REPORT FOR THE HEARING
delivered in Case 338/85 *

I — Facts and written procedure

1. The Community legislation on the common agricultural policy includes rules on the adjustment of amounts fixed in advance and, in particular, the following two provisions:

(a) Regulation (EEC) No 1134/68 of the Council of 30 July 1968 laying down rules for the implementation of Regulation (EEC) No 653/68 on conditions for alterations to the value of the unit of account used for the common agricultural policy (Official Journal, English Special Edition 1968 (II), p. 396) relates to the case where there is an alteration in the relationship between the parity of the currency of a Member State and the value of the unit of account. Article 4 (1) of the regulation provides as follows:

'In the case of an alteration of the relationship between the parity of the currency of a Member State and the value of the unit of account, the Member State concerned, using the new parity relationship and without prejudice to the application of Article 1 (2), shall adjust the following amounts, given in units of account, if they appear in national currency in the documents or certificates issued in pursuance of the common agricultural policy or the special trade systems for goods processed from agricultural products:

(a) amounts which have been fixed in advance for a transaction or part of a transaction still to be carried out after alteration of that parity relationship;

(b) ...

However, any person who has obtained advance fixing of such amounts for a specific transaction may, by written application which must reach the competent authority within 30 days of the entry into force of the measures fixing the altered amounts, obtain cancellation of the advance fixing and of the relevant document or certificate.'

(b) Secondly, Commission Regulation (EEC) No 1160/82 of 14 May 1982 providing for the advance fixing of monetary compensatory amounts (Official Journal 1982, L 134, p. 22) lays down the conditions on which monetary compensatory amounts may be fixed in advance. Article 6 (1) provides as follows:

'The monetary compensatory amount in force on the day on which the application for advance fixing of the monetary compensatory amount is lodged shall be applicable to the operations carried out during the period of validity of the licence or certificate.'

However, Article 7 (1) provides as follows:

'The monetary compensatory amounts fixed in advance shall be adjusted if a new representative rate, decided on before the application for advance fixing was lodged, comes into effect.'

* Language of the Case: Italian.

Regulation No 1160/82 does not, however, contain any provisions concerning the cancellation of the advance fixing of monetary compensatory amounts.

2. In the course of a meeting concerned with agricultural questions held in Brussels on 16 and 17 May 1983, the Council reached an agreement, which was accepted by the Italian delegation subject to confirmation which *inter alia* altered the representative rates for 'green currencies'. The meeting came to an end on 17 May towards 5 o'clock in the morning and was immediately followed by a press conference and a press communiqué. Italy withdrew its reservations on 20 May.

That Council agreement was the subject-matter of Council Regulation (EEC) No 1223/83 of 20 May 1983 on the exchange rates to be applied in agriculture which was published in the *Official Journal of the European Communities* of 21 May 1983 (L 132, p. 33) and entered into force, according to Article 8 thereof, on 23 May 1983. Article 2 (1), in conjunction with Annex VII thereto, fixes the new parity of the Italian lira against the ecu (ECU 1 = LIT 1 341) and states that it 'shall apply from 23 May 1983'. Article 4 of that regulation provides that the provisions of Regulation No 1134/68 in respect of an alteration of the relationship between the parity of the currency of a Member State and the value of the unit of account are to apply except, however, that the final subparagraph of Article 4 (1) of that regulation is to apply 'only if the application of the new representative rates is disadvantageous to the party concerned'.

By Regulation (EEC) No 1244/83 of 20 May 1983 (Official Journal 1983, L 135, p. 1) and Regulation (EEC) No 1245/83 of the same date (Official Journal 1983, L 135, p. 3), the Commission adopted a number of executory measures relating *inter alia* to the adjustment of monetary compensatory amounts fixed in advance under Article 7 (1) of Regulation No 1160/82. For Italy, the adjustment consists in the application of a coefficient of 0 to monetary compensatory amounts fixed in advance in respect of all products for the period from 17 to 23 May 1983, that is to say the annulment of monetary compensatory amounts fixed in advance for that period (Article 4 in conjunction with Annex IVa of Regulation No 1245/83). As regards the possibility of obtaining cancellation of the advance fixing, the following is provided:

'The provisions of the last subparagraph of Article 4 (1) of Regulation (EEC) No 1134/68 shall apply only to advance fixings and to certificates or titles attesting them issued . . . before 17 May 1983, with regard to the representative rates for . . . the Italian lira . . . referred to respectively in Annexes . . . and VII to Regulation (EEC) No 1223/83'.

