OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 12 July 1990 *

Mr President,
Members of the Court,

1. In the present proceedings the French Republic seeks the annulment pursuant to the first paragraph of Article 173 of the EEC Treaty of a measure adopted by the Commission entitled: 'Internal instructions concerning certain administrative and technical procedures to be followed by officials given powers by the Commission concerning sampling and analysis of products for the purpose of the management and control of the European Agricultural Guidance and Guarantee Fund'. [1]

The Internal instructions in question, according to the French Government, empower Commission officials to carry out inspections (sampling and analysis of products) which are not provided for in the current Community legislation and in any event are not matters within the purview of the Commission.

The origin of the dispute thus relates to the scope of the Community legislation on the verification of expenditure financed by the European Agricultural Guidance and Guarantee Fund ('EAGGF').

2. Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy [2] introduced a system of direct Community financing, in parallel with the introduction of the system of own resources. The Commission makes available to the Member States the necessary credits so that the national agencies may make the requisite payments. It is obvious that the management of the payments in question, made by the Member States on behalf of the Community, may give rise to irregularities and fraud. That possibility is dealt with by Articles 8 and 9 of the abovementioned regulation, which provide for a system of inspections and supervision.

Article 8 imposes on the Member States a general obligation to take the necessary measures to ensure the propriety of the transactions financed by the EAGGF, to prevent and deal with irregularities and to recover any sums lost as a result of irregularities or negligence. It is therefore the duty of the Member States to set up a system of controls over economic agents and the national agencies responsible for payments.

Article 9 deals with the Commission's powers to carry out inspections on the spot in addition to the checks undertaken by the Member States, and to cooperate with the

* Original language: Italian.

1 — OJ 1988 C 264, p. 3.

2 — OJ, English Special Edition 1970 (I), p. 218.

Member States in calling for additional checks to be made (see the eighth recital in the preamble).

In particular, Article 9(1) requires the Member States to make available to the Commission all information required for the proper working of the EAGGF and to take all suitable measures to facilitate the supervision which the Commission may consider it necessary to undertake for the management of Community financing, including inspections on the spot.

Article 9(2) provides for those inspections, prescribing that the officials appointed by the Commission are to have access to the books and all other documents relating to expenditure financed by the EAGGF. In particular they may check:

(a) whether administrative practices are in accordance with the Community rules;

(b) whether the requisite supporting documents exist and tally with the transactions financed by the EAGGF;

(c) the conditions under which transactions financed by the EAGGF are carried out and checked.

Finally, pursuant to Article 9(3), the Council, acting by a qualified majority on a proposal from the Commission, is, as far as necessary, to lay down general rules for the application of Article 9.

3. It is specifically that article which underlies the dispute in this case. Considering that Article 9(1) and (2) confer on its officials the power to act independently to take samples of the products financed by the EAGGF and to analyse them, and following differences in that connection with a number of Member States (in particular France), on 7 January 1987 the Commission set up an interdepartmental working party which prepared the Internal instructions at issue. On 15 September 1988 the EAGGF Committee was given notice of them and about one month later they were published in the C series of the Official Journal.

4. Against that background — further details being set out in the Report for the Hearing — it is to be noted that the applicant claims first and foremost that the measure challenged by it is — in disguised form — really an actual regulation for the implementation of Article 9 of the abovementioned regulation, a measure which the Commission was not empowered to adopt since Article 9(3) expressly entrusts the Council, and only the Council, with the power to adopt general rules for the application of that article. Consequently, according to the applicant, the Commission, in adopting the Internal instructions at issue, exercised powers not available to it under the applicable Community provisions: as a result, the measure is vitiated by a lack of powers and is void.

5. In its defence, the Commission has raised an objection of inadmissibility, contending that the Internal instructions at issue are not a measure which can be challenged under

Article 173 of the Treaty. In the alternative, it asks the Court to dismiss the application.

Admissibility

6. The major part of the present dispute is devoted to consideration of the admissibility of the application. The problem is, of course, to determine whether the disputed Internal instructions can be regarded as a measure against which an action may be brought under Article 173.

It is well known that, under the first paragraph of Article 173, proceedings may be instituted against Council and Commission acts other than recommendations and opinions. The wording used gives the impression that the word 'acts' refers only to the binding measures mentioned in Article 189. And indeed, Articles 173 and 189 form a coherent whole, so that the word 'act' appearing in Article 173 cannot extend the jurisdiction of the Community Court to enable it to examine manifestations of will which do not take the form of regulations, directives or decisions.

