OPINION OF ADVOCATE GENERAL JACOBS

delivered on 24 January 2002 [1]

1. In these two cases Spain seeks the annulment of two Commission decisions which concern in Case C-113/00 an aid scheme in favour of horticultural products intended for industrial processing in Extremadura [2] and in Case C-114/00 an aid scheme to finance operating capital in the agricultural sector in Extremadura. [3]

2. Since the two cases raise similar questions and since the arguments invoked are largely identical I will examine them in one Opinion.

Case C-113/00

Background

3. Decree 84/1993 of the Junta de Extremadura (Government of Extremadura) [4] establishes a system of aid for horticultural products intended for industrial processing. It provides that the products eligible for aid, the amount of the aid and the maximum quantity eligible for aid are to be laid down for each marketing year by an Order.

4. The contested decision in Case C-113/00 concerns the Order of 8 July 1998 of the Consejería de Agricultura y Comercio de la Junta de Extremadura (Government of Extremadura Department of Agriculture and Trade) [5] which implements Decree

1 — Original language: English.

2 — Commission Decision 2000/237/EC of 22 December 1999 concerning an aid scheme implemented by Spain in favour of horticultural products intended for industrial processing in Extremadura in the 1997/98 marketing year, OJ 2000 L 75, p. 54.

3 — Commission Decision 2000/240/EC of 22 December 1999 concerning an aid scheme implemented by Spain to finance operating capital in the agricultural sector in Extremadura, OJ 2000 L 76, p. 16.

4 — *Diario Oficial de Extremadura* No 82, 13 July 1993, p. 2071.

5 — *Diario Oficial de Extremadura* No 84, 23 July 1998, p. 5807.

84/1993 and provides for aid for horticultural products intended for industrial processing for the 1997/98 marketing year.

5. The beneficiaries of that measure are growers from Extremadura of horticultural products who signed contracts with processors from Extremadura to supply horticultural products intended for industrial processing during the marketing year 1997/98.

6. The Order determines essentially:

— the horticultural products for which aid can be paid (e.g. peppers for the production of ground pepper, 'industrial gherkins', cabbages for dehydration, potatoes for freezing);

— the amount of aid per kilogram of products supplied for processing (ESP 5/kg for peppers for the production of ground red pepper — designation of origin Pimentón de la Vera and for industrial gherkins, ESP 1.5/kg for all other products);

— the maximum total quantities eligible for aid (e.g. 9 500 tonnes of peppers for the production of ground red pepper — designation of origin Pimentón de la Vera, 250 tonnes for industrial gherkins); and

— the maximum aid per farmer (ESP 500 000).

7. The Commission — which had not received a notification — requested by letter of 8 February 1999 confirmation of the existence of the Order and of its entry into force. Following an exchange of correspondence with the Spanish authorities [6] and comments from the European Union of the Potato Processing Industries, on 22 December 1999 the Commission adopted the contested decision.

8. In the contested decision the Commission finds that:

— the Order fulfils the criteria laid down in Article 87(1) EC and thus constitutes State aid;

6 — The Commission's decision to open the procedure provided for in Article 88(2) EC is published in OJ 1999 C 233, p. 37.

— the derogations provided for in Article 87(2) EC clearly do not apply;

— as regards the aid for potatoes (a product listed in Annex I to the Treaty but not covered by a common organisation of the market) the Commission can by virtue of Article 36 EC and Council Regulation No 26 as amended[7] only recommend that the Spanish Government abolish the aid;

— the aid for the other products was not granted as regional aid but as operating aid for the agricultural sector, since the amount of aid depends on the quantities produced;

— the measure also conflicts with the common organisation of the market in fruit and vegetables and infringes Article 29 EC

of the Treaty;

— as regards Article 87(3)(a) and (c) EC the aid could thus adversely affect trading conditions to an extent contrary to the common interest and is therefore ineligible for any of the derogations provided for in Article 87(3) of the Treaty.

9. The Commission concludes that the aid has not been notified, that its granting was illegal, that the aid (with the exception of that for potatoes) is incompatible with the common market and that it must be recovered from the beneficiaries.

10. In support of its application of 17 March 2000 for the annulment of the contested decision the Spanish Government raises three pleas in law.

The first plea alleging a lack of effect on intra-Community trade and an infringement of the obligation to state reasons

— Arguments of the parties

11. The *Spanish Government* submits that the contested decision infringes Articles 253

7 — Council Regulation No 26/62 of 4 April 1962 applying certain rules on competition to production of and trade in agricultural products, OJ English Special Edition 1959-62 (II), p. 120, as amended by Council Regulation No 49/62 of 29 June 1962, OJ English Special Edition 1959-1962 (II), p. 178.

and 87(1) EC since it does not contain a sufficient statement of reasons why the measure affects trade between Member States. In its view that is essentially because in fact the measure has no effects on intra-Community trade. The arguments of the Spanish Government may be summarised as follows.

12. Only paragraph 21 of the contested decision contains statements on the alleged effects on trade between Member States. In that paragraph the Commission merely states however that Spain produces 115 million tonnes of vegetables and that there is a significant volume of trade in vegetables between Spain and the rest of the Community. By way of example the Commission refers to the year 1998 in which Spain is said to have imported 3 million tonnes of vegetables from the other Member States and exported 29 million tonnes of vegetables to them.