(Article 1 of Regulation No 1244/83; that provision repealed Article 2 (2) of Commission Regulation (EEC) No 1054/78 of 19 May 1978 laying down detailed rules for the application of Regulation (EEC) No 878/77 on the exchange rates to be applied in agriculture and replacing Regulation (EEC) No 937/77 (Official Journal 1978, L 134, p. 40)).

3. On 17 May 1983 at 12.39 p. m. Fratelli Pardini SpA applied to the Ministry of Foreign Trade for an import licence for the importation from non-member countries of 21 000 tonnes of common wheat with advance fixing on the day of the application of both the levy and the monetary compensatory amounts. The application was accompanied by security of LIT 98 280 000 in the form of a guarantee furnished by the Lucca branch of Banca toscana. The monetary compensatory amount applicable at that time was LIT 6 403 per tonne of imported wheat in favour of the importer; that amount would have been deductable

from the amount of the levy payable on importation.

By letter of 20 June 1983 Pardini applied for cancellation of the import licence and release of the security furnished, under the final subparagraph of Article 4 (1) of Regulation No 1134/68 of the Council, on the ground that Commission Regulation No 1245/83 had in effect annulled the advance fixing of monetary compensatory amounts effected on 17 May 1983.

That request was rejected by the Ministry of Foreign Trade by letter of 22 October 1983 on the ground that Article 1 of Commission Regulation No 1244/83 prevented the cancellation of the certificate in question and that, consequently, the security furnished must be forfeited.

In proceedings brought before the Pretore (Magistrate) di Lucca, pursuant to Article 700 of the Codice di Procedura Civile (Code of Civil Procedure) (procedure in cases of urgency), Pardini applied for an order that Banca toscana should not pay the sum of LIT 98 280 000 which was demanded by the aforementioned Ministry by way of forfeiture of the security.

The Pretore di Lucca granted the application by order of 29 October 1985; by the same order he also referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

'1. Must Article 7 (1) of Regulation No 1160/82 (Official Journal 1982, L 134, p. 22) be interpreted as meaning that the adjustment of monetary compensatory amounts fixed in advance may be applied only to amounts so fixed after the actual publication in the *Official Journal of the European Communities* of the new representative rates for national currencies against the ecu (European currency unit)?

2. If the answer to Question 1 is in the negative, may the adjustment of monetary compensatory amounts provided for in Article 7 (1) of Regulation No 1160/82 be applied to amounts fixed in advance before publication in the *Official Journal of the European Communities* of the new representative rates for national currencies, and if so is the date to be adopted for such application:

   (a) the date on which the political intention of the Council to change the representative rate crystallized by virtue of the agreement of all the Member States (in this case, 20 May 1983); or

   (b) the date of the announcement, by means of a notice in the press, of the intention of the Council of Ministers of the EEC to adopt the new representative rate, even though it was acknowledged that a reservation, which was resolved after publication of the notice in the press, had been formulated by a Member State?

3. Must the last paragraph of Article 4 (1) of Regulation No 1134/68 of the Council be interpreted, in the light of the provisions of Regulations Nos 878/77 (Official Journal 1977, L 106) and 1054/78 (Official Journal 1978, L 134) and subsequent amendments, as meaning that the trader concerned may in all cases obtain cancellation of the advance fixing of the levy and of the compensatory amounts, and also of the relevant (import) document or certificate if he submits the appropriate application within the prescribed period and if there

has been a change in the representative rate such as the change made by the Council by means of Regulation No 1223/83 (with reference to Regulation No 878/77), such change being regarded as equivalent to an alteration of the relationship between the parity of the currency of the Member State concerned and the value of the unit of account as referred to in Article 4 of Regulation No 1134/68?

4. If Questions 2 (a) and 3 are answered in the affirmative, must the last indent of Article 1 of Commission Regulation No 1244/83, which amends Article 2 of Regulation No 1054/78 to the effect that the last subparagraph of Article 4 (1) of Regulation No 1134/68 can be applied only to advance fixings carried out before 17 May 1983, be regarded as inapplicable, at least as regards applications for cancellation of certificates in respect of which advance fixing was carried out in Italy between 17 May and 20 May 1983 inclusive, in view of the need to uphold the principle of the protection of legitimate expectations as regards the traders concerned?'

4. The order seeking a preliminary ruling was received at the Court Registry on 14 November 1985.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Fratelli Pardini SpA, represented by Giovanni Maria Ubertazzi and Fausto Capelli, of the Milan Bar, by the Italian Government, represented by Ivo M. Braguglia, avvocato dello Stato, acting as Agent, and by the Commission of the European Communities, represented by its Legal Adviser, Giuliano Marenco, acting as Agent.

Upon hearing the report of the Judge Rapporteur and the views of the Advocate General, the Court decided on 8 May 1987 to assign the case to the Fifth Chamber under Article 95 of the Rules of Procedure and to open the oral procedure without any preparatory inquiry.

II — Written observations

Admissibility of the reference for a preliminary ruling

The Commission expresses doubts regarding the admissibility of the reference to the Court on the ground that the Pretore has asked the Court to give a preliminary ruling whilst at the same time granting the interim measure sought which was the sole object of the proceedings instituted before him. Consequently, the interpretation of Community law cannot be of any use to the Pretore, who did not, moreover, claim that such an interpretation could be useful for the purposes of the interlocutory proceedings, which have been concluded. Instead the Pretore brought the matter before the Court because he considered that such a step could be useful for the purposes of the proceedings on the substance of the case, which have, however, not yet been commenced and must, moreover, be brought before a court or tribunal other than his own.

The first and second questions

The plaintiff in the main proceedings and the Italian Government submit that the reply to the first and second questions should be that the adjustment of monetary compensatory amounts fixed in advance is applicable only in cases where the advance fixing was effected after the date on which the new representative rate was published in the Official Journal. The Commission, on

the other hand, considers that the adjustment may cover all amounts fixed in advance after the substantive Council decision to amend the representative rate.

1. Pardini maintains that monetary compensatory amounts may be adjusted only after new representative rates (green rates) are already actually in force, not merely after they have been the subject of a Council agreement. That follows from Article 7 of Commission Regulation No 1160/82, which provides that monetary compensatory amounts fixed in advance are to be adjusted if a new representative rate 'comes into effect'.

In the instant case since new representative rates came into effect for Italy on 23 May 1983 (Article 2 (1) in conjunction with Annex VII to Regulation No 1223/83) monetary compensatory amounts fixed in advance could not be adjusted prior to that date. Consequently, the adjustment of monetary compensatory amounts ordered on 20 May 1983 in fact had retroactive effect as regards amounts fixed in advance on 17 May 1983.

In that regard Pardini maintains that Article 7 of Regulation No 1160/82 constitutes a derogation from the rule contained in Article 6 of that regulation which provides that the monetary compensatory amount applicable is the one in force on the day on which the application for advance fixing is made. It follows that Article 7 must be interpreted with care, taking account of the precise and restrictive conditions to which it is subject. Article 7 should be interpreted not as meaning that monetary compensatory amounts fixed in advance are to be adjusted from the moment when a new representative rate is agreed by the Council but as meaning that they are to be adjusted when a new representative rate comes into force. The precondition for adjustment is not therefore the Council's decision but the entry into force of the measure in which that decision is expressed in a legally binding manner.

A further factor present in the instant case is the fact that the regulations fixing the new green rates were not approved at the Council's meeting on 16 and 17 May 1983; the Council considered it necessary to adopt them by the written procedure after the final formulation of the text. Furthermore, the so-called agreement of 17 May 1983 was approved by Italy solely 'subject to confirmation'. Since Italy's reservations were withdrawn on 20 May 1983 the formal decision must be regarded, from a political point of view, as having been adopted on that date.

Pardini also points out that Article 191 of the EEC Treaty provides that a precondition for the entry into force of a regulation is that it be published in the *Official Journal of the European Communities.* That means that even if the Council's decision had been definitively approved by all the Member States it was not possible to amend the representative rates or adjust the monetary compensatory amounts prior to the date of publication.

Article 7 of Regulation No 1160/82 cannot be interpreted, in Pardini's view, as a derogation from Article 6 of that regulation in cases where Community operators had notice of amendments in agricultural conversion rates. That is confirmed by the fact that it was only in Regulation No 3152/85 of 11 November 1985 laying down detailed rules for the application of Regulation (EEC) No 1676/85 on the value of the unit of account and the conversion rates to be applied for the purposes of the common agricultural policy (Official Journal 1985, L 310, p. 1) that the Commission dealt for the first time with the

problem of speculation which might occur between the date of the political agreement on an agro-monetary matter and the date of publication in the Official Journal of the rules formally adopted.

Finally, Pardini points out that the statement of the reasons upon which the Commission's regulations of 20 May 1983 are based contains no reference to the danger of speculation and that Article 190 of the EEC Treaty is thereby infringed. The regulations are also contrary to the principle of proportionality since they are intended to avoid a risk rather than deal with an existing problem.

2. The Italian Government refers first of all to the fact that under Article 6 (1) of Regulation No 1160/82 monetary compensatory amounts fixed in advance are not affected by changes occurring during the period of validity of the import licence or certificate. There is, however, one exception to that rule, which is intended to protect the legitimate expectations of traders. Under Article 7 (1) of the regulation monetary compensatory amounts fixed in advance are to be adjusted if a new representative rate, decided on before the application for advance fixing was lodged, comes into effect.

In the light of the principle of the protection of legitimate expectations and the requirements of legal certainty, Article 7 (1) should be interpreted as meaning that adjustment applies only to monetary compensatory amounts fixed in advance after the entry into force of the new representative rate. It follows in the instant case that the adjustment cannot apply to monetary compensatory amounts fixed in advance on 17 May 1983 since the new representative rate did not enter into force until 23 May.

In any event, even on the basis that adjustment is subject solely to the condition that the new representative rate was decided on prior to the lodging of the application for advance fixing — even if it enters into force later — adjustment was nevertheless not possible in the instant case since the Council's decision to alter the representative rates was made on the same day (17 May 1983) as the trader concerned lodged its application.

In conclusion, the Italian Government considers that the reply to the first question should be in the affirmative, with the result that the second question is rendered superfluous. In the alternative, it maintains that the adjustment of monetary compensatory amounts is not lawful under Article 7 (1) of Regulation No 1160/82 unless the decision altering the representative rates was taken before the application for advance fixing was lodged, even if it entered into force after that date. Consequently, the Commission could not lawfully reduce the monetary compensatory amounts for Italy to zero before 23 May 1983, the date on which Regulation No 1123/83 amending the representative rates entered into force. In any event, the reduction could not apply to applications for advance fixing lodged on 17 May 1983, the date on which the decision to alter the rates was taken.

3. The Commission considers that the first and second questions seek to ascertain whether the expression 'decided on' in Article 7 (1) of Regulation No 1160/82 refers to the publication in the Official Journal of the regulation fixing new representative rates or merely to the 'substantive' decision of the Council which has not yet been formalized in the form of a regulation.

It takes the view that the second interpretation must be upheld. The purpose of the rules dealing with the matter at issue is to

prevent traders from benefiting from advance fixing on the basis of the old amounts once they can no longer have any reasonable doubts regarding the imminent entry into force of new amounts and the level of those amounts. If advance fixing in those circumstance were permitted a large number of applications would be lodged in respect of transactions effected without any risk, at the expense of the European Agricultural Guidance and Guarantee Fund.

In that connection the Commission states that a certain amount of time necessarily elapses between the Council's 'substantive' decision and the adoption, publication and entry into force of the regulation giving formal effect to that decision. The substantive decision immediately becomes known to traders who are aware of the outcome of Council meetings through the media and their trade organizations. Since the advance fixing of monetary compensatory amounts makes it possible to secure entitlement to the amount applicable on the day on which the application is lodged, traders could be tempted to lodge applications for advance fixing immediately and thereby benefit from the delay between the substantive decision and its formal entry into force.

In such circumstances it is not contrary to the principle of the protection of legitimate expectations to prevent monetary compensatory amounts from being fixed in advance at the more favourable rate currently in force, pending the entry into force of the newly adapted decisions.

In conclusion, the Commission proposes that the reply to the first and second questions should be as follows:

'Article 7 (1) of Regulation (EEC) No 1160/82 must be interpreted as meaning that the adjustment of monetary compensatory amounts fixed in advance applies to applications for advance fixing made after the Council has taken the substantive decision to alter the representative rate, regardless of any reservation on the part of the delegation of a Member State that its approval is "subject to confirmation" '.

The third and fourth questions

The plaintiff in the main proceedings and the Italian Government submit that the reply to the third and fourth questions should be that advance fixing carried out between 17 May and 20 May 1983 may be cancelled upon application within the prescribed period, so that the provisions of Regulation No 1244/83 which provide to the contrary are inapplicable. The Commission, on the other hand, considers that such advance fixing cannot be cancelled and that the fact that it cannot be cancelled is compatible with the principle of the protection of legitimate expectations.

1. Pardini points out that in so far as the levy or the refund and the monetary compensatory amounts are adjusted in the light of new representative rates, traders for whom the terms of a transaction have changed are able to cancel it under the final subparagraph of Article 4 (1) of Regulation No 1134/68. That provision is contained in a measure adopted by the Council and therefore occupies a higher position in the hierarchy of sources of Community law than legislative measures adopted by the Commission.

The cancellation of the transaction provides a remedy in the event of monetary changes so as to avoid any prejudice to persons who have obtained advance fixing. Article 4 (1) therefore operates to the benefit of all traders who would otherwise be prejudiced by monetary fluctuations. It must apply from the time when the new rates or new parities enter into force.

By deciding, in Regulation No 1244/83, that only certificates issued before 17 May 1983 could be cancelled, the Commission reduced the scope of application of the final subparagraph of Article 4 (1) of Regulation No 1134/68 and deprived traders of a right conferred on them by a Council measure. Regulation No 1244/83 is therefore invalid because it infringes a fundamental principle of the Community legal order.

Regulation No 1244/83 is also invalid on the ground that it fails to provide a sufficient statement of the reasons upon which it is based since it contains no justification in support of a provision which is contrary to the superior legislative provisions laid down by the Council. An adequate statement of such reasons appears all the more necessary in this case inasmuch as it concerns the loss of a right based on the principle of the protection of legitimate expectations.

In addition, it follows by analogy with Article 1 (2) of Regulation No 3152/85, cited above, that the press release must be published in the *Official Journal of the European Communities* in order to have legal effect. Pardini was therefore entitled to apply for cancellation of the import licence since on 17 May 1983 the press release had not yet been published in the Official Journal.

Finally, the Commission's regulations infringe the principle of proportionality since a trader who applies for cancellation of the advance fixing is without doubt a trader who was unaware of the possibility of an alteration of the amounts at the time he applied for advance fixing. He cannot therefore be accused of having a speculative purpose in applying for cancellation.

In conclusion, Pardini considers that Regulation No 1244/83 is invalid in so far as it excludes the application of the final subparagraph of Article 4 (1) of Regulation No 1134/68 to advance fixing certificates issued before 17 May 1983. It must be possible to apply for cancellation in respect of all advance fixing certificates issued before the date of publication in the *Official Journal of the European Communities* of the changes in the representative rates on 23 May 1983.

2. The Italian Government observes that by virtue of the rule laid down in Article 4 (1) of Regulation No 1134/68 of the Council the person concerned is entitled to have the advance fixing cancelled and his security returned to him if the monetary adjustment affects the transaction in question. That provision gives effect to the principle of the protection of legitimate expectations. Nevertheless, the final subparagraph of Article 1 of Commission Regulation No 1244/83 limits the possibility of cancellation in this case to certificates or titles issued before 17 May 1983.

The legality of the provision appears doubtful to the Italian Government. The following alternatives appear inescapable: either (a) the adjustment of the monetary compensatory amounts has no effect on the amount fixed in advance under the application of 17 May 1983, in which case the import transaction should have remained unaffected by subsequent changes as regards the monetary compensatory amount fixed in advance; or (b) the adjustment also relates to the amount fixed in advance of the application of 17 May 1983, in which case it does not seem possible to deny the right to have the advance fixing and the certificate cancelled and the security returned in accordance with Article 4 (1) of Regulation No 1134/68.

3. The Commission states that the third and fourth questions seek to ascertain in substance whether the legal provisions which make it possible to apply for the cancellation of import certificates following

an alteration of the representative rates are contrary to the principle of the protection of legitimate expectations in so far as they must be interpreted as meaning that cancellation cannot be obtained in the instant case.

Article 4 (1) of Regulation No 1134/68 concerns alterations in the relationship between the parity of a currency of a Member State and the value of the unit of account. It provides for the adjustment solely of amounts fixed in units of account and expressed in national currency (levies, refunds). It does not, on the other hand, relate to monetary compensatory amounts, which are fixed not in units of account but directly in national currency.

Council Regulation No 1223/83 placed restrictions on Article 4 of Regulation No 1134/68 and made it possible to derogate from that provision. The more limited possibility of obtaining cancellation is explained by the fact that an alteration in the representative rates is not an unexpected event in the same way that an alteration in the relationship between the parity of a currency and the unit of account is. Furthermore, Regulation No 1223/83, by referring to Regulation No 1134/68, allows for cancellation following an alteration solely of amounts fixed in units of account and not of monetary compensatory amounts as well, which are fixed in national currency. It follows that neither Regulation No 1134/68 nor Regulation No 1223/83 concerns the position of the plaintiff in the main proceedings.

The difference in treatment between levies and refunds on the one hand and monetary compensatory amounts on the other is one of form and not of substance.

In the instant case monetary compensatory amounts fixed in advance were altered by the Commission with effect from 17 May 1983 in view of the fact that from that date traders were aware that new amounts would enter into force in the course of a few days.

On the other hand, levies and refunds fixed in advance were altered by the Member States, and traders were unable to obtain cancellation of advance fixing and of licences unless they had been applied for before 17 May 1983, that is to say before the alteration of the amount in question was foreseeable.

In conclusion, the Commission proposes that the reply to the third and fourth questions should be as follows:

'Neither Regulation (EEC) No 1134/68 nor Regulation (EEC) No 1223/83 provides for the possibility of cancelling an import licence following the alteration of monetary compensatory amounts fixed in advance. The absence of such a possibility is not contrary to the principle of the protection of legitimate expectations'.

III — Replies to the questions put by the Court

The summary procedure in cases of urgency under Article 700 of the Codice di Procedura Civile

The Italian Government observes that where the substance of the case is not yet pending (*ante causam*) the Pretore may order the necessary measures either immediately (*ex parte*) by a decree (decreto) or by an order (ordinanza) after having summoned the interested parties. In the former situation, which is that of the instant case, the Pretore must set a date for a hearing; at that hearing he may, by an order (ordinanza), confirm, vary or discharge the measures

previously ordered (Article 670 of the Codice di Procedura Civile). In such a case, the summary procedure must be regarded as terminated once the Pretore has set a date for a hearing at which all the parties are to appear and once, at that hearing, he has, by order, confirmed, varied or discharged the measure previously ordered.

The instant case is, however, a special one in that, contrary to the rules of procedure, the Pretore ordered an interim measure *ex parte* but failed to set a date for a hearing. In such a case, according to the case-law of the Corte Suprema di Cassazione (Supreme Court of Cassation), the summary procedure cannot be regarded as terminated since the Pretore has the power to summon the parties at any time — as long as proceedings on the substance of the case have not been instituted — for the purpose of confirming, varying or discharging the interim measure.

Both the courts and legal literature are in agreement that interim measures ordered under Article 700 of the Codice di Procedura Civile cannot be challenged since they are not in the nature of decisions but are precautionary measures which have no further *raison d'être* once judgment has been given on the substance of the case.

On the other hand, the courts and academic writers accept that an interim measure ordered by the Pretore may be varied or discharged by him as long as the proceedings on the substance of the case have not been instituted. Interim measures are ordered *rebus sic stantibus* and must therefore be capable of being varied or discharged, even by the Pretore, if there is a change in the factual or legal circumstances.