However, in principle the classification of measures is a matter for the Court, irrespective of the *nomen iuris* attributed to them. That principle is well established in the law of most of the Member States and has been reiterated on numerous occasions by this Court, particularly in relation to the need to ensure proper judicial protection for private persons. In short, the judicial assessment of an expression of will is based on the substance of the measure in question, its content and the effects which it produces; less important, from that point of view, is the form chosen for it.

7. The Court has frequently been called on to consider the scope of the term 'acts' in Article 173. It is perhaps worth noting that the Court's decisions in that regard have related primarily to the second paragraph of Article 173 (and the second paragraph of Article 33 of the ECSC Treaty) and therefore have been concerned to identify the elements which allow a particular measure adopted by the institutions to be classified as a 'decision' within the meaning of the Treaty.

For example, in Case 54/65,[3] the Court stated that 'a decision must in fact appear as a measure emanating from the competent authority, intended to produce legal effects and constituting the culmination of a procedure within that authority, whereby the latter gives its final ruling in a form from which its nature can be identified'.

It is clear from that statement that, while taking account of the substance of the act, the Court clearly specified the formal elements necessary, or in any event sufficient, for the act in question to be regarded as a measure of a decision-making nature against which proceedings may be instituted.

8. However, the relevant decisions in the context of the EEC Treaty are less attentive to the formal criteria and more concerned to ensure the widest possible protection for persons to whom administrative measures

3 — *Forges de Châtillon* v *High Authority* [1966] ECR 185; similarly, judgment in Joined Cases 23/63, 24/63 and 52/63 *Usines Henricot* v *High Authority* [1963] ECR 217.

are addressed. As early as Joined Cases 8/66 to 11/66,[4] which dealt for the first time — within the ambit of the EEC Treaty — with the problem at issue here, the Court stated that for the purpose of bringing proceedings to challenge measures, it is sufficient if they affect the interests of the person concerned 'by bringing about a distinct change in [his] legal position'. In that regard, the fact that the contested measure was not called a decision and took the form of a provisional measure was not regarded as important, in so far as it was substantively a decision which represented the culmination of a special procedure — and was therefore capable of producing definitive legal effects. Moreover, the Court considered that the fact of deeming a procedural measure to be open to challenge, although rendering the procedure more cumbersome, 'cannot prevail against the guarantees for the protection of individuals laid down by the Treaty, which take precedence over all regulations'.

In Case 60/81,[5] the Court stated in more general terms that 'any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action . . . for a declaration that it is void. However, the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that article' (paragraph 9).

9. Rarer, on the other hand, are the occasions on which the Court has been called on to express its views on the term 'act' within the meaning of the first paragraph of Article 173,[6] a provision which is not limited to decisions, particularly where the contested act is not of individual concern but is general and abstract in its scope. In that connection, I would also refer to the well-known judgment in *AETR*,[7] in which the Court stated that 'the objective of this review is to ensure, as required by Article 164, observance of the law in the interpretation and application of the Treaty. It would be inconsistent with this objective to interpret the conditions under which the action is admissible so restrictively as to limit the availability of this procedure merely to the categories of measures referred to by Article 189. An action for annulment must therefore be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects' (paragraphs 38 to 43).

Of particular importance in this connection, it seems to me, is the expression 'intended to have legal effects', an expression which is used with perhaps less force in the judgment in Case 114/86,[8] where the Court stated that 'an action for annulment may not be brought if the act in question is not intended to have legal effects', but which, in my view, clearly explains the difference between the effects to be attributed to an act which is individual in its scope and one which is of general and abstract application.

4 — *Cimenteries* v *Commission* [1967] ECR 75, particularly at p. 91.

5 — *IBM* v *Commission* [1981] ECR 2639.

6 — In this context, particular importance attaches to the judgments establishing the standing of the European Parliament as a defendant: in Cases 230/81 *Luxembourg* v *European Parliament* [1983] ECR 255, 108/83 *Luxembourg* v *European Parliament* [1984] ECR 1945, 294/83 *'Les Verts'* v *European Parliament* [1986] ECR 1339 and 190/84 *'Les Verts'* v *European Parliament* [1988] ECR 1017. In all these cases, the Court decided that an act of the European Parliament (such as a resolution) can also be the subject of an action where it is intended to produce legal effects *vis-à-vis* third parties.

7 — Case 22/70 *Commission* v *Council* [1971] ECR 276.

