OPINION OF ADVOCATE GENERAL DÁMASO RUIZ-JARABO COLOMER
delivered on 6 April 1995 *

1. In the present case the Tribunale di Piacenza has referred to the Court of Justice, pursuant to Article 177 of the EC Treaty, a question concerning the interpretation and, if appropriate, the validity of Article 1 of Council Regulation (EEC) 668/93 of 17 March 1993 on the introduction of a limit to the granting of production aid for processed tomato products. [1]

The facts

2. The question referred by the Tribunale di Piacenza has arisen in a dispute between SCAC Srl ('SCAC') and the Associazione dei Produttori Ortofrutticoli ('ASIPO') in which SCAC has alleged that ASIPO failed to perform a contract between them under which ASIPO undertook to supply to SCAC for the 1993/94 marketing year a total quantity of fresh tomatoes for processing into 'other products' (products made from tomatoes, other than tomato concentrate and preserved whole peeled tomatoes), equivalent to the average of the quantities of 'other products' processed by SCAC during the 1990/91 and 1991/92 marketing years.

Circular No E-318 of the Italian Ministry of Agriculture of 25 March 1993, which distributed among the various processors the fresh tomato quota for the 1993/94 marketing year allocated to Italy by Regulation No 668/93, allotted to SCAC the following quantities of tomatoes eligible for production aid: 11.9 tonnes for 'peeled tomatoes', 3 501.7 tonnes for 'concentrate' and 2 954 tonnes for 'other products'. The latter quantity was 622 400 kg less than that stipulated in the contract and therefore SCAC included a clause in the contract setting out its view that, having been penalized by the machinery for allocating quotas under Regulation No 668/93, it was entitled to production aid for the additional 622 400 kg of fresh tomatoes intended for 'other products', pending the ruling of the Court of Justice on the substance of the case.

In performing the contract, ASIPO supplied to SCAC only the 2 954 tonnes of fresh tomatoes allocated to it by the ministerial

* Original language: Spanish.
1 — OJ 1993 L 72, p. 1.

Circular for the preparation of 'other products'. The refusal to deliver the remaining 622 400 kg of tomatoes was based on the fact that there was uncertainty as to the price guarantee for them in the light of the Community legislation.

3. In view of this partial non-performance of the contract, SCAC brought an action before the Tribunale di Piacenza seeking full performance of the contract for the supply of tomatoes by ASIPO. The Italian court allowed the plaintiff's claims, ordered ASIPO provisionally to deliver the 622 400 kg of tomatoes and referred the following two questions to the Court of Justice:

1. Must Article 1(2) of Council Regulation No 668/93 be interpreted as meaning that when a tomato-processing undertaking to which a certain quota for the production of peeled tomatoes had been allocated transfers 25% of the fresh tomatoes from the 'peeled tomatoes' quota to the 'concentrate' or 'other products' quota, such a transfer affects subsequent marketing years, thus entailing that each undertaking is allocated the quota of fresh tomatoes intended for 'peeled tomatoes' which it received in the preceding marketing year, increased however by a quota of fresh tomatoes intended for 'concentrate' or 'other products' in proportion to the percentage of fresh tomatoes actually processed into 'concentrate' or 'other products' under the abovementioned transfer of 25% carried out during the preceding marketing year, and involving a corresponding decrease in the percentage quotas of fresh tomatoes (intended for 'concentrate' or 'other products') allocated to the other processing undertakings?

2. If the preceding question is answered in the affirmative, regard being had to the judgment of the Court of Justice in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik* and to the fact that serious doubts must be entertained as to the validity of Article 1(2) of Council Regulation No 668/93 of 17 March 1993, and that the plaintiff appears to be under threat of serious and irreparable harm, is Article 1(2) of that regulation, providing for a progressive increase in the processing quota for fresh tomatoes allocated to the undertaking producing 'peeled tomatoes' to the detriment of undertakings producing 'concentrate' or 'other products' under the machinery described in the preceding question, unlawful on the ground that it infringes the principle of non-discrimination recognized in the Community legal order and, in particular, Article 40(3) of the EEC Treaty?