The Italian Government adds that when the Pretore who has ordered an interim measure has no jurisdiction to hear the merits of the case he must in any event set a mandatory period within which the substantive proceedings must be instituted. An interim measure ordered *ante causam* ceases to be effective if the substantive proceedings are not instituted within the period laid down or if those proceedings, although instituted within the period laid down, lapse before judgment.

The Court's jurisdiction to reply to the questions referred to it for a preliminary ruling

1. Pardini maintains that the precautionary measure ordered by the Pretore *ante causam* and *ex parte* may be discharged or varied solely by the same judge, at least until the substantive proceedings have been commenced; in addition, according to one line of cases the Pretore may even discharge the interim measure after the substantive proceedings have been commenced as long as the court hearing the merits has not given a collegiate judgment on the whole of the case.

In those circumstances it is possible to take the view that the interpretation requested is necessary for the subsequent examination of the position and the possible withdrawal of the measure ordered.

What is more, the expression 'court or tribunal' within the meaning of Article 177 of the EEC Treaty may be regarded as going beyond the specific courts seised of the proceedings and referring to the courts as a whole, that is to say all the courts amongst which, in each case, the various functions which lead up to a ruling on the merits are distributed. Consequently, not only the court or tribunal hearing the substance of the case is empowered to request a ruling from the Court of Justice

under Article 177 but also a judge who makes preparatory enquiries and hears evidence (the examining judge) or who anticipates certain consequences by means of precautionary measures.

It follows that in the instant case the Pretore may at any time, of his own motion or on application by the party concerned, vary or discharge his order in the light of the preliminary ruling given by the Court. The Pretore is also entitled to seek the assistance of the Court so that the court or tribunal hearing the substance of the case has available to it in advance all means of interpretation.

2. The Italian Government considers that the Pretore, Lucca, who has not yet set a date for a hearing, may do so, in order to make an order varying or discharging the measure previously ordered, at any time until the substantive proceedings are commenced.

With regard to that possibility, it cannot be denied that the preliminary ruling sought from the Court may be of assistance to the Pretore in giving 'his' decision confirming, varying or discharging the interim measure ordered. It follows that the reference to the Court for a preliminary ruling must be regarded as admissible and that the Court has jurisdiction to hear and rule on it.

The advance fixing mechanism

(a) *The scope of Regulation No 1134/68 in comparison with that of Regulation No 1160/82*

1. The Italian Government takes the view that the scope of Regulation No 1134/68 of the Council of 30 July 1968 and that of Commission Regulation No 1160/82 of 14 May 1982 are analogous as regards adjustment in the event of monetary fluctuations.

Article 1 of Council Regulation No 878/77 of 26 April 1977 on the exchange rates to be applied in agriculture (Official Journal 1977, L 106, p. 27), which concerns transactions within the framework of the common agricultural policy, replaced the official parities of the various currencies with representative rates ('green rates'); Article 4 (1) provides that the provisions of Regulation No 1134/68 are to apply. Article 4 (2) provides that the second subparagraph of Article 4 (1) of Regulation No 1134/68 is to apply 'only if the application of the new representative rates is disadvantageous to the party concerned'.

Commission Regulation No 1160/82 of 14 May 1982 provides that the representative rate is one of the components of a monetary compensatory amount (Article 1 (2) (b)) and that monetary compensatory amounts fixed in advance are to be adjusted 'if a new representative rate . . . comes into effect' (Article 7 (1)). Where, therefore, the adjustment of monetary compensatory amounts fixed in advance is disadvantageous to a trader the second subparagraph of Article 4 (1) of Regulation No 1134/68, concerning the cancellation of advance fixing and of the relevant certificate or document, is applicable by virtue of Article 4 (2) of Regulation No 878/77.

2. The Commission states that Article 4 of Regulation No 1134/68 concerns possible alterations in the relationship between the parity of the currency of a Member State and the value of the unit of account. In its view, Article 7 (1) of Regulation No 1160/82 concerns the possible entry into force of a new representative rate ('green currency').

The essential difference between the two provisions is that Article 4 of Regulation No 1134/68 provides for the adjustment of amounts fixed in units of account, that is to say of amounts fixed in ecus in Community regulations. Article 7 (1) of Regulation No 1160/82 provides, on the other hand, for the adjustment of monetary compensatory amounts, which in Community regulations are fixed not in ecus but directly in national currencies.