8 — *United Kingdom* v *Commission* [1988] ECR 5289.

In short, bearing in mind that the precise terms used in a given context do not necessarily have to carry exactly the same meaning where the facts of the case are different, in so far as it is not possible to draw from them conclusions which are of general application, it follows from the authorities cited above that for the purposes of review by the Court little importance is to be attached to the ostensible form of the measure: what is of overriding importance is the content and effects of the measure. More particularly, there are two conditions which a measure must satisfy for it to be capable of being the subject of an action for annulment:

(a) it must produce legal effects which change the legal situation of the addressees, [9]

(b) and it must be a definitive measure, in particular in so far as an action may not be brought against procedural measures adopted in the course of the procedure leading up to the final measure or against a preparatory measure. [10]

10. The abovementioned decisions of the Court, although without doubt attaching greater importance to the substance than to the form of the measure in question, for the purpose of protecting individuals, have not, it seems to me, given a firm answer to a question which is, to a degree, preparatory in character: namely determination of the extent to which the act is capable of producing legal effects in the presence or absence of a minimum of essential formal requirements, regardless of the fact that, on completion of an examination of the specific content of the measure, it is found to have legal effects and, in particular, harmful effects.

Moreover, in certain cases the Court not only raised the question just referred to but also took account for that purpose of a factor — the powers of the institution concerned — which, strictly speaking, relates not so much to the possibility of contesting a measure as to its lawfulness.

From that point of view, particular importance is to be attached not only to the aforesaid judgment in Case 54/65 but also to a recent order made by the Court on 17 May 1989 [11] in which it treated the fact that the measure was not capable of having legal effects as a ground for the inadmissibility of the application. At issue on that occasion was a telex message from the Commission which gave an interpretation of the Community provisions concerning aid for the production of soya beans and was challenged by the Italian Government: the Court stated that it was 'not capable of producing legal effects' since 'none of the provisions of the aforesaid regulations adopted in this field confers on the Commission the power to adopt decisions on their interpretation; the Commission merely has the possibility, which is always open to it, of expressing an opinion which is not binding on the national authorities'.

11. In view of the foregoing considerations, I believe that it is necessary first to establish — in the abstract, if need be — whether or not the contested 'Internal instructions' are capable of having legal

9 — See Joined Cases 8/66 to 11/66, *supra*; judgment in Case 53/85 *AKZO* v *Commission* [1986] ECR 1965; and Case 114/86, *supra*, paragraph 12.

10 — Case 54/65, *supra*, at p. 195; Case 60/81, *supra*, paragraph 9.

11 — In Case 151/88 *Italian Republic* v *Commission* [1989] ECR 1255.

effects *vis-à-vis* the Member States, before proceeding to analyse their content and deciding whether they have or 'are intended' to have effects, and if so what those effects are.

(a) *The form of the contested measure*

12. The measure with which we are concerned is entitled 'Internal instructions', is described as such in its defence by the institution which adopted it, has no legal basis, does not bear the signature of any Member of the Commission, was published in the C series of the Official Journal, and is apparently addressed solely to the officials of that institution.

It might of course be stated that the arrangements for making it public were excessively — and unusually — formal and solemn for it to rank as an internal measure. It is clear, however, that the Commission is free to adopt such methods as it wishes to publicize a purely internal measure. Furthermore, publication in the Official Journal is not decisive as regards the delimitation of the problem: even if the measure had not been published, we would be confronted by the same questions concerning its nature, as has happened on other occasions (such as in Case 114/86 [12]).

13. That having been said, I would first of all reiterate that internal measures are measures which take effect within the confines of the authority which issued them: either in so far as they govern relations between a superior authority and subordinate departments, or are guidelines to be followed within the institution for the adoption of a definitive measure or, finally, are measures governing the internal organization of the body concerned. They are thus measures which have no importance for the outside world, in particular private persons and the Member States.

Bearing that in mind, I ask myself: is a measure described by the institution which issued it as an internal measure, which satisfies none of the conditions for it to rank as a binding measure, nevertheless binding on third parties or at least enforceable against them where it calls for them to discharge certain obligations? And does a measure like the one at issue in this case, which is without doubt internal as far as its form is concerned, have to be examined with respect to its substance, its purpose and its content, for a decision to be made as to whether proceedings can be brought against it?