4. Before replying to those questions, in which the Tribunale di Piacenza proposes an interpretation of Article 1(2) of Regulation

No 668/93 which leads it to question the validity of that provision on the ground that it may infringe Article 40(3) of the EEC Treaty, it is necessary to set out the legislative context of the provision at issue.

Community legislation

5. The basic measure in this area is Council Regulation (EEC) No 426/86 of 24 February 1986 on the common organization of the market in products processed from fruit and vegetables. [2] This common market organization aims to ensure Community preference for certain products processed from fruit and vegetables which are of particular importance in the Mediterranean regions of the Community, as producer prices are considerably higher than those of non-member countries.

6. To attain this objective, the common market organization lays down a uniform system for trade with non-member countries on the basis of fixing a minimum import price and of applying customs duty and a countervailing charge if the free-at-frontier price of products from non-member countries is lower. In addition, provision is made for the grant of export refunds to enable Community products to have access to world markets.

7. With regard to trade within the Community, the common market organization sets up a system based on fixing a minimum price payable by processors to producers which is determined taking into account the basic prices for fruit and vegetables for consumption as fresh and the need to maintain a sufficient balance between the various uses for fresh products. Since that minimum price is high and would make Community products uncompetitive, Article 2 of Regulation No 426/86 establishes a system of production aid which permits undertakings to manufacture products processed from fruit and vegetables at a price lower than that which would result from the payment of a remunerative price to producers of the fresh products.

Given the Community production potential for certain fruit and vegetables, Article 2(3) of Regulation No 426/86 envisages the possibility that the Council will take appropriate measures to avoid a major imbalance between the supply and the demand for processed products, in particular, by limiting production eligible for production aid. Furthermore, Article 3 of Regulation No 426/86 ties the grant of production aid to the conclusion of contracts between processors and producers of fruit and vegetables.

2 — OJ 1986 L 49, p. 1.

8. The provisions concerning production aid in the basic regulation on the common market organization were amplified by Commission Regulation (EEC) No 1558/91 of 7 June 1991 laying down detailed rules for the application of the system of production aid for products processed from fruit and vegetables. [3] This measure regulates mainly the administrative procedure applying to production aids, in which emphasis is placed on the need for tomato processors to conclude a 'preliminary contract' with producers before planting begins and, later, a 'processing contract' which must give the particulars of both parties, the quantities of fresh tomatoes purchased, the schedule for deliveries and the price paid, as well as the finished products to be obtained from the fresh tomatoes.

9. Finally, the last provision on the restriction on production aid laid down by Article 2(3) of Regulation No 426/86 in relation to products processed from tomatoes is contained in Regulation No 668/93, as supplemented by Regulation (EEC) 1794/93. [4] Article 1(1) of Regulation No 668/93, which is applicable from the 1993/94 marketing year, allocates to each Member State a maximum quantity of fresh tomatoes eligible for production aid, which is broken down according to the processed products to be obtained from them. Italy was allocated 1 655 000 tonnes for 'tomato concentrate', 1 185 000 tonnes for 'tinned whole peeled tomatoes' and 453 998 tonnes for 'other tomato products'.

Article 1(2) of Regulation No 668/93 provides that each Member State must divide its quota 'between the processing undertakings in proportion to the average quantities actually produced by each of them during the three marketing years preceding the marketing year for which the aid is fixed'. However, in order to make this rigid system of allocating fresh tomato quotas to undertakings by reference to the processed product somewhat more flexible, the final subparagraph of Article 1(2) of Regulation No 668/93 provides as follows:

'On application by the undertakings concerned, the competent authorities of the Member State shall authorize one only of the following transfer possibilities:

— a transfer of up to 25% of quantities of peeled tomatoes, expressed in quantities of fresh tomatoes, to the quantities allocated for tomato concentrate and other tomato products,

3 — OJ 1991 L 144, p. 31.