(b) *The scope of Regulation No 1244/83 in comparison with that of Article 4 of Regulation No 1223/83*

1. The Italian Government considers that Commission Regulation No 1244/83 of 20 May 1983 seems to be intended to implement Article 4 of Council Regulation No 1223/83 of 20 May 1983.

Nevertheless, in the case of advance fixing of monetary compensatory amounts, cancellation of the fixing and the relevant certificate or document is subject to the requirement that the trader is placed at a disadvantage.

In that light it appears that there was no legal basis whatsoever empowering the Commission, in a general and abstract manner, to make the final subparagraph of Article 4 (1) of Regulation No 1134/68 inapplicable to advance fixings and certificates and documents attesting them issued, in the case of Italy, before 17 May 1983, as the Commission did, however, in Regulation No 1244/83. It should instead have assessed each case individually in order to ascertain whether the adjustment of monetary compensatory amounts fixed in advance was disadvantageous to the trader concerned, in accordance with Article 4 (2) of Council Regulation No 1223/83.

2. The Commission confirms that Regulation No 1244/83 is in fact intended to implement Article 4 of Council Regulation No 1223/83.

The legal basis for Regulation No 1244/83 is Article 6 of Regulation No 1223/83. The reference in the second citation in the preamble to Regulation No 1244/83 to Article 5 of Regulation No 1223/83 (and not to Article 6) is incorrect.

(c) *The possibility of cancelling advance fixings of monetary compensatory amounts*

1. In the opinion of the Italian Government it follows from the arguments set out above that advance fixings of monetary compensatory amounts may be cancelled in the event of an alteration of the representative rates. Moreover, the second subparagraph of Article 2 (1) of Regulation No 1160/82 provides that the monetary compensatory amount may be fixed in advance only if the levy or refund is fixed in advance.

It follows that once the levy and the monetary compensatory amount have been fixed in advance they must be dealt with together. Consequently, the possibility of cancelling one (namely the levy) automatically entails the possibility of cancelling the other (namely the monetary compensatory amount) where the requirements are satisfied.

It would, moreover, be illogical in the light of Article 4 (2) of Regulation No 1223/83 to refuse cancellation of advance fixings of monetary compensatory amounts since it is precisely alterations in the representative rates (which are a component of monetary compensatory amounts) which lead to the 'disadvantageous' consequences, the existence of which is a precondition for cancellation and which Article 4 (2) is intended to avoid.

2. The Commission points out that traders' expectations that representative rates will be maintained is taken into account in the same manner as regards the advance fixing of both levies and refunds on the one hand and of monetary compensatory amounts on the other. The difference relates solely to the mechanisms used and is due to the fact that levies and refunds are fixed in units of account whereas monetary compensatory amounts are fixed directly in national currency.

In the case of monetary compensatory amounts fixed in advance in national currency, the adjustment effected by the Commission after an alteration in the representative rates is subject to a temporal limitation so as to take account of traders' expectations. In so far as those expectations must be respected the amounts are not adjusted and, consequently there is no damage. It is therefore unnecessary to provide for the possibility of cancelling advance fixings.

In the case of levies and refunds, on the other hand, the adjustment effected by the Member States is automatic and takes no account of traders' expectations. It is therefore necessary to provide for the possibility of cancellation. It must nevertheless be made clear that the difference described above does not apply where the levy or refund is fixed in advance at the same time as the monetary compensatory amount.

The Commission adds that, in relation both to levies and refunds and to monetary compensatory amounts, traders' expectations that representative rates would be maintained were safeguarded in respect of applications for advance fixing lodged by 16 May 1983 at the latest. As regards applications lodged after that date traders were taken to be aware already of the new representative rates. Monetary compensatory amounts fixed directly in national currency by the Commission were consequently adjusted immediately, but solely as from 17 May 1983. As regards levies and refunds expressed in ecus and converted into national currency by the Member States, the Commission merely prescribed a time-limit (16 May 1983 at the latest); applications for advance fixing lodged after that date could not be cancelled.

U. Everling
Judge-Rapporteur