I am, inclined to say that it does not. I would not rule out the possibility that a measure of the type at issue here may in any event not be capable of being binding on third parties, regardless of the fact that it may be seen as being intended to create obligations even for those to whom it is not apparently addressed or at least to have an effect on their sphere of interests. All that can be said is that the Commission may think what it likes concerning the sampling of products: whether mistaken or correct, its view is still, as in the case of *Italy* v *Commission*, an interpretation of Article 9 of Regulation No 729/70, expounded to its own officials and not binding on the national authorities and economic agents.

But the fact is that the Internal instructions at issue present no external formal element

12 — *Supra*, paragraph 9.

which, regardless of their content, can lead a third party to conclude that they constitute a measure which can in any way affect his legal position.

14. There is another factor, which the Court did not overlook in the order in *Italy* v *Commission* to which I referred earlier. It is undeniable that Article 9 of Regulation No 729/70 does not confer any powers on the Commission to adopt measures regulating the matters at issue here, in particular inspection procedures, and still less acts binding on the Member States; nor can it adopt measures for the interpretation of the regulation in question which are binding on third parties, as in the case just referred to. And in fact it is significant that there has been much discussion between the parties as to whether the Commission has powers to undertake sampling, but not as to its power to adopt a regulatory measure in that regard, a power which no one has ever supposed — or could reasonably suppose — could be attributed to the Commission.

It follows that, even if it appeared from the content of the contested measure that it was intended in any way to bind third parties, it could not in fact bind them or affect the legal position of Member States or economic agents.

In other words, a Member State cannot be made subject to an obligation or legally affected by a measure which, like the one at issue here, fulfils none of the essential formal requirements of a binding act and, moreover, emanates from an institution which has no powers to adopt binding measures in the area concerned. And that is so without there being any need to establish whether or not sampling by the Commission itself comes within its powers under Article 9 of Regulation No 729/70, since in any event it is not the responsibility of the Commission to adopt binding measures which regulate verification procedures in general terms — at most it may adopt 'internal instructions', which are purely interpretative (it is of no importance whether or not they are correct) and in any case are binding neither on the national authorities nor on private persons.

Having regard to the foregoing, it follows that the contested measure, not being capable of producing legal effects for third parties to whom it does not purport to be addressed, since it does not fulfil essential formal requirements and the institution which adopted it had absolutely no power to do so, cannot be the subject of an action under Article 173 of the Treaty, and therefore that the French Government's application should be declared inadmissible.

15. Any doubts which might arise in that regard — from which I do not claim to be immune — are not insuperable.

In particular, I do not consider that such a solution conflicts with the requirement of providing adequate judicial protection for private persons (and the Member States). The problem can be resolved *ab initio* in so far as the Commission could not in any circumstances or on any basis call for the fulfilment of obligations which, deriving as they do from the measure in question, are non-existent as far as third parties are concerned. Moreover, any refusal on the

part of a Member State to agree to 'independent' sampling by Commission officials could prompt the Commission to take action under Article 169, not for breach of the 'internal instructions' but for breach of Article 9 of Regulation No 729/70: the question whether or not such action would be well founded is immaterial.

On the other hand, the solution proposed is without doubt the one most likely to ensure legal certainty, since it removes the need for private persons and Member States to undertake a laborious examination of all documents and internal measures which might in some way conceal within them a regulation, with the result that even the slightest uncertainty would force them to bring the matter before the Court (in the present case the search was facilitated by publication in the Official Journal). Nor can the basic principle be forgotten: 'The uniform application of Community law is only guaranteed if it is the subject of formal measures taken in the context of the Treaty' [13] — a principle which may be applicable in establishing whether or not the measure can be the subject of an action.

16. It is not as if there is no specific precedent for the view expressed here, in the history of the case-law of the Court: there is the judgment in Case 20/58, [14] concerning service instructions, in particular a letter sent by the High Authority to an auxiliary agency and published in the Official Journal. On that occasion, after stressing that the High Authority had not intended to adopt a decision but simply to 'reaffirm principles which it considered, rightly or wrongly, to follow logically from the basic decision', the Court held that the contested measure 'appears as being a directive of an internal character sent by a superior to services coming under its authority and intended to direct the activity of those services. Therefore if [the contested measure] could give rise to immediate duties, it could do so only on the part of the addressee organization and not of undertakings consuming ferrous scrap'.