4 — Commission Regulation (EEC) 1794/93 laying down detailed rules for the application of production aid for processed tomato products (OJ 1993 L 163, p. 23)

— a transfer of up to 5% of quantities of tomato concentrate, expressed in quantities of fresh tomatoes, to the quantities allocated for the other products,

— a transfer of up to 5% of the quantities of other tomato products, expressed in quantities of fresh tomatoes, to the quantities allocated for concentrate'.

Question 1

10. The first question from the Tribunale di Piacenza refers to the proper interpretation of Article 1(2) of Regulation No 668/93, which requires each Member State to divide between the processing undertakings the quota of fresh tomatoes allocated to it by that regulation which are eligible for production aid. In addition, that provision allows undertakings, after obtaining authorization from the competent authorities of the Member State, to make a transfer of fresh tomatoes between the quantities forming its quota. However, the possibilities of transfer of quantities are limited in that an undertaking may transfer up to 25% of its 'whole peeled tomatoes' to 'tomato concentrate' and 'other products', and 5% of 'tomato concentrate' to 'other products' and vice versa. But no transfers of quantities are permitted from 'tomato concentrate' and 'other products' to 'whole peeled tomatoes'. The question refers precisely to the interpretation of this transfer machinery between the different quantities within the quota allocated to each undertaking.

11. According to the plaintiff in the main action, the transfer system favours undertakings producing peeled tomatoes to the disadvantage of those producing tomato concentrate or other products. In the plaintiff's opinion, if an undertaking transfers 25% of its quantity of 'peeled tomatoes' to 'tomato concentrate' or 'other products', the transfer will affect the following marketing years in such a way that the undertaking will retain the same quantity of peeled tomatoes increased by a quantity of tomato concentrate or other products proportional to the quantities of fresh tomatoes actually processed into concentrate or into other products, including the quantities transferred. Consequently, SCAC contends that producers of peeled tomatoes will retain their quotas of peeled tomatoes and can progressively gain quotas of concentrate and other products at the expense of undertakings processing those two types of product, whose quotas will be progressively reduced.

12. This interpretation of the transfer machinery provided for in Article 1(2) of Regulation No 668/93, which the national court has taken as a basis for the reference, must be rejected.

Firstly, it is technically possible to make transfers of quantities only from 'peeled tomatoes' to 'tomato concentrate' or 'other products', and not vice versa. Fresh tomatoes used for producing tinned peeled tomatoes must be of good quality and in a perfect state of preservation, so that they are also suitable for making tomato concentrate and other products. However, tomatoes used for the production of concentrate and other products may be of lower quality and do not need to be in a perfect state of preservation, so that they cannot be used for processing into peeled tomatoes. Thus the possibility of transferring quantities from 'peeled tomatoes' to the other two serves to introduce a degree of flexibility into the rigid quota system of the common market organization so as to enable undertakings buying high-quality tomatoes which subsequently deteriorate for some reason to use them for tomato concentrate or other products. To this end Article 6(5) of Regulation No 1558/91 provides that, when tomatoes have deteriorated after being taken over by processors, the competent authorities may allow the latter to use the tomatoes for processing into a product different from that stipulated in the processing contract.

Secondly, under Article 1(2) of Regulation No 668/93, the Member States are to divide their quota and the three quantities of which it consists among processing undertakings 'in proportion to the average quantities actually produced by each of them'. This means that if an undertaking transfers within its quota 25% of the quantity for 'peeled tomatoes' to the other two quantities, in the following marketing year its quantity of peeled tomatoes will depend on those actually produced and it will not retain the quantity for the previous year. An undertaking cannot keep intact the quantity from which it has made a transfer and, at the same time, increase the quantity to which the transfer is made. As the Commission points out in its observations, the quota system does not entail the creation of acquired rights in favour of any undertaking.

Finally, the average quantities of processed tomato products actually produced by each undertaking during the three preceding marketing years, which is the criterion to be used by the Member States for allocating quotas to undertakings, comprise an undertaking's total production, both that which qualified for production aid and that which did not. All undertakings are free to produce the quantity of processed tomato products which they deem appropriate, but production aid will be paid only for those covered by the relevant quantities within its quota. Nevertheless, production in excess of the quota is also taken into account by the Member State for the purpose of dividing the quota among undertakings.

