(3) of the basic regulation?

14. I shall recall briefly — since both my Opinion in Case C-289/97 cited above and the judgment in that case acknowledge these factors — that there is a deficit, within the meaning of the basic regulation, where the total available production falls short of consumption and that available production corresponds to the total quantities of A sugar and B sugar produced during the marketing year, plus the carry-forward of C sugar effected in accordance with the Community rules.

15. Indeed, it appears that on the part of both Eridania and the national court — as the Commission notes in its observations — there is 'a misunderstanding as regards the system for setting prices', and that the classification by the Council of an area as a deficit area for a given marketing year is effected not on the basis of measured production and consumption, but according to forecasts which can be reasonably made, given the data available, as to what the levels of production and consumption will be during the year in question.

16. It must be noted, in passing, that if prices were decided before the date — laid down in Article 3(4) of the basic regulation, namely that before 1 August preceding the year in which the year begins on 1 July — which, since *Eridania*, is however not to be mandatory, those forecasts would be made without any concrete information as to what production during the marketing year concerned might be.

17. Prices are fixed when, in most Member States, the beet produced during the marketing year preceding the one in question have not yet been harvested and when, therefore, there is no indication of what will be sown, on the basis of which precisely production in the marketing year concerned might be calculated.

18. Furthermore, they are fixed when there are no indications yet available of any carry-over to the marketing year concerned of the C sugar produced during the previous marketing year, since it is not possible to establish the existence of any quantities of C sugar and while the option to choose to export outside of the Community rather than to carry over remains available.

19. It cannot, therefore, be disputed that the basic regulation, in referring to deficit areas, refers to areas which may, when the Council fixes the prices, be predicted as being deficit areas in the course of the forthcoming marketing year.

20. Accordingly, as we shall subsequently see, it is futile to wish, as Eridania does, to dispute classification by the Council of an area as a deficit area on the basis of data which were only available after the date when the Council carried out such classification and even only after the marketing year had begun, that is when it was imperative that prices should already have been fixed, in order to avoid serious disruption in the functioning of the common organisation of the markets in the sugar sector.

21. For the marketing year 1997/98 the Council fixed a derived intervention price for white sugar in Italy, and therefore considered on 25 June 1997, only a few days before the beginning of the marketing year, set by the basic regulation as 1 July, that a deficit could be expected for that marketing year.

22. It could not therefore reasonably be expected that the Council should defer its decision, in order that it might refine its analysis as to the market situation for the marketing year in question. What reliable data did it have available at that date?

23. As the Council quite rightly points out, it does not have the administrative means to allow it to collect the data itself to enable it to compare foreseeable consumption with foreseeable production.

24. The Council must therefore base its decision on data communicated to it by the Commission. However, the Commission does not have any greater resources allowing it to collect the information directly from operators in the sector and, in particular, to verify such information. For this reason Article 39 of the basic regulation provides that Member States and the Commission forward to each other the data necessary for application of the regulation. That system of collaboration is regulated by Commission Regulation (EC) No 779/96 of 29 April 1996 laying down detailed rules for the application of the

basic regulation as regards communications in the sugar sector. [7] Chapter IV of the regulation sets out in detail the information that the Member States must send to the Commission regarding production and consumption of sugar, and lays down the timetable for such notification.

25. On 25 June 1997, when the Council adopted the contested regulation, the data notified by the Italian Government indicated the forecast consumption to be 1 483 000 tonnes for the marketing year 1997/98. That figure, which is less than the 1 532 000 tonnes used for the previous year when consumption for the marketing year 1996/97 was forecast, but which, at the same time, takes account of a consistent trend towards reduced consumption in Italy and of the figures recorded at the end of December 1996 of actual consumption for that marketing year, is not contested by Eridania. The fact that an undertaking which, because it contests the existence of a deficit, has every interest in presenting calculations which indicate the highest possible consumption does not contest those figures, shows, if proof were needed, just how reliable the estimate is.

26. On the same date, the Council had an estimate for available production of 1 450 000 tonnes, consisting of 1 440 000 tonnes of actual production and 10 000 tonnes of carry-over from the previous marketing year. This estimate, provided by the Italian Government, dated from the meeting of the Management Committee for Sugar of 9 April and was based on a sowing area of 275 000 ha, with a yield of white sugar calculated at between 5 and 5.5 tonnes per hectare.

27. The Council does not in any way dispute the fact that, in a communication dated 16 June, the Italian Government informed the Commission that the figure of 1 440 000 tonnes, decided when the harvest prospects, given the climatic conditions, seemed somewhat unfavourable, should probably be adjusted upwards, since it seemed the harvest would be better than had been thought.

28. In that communication, the Italian Government, sheltering behind the considerable variability noted in previous years as to the sugar content of the beets, was however careful not to propose a figure to replace the 1 440 000 tonnes previously communicated.

29. It merely stated that, in any event, production would not exceed 1 568 250 tonnes, the total figure for the A and B quotas allocated to Italy.