13. Those statements are insufficient because they do not reflect the reality of the specific market concerned. The Commission

— refers to the total production of vegetables in Spain without mentioning the year of reference;

— refers to data on vegetables in general and not on vegetables intended for industrial processing or on the particular vegetables which are covered by the Order;

— refers to data concerning Spain as a whole and not Extremadura; and

— does not relate its data to the maximum total quantities eligible for aid under the Order.

14. The Commission's reference to the quantities of vegetables imported to and exported from Spain is also incoherent and therefore misplaced.

15. Moreover, the present case is not one in which the very circumstances in which the aid is granted are sufficient to show that the aid is capable of affecting trade. [8] That is apparent, first of all, from the small total amount of aid and the fact that is was divided among a large number of growers who each receive an insignificant amount

8 — See Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 18 of the judgment.

of money. The total cost of the measure is estimated at about EUR 480 000. The total maximum aid per grower — there are fewer than 1 000 beneficiaries — is about EUR 3 000. More than half of the beneficiaries received less than EUR 300 and only 8% of the beneficiaries received more than EUR 1 500. That such small amounts of aid cannot have any significant effect on trade between Member States is shown by the Commission's own *de minimis* policy. [9] Second, no undertaking or trade association which might have been affected showed any interest; only the European Union of the Potato Processing Industries submitted comments. Those comments however concerned the aid for potatoes which is in any event outside the scope of the contested decision.

16. Finally, a detailed analysis of the Court's case-law [10] confirms that the Commission's reasoning on this point is insufficient.

17. According to the *Commission* the measure in issue is capable of affecting trade between Member States and the contested decision sets out circumstances sufficient to show that that is the case.

18. The Commission argues first, that the decision refers to the common organisation of the market in fruit and vegetables. [11] It follows from the existence of such a common organisation that the market for the vegetables in question is the Community as a whole and that the production and transformation of the vegetables concerned are regulated by an integrated legal framework which already provides for aid in favour of the production and the transformation of those vegetables.

19. Second, it follows from paragraph 21 of the contested decision mentioned above that the volume of Spanish production of vegetables is significant, that a quarter of that production is exported to the rest of the Community and that only a relatively small quantity of vegetables from other Member States is imported. The effects of a given aid on intra-Community trade are particularly manifest where the volume of exports from the Member State granting

9 — The Spanish Government refers to the Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ 1994 C 368, p. 12.

10 — The Spanish Government refers to and discusses in detail Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraphs 38 and 39 of the judgment; Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraphs 22 to 24; Case 57/86 *Greece* v *Commission* [1988] ECR 2855, paragraphs 14 to 16; Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraphs 9 to 14; Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraphs 32, 35, 43 and 44; Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraphs 37 and 38; Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraphs 63 to 66; Case 102/87 *Commission* v *France* [1988] ECR 4067, paragraphs 17 to 21.

11 — Council Regulation (EC) No 2200/96 of 28 October 1996, OJ 1996 L 297, p. 1.

the aid is considerably higher than the volume of imports. The Commission could therefore legitimately conclude in paragraph 22 of the contested decision that the measure in issue could affect trade in vegetables between the Member States.

20. Moreover, even if the amount of aid for each farmer appears to be modest, the cumulative effect of the aid must be taken into account in particular where a common organisation of the market exists. That is one of the reasons why the Commission's *de minimis* policy does not apply to aid towards expenditure in connection with agriculture. [12]

21. Finally, the Commission should be allowed to establish the effect on trade in relatively general terms and should not be required to provide a more detailed economic analysis of the effects of the measure on intra-Community trade. The Commission usually possesses only certain general statistics but no detailed data about for example the production of vegetables in a particular region or the total production of specific vegetables in a given Member State or still less the quantities of specific products from a particular region intended for a specific use or consumption. If a more detailed economic analysis were required the Commission would have to rely on the cooperation of the Member State concerned. That would hinder the effectiveness of the enforcement of the State aid rules and Member States which cooperated in good faith would be at a disadvantage compared with Member States which did not cooperate. In *Vlaamse Gewest* v *Commission* the Court of First Instance therefore accepted that the Commission did not need to carry out a detailed economic analysis or demonstrate the real effect of aid which had not been notified. [13]

— Assessment

22. The Spanish Government's first plea contains in effect two distinct arguments, namely the substantive argument that trade between Member States is not affected and the formal argument that the contested decision does not contain a sufficient statement of reasons on that point.

23. As to the substantive argument it is clear from the Court's case-law that the

12 — The Commission refers to the fourth paragraph of the Commission notice on the *de minimis* rule for State aid, OJ 1996 C 68, p. 9.

13 — Case T-214/95, cited in note 10, paragraph 67 of the judgment.

requirement of an effect on trade between Member States is easily satisfied. [14] For example, the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected. [15] The Court has also refused to establish a threshold below which intra-Community trade is not affected. [16]

24. In order to assess whether a given measure affects trade the Court has established the following basic presumption:

'When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid.' [17]

25. On the basis of that formula it is clear that in sectors with strong intra-Community competition or with specific difficulties even aid of a relatively small amount is liable to affect trade between Member States. [18] Conversely it is conceivable that in economic sectors with little competition in intra-Community trade (e.g. car repairs, taxis, restaurants or sectors with prohibitive transport costs) aid of a relatively small amount granted to small undertakings operating on essentially local markets might not affect trade between Member States.

