# OPINION OF ADVOCATE GENERAL MISCHO

delivered on 15 March 2001 [1]

1. In his fable, *The Miller, his Son and the Donkey*, Jean de la Fontaine puts the following words into the mouth of the miller: 'Anyone who says he can please the whole world and his wife is mad indeed'. It seems to me that, in view of the flood of proceedings which have arisen in connection with the fixing of the intervention price for sugar in Italy, these words of exasperation could very well be spoken by the Council of the European Union.

2. To take only a recent example, the fixing for Italy of a derived intervention price for white sugar, owing to a foreseeable deficit in the supply of the Italian market, for the marketing years 1996/97 and 1997/98, caused great discontent among the Italian sugar manufacturers, who were required to pay a higher price to their sugarbeet suppliers; that discontent found expression in proceedings which have increased the workload of both the Court of Justice and the Court of First Instance. [2] When, from the year 1998/99, a derived intervention price was no longer fixed for Italy, the discontent caused by the Council's choices did not disappear; far from it, because the discontent of the Italian sugar manufacturers was replaced by that of the Italian Government and the Italian sugarbeet producers.

3. The regulations fixing the sugar prices for the year 1998/99 are therefore being contested by Italy before this Court in Case C-340/98 and by the sugarbeet producers before the Court of Instance in Cases T-152/98 *Azienda agricola Ponte S. Pietro* v *Council* and T-153/98 *ANB and Others* v *Council*, and those fixing the sugar prices for the year 1999/2000 are already being contested by Italy in Case C-352/00.

4. Of these many actions, it is Case C-340/98, the proceedings brought by the Italian Republic against the Council, which is supported by the Commission, in respect of the fixing of the sugar intervention price for the marketing year 1998/99 which I have to consider now. They take the form of an application for the annulment of Article 1 of Council Regulation (EC) No 1361/98 of 26 June 1998 fixing, for the 1998/99 marketing year, the derived intervention prices for white sugar, the intervention price for raw sugar, the minimum prices for A and B beet, and the

1 — Original language: French.

2 — Case C-289/97 *Eridania* [2000] ECR I-5409; Case T-178/96 *Eridania and Others* v *Council* (not published in the Reports), Case C-160/98 *Eridania*, and Case T-258/97 *Eridania and Others* v *Council* (not yet published in the Reports).

amount of compensation for storage costs,[3] 'in so far as it does not fix the derived intervention price for white sugar for all areas of Italy, thereby rendering applicable in Italy the intervention price for white sugar fixed by Article 1(2) of Regulation (EC) No 1360/98,[4] for the non-deficit areas, a regulation which is, in this part, so far as may be necessary, also contested'.

5. Let me draw attention, very briefly, to the fact that the common organisation of the sugar markets, in the form resulting, at present, from Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector[5] (hereinafter 'the basic regulation'), establishes, amongst other measures, a guaranteed prices regime. This provides for the fixing, before 1 August each year, for the marketing year beginning on 1 July of the following year, of an intervention price for white sugar, which the intervention bodies are required to pay for the sugar delivered to them by the producers (Article 3 of the basic regulation).

6. At the same time the Council fixes a basic price for beet each year (Article 4 of the basic regulation). On the basis of that price, the Council fixes a minimum price which the sugar producers have to pay the sugarbeet suppliers (Article 5(1) of the basic regulation).

7. The intervention price for white sugar and the minimum price of sugarbeet are not the same throughout the Community. A distinction is made between non-deficit areas and deficit areas. For the deficit areas derived intervention prices for white sugar and higher minimum prices for sugarbeet are fixed (Articles 3(1) and 5(3) of the basic regulation).

8. In Regulation No 1361/98, unlike the regulations relating to previous marketing years, no derived intervention price is fixed for Italy; therefore the intervention price fixed by Regulation No 1360/98 applies.

9. The Italian Government puts forward three pleas in support of its application:

— infringement of Article 3(4) and (5) of the basic regulation, in that the intervention prices for the marketing year 1998/99 were not fixed until 26 June 1998, and breach of the principle of the protection of legitimate expectations as a consequence of the late fixing of the prices;

3 — OJ 1998 L 185, p. 3.

4 — Council Regulation of 26 June 1998 fixing, for the 1998/99 marketing year, certain sugar prices and the standard quality of beet (OJ 1998 L 185, p. 1).