7 — OJ 1996 L 106, p. 9.

30. This communication from the Italian Government was the reply to a request from the Commission for updated data to the Member States at the meeting of the board of management of 11 June.

31. The purpose of this request was for the Commission to find out, three weeks before the start of the new marketing year, whether it should adhere to its proposal published in the *Official Journal of the European Communities* on 27 March 1997,[8] fixing the derived intervention price of white sugar for Italy.

32. On 18 June, at a further, final meeting of the Management Committee for Sugar before the Council decision, the Italian Government produced no further predicted figures. Accordingly, I can only say that, if the Commission took into account data obtained officially pursuant to Regulation No 779/96, despite its willingness to take more recent data into account, it had no reason to go back on the proposal which it had set out at the end of March since the figures it had available made a deficit seem likely.

33. Eridania, however, asserts that the Commission could not rely blindly, as it apparently did, on figures communicated by the Italian Government, as both Eridania and various professional organisations bringing together sugar producers had, on many occasions, duly informed the Commission of the totally unrealistic, even fanciful, nature of production forecasts contained in communications by the Italian Government.

34. In support of its claims, Eridania has produced an abundance of correspondence addressed both to the Commission and to the Council by the Associazione Nazionale fra gli Industriali dello Zucchero dell'Alcool e del Lievito and by the European Committee of Sugar Manufacturers. From that correspondence it is clear that from January 1997, Italian sugar producers were forecasting sugar production of 1 560 000 tonnes, which was greater, therefore, than the expected consumption of 1 483 000 tonnes and, that when the Commission's proposals were set out in March on the basis of a foreseeable deficit in Italy, the sugar industry very vigorously contested them.

35. Those protests were based both on observation of consumption trends and sugar production in Italy in previous years and on expert advice from scientists regarding the sugar-beet yield which, in view of the maturity of the beets in spring of 1997, could be expected in Italy at the next harvest.

8 — OJ 1997 C 101, p. 6.

36. As well as those letters of protest, Eridania has produced the minutes of the work of the joint group of the Consultative Committee on Sugar which met on 14 April 1997.

37. It is clear from them that during that meeting, the representative from the Italian sugar industry indicated that he considered the sowing area in Italy as presented by the Commission to have been patently underestimated and stated 'that it was impossible that the Commission could have been in a position to propose the regionalisation of the price of sugar in Italy given that Italy is in surplus' (annex 20 of Eridania's observations).

38. Like the Council and the Commission, I would not seek to deny, in view of the information produced by Eridania, that the Community institutions were perfectly aware of the fact that the production estimates communicated by Italy clearly appeared to be overestimates to Italian or even European, sugar producers.

39. At the same time, however, I should point out that the claims made by other operators with radically opposed interests, the Italian beet farmers, were in conflict with the claim made by economic operators who were being asked to accept the burden of an increased purchase price for beet if Italy was classed as a deficit area. Indeed, during the entire period when decisions on fixing the price for the marketing year 1997/98 were being prepared, the farmers, as in previous years, strongly objected to any proposal that Italy should no longer be part of the system applicable to deficit areas. Proof of this, in particular, is provided by the minutes of the meeting of the joint group of the Consultative Committee on Sugar of 14 April 1997, submitted by Eridania, as well as by the communication addressed to the Commission on 23 June 1997, and submitted by the Commission as an annex to its observations (annex II).

40. The Commission, which had responsibility for presenting proposals, and the Council, with the task of deciding the prices, were thus confronted with estimates communicated by the Italian Government, approved by one group of economic operators who found them to be manifestly in their interests, and contested by another group with opposed interests.

41. It appears entirely legitimate to me that they should have believed the indications of the Italian Government which, one must assume, maintained the neutrality to be expected (at least as regards collection of objective data) of public authorities bombarded with opposing claims by groups with conflicting interests when it confirmed following the request by the Commission on 11 June for updated figures the figures previously communicated.

42. I am even of the opinion that the Community institutions had no alternative but to use the figures submitted by the Italian Government unless there was proof that the data communicated was deliberately misleading.

43. Indeed, I do not see on what basis the institutions could have disregarded those figures since the Italian Government, in communicating them, discharged its obligations under Regulation No 779/96 and, in doing this, was only able to act in the strictest compliance with the duty of cooperation contained in Article 5 of the EC Treaty (now Article 10 EC), the scope of which has been referred to many times in the Court's case-law.

44. Undeniably, there might appear to be cause for concern — on which Eridania naturally bases one of its arguments — that whereas the Italian Government stated on 16 June that it was not in a position to substitute new figures for those produced in April, whilst announcing that those figures should quite probably be adjusted upwards, it should then be able on 3 July (10 days after the Council fixed the derived intervention price for white sugar for Italy, based on a foreseeable deficit situation) to communicate to the Commission a new forecast for available production corresponding exactly to the sum of the A and B quotas assigned to Italy.

