Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

7 September 2016*

(Action for annulment — Choice of legal basis — Article 43(2) TFEU or Article 43(3) TFEU — Common organisation of the markets in agricultural products — Regulation (EU) No 1308/2013 — Article 7 — Regulation (EU) No 1370/2013 — Article 2 — Measures on fixing prices — Reference thresholds — Intervention prices)

In Case C-113/14,

ACTION for annulment under the second paragraph of Article 263 TFEU, brought on 10 March 2014,

Federal Republic of Germany, represented by T. Henze and A. Lippstreu and by A. Wiedmann, acting as Agents,

applicant,

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by M. Holt and by C. Brodie and J. Kraehling, acting as Agents, and by A. Bates, Barrister,

and

Czech Republic, represented by M. Smolek, J. Škeřík, J. Vláčil and D. Hadroušek, acting as Agents,

interveners,

v

European Parliament, represented by L.G. Knudsen and R. Kaškina and by U. Rösslein, acting as Agents,

Council of the European Union, represented by G. Maganza and J.-P. Hix and by S. Barbagallo, acting as Agents,

defendants,

supported by:

European Commission, represented by D. Triantafyllou and G. von Rintelen, acting as Agents, with an address for service in Luxembourg,

intervener,

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, F. Biltgen (Rapporteur), A. Borg Barthet, E. Levits and M. Berger, Judges,

Advocate General: M. Szpunar,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 3 February 2016,

after hearing the Opinion of the Advocate General at the sitting on 20 April 2016,

gives the following

Judgment

1 By its action, the Federal Republic of Germany seeks the annulment of Article 7 of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671) ('the Single CMO Regulation'), and of Article 2 of Council Regulation (EU) No 1370/2013 of 16 December 2013 determining measures on fixing certain aids and refunds related to the common organisation of the markets in agricultural products (OJ 2013 L 346, p. 12) ('the fixing regulation').

Legal context

The Single CMO Regulation

2 According to recitals 2, 5, 10, 12 and 14 of the Single CMO Regulation:

'(2) This Regulation should contain all the basic elements of the common organisation of the markets in agricultural products.

…

(5) Pursuant to Article 43(3) TFEU, the Council is to adopt measures on fixing prices, levies, aid and quantitative limitations. In the interest of clarity, where Article 43(3) TFEU applies, this Regulation should explicitly refer to the fact that measures will be adopted by the Council on that legal basis.

…

(10) In order to stabilise the markets and to ensure a fair standard of living for the agricultural community, a differentiated system of market support for the different sectors has been developed and direct support schemes have been introduced, taking into account the different needs in each of these sectors on the one hand and the interdependence between different sectors on the other. Those measures take the form of public intervention or the payment of aid for private storage. There continues to be a need to maintain market support measures whilst streamlining and simplifying them.

…

(12) For the sake of clarity and transparency, the provisions on public intervention should be made subject to a common structure, whilst maintaining the policy pursued in each sector. For that purpose, it is appropriate to distinguish between reference thresholds and intervention prices and to define the latter. In doing so, it is particularly important to clarify that only intervention prices for public intervention correspond to the applied administered prices referred to in the first sentence of paragraph 8 of Annex 3 to the WTO Agreement on Agriculture (i.e. market price support). In this context, it should be understood that market intervention can take the form of public intervention, as well as of other forms of intervention that do not use ex-ante established price indications.

…

(14) Public intervention price should consist of a fixed price for certain quantities for some products and in other cases should depend on tendering, reflecting the practice and experience under previous [common organisations of the markets].'

3 Article 7 of the Single CMO Regulation, entitled 'Reference thresholds', provides:

'(1) The following reference thresholds are fixed:

(a) as regards the cereals sector, EUR 101,31/tonne, related to the wholesale stage for goods delivered to the warehouse, before unloading;

(b) as regards paddy rice, EUR 150/tonne for the standard quality as defined in point A of Annex III, related to the wholesale stage for goods delivered to the warehouse, before unloading;

(c) as regards sugar of standard quality as defined in point B of Annex III, related to unpacked sugar, ex-factory:
(i) for white sugar: EUR 404,4/tonne;
(ii) for raw sugar: EUR 335,2/tonne;

(d) as regards the beef and veal sector, EUR 2 224/tonne for carcasses of male bovine animals of conformation/fat cover class R3 as laid down in the Union scale for the classification of carcasses of bovine animals aged eight months or more referred to in point A of Annex IV;

(e) as regards the milk and milk products sector:
(i) EUR 246,39 per 100 kg for butter;
(ii) EUR 169,80 per 100 kg for skimmed milk powder;

(f) as regards pigmeat, EUR 1 509,39/tonne for pig carcasses of a standard quality defined in terms of weight and lean meat content as laid down in the Union scale for the classification of pig carcasses referred to in point B of Annex IV as follows:
(i) carcasses weighing from 60 to less than 120 kg: class E;
(ii) carcasses weighing from 120 to 180 kg: class R;

(g) as regards the olive oil sector:
(i) EUR 1 779/tonne for extra virgin olive oil;
(ii) EUR 1 710/tonne for virgin olive oil;
(iii) EUR 1 524/tonne for lampante olive oil with two degrees of free acidity, this amount being reduced by EUR 36,70/tonne for each additional degree of acidity.