26. In the present case it is common knowledge that the products in issue (vegetables which can be transported at relatively low costs) are subject to intense intra-Community trade and competition. Spain exports considerable quantities of vegetables to the other Member States and competition in the sector sometimes even appears to generate violent tensions between producers in different Member States. [19]

27. Competition in intra-Community trade in vegetables is moreover furthered by a common organisation of the market which

14 — See my Opinion in Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 33.

15 — Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 43 of the judgment, and *Spain* v *Commission*, cited in note 14, paragraphs 40 to 42.

16 — *Belgium* v *Commission*, cited in note 15, paragraph 43 of the judgment.

17 — Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11 of the judgment.

18 — See Case 259/85 *France* v *Commission* [1987] ECR 4393, paragraph 24 of the judgment (textile and clothing sector); Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 27 (textile and clothing sector); Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 26 (motor vehicle sector); Joined Cases C-278/92 to C-280/92 *Spain* v *Commission*, cited in note 14, paragraph 41 (textile and footwear sector).

19 — See the background to Case C-265/95 *Commission* v *France* [1997] ECR I-6959, which concerned imports from Spain into France.

creates a comprehensive reference framework encouraging fair trading and market transparency in intra-Community exchanges. [20]

28. It must also be borne in mind that the Commission does not apply its *de minimis* policy to aid towards expenditure in connection with sectors such as the sector of vegetables [21] which are characterised by overcapacity and a large number of small operators. In those sectors the cumulative effects of individually small amounts of aid may have a substantial adverse impact on competition and trade. In the light of those characteristics the Commission's decision to exclude the agricultural sector from its *de minimis* policy appears to be wholly justified.

29. Furthermore, the Spanish Government cannot validly argue that the measure does not encourage the production of vegetables but only a certain type of processing. By granting a certain amount of aid per quantity of product supplied for processing, the aid reduces growers' production costs in respect of the products supplied. A direct consequence of such aid is the improvement of production and marketing opportunities. It thus encourages both the production of the vegetables in question and a certain type of processing.

30. Finally, whilst the presence of comments from interested parties might be an element indicating effects on trade between Member States, I do not think that one should attach too much significance to the absence of such comments, which may be explained by other reasons.

31. I consider therefore that the present case is one in which the very circumstances in which the aid is granted are sufficient to show that the aid is capable of affecting trade between Member States. [22]

32. As to the Spanish Government's formal argument it is settled case-law that in cases where the circumstances are sufficient to show that the aid is capable of affecting intra-Community trade the Commission must at least set out those circumstances in the statement of reasons for its decision. [23]

20 — See recital 3 of the preamble of Council Regulation (EC) No 2200/96, cited in note 11.

21 — Commission notice on the *de minimis* rule for State aid, cited in note 12; see now Article 1(a) of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid, OJ 2001 L 10, p. 30.

22 — See *Greece* v *Commission*, cited in note 10, paragraph 15 of the judgment.

23 — See, for example, *Germany* v *Commission*, cited in note 8, paragraph 18 of the judgment.

33. A first problem in that regard is that the figures provided in paragraph 21 of the contested decision do not seem to be correct. It appears for example that Spain's total vegetable production in 1998 was about 11.5 million tonnes (not 115 million tonnes) [24] and that the given figures for imports and exports (3 million and 29 million tonnes respectively) should also have been correspondingly lower.

34. The Spanish Government has not however invoked those errors and there are not sufficient reasons in my view for the Court to raise the problem of its own motion. [25] In any event, the correct figures would have conveyed the same message as the erroneous figures — namely a significant production of vegetables in and substantial exports from Spain.

35. Second, it is true that at first sight the reasoning in paragraph 21 of the contested decision on the effects of the measure on trade between Member States seems to be scant.

36. A different picture emerges however if one takes into account the decision as a whole. The decision refers both in the preamble and in paragraph 19 to the common organisation of the market in fruit and vegetables. In paragraph 21 of the decision the Commission refers to figures concerning total production of vegetables in Spain and exports from and imports to Spain. In paragraph 22 the Commission states that the measure has a direct and immediate effect on the production costs of undertakings producing and processing fruit and vegetables in Spain and therefore confers an economic advantage over undertakings which do not have access to comparable aid in other Member States. It follows that all the circumstances which show that trade between Member States is affected are actually referred to in the decision. Furthermore, according to the Court's case-law it is in general sufficient that the Commission refers to general figures concerning cross-border trade in the product or service in issue. [26]

37. Moreover, since in the present case the effect on trade between Member States is clear (in view of the intense intra-Community competition in the sector concerned

24 — Report from the Commission to the Council on the state of implementation of Regulation (EC) No 2200/96 on the common organisation of the market in fruit and vegetables of 24 January 2001, COM(2001) 36 final, p. 6.

25 — See for criteria when an issue may be raised by the Court of its own motion my Opinion in Case C-210/98 P *Salzgitter* [2000] ECR I-5843, paragraphs 140 to 143.