17. Furthermore, such a solution should not, in fact, encounter any insuperable obstacle in the case-law of the Court, which tends to favour the possibility of challenging acts which are individual in scope, namely those with clearly identified addressees who can readily be recognized. Indeed, that trend has manifested itself above all in cases in which the application was alleged to be inadmissible on the ground that certain formal conditions had not been satisfied but in which, on the other hand, the decisional nature of the measure in question was not disputed at all. [15]

In the present case, however, the absence of the minimum formal requirements for a binding measure, together with the lack of any powers on the part of the institution concerned to lay down rules in the area concerned by means of a regulatory measure, means *a priori* that the measure cannot have legal effects for third parties: to such an extent that its content, from which

13 — Judgment in Case 74/69 *Hauptzollamt Bremen* v *Krohn* [1970] ECR 451, paragraph 9.

14 — *Phoenix-Rheinrohr* v *High Authority* [1959] ECR 75; on the same date and to the same effect, Joined Cases 32/58 and 33/58 [1959] ECR 127.

15 — Joined Cases 8/66 to 11/66, *supra*. Even more significant in that regard — even though it was given in proceedings concerning the Staff Regulations — is the judgment in Joined Cases 316/82 and 40/83 *Nelly Kohler* v *Court of Auditors* [1984] ECR 641, in which the Court held an action against an oral decision to be admissible.

it is claimed that obligations arise for third parties, becomes legally irrelevant.

18. The fact remains that the Commission's lack of powers, in strict terms, is a defect whose importance is to be assessed in relation to the lawfulness of the measure in question, not the possibility of an action to have it annulled; in procedural terms, the lack of powers is a matter of substance, not of admissibility.

However, whilst I cannot ignore the views expressed by the Court in its aforesaid order in *Italy* v *Commission* and also earlier in the judgment in Case 54/65, I consider that, in a case as extreme as this one, a lack of powers may be of some importance in relation to admissibility itself — an approach also adopted in certain French and Italian cases in the field of administrative law. In addition, in the present case the lack of powers is not the only important aspect but is accompanied by a total absence of the formal requirements which must be fulfilled if a measure is to have effects for third parties; in other words, the lack of powers is not a decisive factor and the analysis as to whether the measure is capable of producing legal effects *vis-à-vis* third parties may well disregard it. In that connection, particular importance attaches to the fact that the measure has no apparent addressees other than Commission officials and it is only the substantive content of the measure that implies the involvement of the Member States and economic agents in the industry concerned.

In the second place, in the present case there is an absolute, rather than a relative, lack of powers, with the result that the measure may even be seen as non-existent (or entirely void, if you prefer) as regards third parties to whom it does not purport to be addressed, and any obligation arising exclusively from the measure is in any event unenforceable against them.

(b) *The content of the contested measure*

19. That having been stated, in case the Court does not adopt the solution I have proposed and decides that it must assess the measure at issue solely by reference to its content, disregarding in their entirety the elements which unequivocally render it classifiable as an internal measure, I consider it necessary also to examine the content of the contested measure in order to establish whether, as the applicant maintains, it in fact pursues the aim of producing legal effects for third parties, and whether therefore an action can be brought against it.

20. The Commission contends in the first place that, even from the substantive point of view, the instructions at issue are a mere internal measure in so far as they have no legal or financial effect whatsoever on the Member States and economic agents. In support of that view, it states that, on the basis of the Internal instructions, the expenses arising from the sampling are borne by it, the quantities taken are limited to the minimum necessary and the unused samples are returned to the owner (pp. 3 and 4 of the defence). It considers the measure to be merely declaratory, having been adopted for the use of its officials in order to avoid differing practices in carrying out the physical operations to which the instructions relate. Thus, the measure does

no more than describe obligations which already arise from Article 9 of Regulation No 729/70; more precisely, the instructions presuppose obligations which are, in the Commission's view, those deriving from Article 9, but they do not introduce new obligations.

21. As regards the content and substance of the measure, it must be observed in the first place that the preamble contains four recitals and refers to Regulation No 729/70, and in particular to Article 9(1) (second recital). It is also stated that the taking and analysis of samples of products financed by the EAGGF have become ever more frequently necessary for the purpose of carrying out the inspections referred to in Article 9 (third recital); and accordingly a series of 'instructions' are laid down, which are addressed to Commission officials and are intended to ensure that the operations involved are carried out under the best possible conditions.

Those instructions, which relate to certain 'administrative and technical procedures ... to be followed by Commission officials', provide in particular for a right of access for Commission officials to a number of establishments, of which a non-exhaustive list is given, for the purpose of 'taking samples or having samples taken' (point 1). The Commission officials are required to inform the Member State concerned at least 48 hours before sampling is undertaken, but are not obliged to provide a list of the establishments to be checked (point 3).

Moreover, the officials 'may request' such information as they consider necessary concerning the method of production and testing methods of the products being inspected (point 8).

As regards the financial repercussions of the Internal instructions, it is to be observed that the Commission bears a number of expenses (second paragraph of point 2); nevertheless, certain additional financial charges have to be borne by the economic agents. It is laid down that 'the transport and handling of goods on the premises where samples are taken and unpacking and repacking operations shall be carried out under the responsibility of the owner of the goods or his representative' (third paragraph of point 2). Moreover, no compensation is to be paid for the loss of all or part of the value of samples because of the analyses carried out (second paragraph of point 7).

I think at this stage I may confine myself to an examination of these points in order to establish whether or not the instructions are intended to produce legal effects.

22. In the first place I would point out that the instructions at issue are not 'traditional' internal instructions (although they were described as such by the Commission at the hearing): that term is usually employed to describe a mere internal measure which takes effect only within the confines of the body which adopted it, in so far as it deals with relations between a superior authority and those below it, thus having no importance to private persons outside that body.

It must, I think, be acknowledged that the Internal instructions in question are intended to produce external legal effects. The fact that Commission officials must apply the instructions makes it difficult, in my view, to reach any other conclusion. Let me explain: the obligation to take samples

independently and the obligation to enter premises necessarily presuppose the corresponding duty on the part of the Member States and the economic agents concerned to grant access (what is more, without notice) to such premises and, in the second place, to allow the Commission officials to undertake independent sampling. If that were not the case, the measure would serve absolutely no purpose, even as an internal measure.

Against that background, the fact of publication (albeit in the C series) also appears to be an important, if not decisive, indication that the measure in question is intended to have external effects.

It is also clear that a mere internal measure cannot have for economic agents — and I refer here to paragraph 8 of the instructions — consequences concerning the secrecy of the method of production where, as in this case, there is no provision guaranteeing to them that the information disclosed will be kept secret.

As regards the abovementioned 'provisions' of points 2 and 7, I must confess that I find it difficult to interpret them as mere service instructions addressed by the Commission to its officials. The logical, as opposed to legal, reason for which a measure which excludes any compensation for damage could possibly be regarded as not addressed also to those who suffer the damage, but merely to those who cause it, is a mystery. The Commission's representative stated at the hearing that the expenses (borne by economic agents) at issue were of such little significance that recourse to the Court could be considered unlikely to succeed. I shall not venture to make any predictions regarding the extent of the expenditure or any other matter but will merely state that no financial charge of that kind is envisaged in Article 9 of Regulation No 729/70.

23. In view of the foregoing observations, I do not think that I need dwell further on the question whether the measure at issue is 'intended to have legal effects'. [16]

What is indispensable at this stage is to establish whether the obligations deriving from the application of that measure flow from Article 9 of Regulation No 729/70 (as the Commission contends) or whether they are new obligations which change the legal circumstances of the Member States, of economic agents or of both: whether, therefore, the contested measure merely interprets Article 9 or whether it adds obligations additional to those envisaged by the applicable provisions.

According to the literal wording of Article 9 the Commission does indeed appear to have the power to carry out inspections itself, acting through its officials, but the text says nothing about sampling the products and

16 — Judgment in Case 22/70 *Commission* v *Council*, *supra* It is worth noting that the application in that action was also brought under the first paragraph of Article 173 On that occasion the Court took the term 'acts' to include Council proceedings relating to the negotiation and conclusion of an agreement (the proceedings in question laid down rules of conduct and included the adoption of procedural provisions)

analysing the samples. Moreover, the Commission's inspections are expressly intended to verify those carried out by the Member States, a fact confirmed by the general philosophy underlying the system of inspections, which is apparent in, for example, the eighth recital to Regulation No 729/70, which indicates the reasons on which Article 9 thereof is based.

It is true that the Member States are required to adopt all suitable measures to facilitate the supervision which the Commission may consider it necessary to undertake, including inspections on the spot (Article 9(1)). But the checks which may be carried out during such on-the-spot inspections do not include the taking of samples by the Commission (first subparagraph of Article 9(2)). On the other hand, pursuant to the third subparagraph of Article 9(2), the Commission may ask the Member States to carry out additional inspections in which its own officials may take part. As it significantly transpired at the hearing, it is to that provision that the sampling must be linked which has so far been carried out — on rare occasions — by the Member States at the request of the Commission, with national inspection procedures therefore being applied.

In that connection, the Commission states that 'the Member States shall make available to the Commission all information required for the proper working of the Fund' (Article 9(1)), and that its officials may check, *inter alia*, 'the conditions under which transactions financed by the Fund are carried out and checked' (Article 9(2)(c)). The latter provision, read in the light of the first, allows — according to the Commission — independent sampling by the Commission. By virtue of that interpretation, of course, the 'information' includes samples. However, since it is still the Member States which are to 'make [the information] available', it is clear that the inspections, the information and also the samples are covered by a power and a duty on the part of the Member States; and that the Commission, far from having any independent power in that regard, must confine itself to checking due compliance by the Member States with their obligations.

24. Moreover, it does not seem to me that anything can be proved by the Commission's assertion that, in order to be effective, the inspections must extend to matters other than mere book keeping and that therefore it was inconceivable that the Council intended to entrust it solely with inspections of that kind.

On the contrary it would be, to say the least, unusual if the power at issue were deemed to arise by implication when it is not only not expressly provided for but is also clearly negated first by the attribution of a power which is limited to inspections of inspections (including those based on samples) by the Member States, secondly by the fact that the Council has exclusive power to adopt general implementing rules, and lastly by the approach on which the whole system is based.

Indeed, even if it is acknowledged that verification by sampling is a useful way of checking the operation of the system and of arriving at an assessment as to its application by the Member States, it cannot reasonably be conceded that recourse to

sampling, although representing one of the factors used in determining financial penalties, should not be expressly provided for and regulated in the manner and in accordance with the powers specifically and validly conferred.

The methods adopted (both for sampling and for analysis of the samples) must be known in advance to the economic agents subject to control and, obviously, to the Member States, *inter alia* because national control procedures (imposed by Community legislation itself in Article 8 of Regulation No 729/70) may conflict with the procedures adopted at Community level; in particular, ad hoc regulations would be an appropriate means of eliminating, or in any event limiting, a source of disputes deriving from the inevitable challenging of results by the Member States.

25. The fact that the Commission has no independent power to take samples is also confirmed by the proposal for a regulation on the checks and penalties applicable under the common agricultural and fisheries policies,[17] submitted by the Commission to the Council on 21 May 1990. That proposal, which is based on Article 43 of the Treaty and covers all agricultural products, expressly includes in the checks which the Commission officials may carry out the 'taking and verification of representative samples' (Article 3(2); but, significantly, it provides for the Commission to be empowered to adopt rules concerning checks only in those cases in which the legislation relating to the policy in question confers on it the power to adopt implementing rules under one of the procedures provided for in the 'comitology' decision (Article 2(1)).

26. Further confirmation of the foregoing, although in a specific sector and thus in a partly different context, can be found in a comparison of Council Regulation (EEC) No 2048/89 of 19 June 1989 laying down general rules on controls in the wine sector[18] with the Commission proposal leading to it.[19] In the latter, provision was made for the Commission officials themselves to be empowered to take samples (Article 6(3)) and for the Commission to be empowered to adopt the necessary detailed rules for application (Article 16). In Regulation No 2048/89, both those provisions have disappeared; by contrast, it is the Member States which are allowed, at the request of the Commission, to take the samples (Article 12).

27. The Internal instructions at issue, therefore, which, in the form of a measure which in substance is a regulation for the implementation of Article 9 of Regulation No 729/70, unilaterally regulate the sampling procedures, are intended surreptitiously to add to the existing requirements. As such, they may be challenged.

28. The foregoing having been established, it is necessary at this stage to establish whether the instructions at issue constitute a definitive manifestation of will. Such a

17 — OJ 1990 C 137, p. 10.

18 — OJ 1989 L 202, p. 32.

19 — OJ 1988 C 24, p. 8.

check is particularly important in this case since the Commission, in support of its objection of inadmissibility, contended that in line and by analogy with what the Court has held in Case 60/81 [20] and in Case 114/86, [21] the instructions are in the nature of a preparatory measure and therefore are not acts of a kind which may be challenged.

29. Essentially, the Commission's argument is that the defendant's action is premature: an action for annulment can not be brought against the Internal instructions but could be brought against the subsequent individual decisions to take and analyse samples.