(2) The reference thresholds provided for in paragraph 1 shall be kept under review by the Commission, taking account of objective criteria, notably developments in production, costs of production (particularly inputs), and market trends. When necessary, the reference thresholds shall be updated in accordance with the ordinary legislative procedure in the light of developments in production and markets.'

4 Article 15 of the Single CMO Regulation, entitled 'Public intervention price', provides:

'(1) Public intervention price means:

(a) the price at which products shall be bought in under public intervention where this is done at a fixed price; or

(b) the maximum price at which products eligible for public intervention may be bought in where this is done by tendering.

(2) The measures on fixing the level of the public intervention price, including the amounts of increases and reductions, shall be taken by the Council in accordance with Article 43(3) TFEU.'

The fixing regulation

5 In accordance with recitals 2 and 3 of the fixing regulation:

'(2) For the sake of clarity and transparency, the provisions on public intervention should be made subject to a common structure, whilst maintaining the policy pursued in each sector. For that purpose, it is appropriate to distinguish between reference thresholds laid down in [the Single CMO Regulation] on the one hand and intervention prices on the other hand, and to define the latter. Only intervention prices for public intervention correspond to the applied administered prices referred to in the first sentence of paragraph 8 of Annex 3 to the WTO Agreement on Agriculture (i.e. market price support). In this context, it should be understood that market intervention can take the form of public intervention as well as other forms of intervention that do not use ex ante established price indications.

(3) The level of the public intervention price at which buying-in is carried out at a fixed price or under a tendering procedure should be provided for, including the cases for which an adjustment of the public intervention prices may be necessary. Equally, measures on quantitative limitations for carrying out the buying-in at a fixed price need to be taken. In both cases, the prices and quantitative limitation should reflect the practice and experience acquired under previous common market organisations.'

6 Article 1 of the fixing regulation, which defines the scope of that regulation, provides:

'This Regulation provides for measures on fixing prices, levies, aid and quantitative limitations related to the single common organisation of agricultural markets established by [the Single CMO Regulation].'

7 Article 2 of the fixing regulation, entitled 'Public intervention prices', provides:

'(1) The level of the public intervention price:

(a) for common wheat, durum wheat, barley, maize, paddy rice and skimmed milk powder shall be equal to the respective reference threshold set out in Article 7 of [the Single CMO Regulation] in the case of buying-in at a fixed price and shall not exceed the respective reference threshold in the case of buying-in by tendering;

(b) for butter shall be equal to 90% of the reference threshold set out in Article 7 of [the Single CMO Regulation] in the case of buying-in at a fixed price and shall not exceed 90% of that reference threshold in the case of buying-in by tendering;

(c) for beef and veal shall not exceed the level referred to in point (c) of Article 13(1) of [the CMO Regulation].

(2) The public intervention prices for common wheat, durum wheat, barley, maize and paddy rice referred to in paragraph 1 shall be adjusted by price increases or reductions to those prices based on the main quality criteria for the products.

(3) The Commission shall adopt implementing acts determining the increases or reductions to the public intervention prices of the products referred to in paragraph 2 of this Article under the conditions laid down therein. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 15(2).'

Background to the dispute

8 The common organisation of agricultural markets was codified for the first time in a uniform and comprehensive way by Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (OJ 2007 L 299, p. 1), adopted on the basis of Article 37 EC.

9 The provisions which the Federal Republic of Germany seeks to have annulled were adopted in the context of a reform of the Common Agricultural Policy (CAP) after the entry into force of the Lisbon Treaty and the TFEU.

10 On 12 October 2011, the Commission submitted a proposal for a regulation of the European Parliament and of the Council establishing a common organisation of the markets in agricultural products, pursuant to Article 43(2) TFEU. Article 7 of that proposal for a Single CMO Regulation concerned, in that version, the fixing of 'reference prices'.

11 On the same day, the Commission submitted a proposal for a Council regulation establishing measures on fixing certain aids and refunds related to the common organisation of the markets in agricultural products which was based on Article 43(3) TFEU.

12 On 13 September 2012, the Presidency of the Council of the European Union informed the Special Committee on 'Agriculture' that, in its view, only the Council was empowered to fix the reference prices of the agricultural products which could be the subject of public interventions, in accordance with Article 43(3) TFEU. According to the Council, a large majority of Member States shared that assessment.

13 After long discussions between the Parliament, the Council Presidency and the Commission, the General Secretariat of the Council submitted, on 4 June 2013, a report on the state of the informal trilogue concerning the Single CMO Regulation between the Parliament, the Council and the Commission. It followed therefrom that the fixing of reference prices was an area of contention. During the negotiations, the Parliament indicated that it would not approve the CAP reform package in the absence of rules on the reference prices in the future Single CMO Regulation.

14 On 25 June 2013, the Council Presidency submitted an addendum to a working document, which reproduced the remaining areas of contention. Under the title 'Positions on Article 43(3) related provisions' concerning the Single CMO Regulation, it proposed, as a landing zone, the use of the concept of 'reference threshold'.

15 During the vote on the modification of the general approach, which also took place on 25 June 2013, that approach was adopted by the majority. However, the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland abstained.

16 On 25 September 2013, the Council Presidency forwarded a working document containing the whole of the consolidated version of the draft Single CMO Regulation. In that version, the whole draft reflected the agreement reached in the internal trilogies. Article 7 of the consolidated version of the draft Single CMO Regulation was entitled 'Reference threshold' and no longer 'Reference prices'. The content of the legislation remained however unchanged.

17 On 13 December 2013, the General Secretariat of the Council sent a note to the delegations, according to which the 'outcome of the negotiations concerning recourse to Article 43(3) TFEU form[ed] part of the package deal on the current form of the CAP and in no way prejudg[ed] the position of each institution with regard to the scope of that provision or any subsequent development on the matter, inter alia any new case-law of the Court of Justice of the European Union'.

18 In a '[d]eclaration of the Council on Article 43(3) [TFEU]', it was stated, as regards the outcome of the negotiations on the CAP, during the trilogue of June 2013, that 'the Council confirm[ed] that, in the exceptional circumstances of that trilogue, the sole aim of its decision that the Single CMO Regulation should relate to questions arising under Article 43(3) TFEU was to reach a compromise'.

19 The Federal Republic of Germany declared that it could not, for various reasons, support some of the proposals for regulations on common market organisations. That Member State claimed inter alia that, under Article 43(3) TFEU, the Council, on a proposal from the Commission, adopts the measures on fixing prices, levies, aid and quantitative limitations and that it is therefore exclusively the responsibility of the Council to lay down such rules. Also according to that Member State, a deviation from this clear contractual attribution of responsibilities between the EU institutions was not acceptable.

20 On 16 December 2013, at the time of the vote on the adoption of the Single CMO Regulation, the Federal Republic of Germany voted against that adoption and the United Kingdom abstained. At the time of the vote relating to the adoption of the fixing regulation, which took place on the same day, those Member States abstained.

Forms of order sought by the parties and procedure before the Court

21 The Federal Republic of Germany claims that the Court should annul Article 7 of the Single CMO Regulation and Article 2 of the fixing regulation, maintain the effects of those provisions until the entry into force of legislation adopted on the correct legal basis and order the Parliament and the Council to pay the costs.

22 The Parliament contends that the Court should declare the action inadmissible and, in the alternative, dismiss it as unfounded. That institution contends in addition that the Court should order the Federal Republic of Germany to pay the costs.

23 The Council relies on the wisdom of the Court to rule on the principal claims of the Federal Republic of Germany and requests that the Court, if it upholds those claims, rule that the effects of the contested provisions be considered to be 'definitive', within the meaning of the second paragraph of Article 264 TFEU, until the entry into force of the provisions adopted on the correct legal basis, and order each party to bear its own costs.

24 By order of the President of the Court of 22 May 2014, the Commission was granted leave to intervene in support of the form of order sought by the Parliament. By orders of the President of the Court of 7 and 17 July 2014, the Czech Republic and the United Kingdom, respectively, were granted leave to intervene in support of the form of order sought by the Federal Republic of Germany.

Admissibility

Arguments of the parties

25 The Parliament and the Commission consider that the application for partial annulment of the Single CMO Regulation is inadmissible on the ground that the provision of which the annulment is sought is not severable from the other provisions of the act at issue. Article 7 of the Single CMO Regulation fulfils several functions in the context of that regulation, which are closely linked with other provisions of that regulation. Moreover, that article is entirely in line with the objectives of the Single CMO Regulation and serves to achieve those objectives. Therefore, the substance of that regulation would be altered if Article 7 were annulled.