26 — See for example Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 22 of the judgment; Joined Cases *Spain* v *Commission*, cited in note 14, paragraphs 36 to 39; see however also Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraphs 50 to 53; for further references and a thorough discussion see J.-P. Keppenne, *Guide des aides d'État en droit communautaire*, Bruylant, Brussels, 1999, paragraphs 159 to 169.

and of the existence of a common organisation of the market) the Commission was not required to carry out and present a more detailed economic analysis of figures concerning trade in the vegetables in issue or concerning specifically the region of Extremadura. [27]

38. The first plea must therefore be rejected.

The second and third pleas alleging an infringement of Article 87(3)(a) and (c) and of the obligation to state reasons

39. Article 87(3) EC enumerates several categories of aid which may be considered to be compatible with the common market. Article 87(3)(a) refers to 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious unemployment'. Article 87(3)(c) refers to 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

27 — *Vlaamse Gewest* v *Commission*, cited in note 10, paragraph 67 of the judgment.

— Arguments of the parties

40. The *Spanish Government* submits first, that the measure in issue is covered by Article 87(3)(a) and that the decision fails to state the reasons why Article 87(3)(a) does not apply. The aid in issue is intended to promote the economic development of a region (Extremadura) where the standard of living is low, where there is very serious unemployment (29.4% in 1998) and which has a gross domestic product of only 55% of the Community average. Article 87(3)(a) does not contain the proviso contained in Article 87(3)(c) to the effect that the aid concerned must not adversely affect trading conditions to an extent contrary to the common interest; it is therefore sufficient that the circumstances are as grave as described in that provision for the Commission to declare the aid compatible with the common market.

41. Second, the Commission wrongly classifies the measure as operating aid for the agricultural sector and not as regional aid falling under Article 87(3)(a). Decree 84/93, on which the measure is based, is however expressly designed to adapt production to the requirements of the market, to promote diversification of production and to encourage the develop-

ment of products with important beneficial social consequences. The aid manifestly has a social objective in that it aims to create stable contractual relations between growers and processors, to guarantee constant supply to processors and to encourage processors to set up in the region of production.

42. Moreover, because the amounts of aid received by the farmers are small, the common organisation of the market cannot be regarded as affected. In its analysis of Article 29 EC the Commission also refers erroneously to an 'obligation' to sell to industrial processors in Extremadura.

43. Finally, the Commission failed to explain why it refused in the present case to authorise aid of a small amount intended to remedy an abnormally grave situation in the Community and thereby infringed Article 253 EC.

44. The *Commission* argues that the measure cannot be classified as regional aid but must be regarded as operating aid for the agricultural sector which must as a matter of principle be considered incompatible with the common market. Such operating aid is *a fortiori* incompatible where — as in the present case — there is a common organisation of the market under which growers already receive financial assistance. Finally, it follows from the Court's case-law that even mere incitement to sell all products to processors established in Extremadura or Spain are a restriction of exports prohibited by Article 29 EC.

— Assessment

45. As a preliminary point it will be recalled that Article 87(3) gives the Commission a discretion the exercise of which involves economic and social assessments which must be made in a Community context. [28]

46. In the contested decision the Commission finds, first, that the aid in question was granted not as regional aid, but as operating aid for the agricultural sector which must be assessed 'in particular' in the light of Article 87(3)(c). [29] Then it finds that 'as

28 — *Spain* v *Commission*, cited in note 10, paragraph 18 of the judgment.

29 — Paragraphs 27 and 29 of the contested decision.

regards the derogations provided for in Article 87(3)(a) and (c)... the aid could adversely affect trading conditions to an extent contrary to the common interest'. [30]

47. At first sight the decision seems thus to be based on two distinct (albeit not mutually exclusive) findings. The Commission's extensive analysis of the aid's adverse effect on trading conditions [31] suggests however that it is in fact the second finding which supports the Commission's conclusion that it is not eligible for any of the derogations provided for in Article 87(3). What must therefore be determined is whether it was lawful for the Commission to find that both Article 87(3)(a) and (c) do not apply because the measure adversely affects trade to an extent contrary to the common interest.

48. It will be recalled that regional aid may fall within one of the derogations in Article 87(3)(a) and (c) EC. In that respect the use of the words 'abnormally' and 'serious' in the derogation contained in Article 87(3)(a) shows that it concerns areas where the economic situation is extremely unfavourable in relation to the Community as a whole. The derogation in Article 87(3)(c), on the other hand, is wider in scope inasmuch as it permits the development of certain areas in a Member State which are less favoured in relation to the national average without being restricted by the economic conditions laid down in Article 87(3)(a), provided such aid 'does not adversely affect trading conditions to an extent contrary to the common interest'. Conversely, the absence of that condition in the derogation under Article 87(3)(a) implies greater latitude in granting aid to undertakings in regions which do meet the criteria laid down in that derogation. [32]

49. Nevertheless, the Court has held that that difference in wording cannot lead to the conclusion that the Commission should take no account of the Community interest when applying Article 87(3)(a), and that it must confine itself to verifying the regional specificity of the measures involved, without assessing their impact on the relevant market or markets in the Community as a whole. [33] The Commission is therefore under a duty to evaluate the sectoral effects of a planned regional aid, even where regions likely to fall within paragraph 3(a) are concerned, in order to avoid a situation in which, as a result of an aid measure, a sectoral problem is created at Community

30 — At paragraph 36.

31 — Paragraphs 31 to 35 of the decision.

32 — *Spain* v *Commission*, cited in note 10, paragraphs 15 and 16 of the judgment.

33 — *Ibidem*, paragraph 17 of the judgment.

level which is more serious than the initial regional problem. [34] Contrary to the Spanish Government's contention it is thus not sufficient that the circumstances are as grave as described in Article 87(3)(a) EC for the Commission to declare the aid compatible with the common market. Even as regards a region falling under Article 87(3)(a) the adverse effects on trading conditions must not be ignored.

50. In the contested decision the Commission invokes three reasons for concluding that the aid adversely affects trading conditions to an extent contrary to the common market: the aid in question is operating aid, it has been granted despite the existence of a common organisation of the market and it contains a requirement which constitutes an infringement of Article 29 of the Treaty. [35]

51. As regards, first, the nature of the aid, it follows from the case-law that operating aid, that is to say aid intended to relieve an undertaking of the expenses which it would itself normally have had to bear in its day-to-day management or its usual activities, does not in principle fall within the scope of Article 87(3)(a) or (c). That is because the effect of such aid is in principle to distort competition in the sectors in which it is granted, whilst nevertheless being incapable, by its very nature, of achieving the objective of those derogations, i.e. the *development* of certain areas or certain activities.

52. In the present case the aid depends on the quantities produced and supplied under contracts to processors. Such aid linked to supply contracts is by its very nature operating aid since it directly and immediately reduces the production costs per unit and thus the current expenses of growers. [36]

53. As to the Spanish Government's argument that the aid has the structural objectives of adapting production to the requirements of the market, of promoting diversification, of encouraging the development of products with important beneficial social consequences and of creating stable contractual relations between growers and processors, it will be noted first that the Spanish Government has failed to demonstrate that the operating aid in issue is in fact capable of contributing to the achie-

34 — Case T-126/96 *BFM* v *Commission* [1998] ECR II-3437, paragraph 101 of the judgment.

35 — See paragraph 56.

36 — In the shipbuilding sector also, the Community legislature classifies contract related production aid as operating aid, see Article 4 of Council Directive 90/684 of 21 December 1990 on aid to shipbuilding, OJ 1990 L 380, p. 27.

vement of those structural objectives and that it complies in that regard with the principle of proportionality. The aid would therefore not fulfil the requirements for an exceptional authorisation of operating aid under the Guidelines on National Regional Aid, [37] even if those Guidelines were applicable.

54. In the agricultural sector however the Guidelines on National Regional Aid do not in any event apply. [38] The categories of operating aid in that sector which are, exceptionally, compatible with the common market are governed by special rules [39] and none of those rules permits aid of the type in issue in the present proceedings.

55. As regards, second, the existence of a common organisation of the market, the contested decision refers correctly to the Court's consistent case-law that the common organisations of the market must be considered comprehensive and exhaustive systems which preclude the Member States from adopting derogations or measures which conflict with them. [40] It is therefore clear that the comprehensive set of Community rules on the market for the vegetables affected by the measure in issue (with the exception of potatoes), which already provide for a Community system of prices and aid, preclude the grant of further aid by the Spanish authorities. [41]

56. As regards finally Article 29 EC, the contested decision does not state — as the Spanish Government wrongly assumes — that growers are obliged to sell their production to processors. The decision states only that 'in order to receive the aid, growers are obliged to sell their production to processors in the region'. It is in my view clear from that formula and from the decision as a whole that the decision does not refer to a legal obligation but merely to a precondition for receiving State aid. Moreover it is well established case-law that a national measure encouraging the purchase of domestic products must be regarded as a measure having an effect equivalent to a quantitative restriction on imports. [42] Conversely, financial incentives

37 — See in this respect points 4.15 to 4.17 of the Guidelines, OJ 1998 C 74, p. 9.

38 — See point 2 of the Guidelines.

39 — See now the Community Guidelines for State aid in the agricultural sector, OJ 2000 C 28, p. 2.

40 — Case 177/78 *Pigs and Bacon Commission* v *McCarren* [1979] ECR 2161, paragraph 14 of the judgment; see also, for example, Case C-35/88 *Commission* v *Greece* [1990] ECR I-3125, paragraphs 29 and 30.

41 — Case 169/82 *Commission* v *Italy* [1984] ECR 1603, paragraph 33 of the judgment.

42 — Case 249/81 *Commission* v *Ireland* [1982] ECR 4005, paragraphs 27 to 29 of the judgment.

to sell products to domestic processing undertakings may be regarded as a measure having an effect equivalent to a quantitative restriction on exports which falls under Article 29 EC.

57. It follows from the foregoing considerations that in basing its decision on those three cumulative elements (operating aid, common organisation of the market, infringement of Article 29 EC) the Commission did not exceed its margin of discretion when it decided that, independently of the issue whether the aid was to be assessed under Article 87(3)(a) or (c), the aid could adversely affect trading conditions to an extent contrary to the common interest and was therefore ineligible for any of the derogations provided for in Article 87(3) EC.

58. The Spanish Government's second and third pleas must therefore also be rejected.

Case C-114/00

Background

59. The contested decision in Case C-114/00 concerns Decree 35/1993 of 13 April 1993 of the Junta de Extremadura on the financing of operating capital in the agricultural sector in Extremadura. [43]

60. The three groups of beneficiaries of the scheme laid down by the Decree are

— farmers with agricultural holdings in Extremadura,

— agricultural cooperatives and other associations in Extremadura, and

— processing undertakings in Extremadura signing contracts with agricultural and livestock holdings in Extremadura for the supply of raw materials for industrial processing.

61. The aid takes the form of an interest-rate rebate for loans lasting less than one year. The rebate in question ranges from 0.5 to 5 percentage points depending on the beneficiary.

43 — *Diario Oficial de Extremadura* No 45, 15 April 1993, p. 1027.

62. In the case of farmers the interest-rate rebate is up to five percentage points for farmers practising farming as their main occupation and up to four percentage points for other farmers; where there is Community or State part-financing, the beneficiary must pay a minimum interest rate of 6% (4% for farmers practising farming as their main occupation).

63. In the case of cooperatives and other associations, the rebate is up to one percentage point for the purchase of inputs (with an additional 0.5 percentage point for the purchase of certified plants and seeds and a further 0.5 percentage point for the purchase of straight fertilisers) and up to five percentage points in the case of loans to provide operating capital for seasonal payments to members.

64. In the case of processing undertakings, in sectors laid down each year by order, the rebate is up to five percentage points for loans for the purchase of raw materials under contracts with farmers and equally up to five percentage points for loans to provide general operating capital.

65. In that connection the Order of 29 September 1998 of the Consejeria de Agricultura y Comercio de la Junta de Extremadura [44] lays down for the 1997/98 marketing year the following products: dried figs and fig paste, peppers for the production of ground red pepper, Iberian swine, olives for the production of olive oil and tomatoes for dehydration other than powdered tomatoes. The interest-rate rebate provided for is five percentage points and the maximum duration one year.

66. Ceilings are placed on the aid: for farmers these are maximum amounts per hectare, product and animal, for cooperatives the average value of inputs purchased in the last three years plus 10% and for processing undertakings the value of the loan.

67. The aid scheme has an annual budget of ESP 107 million (about EUR 640 000) and is of indefinite duration.

68. The Commission — which had not received a notification — requested by letter of 8 February 1999 confirmation of the existence of the aid and of its entry into

44 — *Diario Oficial de Extremadura* No 114, 6 Octobre 1998, p. 7412.

force. Following an exchange of correspondence with the Spanish authorities,[45] on 22 December 1999 the Commission adopted the contested decision.

69. In that decision the Commission finds that:

— as regards the aid for agricultural products listed in Annex I to the Treaty but not covered by a common organisation of the market (potatoes other than for starch, horsemeat, honey, coffee, vinous alcohol, spirit vinegar and cork) the Commission can by virtue of Article 36 EC and Council Regulation No 26 as amended only recommend that the Spanish Government abolish the aid;

— as regards agricultural products listed in Annex I to the Treaty and covered by a common organisation of the market the measure in issue fulfils the criteria laid down in Article 87(1) EC and thus constitutes State aid;

— the derogations provided for in Article 87(2) clearly do not apply;

— the aid was not granted as regional aid but as operating aid for the agricultural sector;

— in assessing the measure, a distinction must be made between the period before and that following 30 June 1998 because on that date the application of the Commission 'Communication on State aids: subsidised short-term loans in agriculture'[46] resumed;

— the aid granted to farmers, agricultural cooperatives and other associations before 30 June 1998 meets the then applicable criteria for that type of aid and is therefore eligible for derogation under Article 87(3) EC;

45 — The Commission's decision to open the procedure provided for in Article 88(2) EC is published in OJ 1999 C 225, p. 6.

46 — OJ 1996 C 44, p. 2; in footnote 6 of the contested decision the Commission explains that by letter dated 4 July 1997 the Commission informed the Member States of its decision to suspend application of that Communication and, by letter dated 19 December 1997 informed them that it would reapply it from 30 June 1998.

— the aid granted to processing undertakings before 30 June 1998 in principle meets the then applicable criteria for that type of aid but constitutes a restriction of the free movement of goods prohibited by Article 28 EC in that processors using raw material from other Member State are ineligible for the aid;

— the aid granted to the three groups of beneficiaries after 30 June 1998 is incompatible with the common market because it does not fulfil the criteria laid down in the abovementioned Communication; the aid granted to processing undertakings moreover infringes Article 28 EC;

— consequently with the exception of the aid granted before 30 June 1998 to farmers, agricultural cooperatives and associations the aid scheme in question must be considered to be operating aid incompatible with the common market and is ineligible for any of the derogations provided for in Article 87(3) EC.

70. The Commission concludes that the aid has not been notified, that its granting was illegal, that the aid granted before 30 June 1998 to processing undertakings and that granted after that date (with the exception of that for potatoes other than for starch, horsemeat, honey, coffee, vinous alcohol, spirit vinegar and cork) is incompatible with the common market and that it must be recovered from the beneficiaries.

71. In support of its application of 17 March 2000 for the annulment of the contested decision the Spanish Government raises four pleas in law.

The first plea alleging that the Commission committed a manifest error of assessment in so far as part of the aid has never been paid

72. The Spanish Government submits that the contested decision is void in so far as it declares aid granted after 30 June 1998 incompatible with the common market and requires its recovery. That is because the Government of Extremadura suspended the aid for the marketing year 1998/99 with the result that after 30 June 1998 no aid was granted or paid. The Commission cannot claim that it did not know about that suspension since it had to assume that the Spanish Government would comply

with its obligation under the Treaty to suspend the payment of the aid after the procedure provided for in Article 88(2) EC was opened.

74. The Spanish Government's first plea must therefore be rejected.

The second plea alleging a lack of effect on intra-Community trade and an infringement of the obligation to state reasons

73. However, as the Commission rightly argues, the legality of the decision must be assessed in the light of the information available to the Commission when the decision was adopted. [47] On 22 December 1999 the aid scheme laid down in the decree in issue was still in force and there was nothing which indicated to the Commission that no aid had been granted after 30 June 1998. It does not follow from the fact that a Member State is obliged under the Treaty not to grant aid that the Commission can assume that the Member State has complied with that obligation. In any event I am not sure that it is correct to say that no aid was granted after 30 June 1998. The decision about the aid for the marketing year 1997/98 seems to have been taken either on 29 September 1998 or on 8 July 1998 (the parties' pleadings are not fully consistent on the exact date) which means that it was taken after 30 June 1998. As regards the obligation to recover aid which has allegedly never been paid, Article 3 of the operative part of the contested decision refers expressly only to aid which has been *granted* illegally. It is obvious that the obligation to recover aid does not extend to aid which has not been granted.

75. The Spanish Government submits that the contested decision infringes Articles 253 and 87(1) EC since it does not contain a sufficient statement of reasons for concluding that the measure affects trade between Member States and since the measure has in fact no effect on intra-Community trade.

76. On this plea both the Spanish Government and the Commission exchange almost exactly the same arguments as in Case C-113/00 to which I can therefore refer. I can also refer to the assessment of those arguments made above.

77. I consider therefore that in the sector of agriculture where there are specific difficulties and intense intra-Community competition and where in most subsectors there is a common organisation of the market,

47 — *Belgium* v *Commission*, cited in note 26, paragraph 16 of the judgment.

the cumulative effect even of small amounts of aid granted to a large number of small operators is such that there is liable to be an effect on trade between Member States within the meaning of Article 87(1) EC.

The third and fourth plea alleging an infringement of Article 87(3)(a) and (c) and of the obligation to state reasons

78. As to the obligation to state reasons, the contested decision refers to the existence of common organisations of the market, [48] points out that there is a significant volume of trade in agricultural [49] products between Spain and the rest of the Community, gives figures about the volume of that trade, [50] and explains that the measures in issue have a direct and immediate effect on the production costs of undertakings producing and processing agricultural products in Spain which give the Spanish beneficiaries of the aid an economic advantage over those undertakings which do not have access to comparable aid in other Member States. [51] All the circumstances which show that trade between Member States is affected are therefore referred to in the decision.

79. The second plea must therefore also be rejected.

80. The Spanish Government and the Commission again exchange much the same arguments as in Case C-113/00. To the extent that the contested decisions and the arguments invoked are identical I can refer to the assessment made above. In that connection I would only stress that according to the Court's case-law [52] the Spanish Government cannot validly claim that in relation to a region falling under Article 87(3)(a) EC the Commission cannot take into account the aid's adverse effects on trading conditions.

81. The three arguments which the Spanish Government submits only in the present case (and not in Case C-113/00) are as follows.

82. The Spanish Government argues, first, that according to the 'Commission communication on the method for the application of Article 92(3)(a) and (c) to

48 — Paragraph 51.

49 — It is clear from the decision which concerns a scheme applicable to all agricultural products that the figures in paragraph 25 of the decision also concern all agricultural products.

50 — Paragraph 25.

51 — Paragraph 26.

52 — *Spain* v *Commission*, cited in note 10, paragraph 17 of the judgment.

regional aid' published in the *Official Journal of the European Communities* on 12 August 1988 the Commission could have authorised in an Article 87(3)(a) region operating aid of the type at issue [53] and failed to give reasons for not having done so.

83. The Commission replies that the Communication in question has been replaced by the 'Guidelines on National Regional Aid' published on 10 March 1998, [54] that those Guidelines are the rules applicable *ratione temporis* since they were the law in force when the contested decision was adopted on 22 December 1999 [55] and that aid granted in the agricultural sector is outside the scope of the Guidelines in question. [56]

84. I consider — and the Spanish Government does not seem seriously to contest this point — that any aid granted after 30 June 1998 had to be assessed according to the system established by the new Guidelines of 10 March 1998 which entered into force before the aid was granted and exclude aid in the agricultural sector from their scope of application.

85. As regards the aid granted to processing undertakings before 30 June 1998 I agree with the Spanish Government that by virtue of the principle of legal certainty the criteria applicable must be the ones in force at the moment when the aid is granted and not the ones in force when the decision on the compatibility of the aid is taken.