In the first place it must be stated that the contested measure cannot constitute a preparatory measure in the strict sense, that is to say in the ordinary sense of a step in a procedure which culminates in the adoption of a measure having external effect. That is not the case here, as the Commission itself made clear at the hearing. It is therefore inappropriate to refer to the judgment in Case 60/81, in which a statement of objections in a competition matter was challenged and the Court rightly stated that 'in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure . . . an act is open to review only if it is a measure definitively laying down the position of the Commission or of the Council on conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision'. [22]

30. Nevertheless, in the Commission's view it is a measure which, in so far as it is a prelude to the adoption of individual decisions or conduct of a particular kind, does not damage any interests and therefore cannot be challenged as such. Moreover, the legal basis of the subsequent individual decisions — the only measures that would be harmful — is Article 9 of Regulation No 729/70 and not the contested Internal instructions. Hence the reference to the judgment in Case 114/86.

Although attractive, that argument is unfounded and, it seems to me, cannot reasonably be subscribed to by the Court. In Case 114/86 the circumstances were wholly different, in so far as the instructions at issue there laid down rules — not even exhaustively — for officials drawing up 'restrictive' lists of candidates for service contracts for the purposes of cooperation under the Lomé Convention. The Court, without even describing the measure as 'preparatory', held that it was '. . . the drawing up of the lists themselves which is capable of having legal effects, in so far as it may result in the omission of certain undertakings from those lists and thus deprive them of the possibility of participating in the contracts in question'. And it added: 'this conclusion is reinforced by the fact that . . . as a general rule the lists in question are not settled entirely in conformity with the criteria adopted by the Commission'. [23]

20 — *Supra*, paragraph 21.
21 — *Supra*, paragraph 13.
22 — *Supra*, paragraph 10.
23 — *Supra*, paragraphs 13 and 14.

Rather than a preparatory measure, it seems to me that in the present case one may speak of an essentially internal measure. According to a view which is also familiar in administrative law, directions given by a superior to his subordinates, which are intended to guide their conduct in a particular sector and leave them a margin of discretion, are not capable of actually harming interests: only a measure which duly gives effect to them can be challenged.

31. In the present proceedings, on the other hand, we are dealing with a measure of a regulatory nature since, on the premiss that the Commission is vested with power to take samples independently of the Member States, it lays down the main rules for the exercise of that right — rules which, as I have emphasized, impose on the Member States, and in particular economic agents, obligations which are not envisaged in Regulation No 729/70. The measure does not therefore comprise directions to officials but rather brings about a change in the legal position of third parties to whom the measure does not purport to be addressed. As such, the measure is intrinsically harmful to the interests of those third parties.

To accept the Commission's view would be tantamount to saying that an action cannot be brought against any measure of a regulatory nature, in so far as it paves the way for individual decisions or a particular course of conduct, but only against subsequent decisions.

As far as I am concerned, and until such time as Article 173 of the EEC Treaty is rewritten, I cannot subscribe to the argument put forward by the Commission: quite apart from anything else, it does not seem to me to be consonant with the requirements of keeping proceedings to a minimum, of legal certainty or of the uniform application of Community law. In any event, the result would be to cast doubt upon the possibility of challenging any regulation or any measure of general rather than individual scope.

32. For the reasons I have so far put forward, I therefore consider that, in the event of the Court's deciding to classify the measure solely on the basis of its content, it must be concluded that the contested Internal instructions are intended to have legal effects on the Member States and the economic agents in the sector in question and therefore that the French Government's application is admissible.

The substance

33. If the French Government's application is declared admissible, I do not think there is any other reasonable course than to uphold it. The defects complained of are that the Commission had no powers to adopt the measure and that it misused its powers.

The answer is contained in the foregoing considerations. Article 9 of Regulation No 729/70 confers on the Council, and on the Council alone, the power to introduce 'general rules for the application of this article'. In no other relevant provision is similar authority vested in the Commission. Accordingly, without the need for further comment, the 'Internal instructions' must be annulled by reason of the Commission's absolute lack of powers.

Conclusions

In short, I propose that the Court declare the application inadmissible, in so far as the contested measure fails to satisfy the essential formal requirements for it to constitute a binding measure; the parties should bear their own costs in view of the uncertainty to which the measure itself inherently gives rise regarding the possibility of its being challenged by a Member State.

If the Court should nevertheless consider itself bound to appraise the content of the contested measure, I propose that it declare the application admissible, annul the measure by reason of the Commission's complete lack of powers and order the Commission to pay the costs.