26 By contrast, the Federal Republic of Germany, supported by the Czech Republic, the United Kingdom and the Council considers that the provisions of which the annulment is sought are severable from other provisions of the regulations in which they appear. In support of its argument, it claims, in particular, that the proximity between the reference thresholds and the intervention prices included in the fixing regulation is more important than that between the reference thresholds and the other provisions of the Single CMO Regulation. In addition, there is no evidence capable of showing that the substance of the Single CMO Regulation, which consists of more than 200 articles, would be altered by the annulment of Article 7, relating to the reference thresholds.

Findings of the Court

27 According to the settled case-law of the Court, partial annulment of an EU act is possible only if the elements the annulment of which is sought may be severed from the remainder of the act at issue. The Court has repeatedly ruled that that requirement of severability is not satisfied where the partial annulment of an act would have the effect of altering its substance (judgment of 18 March 2014 in *Commission* v *Parliament and Council*, C-427/12, EU:C:2014:170, paragraph 16 and the case-law cited).

28 In the present case, it should be noted, first, that Article 7 of the Single CMO Regulation fixes the reference thresholds of different agricultural products in euros and cents per weight unit of the product concerned.

29 Secondly, the Single CMO Regulation establishes a common organisation of agricultural markets for all the agricultural products listed in Annex I to the treaties and covers such diverse areas as, inter alia, public intervention on the markets, private storage aid, the aid schemes in the different agricultural sectors, the rules on marketing and producer organisations and exchanges with third States.

30 As the Advocate General stated in point 41 of his Opinion, those diverse areas covered by the Single CMO Regulation are not connected with the reference thresholds fixed in Article 7 thereof. Only the intervention prices, which are admittedly defined in Article 15 of that regulation, but which are established in the fixing regulation, can be considered to be connected with those thresholds.

31 It follows that Article 7 of the Single CMO Regulation concerns a severable aspect of the regulatory framework established by that regulation and, consequently, the annulment thereof would not affect the substance of that regulation.

32 Therefore, the Federal Republic of Germany's action for the partial annulment of the Single CMO Regulation is admissible.

Substance

Arguments of the parties

33 The Federal Republic of Germany claims that the Parliament and the Council based Article 7 of the Single CMO Regulation on an incorrect legal basis. That provision contains 'reference prices' which, even if that term has been replaced by the expression 'reference thresholds', constitute a 'measure on fixing prices'. Therefore, that article had to be adopted on the basis of Article 43(3) TFEU.

34 In support of its position, the Federal Republic of Germany, first, puts forward arguments relating to the previous scheme of the common organisation of agricultural markets, namely that resulting from Regulation No 1234/2007, recital 16 of which defined the 'reference price' as a price resulting from a policy decision of the Council. In that context, that Member State notes that Regulation No 1234/2007 expressly conferred on the Council the power to alter the reference prices. Moreover, the former common organisation of the agricultural market and the background to the Single CMO Regulation in general and to Article 7 thereof in particular show that the system of measures on fixing the prices of agricultural products was not altered as to the substance and that the 'reference prices', now called 'reference thresholds', continue to act as a 'safety net' of the CAP.

35 Secondly, the Federal Republic of Germany refers to the wording of Article 43(3) TFEU, which, according to it, makes no distinction between prices in the strict sense or in the broad sense, since it covers all of the 'measures on fixing prices'. Therefore, all the essential elements of price fixing fall within the exclusive competence of the Council. Moreover, it is apparent from paragraphs 54 and 59 of the judgment of 1 December 2015 in *Parliament and Commission* v *Council* (C-124/13 and C-125/13, EU:C:2015:790), that Article 43(3) TFEU grants the Council the power to adopt acts other than implementation acts and that the scope of that provision is not limited to measures on fixing prices. It should be concluded, *a fortiori*, that Article 7 of the Single CMO Regulation falls within the scope of that provision. Given that Article 7 of the Single CMO Regulation fixes a specific monetary unit for certain agricultural products and that, subsequently, Article 2 of the fixing regulation defines the intervention price as a certain percentage of the 'reference threshold', Article 7 of the Single CMO Regulation is an essential element of the fixing of prices.

36 Thirdly, as regards the objectives pursued by Article 43(3) TFEU, the Federal Republic of Germany maintains that it follows from Article 7(2) of the Single CMO Regulation that the threshold references must be updated in the light of developments in production and markets. If the competent legislative

authority is required to react quickly, flexibly and effectively to market disturbances, that reaction would be much quicker if the Council were competent because, since the entry into force of the Lisbon Treaty, that institution is no longer obliged to consult the Parliament.

37 Fourthly, the Federal Republic of Germany claims that it follows from paragraph 58 of the judgment of 1 December 2015 in *Parliament and Commission* v *Council* (C-124/13 and C-125/13, EU:C:2015:790), that Articles 43(2) and 43(3) TFEU constitute two clearly different legal bases which are mutually exclusive, without there being a hierarchy between them. Moreover, Article 43(3) TFEU would be completely meaningless and would therefore lose its effectiveness if Article 43(2) TFEU were held to be the legal basis in the present case.

38 In response to the Parliament's contention that it is apparent from Article 40(2) TFEU that, in exercising its power under Article 43(2) TFEU, the Union legislature is free to adopt all the measures stated in Article 40(2) TFEU, including 'regulation of prices', the Federal Republic of Germany claims that that argument takes no account of the existence of Article 43(3) TFEU and calls into question the effectiveness of that provision.

39 In the light of all of the foregoing, the Federal Republic of Germany concludes that Article 43(3) TFEU constitutes the sole valid legal basis for the adoption of Article 7 of the Single CMO Regulation.

40 The Czech Republic, the United Kingdom and the Council reproduce the arguments put forward by the Federal Republic of Germany. Moreover, the Council claims, referring to Article 294(1) TFEU, that the treaties provide no support for the hypothesis that the ordinary legislative procedure takes priority over provisions providing for the adoption of non-legislative measures.

41 The Czech Republic adds, in particular, that Article 43(3) TFEU constitutes a *lex specialis* in relation to the broader measures referred to in Article 43(2) TFEU. That interpretation is moreover not called into question by the judgment of 1 December 2015 in *Parliament and Commission* v *Council* (C-124/13 and C-125/13, EU:C:2015:790).

42 Furthermore, according to that Member State, the existence of two separate legal bases is due to the fact that, at the time of the negotiations for the Treaty establishing a Constitution for Europe, which led to the adoption of the Treaty of Lisbon, the Member States wished to remain sovereign concerning the costs of the CAP. It is precisely for that reason that Article 37 EC, which constitutes a single legal basis, was, as the Court stated in paragraph 57 of the judgment of 1 December 2015 in *Parliament and Commission* v *Council* (C-124/13 and C-125/13, EU:C:2015:790), replaced by two distinct legal bases which pursue different aims and each has a specific field of application.

43 The United Kingdom points out that it follows from the judgment of 1 December 2015 in *Parliament and Commission* v *Council* (C-124/13 and C-125/13, EU:C:2015:790), that Article 43(3) TFEU does not merely confer a residual power or grant the Council a delegation of power, but confers exclusive power on that institution to adopt all measures relating to price fixing, in particular those involving technical and scientific assessments. The adoption of a provision such as Article 7 of the Single CMO Regulation, which directly fixes prices, therefore *a fortiori* falls under the exclusive competence of the Council.

44 The Parliament, supported by the Commission, shares the opinion of the Federal Republic of Germany that Articles 43(2) and 43(3) TFEU constitute two separate legal bases. Those two institutions consider that Article 43(3) TFEU confers on the Council only the very specific executive power to fix the exact final amounts of the prices. Any other measure going beyond that fixing falls within the scope of Article 43(2) TFEU.

45 According to the Parliament, that interpretation is confirmed by the judgment of 1 December 2015 in *Parliament and Commission* v *Council* (C-124/13 and C-125/13, EU:C:2015:790). It follows from paragraph 58 of that judgment that all the measures necessary for the pursuit of the objectives of the common agriculture and fisheries policies involve a political choice. The adoption thereof is therefore reserved to the EU legislature.

46 The intervention mechanism is an essential element to achieve the objectives of the CAP, as specified in Article 39 TFEU, as is shown by the fact that, under Article 40(2) TFEU, the Union legislature is competent to adopt regulations of prices.

47 The Parliament infers from that that the 'measures' which Article 43(3) TFEU authorises the Council to adopt can be classified as 'sui generis implementing acts'. According to it, the non-legislative procedure provided for in Article 43(3) TFEU must be conceived as an exception to the general rule laid down in Article 43(2) TFEU. The Commission, on the other hand, considers that there is a hierarchical relationship between Article 43(2) TFEU and Article 43(3) TFEU. It adds that the Union legislature has considerable discretion when it grants delegations of powers to the executive and that, in the present case, no manifest error was committed in the exercise of that discretion, even though Article 43(3) TFEU provides for an express delegation of powers.

48 As regards the objective and content of Article 7 of the Single CMO Regulation, the Parliament claims that that objective, which is identical to that of the Single CMO Regulation and therefore inseparable from it, seeks to '[establish] a common organisation of the market in agricultural products'. According to the Parliament and the Commission, Article 7 of the Single CMO Regulation serves as a basic provision for the scheme of intervention in the common organisation of the market. The reference thresholds constitute, as the 'safety net of the CAP', the trigger for the intervention mechanism and for other types of market support measures.

49 As regards the designation of the 'reference thresholds', which, both in Regulation No 1234/2007 and in the context of the negotiations on the reform of the CAP, were called 'reference prices', the Parliament observes that the title of Article 7 of the Single CMO Regulation was altered in response to a request from the Council. For the Commission, the former designation of 'reference thresholds' was misleading because the 'reference prices' were already threshold values, which guided the fixing of actual prices and only had a guiding role.

50 Concerning the reference made by the Federal Republic of Germany to the former scheme of the common organisation of the markets, the Parliament and the Commission consider that that Member State ignores the fact that Regulation No 1234/2007 was adopted on another legal basis, namely Article 37 EC.

51 As for the Federal Republic of Germany's argument that the effectiveness of Article 43(3) TFEU would be undermined if Article 7 of the Single CMO Regulation could be based on Article 43(2) TFEU, the Parliament considers that the adoption of the fixing regulation itself is sufficient to demonstrate the effectiveness of Article 43(3) TFEU. Moreover, neither the Parliament nor the Commission see the need for a quick adjustment to the reference thresholds in the light of market developments which, according to the Federal Republic of Germany, require the intervention of the Council. According to the Parliament, even though Article 43(3) TFEU seeks to ensure that prices are fixed quickly and although that task was, at the time the CAP was established, an important requirement, it has gradually become less important and, in practice, disappeared.

52 In the alternative, the Parliament maintains that, although Article 7 of the Single CMO Regulation pursued objectives referred to in Articles 43(2) and 43(3) TFEU, the contested provision is still valid owing to the preponderance of the objectives referred to in Article 43(2) TFEU within the Single CMO Regulation.

Findings of the Court

53 By its single plea in law, the Federal Republic of Germany claims that, by adopting Article 7 of the Single CMO Regulation on the basis not of Article 43(3) TFEU but of Article 43(2) TFEU, the Parliament and the Council chose an incorrect legal basis.

54 In that regard, it must, first of all, be noted that, as is apparent from the wording of Article 43(2) TFEU, the Parliament and the Council are required to adopt, in accordance with the ordinary legislative procedure, inter alia, the 'provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy', whereas, in accordance with Article 43(3) TFEU, the Council, acting on a proposal from the Commission, is to adopt 'measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities'.

55 It should, next, be pointed out that measures involving a political choice reserved to the EU legislature due to the fact that they are necessary for the pursuit of the objectives of the common agriculture and fisheries policies must be based on Article 43(2) TFEU. By contrast, the adoption of measures on the fixing and allocation of fishing opportunities, in accordance with Article 43(3) TFEU, does not require such a choice, since such measures are principally technical and are intended to be taken in order to implement provisions adopted on the basis of Article 43(2) TFEU (see, to that effect, *Parliament and Commission* v *Council*, C-103/12 and C-165/12, EU:C:2014:2400, paragraph 50, and of 1 December 2015 in *Parliament and Commission* v *Council*, C-124/13 and C-125/13, EU:C:2015:790, paragraphs 48 and 50).

56 In that regard, although Article 43(3) TFEU grants the Council the power to adopt, inter alia, implementing acts in the area concerned, the fact remains that those acts are not simply to be considered the same as those conferring implementing powers, within the meaning of Article 291(2) TFEU (judgment of 1 December 2015 in *Parliament and Commission* v *Council*, C-124/13 and C-125/13, EU:C:2015:790, paragraph 54).

57 It follows therefrom that, contrary to what is maintained by the Parliament, that provision grants the Council the power to adopt acts going beyond what can be regarded as an 'implementing act'.

58 Moreover, paragraphs 2 and 3 of Article 43 TFEU pursue different aims and each has a specific scope so that they can be used separately as a basis for adopting particular measures under the CAP, provided that the Council, when it adopts measures on the basis of Article 43(3) TFEU, acts within the limits of its powers and, where relevant, within a legal framework already established under Article 43(2) TFEU (see, as regards the common fisheries policy, applicable *mutatis mutandis* to the CAP, the judgment of 1 December 2015 in *Parliament and Commission* v *Council*, C-124/13 and C-125/13, EU:C:2015:790, paragraph 58).

59 It should be noted, in that regard, that, contrary to what is maintained by the Commission, it cannot validly be claimed that the Court acknowledged the existence of a hierarchy between the two provisions at issue. The use, by the Court, of the words 'where relevant' indicates that the Council may make use of the powers conferred on it by Article 43(3) TFEU, although the EU legislature has not yet established a legal framework by exercising the powers conferred on it by Article 43(2) TFEU.

60 It follows moreover from the Court's case-law that the scope of Article 43(3) TFEU may extend to measures which do more than merely fix and allocate fishing opportunities, provided that they do not entail a policy choice that is reserved to the EU legislature because the measures are necessary for the pursuit of the objectives of the common policies for agriculture and fisheries (judgment of 1 December 2015 in *Parliament and Commission* v *Council*, C 124/13 et C 125/13, EU:C:2015:790, paragraph 59).

61 It should, finally, be borne in mind that, according to the Court's settled case-law, the choice of the legal basis for an EU measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure (judgments of 23 October 2007 in *Commission* v *Council*, C-440/05, EU:C:2007:625, paragraph 61, and of 26 November 2014 in *Parliament and Commission* v *Council*, C-103/12 and C-165/12, EU:C:2014:2400, paragraph 51).

62 It is in the light of those considerations that it is necessary to examine whether the Parliament and the Council were justified in relying on Article 43(2) TFEU as the legal basis for the adoption of Article 7 of the Single CMO Regulation.

63 Concerning the objective pursued by Article 7 of the Single CMO Regulation, it should be noted that it follows admittedly, first, from recital 10 of that regulation that, in order to stabilise the markets and to ensure a fair standard of living for the agricultural community, a system of direct support was established and that the measures adopted in the context of that system can take the form of public intervention and, secondly, from recital 12 of that regulation, that it is appropriate to distinguish between reference thresholds and intervention prices.

64 However, those two factors, in the absence of any other clarification by the Union legislature, in particular in Article 7 of the Single CMO Regulation, regarding the alleged importance of policy choices made through the adoption of those thresholds, are not capable of establishing to the requisite legal standard the existence of that importance.

65 That finding is supported by the fact that, in view of the wording of Article 2 of the fixing regulation, the reference thresholds are used exclusively as a basis in order to fix intervention prices for the products at issue.

66 Moreover, as the Advocate General stated in point 83 of his Opinion, recitals 16 and 28 of Regulation No 1234/2007 describe, in an abstract manner, the relationship between the reference prices, now called 'reference thresholds', and the intervention prices, and support the view that the former constitute elements necessary to calculate the latter. Since, in accordance with recital 12 of the Single CMO Regulation, the Union legislature intended to maintain the intervention policy pursued in each sector, it must be concluded that the relationship between the reference thresholds and the intervention prices was not affected by the adoption of the Single CMO Regulation.

67 Concerning the contents of Article 7 of the Single CMO Regulation, it is necessary to note that paragraph (1) of that article fixes, with respect to the products it covers, monetary values per weight unit. The mere fact that the Union legislature decided to use the word 'thresholds' instead of the word 'prices', used earlier, cannot contradict the fact that those values constitute prices. Moreover, as follows from Article 7(2) of that regulation, the thresholds in question are established according, in particular, to input 'prices'.

68 It should be added that, as is apparent from paragraph 65 of the present judgment, the wording of Article 7 of the Single CMO Regulation does not allow the objectives pursued by the reference thresholds provided for therein to be identified, or to determine whether the adoption of that article by the Union legislature entailed a policy choice reserved to that legislature as a result of the fact that it is necessary for the pursuit of the objectives of the CAP.

69 Moreover, it should be noted that neither Article 7 of the Single CMO Regulation nor any other provision of that regulation contains a definition of the concept of 'reference threshold'. The absence in that regulation of such a definition, although the concept of 'intervention price' is defined in Article 15 of that regulation, is such as to rebut the Parliament's argument that the determination of the reference thresholds involves policy choices reserved to the legislator.

70 In that regard, it should be added that it follows from Article 7(2) of the Single CMO Regulation that the reference thresholds must be reviewed in the light of objective factors such as production changes, production costs and market trends.

71 As is maintained by the Federal Republic of Germany, the Czech Republic, the United Kingdom and the Council, such a review requires principally technical and scientific assessments to be carried out, and must therefore be distinguished from measures involving political decisions which, according to the Court's case-law, are reserved to the Union legislature (see, to that effect, the judgment of 26 November 2014 in *Parliament and Commission* v *Council*, C-103/12 and C-165/12, EU:C:2014:2400, paragraph 50). The assessment of elements which are principally technical with a view to adopting measures relating to fixing prices is a prerogative reserved to the Council by Article 43(3) TFEU.

72 In so far as there is nothing else in the Single CMO Regulation which allows a distinction to be validly made between the review of the thresholds at issue and the initial fixing thereof, and in the light of the fact, pointed out in paragraph 66 of the present judgment, that the intervention prices are derived from the reference thresholds, it must be concluded that the fixing of those thresholds constitutes a measure on fixing prices. Consequently, Article 7 of the Single CMO Regulation should have been adopted on the basis of Article 43(3) TFEU.

73 That conclusion is not undermined by the Parliament's argument that Article 7 of the Single CMO Regulation pursues the objectives referred to both in Article 43(2) TFEU and in Article 43(3) TFEU so that, given the preponderance of the objectives referred to in Article 43(2) TFEU, Article 7 of that regulation should not be annulled.

74 First, as is apparent from paragraph 31 of the present judgment, Article 7 of the Single CMO Regulation is clearly severable from the other provisions of that regulation. Secondly, as the Court held in paragraph 58 of its judgment of 1 December 2015 in *Parliament and Commission* v *Council* (C-124/13 and C-125/13, EU:C:2015:790), Articles 43(2) and 43(3) TFEU pursue different aims and each has a specific field of application. Therefore, as the Council must act within the limits of its powers when it adopts measures on the basis of Article 43(3) TFEU, the EU legislature is required to act within the limits of its powers when it adopts measures on the basis of Article 43(2) TFEU.

75 In the light of all of the foregoing considerations, the Federal Republic of Germany's single plea in law must be upheld.

76 Consequently, Article 7 of the Single CMO Regulation must be annulled.

77 In the light of the fact that Article 2 of the fixing regulation, so as to establish the intervention prices, refers explicitly to the reference thresholds set in Article 7 of the Single CMO Regulation, the annulment of the latter article deprives Article 2 of the fixing regulation of its substance.

78 Therefore, in view of the inextricable links between Article 7 of the Single CMO Regulation and Article 2 of the fixing regulation, that article must also be annulled.

The request for the effects of the contested provisions to be maintained

79 In order to safeguard higher interests, and in particular for reasons of protection of the legitimate expectations of farmers and legal certainty, the Federal Republic of Germany requests the Court to maintain, in accordance with the second paragraph of Article 264 TFEU, the effects of the contested provisions until the entry into force of the new provisions adopted on the correct legal basis. The Commission supports those arguments in the alternative.

80 Under the second paragraph of Article 264 TFEU, the Court may, if it considers this necessary, indicate which of the effects of the measure it has declared void are to be considered definitive.

81 The Court has held in this regard that, on grounds of legal certainty, the effects of such an act may be maintained, in particular where the immediate effects of its annulment would give rise to serious negative consequences for the persons concerned and where the lawfulness of the act in question is contested, not because of its aim or content, but on grounds of lack of competence or infringement of an essential procedural requirement. Those grounds include, in particular, the fact that an incorrect legal basis was used for the contested act (judgment of 1 December 2015 in *Parliament and Commission* v *Council*, C-124/13 and C-125/13, EU:C:2015:790, paragraph 86).

82 In the present case, it must be noted, in accordance with Article 232 of the Single CMO Regulation, that that regulation, including Article 7 thereof, entered into force on the date of its publication in the *Official Journal of the European Union*, on 20 December 2013, and is applicable since 1 January 2014.

83 To the extent that the provisions at issue fix the prices at which public intervention must take place and that the latter seeks to ensure the stability of markets and a fair standard of living for the agricultural community, the annulment thereof with immediate effect could have severe consequences for the individuals concerned.

84 In those circumstances, there are significant grounds of legal certainty justifying the grant by the Court of the request that the effects of Article 7 of the Single CMO Regulation and of Article 2 of the fixing regulation be maintained. Moreover, it must be noted that the Federal Republic of Germany has not contested the lawfulness of Article 7 of the Single CMO Regulation on the ground of its aim or content and there is therefore no obstacle in that respect to prevent the Court from ordering that the effects of those articles be maintained.

85 It is, consequently, necessary to maintain the effects of Article 7 of the Single CMO Regulation and of Article 2 of the fixing regulation until the entry into force, within a reasonable period of time which cannot exceed five months from the date of delivery of the present judgment, of a new regulation on the correct legal basis, namely Article 43(3) TFEU.

Costs

86 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Federal Republic of Germany applied for costs and the Parliament and the Council have been unsuccessful, the latter must be ordered to pay the costs. In accordance with Article 140(1) of those rules, the Czech Republic, the United Kingdom and the Commission, which were granted leave to intervene in the present case, are ordered to bear their own costs.

On those grounds, the Court (Fifth Chamber) hereby:

1. **Annuls Article 7 of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007;**

2. **Annuls Article 2 of Council Regulation (EU) No 1370/2013 of 16 December 2013 determining measures on fixing certain aids and refunds related to the common organisation of the markets in agricultural products;**

3. Declares that the effects of Article 7 of Regulation No 1308/2013 and of Article 2 of Regulation No 1370/2013 are to be maintained until the entry into force, within a reasonable period of time which cannot exceed five months from the date of delivery of the present judgment, of a new regulation on the correct legal basis, namely Article 43(3) TFEU;

4. Orders the European Parliament and the Council of the European Union to pay the costs;

5. Orders the Czech Republic, the United Kingdom of Great Britain and Northern Ireland and the European Commission to bear their own costs.

[Signatures]