86. But even under the Communication of 1988 operating aid could be authorised only if certain conditions were satisfied, one of those conditions being that the aid must not give rise to a sectoral overcapacity at the Community level such that the resulting Community sectoral problem is more serious than the original regional problem; in this context the Communication of 1988 requires a sectoral approach and in particular that the Community rules applicable to the agricultural sector and certain industrial undertakings involved in the transformation of agricultural products are observed.

87. In any event it must be borne in mind that the Commission declares the aid granted to processors before 30 June 1998 incompatible not because it is operating aid, but mainly because it constitutes a restriction on the free movement of goods in that processors using raw materials from

53 — See point I 6 of that Communication, OJ 1988 C 212, p. 2.

54 — Cited in note 36.

55 — The Commission refers to Case T-158/96 *Acciaierie di Bolzano* [1999] ECR II-3927, paragraph 65 of the judgment and Case T-132/96 *Freistaat Sachsen and Others* v *Commission* [1999] ECR II-3663, paragraphs 192 and 203 et seq.

56 — See point 2 of the Guidelines, cited in note 36.

other Member States are ineligible for the aid. [57] I consider that independently of the question which Commission Communication is applicable *ratione temporis* the Commission did not exceed its margin of discretion when it decided that aid with that type of restrictive effects on the free movement of goods could adversely affect trading conditions to an extent contrary to the Community interest and was therefore ineligible for any of the derogations provided for in Article 87(3) EC.

88. That leads me to the second argument of the Spanish Government which submits that the scheme in issue does not in fact infringe Article 28 EC since it does not legally prevent imports from other Member States and does not affect trade between Member States to an appreciable extent.

89. It is true that the scheme in issue does not prohibit the importation of raw materials for processing in Extremadura. It is however clear from the case-law that even measures which merely encourage the purchase of domestic products must be regarded as measures having an effect equivalent to a quantitative restriction on imports and are therefore prohibited by Article 28 EC. [58] It is in principle also established case-law that there is no *de minimis* rule in relation to Article 28. In the present case — since processing undertakings buying raw materials from other Member States are ineligible for the aid — it is likely that they will buy raw materials from Extremadura. The Commission therefore rightly concluded that making aid for processors conditional to their signing contracts with agricultural and livestock holdings from Extremadura constitutes a restriction on the free movement of goods between the Member States and a breach of Article 28 EC.

90. The Spanish Government argues, third, that any aid granted after 30 June 1998 fulfils the requirements set out in the Commission Communication on subsidised short-term loans in agriculture [59] and should therefore be considered compatible with the common market. In its view, the aid is granted on a non-discriminatory basis since every year an Order selects the sectors benefiting from the aid according to objective criteria. The aid is also limited to what is strictly necessary and the amount of the subsidised loans does not exceed the cash flow requirements arising from the fact that

57 — See paragraph 42 of the contested decision.

58 — See for example Case 103/84 *Commission* v *Italy* [1986] ECR 1759, paragraph 24 of the judgment.

59 — See the letter to the Member States published in OJ 1996 C 44, p. 2.

production costs are incurred before income from sales is received, since beneficiaries of the aid must pay a minimum interest rate and ceilings are placed on the aid.

91. The Commission was right in my view to find that the requirements set out in its Communication on short-term loans in agriculture are not satisfied.

92. According to letter B of that Communication the Commission refuses to authorise such aid whenever it is not made available within the administrative region of the authority granting the aid to all operators in agriculture on a non-discriminatory basis irrespective of the agricultural activity for which the operator needs short-term loans. By way of exception the Commission accepts aid which excludes certain activities provided that the Member State is able to demonstrate that all such instances of exclusion are justified on the grounds that the problems of obtaining short-term loans faced by those excluded are inherently less significant than in the rest of the agricultural economy.

93. In the present case the scheme in issue provides for an annual selection of the sectors benefiting from the aid. The sectors selected are those in which producers and processing undertaking have signed contracts approved by the authorities. Such a criterion is perhaps objective. It does not however correspond to the only permissible criterion under the Communication, namely that only sectors in which the problems of obtaining short-term loans are less significant can exceptionally be excluded from a general scheme covering in principle all operators in agriculture.

94. According to letter C of the Communication the element of aid under the scheme must be limited to that which is strictly necessary and the amount of subsidised loans to any beneficiary must not exceed the cash flow requirements arising from the fact that production costs are incurred before income from output sales is received. It is true that the minimum interest rates and the ceilings imposed by the Spanish authorities limit the amount of aid to a certain extent. Under the Communication a Member State wishing to apply subsidised loans must however always remain within the limits of the gap between the interest rate paid by a typical agricultural operator and the interest rate paid in the rest of the economy of the Member State concerned for short-term loans of a similar amount per operator not linked with investments. I can see no element of the scheme in issue which seeks to ensure that that limit is respected.

95. The Spanish Government's third and fourth pleas must therefore also be rejected.

Conclusion

96. Accordingly the Court should in my opinion in both Case C-113/00 and Case C-114/00:

(1) dismiss the application;

(2) order the Spanish Government to bear the costs.