13. Therefore the reply to the first question from the Tribunale di Piacenza must be in the negative because the transfer of fresh

tomatoes from the quantity for peeled tomatoes to the quantities for concentrate or other products does not alter the criterion for the allocation of quotas and quantities to undertakings in the following marketing year, which will be effected by reference to the quantity of tomatoes actually processed by each undertaking into the different tomato products.

Question 2

14. As the reply to the first question is in the negative, it is not in principle strictly necessary to reply to the second question from the Tribunale di Piacenza. However, I think it may be useful for the national court, when determining the main action, to know whether Article 1(2) of Regulation No 668/93, as interpreted above, results in any kind of discrimination which would render it incompatible with Article 40(3) of the EEC Treaty.

15. In this connection the Court has consistently held that the principle of non-discrimination between producers or consumers within the Community laid down by Article 40(3) of the Treaty is a specific expression, within the ambit of agricultural policy, of the general principle of equal treatment which is one of the fundamental principles of Community law. This principle requires comparable situations not to be treated differently and different situations not to be treated as equal, unless such treatment is objectively justified. [5] Furthermore, the Court has stated that 'it must be said that the fact that a measure adopted within the framework of the common organization of the market may affect producers in different ways, depending on the particular nature of their production ... cannot be regarded as discrimination if the measure is based on objective rules formulated to meet the needs of the overall functioning of the common organization of the market'. [6]

16. The limitation of production aid for processed tomato products by means of a quota system is entirely compatible with Article 40(3) of the Treaty, as was the system of guarantee thresholds previously applied as a means of stabilizing production in this common market organization, [7] because both seek to maintain a balance between supply and demand, which is one of the objectives of the common agricultural policy as laid down by Article 39(1)(c) of the Treaty.

17. The machinery for transfers between the different quantities within the quotas

5 — See Joined Cases C-267/88 and C-285/88 *Wuidart* [1990] ECR I-435; Case C-311/90 *Hierl* ECR I-2061; and Case C-309/89 *Codorniu* v *Council* ECR I-1853.

6 — See *Hierl*, paragraph 19, and Case 179/84 *Bozzetti* ECR 2301.

7 — See Case C-27/90 *SITPA* ECR I-133.

allocated by the Member States to undertakings permits the transfer of fresh tomatoes from 'peeled tomatoes' to 'tomato concentrate' and 'other products' because such transfer is technically possible and it promotes the output of a high-quality product like peeled tomatoes. This possibility of transfer does not create a disproportionate advantage for producers of peeled tomatoes because their quota will always depend on the quantities actually produced and, if they transfer tomatoes to the quantities for tomato concentrate or other products, they will lose the corresponding proportion of their quota of peeled tomatoes for the next marketing year. Furthermore, any undertaking may produce processed tomato products outside its quota and increase the quota proportionately in any of the three quantities constituting it. However, if there is a shift from fresh tomatoes to 'other products' because that sector is booming, the quantities of tomatoes eligible for production aid will decrease unless the Community institutions increase the national quota.

18. It follows that the transfer machinery provided for by Article 1(2) of Regulation No 668/93 does not give rise to unjustified discrimination between different undertakings and there is therefore nothing to cast doubt on its validity.

Conclusion

19. On the basis of the foregoing, I propose that Court reply as follows to the questions from the Tribunale di Piacenza:

Article 1(2) of Council Regulation (EEC) No 668/93 of 17 March 1993 on the introduction of a limit to the granting of production aid for processed tomato products must be interpreted as meaning that transfers of fresh tomatoes by processing undertakings from the quota for peeled tomatoes to the quotas for concentrate or other products do not affect the following marketing year in such a way that those undertakings keep intact their quota for peeled tomatoes and at the same time increase their quotas for concentrate or other products in proportion to the transfers effected.

The present case has revealed no factor of such a kind as to affect the validity of Article 1(2) of Regulation No 668/93.