5 — OJ 1981 L 177, p. 4.

— infringement of Article 190 of the EC Treaty (now Article 253 EC) in that the contested regulations do not contain a statement of reasons which satisfies the requirements of that article so far as the non-fixing of a derived intervention price for white sugar in Italy is concerned;

— breach of the principle of equal treatment in that it was not in application of the same criteria that the Italian Republic was considered to be a non-deficit area whereas other Member States were classified as deficit areas.

I shall examine the pleas one by one and in that order.

**The plea that Regulations Nos 1360/98 and 1361/98 were adopted late**

*Infringement of Article 3(4) and (5) of the basic regulation*

10. The Italian Government maintains that the intervention price and the derived intervention prices for the year 1998/99 were not fixed until 26 June 1998. Thus, the Council infringed the provisions of Article 3(4) and (5) of the regulation since it should have fixed them by 1 August 1997.

11. In support of its contention that it was mandatory for the Council to adhere to that date, the Italian Government does not put forward any argument which has not already been discounted by the judgment of 6 July 2000 in Case C-289/97 *Eridania*, cited above, and I see no reason for that judgment to be called into question.

12. I should point out that, in that judgment, the Court considered the aims of the price regime introduced by the basic regulation. It stated that, 'in the interests of the proper functioning of the intervention price machinery in the light of those objectives, it is necessary, as rightly pointed out by the Council, that the date on which those prices are fixed should be as close as possible to the date of commencement of the relevant marketing year. Those prices are determined by reference to the ratio between the volume of available production for the forthcoming marketing year and that of foreseeable consumption in the same year. Thus, the nearer the date of price-fixing is to 1 July, the more likely is it that the data on which the assessment of such volumes is based may be regarded as reliable' (paragraph 30 of the judgment).

13. The Court concluded that 'the limit-date of 1 August in Article 3(4) and (5) of Regulation No 1785/81 is not peremptory and, therefore, that failure to observe that date cannot have the effect of rendering invalid Regulation No 1580/96 as regards the fixing therein of the intervention price after 1 August.' (paragraph 34 of the judgment).

*Breach of the principle of protection of legitimate expectations*

14. As regards the second change formulated by the Italian Government under its first plea — breach of the principle of the protection of legitimate expectations —, I shall begin by pointing out that, in so far as it is based on the premiss that the fixing of the prices before 1 August is designed to enable the economic operators, that is to say, the sugar manufacturers and beet growers, to plan their activities with full knowledge of the facts, it, too, comes into conflict with the judgment of 6 July 2000 in *Eridania*.

15. In that judgment, the Court held that '... that price-fixing machinery cannot be intended to lay down rules enabling operators in the sugar sector to plan their activities before contracts are concluded between sugar manufacturers and beet producers and before the latter sow their land. The prices in question are not intended to orientate the economic conduct of operators in the sugar market but represent an attempt to anticipate, in their interests, the probable evolution of production and consumption with a view to stabilising the Community market' (paragraphs 31 and 32).

16. As regards price formation, the Court also denied that its judgment of 11 August 1995, [6] invoked by the Italian Government, had any relevance.

17. Could it nevertheless be considered, regardless of that mistaken premiss, that, as the Italian Government maintains, the principle of protection of legitimate expectations was not observed by reason of the fact that, a few days before the start of a new marketing year, and although in the past a derived intervention price had always been fixed for Italy, the Council adopted a regulation which did not prescribe such a price?

18. I do not think so, for two reasons, one legal, the other factual. From a legal point of view, it is quite clear from the judgment of 17 September 1998 [7] that when a common organisation of the markets pro-

6 — Case C-1/94 *Cavarzere Produzioni Industriali and Others* [1995] ECR I-2363.

7 — Case C-372/96 *Pontillo* [1998] ECR I-5091.

vides for prices to be fixed annually according to market fluctuations, traders cannot legitimately expect the prices fixed for the previous year to be retained.

19. As pointed out in that judgment, an annual fixing of prices by definition entails the possibility that prices will be altered from one year to the next and, as had already been observed in the judgment of 5 October 1994, [8] '... whilst the protection of legitimate expectations is one of the fundamental principles of the Community, traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained; this is particularly true in an area such as the common organisation of the markets whose purpose involves constant adjustments to meet changes in the economic situation...' (paragraph 57).

20. From a factual point of view I cannot agree with the Italian Government's assertion that the failure to fix a derived intervention price for Italy was a completely unexpected event which took all the operators in the sector by surprise.

21. Quite the contrary, all those operators were fully aware, even before publication of the Commission's pricing proposals on 13 March 1998, that Italy no longer seemed to have the deficit situation it had experienced in the past. Their representatives sit on several consultative bodies connected with the management of the common organisation of the sugar markets.

22. It is true that, when the regulations on prices for the marketing years 1996/97 and 1997/98 were adopted, a deficit situation was still expected in the future, but events contradicted those forecasts. It subsequently proved to be the case that Italian sugar production had exceeded demand during those years. Therefore, the non-fixing of a derived intervention price for the marketing year 1998/99 became a possibility to be taken into account.

23. I therefore consider that the first plea must be rejected in its entirety.

**Non-existent or inadequate statement of reasons**

24. The second plea comprises two different lines of argument. According to the first, it is unacceptable that Regulations Nos 1360/98 and 1361/98 do not contain,

8 — Joined cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863.

even if read in conjunction, any indication of the reasons for which, contrary to what had been done for all the previous marketing years, no derived intervention price for white sugar was fixed for Italy.

25. According to the second line of argument, the fact that Italy was not included amongst the deficit areas can only be explained by a change in the way of identifying the Member States for which it is necessary to fix a derived intervention price for white sugar, and for that change a specific statement of reasons was needed, which was completely lacking.

26. Let me begin by saying that, in fact, as the Italian Government maintains, Regulation No 1360/98 does not state specifically why the intervention price for which sugar which it fixes must apply to Italy and Regulation No 1361/98 does not state specifically why it does not fix a derived intervention price for white sugar for Italy. Must one therefore conclude that there is no statement of reasons for the situation determined for Italy? Certainly not, because it is apparent, from reading the two regulations in conjunction, that, if a derived intervention price for white sugar is not applied to Italy, it is clearly because it is not classified as a deficit area, and the basic regulation provides that such a price must be fixed only for deficit areas.

27. However, is that statement of reasons a sufficient basis on which to conclude that Article 190 of the Treaty has not been infringed? I think that if one refers, once again, to the judgment of 6 July 2000 in *Eridania*, one must consider that, although succinct, it is adequate. The judgment points out that:

'the statement of reasons must be appropriate to the nature in question and must show clearly and unequivocally the reasoning of the institution which adopted the contested measure so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review...' (paragraph 38).

28. The same judgment goes on to state that '... according to settled case-law, the statement of the reasons on which regulations are based is not required to specify the often very numerous and complex matters of fact or of law dealt with in the regulations, provided that the latter fall within the general scheme of the body of measures of which they form part...' (paragraph 40).

29. The Court observed, finally, that '... the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question...' (paragraph 41).

30. The statement of reasons which concerns us here is indeed unequivocal, since it leaves no room for doubt as to the fact that, if no derived intervention price for white sugar is applied for Italy, it is because that country was not held to be a deficit area. Classification as a deficit area did not necessarily have to be accompanied by an account of the complex factors in the light of which it had been decided, particularly since these were fully known to the Italian Government, which is present in all the bodies of the Council and is represented on the committees which help the Commission to manage the common organisation.

31. Furthermore, we must not lose sight of the fact that classification as a non-deficit area is not the result of a choice made by the Council in the exercise of a discretion the use of which it would have been under an obligation to explain. It is the objective result of applying a method, itself objective, for establishing a foreseeable deficit situation.

32. Did the fact that, for the year 1998/99, the application of that method led, for the first time, to the conclusion that no deficit was foreseeable for Italy, nevertheless require particular explanation?

33. I do not think so. The fact that the same method may, over the years, give different results is not, in itself, in any way extraordinary. It was never considered that the Italian Republic would be in permanent deficit and the improvement in its sugar supply situation, far from being abnormal, may be considered, on the contrary, as the happy outcome of the policy of promoting sugarbeet production by fixing, over many years, a derived intervention price for white sugar. The fact that, once the result has been achieved, the methods employed for that purpose no longer need to be used seems to me to be in keeping with the very logic of the basic regulation, a logic rendering any statement of reasons redundant.

34. I should point out, finally, that it would be paradoxical, to say the least, if, while, according to the judgment of 6 July 2000 in *Eridania* (paragraph 39), the fixing of a derived intervention price requires no statement of reasons other than a statement that a deficit is foreseeable, it were then to be considered that the lack of such a statement regarding such a deficit is not sufficient to justify the omission to fix a derived intervention price.

35. As the abovementioned judgment points out, the application of an intervention price and that of a derived intervention price do not constitute exceptions to the rule. Each of them is a response to two different economic situations envisaged by the basic regulation, with the result that, since a reading of the regulations leaves no room for the slightest doubt as to

the situation of any given area, the application of the intervention price to that situation does not call for a specific statement of reasons.

36. Since there is no alternative but to reject the Italian Government's first line of argument, I must examine the second.

37. Let me say, at the outset, that if, as the Italian Government maintains, the Council had, in fact, amended, from one year to the next the method used to assess whether, in a given Member State, a deficit situation was foreseeable for the following marketing year, the statement of reasons which emerges from reading the recitals of Regulations Nos 1360/98 and 1361/98 would have to be considered inadequate.

38. It is one thing to arrive, without changing method, at different findings, on account of fluctuations in production and consumption, as regards the supply situation but quite another to change the instruments of measurement in order to obtain different findings.

39. To apply a new method without informing the operators of this is to deprive them of the opportunity of an effective judicial review to ensure that they have not been treated arbitrarily.

40. Did the Council and the Commission use, for the marketing year 1998/99, a method for assessing the supply situation in the various Member States that differed from the one they used in the previous year?

41. In my view, the Italian Government, which, we must remember, is the applicant and therefore bears the burden of proof, does not adduce persuasive evidence to convince us that they did. If we are to believe the applicant, the method used for the marketing year 1998/99 — which consists of comparing the available production, made up of the foreseeable production of A sugar and B sugar, possibly increased by the amount of C sugar carried forward in accordance with the Community rules, with the foreseeable consumption — had not been used for the previous marketing years.

42. The Italian Government maintains that, up to the marketing year 1997/98, the foreseeable deficit situation had been established by taking into account the quantities of unprocessed sugar imported into Italy and exported by Italy and also the corresponding balance. In support of its statements, it refers to the statement of

reasons contained, until 1980, in the regulations fixing a derived intervention price for white sugar for Italy. [9] That statement of reasons noted:

'... owing to relatively high production costs, sugar production in Italy will probably not be significantly in excess of the basic quantity fixed; it will therefore be necessary to take into account a deficit of more than 200 000 tonnes [10] to be covered by the Community areas having the largest surplus.'

and also:

'in those circumstances, the level of market prices in Italy will be determined by the supply prices of sugar from northern France, the derived intervention price for Italy may be fixed at... taking into account, on the one hand, the intervention price applicable in northern France, plus the marketing costs for deliveries to northern Italy and, on the other, the sales costs of the Italian sugar industry.'

43. These recitals clearly give no indication that the deficit they mention was revealed by application of the method to which the Italian Government refers.

44. Secondly, the Italian Government has failed to point out that the conditions laid down, at that time, by the basic regulations, in order to enable a derived intervention price for white sugar to be fixed were not the same as those laid down by the current basic regulation. In Regulation (EEC) No 3330/74 of the Council of 19 December 1974 on the common organisation of the market in sugar [11] we read, for example, in Article 3:

'1. An intervention price for white sugar shall be fixed each year for the Community area *having the largest surplus*. [12]

2. Derived intervention prices shall be fixed for other areas, taking account of the regional variations which, given a normal harvest and free movement of sugar, might be expected to occur in the price of sugar under natural conditions of price formation.'

9 — See, for example, Regulation (EEC) No 432/68 of the Council of 9 April 1968 fixing, for the 1968/69 sugar marketing year, the derived intervention prices, the minimum prices for sugarbeet, the threshold prices and the guaranteed quantity as well as the contribution to production (OJ 1968 L 89, p. 4).

10 — According to Italy, during that period the deficit had fluctuated between 200 000 and 500 000 tonnes.

11 — OJ 1974 L 359, p. 1.

12 — Emphasis added.

45. It therefore seems clear that the fixing of a derived intervention price was not, under that regulation, governed by rules identical to those currently in force. I would merely point out, in this connection, that the basic regulation, implemented by the contested regulation, provides in Article 3:

'1. For white sugar there shall be fixed each year:

(a) an intervention price for the non-deficit areas;

(b) a derived intervention price for each of the deficit areas.

...'

46. To lend credibility to its case, the Italian Government should have shown us that, under the current basic regulation, that is to say, since 1981, a derived intervention price has been regularly fixed for Italy by application of a method other than that used for the marketing year 1998/99. It has not done so. Admittedly, it makes every effort to establish that the method it claims was actually applied did, in fact, result in a finding of a deficit situation. However, that still does not prove that the Commission and the Council did in fact apply that method.

47. Added to that is the — in my view — not insignificant fact that the Italian Government, which nevertheless was always closely involved, if only within the sugar management committee, in the preparation of pricing decisions, does not supply us with any document to show that, while agreeing with the finding of a deficit and the fixing of a derived intervention price, it had, if not protested, at least expressed reservations as to the method used. Nor, it will be noted, does it contest the accuracy of the figures to which the method it is criticising were applied, doubtless because it supplied those figures itself to the Commission under Commission Regulation (EC) No 779/96 of 29 April 1996 laying down detailed rules for the application of Council Regulation (EEC) No 1785/81 as regards communications in the sugar sector. [13]

48. The Commission and the Council, for their part, referred to documents, submitted to the Court in Case C-289/97 and communicated to the Italian Government, which did not contest their veracity. It is

13 — OJ 1996 L 106, p. 9.

impossible to detect in those documents any change in method when the forecasts for the marketing year 1998/99 were made.

49. In those circumstances, I have to consider that the Italian Government's second plea cannot be upheld.

**Breach of the principle of equal treatment**

50. The Italian Government's third plea remains to be examined. By this plea it claims that the absence of the Italian Republic from the list of the Member States for which it was necessary to fix a derived intervention price can be explained only by the fact that different criteria were applied depending on the Member State concerned. This discrimination is particularly obvious in the case of Ireland, in respect of which the Italian Government states that, if it was considered to be a deficit area, it can only be because the same method was not applied to it as to the Italian Republic.

51. The Council and the Commission do not only deny any discrimination, but also state that, since it has not sought the annulment of the fixing of a derived intervention price for other Member States, the Italian Government cannot seek to obtain the annulment it requests by referring to the situation of other Member States. Let me say, at once, that I disagree with this last statement.

52. If it were established, after examination, that the only explanation for the measures adopted in respect of other Member States is that, for the purposes of forecasting a deficit, a different method was applied to them from the one applied to Italy, the application should be granted. It would then be a matter for the Council, under Article 176 of the EC Treaty (now Article 233 EC) to consider the most judicious way of removing the discrimination: to apply to Italy the method used for other Member States or to apply to the other Member States the different method used for Italy.

53. That said, has the Italian Government adduced the necessary proof of discrimination? I do not think so. As the Council and the Commission point out, the documents on which it relies have no evidential value, since they do not show that, *at the time when the Commission drew up its proposals and at the time when the Council made its decision*, the application of the method used to find that no deficit was foreseeable for Italy for the coming marketing year would have led, if it had been rigorously applied to the available data in respect of other Member States for which a derived intervention price was finally fixed, to the conclusion that those Member States probably did not have a deficit.

54. Only evidence to that effect would allow the conclusion that the principle of equal treatment was not observed. It is of no consequence to find that the forecast, for previous marketing years, of a deficit for any given Member State has subsequently proved to be wrong, which, I should mention in passing, happened, in particular, in the case of Italy. What matters is that, at the time when the decision is taken by the Council, the forecast should be made using a single method applied to equally reliable data.

55. I am well aware that adducing evidence of discrimination is not easy in respect of Regulations Nos 1360/98 and 1361/98, owing to the fact that they contain a minimum of reasoning. However, since the Italian Government was closely involved in the preparation and adoption of the decision, it cannot claim that it did not have access to the documents which would have enabled it to prove the substance of its assertions.

56. I therefore consider that the Italian Government has not succeeded in substantiating, by supporting evidence, the assertions on which its third plea is based.

## Conclusion

57. Since none of the pleas raised by the Italian Government seems to me to be well founded, I have no alternative but to propose that the Court should give judgment as follows:

— the application is dismissed;

— the Italian Government shall have its own costs and pay those of the Council;

— the Commission shall bear its own costs.