45. Contrary to what Eridania maintains, when that correction was made, it could no longer affect the price fixing as this must be done every year before 1 July, the beginning of the marketing year, and the Italian Government was perfectly aware of that fact. To infer from that that the Italian Government was deliberately withholding information is something I would not be willing to do.

46. I do not in any way dispute that Italian sugar producers must have felt frustrated in witnessing, too late for the Council to be able to take it into account, confirmation of what they had for several months been saying, namely that for the marketing year 1997/98 Italy would probably not be in deficit.

47. This frustration might perhaps have been attenuated if the revised figures from the Italian Government had been communicated, for example, only at the end of July. But, would the Italian Government not, quite rightly, have been criticised if, when it had available new figures at the beginning of July, it had deliberately deferred communication of those figures to the Commission in order to avoid the unfortunate coincidence constituted by the adoption of prices which were based on a deficit in production and the publication, several days later, of figures ruling out the possibility of such a deficit.

48. A situation of this kind would have constituted a serious case of withholding of information and a breach of the obligations contained in Regulation No 779/96.

49. I should, however, point out that even if the figures communicated by the Italian Government on 3 July had been communicated before the Council meeting of 25 June, that fact would not necessarily have induced the Council not to fix a derived intervention price for white sugar in Italy, as it might have relativised the importance to be accorded to such figures, in view of the structural deficit which the Italian Republic had experienced in the past.

50. This is, in my view, quite clear from the judgment in *Eridania* cited above, in which the Court ruled that:

'In that connection, when the implementation by the Council of the agricultural policy in the sugar sector involves the need to evaluate a complex economic situation, the discretion which it has does not apply exclusively to the nature and scope of the measures to be taken but also to some extent to the finding of the basic facts (see Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, paragraph 25, and Case C-285/94 *Italy* v *Commission* [1997] ECR I-3519, paragraph 23)' (paragraph 48).

51. Of course, the exercise of such discretion is subject to judicial review, and it is not altogether obvious, from my point of view, that, as part of the system for the annual fixing of prices set up by the basic regulation, the fact of taking into account the situation in the past can justify a refusal to take into account immediately a clear change in trend or, in other words, to allow a marketing year which turns out to be in surplus to be treated as a matter of chance, not requiring the removal albeit temporarily of regionalisation status applied in all the previous marketing years. However, in the words of the judgment cited above, '[i]n reviewing the exercise of such a power, the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority in question did not clearly exceed the bounds of its discretion (see *Roquette Frères* v *Council*, cited above, paragraph 25)'.

52. Therefore, leaving aside the fact that 30 June is the deadline in the common organisation of the markets in the sugar sector for fixing prices, it is rash to claim, as Eridania does, that the figures communicated by the Italian Government on 3 July should have led the Council to 'acknowledge its error' and to respond to the request

of the Italian sugar producers, in their letter of 10 July, to amend Regulation No 1188/97.

53. These figures on their own are not sufficient, on the basis of the case-law cited above, to qualify the classification of Italy as a deficit area as an error.

54. Be that as it may, I would acknowledge that when the Council made its decision, on the basis of data communicated to it by the Commission, which in turn had received the data from the Italian Government, it was justified in reckoning on a deficit in Italy, and therefore in fixing a derived intervention price for white sugar for Italy.

55. Before concluding, I should point out that, in its observations, Eridania also claims that Regulation No 1188/97 is invalid because it causes disruption in the market and breaches the principle of Community preference. However, those claims are not made by the referring court so, as the Council observes, I am not required to examine them. I can, nevertheless, briefly demonstrate that, in any event, the claims cannot be upheld.

56. Eridania criticises the choices made by the Council regarding Community market supply and contests the suitability of those choices in connection with the Community's undertakings in the framework of the General Agreement on Tariffs and Trade (GATT). I hardly need emphasise that, in so doing, Eridania loses sight of the fact that those choices, which are within the broad margin of discretion of the Council in the running of the common agricultural policy, unless there is manifest error, fall outwith the preview of the Court.

57. Eridania makes the same mistake when it submits that the regionalisation applied to Italy is a breach of the principle of Community preference. In its judgment of 14 July 1994, *Greece* v *Council*,[9] the Court ruled that 'Community preference is not in any case a legal requirement the violation of which would result in the invalidity of the measure concerned'.

9 — C-353/92 ECR I-3411, paragraph 50.

Conclusion

58. I can therefore only observe that none of the claims set out regarding the validity of Regulation No 1188/97 is well founded. Accordingly, I propose, in view of both my introductory remarks and the conclusion which I have reached, that the Court should reply to the questions put by the Giudice di Pace di Genoa, with reference to the Court's judgment of 6 July 2000 in Case C-289/97 *Eridania* that:

Consideration of the questions raised has disclosed nothing to affect the validity of Council Regulation (EC) No 1188/97 of 25 June 1997 fixing, for the 1997/98 marketing year, the derived intervention prices for white sugar, the intervention price for raw sugar, the minimum prices for A and B beet, and the amount of compensation for storage costs and the validity of Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector.