OPINION OF ADVOCATE GENERAL COSMAS

delivered on 22 November 1995 *

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* Original language: Greek.

Preliminary observations

1. By this action, brought before the Court in pursuance of Article 173 of the EC Treaty, the Commission is claiming the annulment of two Council decisions adopted on 21 February 1994 under the third subparagraph of Article 93(2) of the Treaty, by which the Council decided that exceptional aid for the distillation of certain wines, granted by France and Italy to certain wine-producers, was compatible with the common market.

2. This case provides the opportunity to clarify the conditions for the application of the third subparagraph of Article 93(2) of the Treaty which, in accordance with Article 76 of Council Regulation (EEC) No 822/87, [1] is also applicable to the common organization of the market in wine.

I — Legislative background and case-law

A — *The provisions of the EC Treaty*

3. The Treaty establishing the European Community expressly mentions, amongst the policies of the Community, agriculture (Title II) (Articles 38 to 47), to which the common market which has been established is to apply (Article 38).

4. Article 39(1) sets out the objectives of the common agricultural policy, in particular:

'(...)

(b) (...) to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;

(c) to stabilize markets;

(...)'.

5. Article 40(2) provides as follows:

'2. In order to attain the objectives set out in Article 39 a common organization of agricultural markets shall be established.

1 — Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organization of the market in wine (OJ 1987 L 84, p. 1).

This organization shall take one of the following forms, depending on the product concerned:

(...)

(c) a European market organization.'

6. Article 42 of the Treaty provides:

'The provisions of the chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of Article 43(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.

The Council may, in particular, authorize the granting of aid:

(a) for the protection of enterprises handicapped by structural or natural conditions;

(b) within the framework of economic development programmes.'

7. In its judgment in Case C-280/93 *Germany* v *Council* [2] the Court pointed out that 'the institution of a system of undistorted competition is not the only objective mentioned in Article 3 of the Treaty, which also provides *inter alia* for the establishment of a common agricultural policy' and that 'the simultaneous pursuit of those two objectives might ... prove difficult'. [3] It also emphasized [4] that, according to the first paragraph of Article 42 of the Treaty, 'recognition is thus given to both the priority of the agricultural policy over the objectives of the Treaty in the field of competition and the power of the Council to decide to what extent the competition rules are to be applied in the agricultural sector'. [5] In the previous judgment in Case 139/79 *Maizena* v *Council*, delivered on 29 October 1980, the Court had also declared that 'the Council has a wide discretion in the exercise of that power, as it has in the implementation of the whole agricultural policy'. [6]

8. At a very early stage the Community legislature, taking the view that, for the

2 — [1994] ECR I-4973; that case concerned the legality of the establishment of a tariff quota and of special rules for its subdivision in the framework of the common organization of the market in bananas.

3 — Paragraphs 59 and 60.

4 — Paragraph 61.

5 — That judgment reproduces the solution provided by the Court in the judgment in Case 139/79 *Maizena* v *Council* [1980] ECR 3393 at paragraph 23. See also point 101 of Advocate General Gulmann's Opinion in Case C-280/93 (previously cited, in footnote 2).

6 — Judgment in Case 139/79 (previously cited, in footnote 5) at the end of paragraph 23.

development and application of the common agricultural policy, certain competition rules must be applied immediately to the production of and trade in agricultural products, adopted, in 1962, Regulation No 26/62, [7] in which it decided that Articles 85 to 90, 91(1), 93(1) and the first sentence of Article 93(3) of the Treaty were in principle to apply to production of or trade in agricultural products. In other words, it conferred on the Council a discretion to determine in each case in the context of the rules governing the common organization of the market in an agricultural product, the field of application of the other competition rules envisaged by the Treaty, that is, those in Articles 92 and 93(2), the second and third sentences of Article 93(3), and Article 94.

9. In this respect the Court declared that, in the said Regulation No 26/62, 'the Council of the EEC adopted certain general provisions ... intended to permit of a limited application of the rules of competition to the agricultural sector; specific provisions were subsequently adopted in the various agricultural regulations with a view to a wider application of the rules of competition in the different sectors of the market'. [8]

10. Article 92 of the Treaty, which is one of the articles which may be applied in the sector of agricultural policy, on the one hand prohibits State aid which distorts or threatens to distort competition (paragraph 1) and on the other hand lays down a series of derogations from that principle for aids which are compatible (paragraph 2) or which may be considered to be compatible (paragraph 3) with the common market. More precisely, it provides as follows:

'1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

2. The following shall be compatible with the common market:

(a) ...

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) ...

7 — Council Regulation (EEC) No 26/62 applying certain rules of competition to production of and trade in agricultural products (adopted on 4 April 1962, Official Journal, English Special Edition 1959-1962, p. 129).

8 — See the judgment in Case 177/78 *Pigs and Bacon Commission v McCarren* [1979] ECR 2161, paragraph 11.

3. The following may be considered to be compatible with the common market:

(...)

(e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.'

11. Article 93 of the Treaty provides for the review, in principle by the Commission, [9] and exceptionally by the Council, [10] of the compatibility with the common market of the various types of State aid already existing and of proposals to grant or alter aid. The article reads as follows:

'1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 92, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 169 and 170, refer the matter to the Court of Justice direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 92 or from the regulations provided for in Article 94, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

9 — See, for example, the judgments in Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595, paragraph 9, at end, and in Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 11.

10 — See the judgment in Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 41.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

12. Article 94 of the Treaty provides as follows:

'The Council, acting by a qualified majority on a proposal from the Commission, and after consulting the European Parliament, may make any appropriate regulations for the application of Article 92 and 93 and may in particular determine the conditions in which Article 93(3) shall apply and the categories of aid exempted from this procedure.'

13. In the judgment in Case C-225/91 *Matra* v *Commission* [11] the Court referred to its consistent case-law [12] according to which 'while the procedure provided for in Articles 92 and 93 leaves a wide discretion to the Commission, and under certain conditions to the Council, in coming to a decision on the compatibility of a system of State aid with the requirements of the common market, it is clear from the general scheme of the Treaty that that procedure must never produce a result which is contrary to the specific provisions of the Treaty'. [13]

14. As the Court stated in the judgment in Case 78/76 *Steinike und Weinlig*, [14] the prohibition in Article 92(1) 'is neither absolute nor unconditional since Article 92(3) and Article 93(2) give the Commission a wide discretion and the Council extensive power to admit aids in derogation from the general prohibition in Article 92(1)'. [15]

15. Article 43(2) and (3) of the Treaty provided for working out and implementing the common agricultural policy including the replacement of the national organizations of the market by a common organization. Its specific provisions are as follows:

'2. ... the Commission shall submit proposals for working out and implementing the common agricultural policy, including the

11 — Previously cited, in footnote 10; see paragraph 41 of the judgment.

12 — See the judgment in Case 73/79 *Commission* v *Italy* [1980] ECR 1533, paragraph 11.

13 — In the same paragraph 41 of the judgment in Case C-225/91 *Matra* v *Commission*, previously cited in footnote 10, the Court reproduced its consistent case-law according to which 'Those aspects of aid which contravene specific provisions of the Treaty other than Articles 92 and 93 may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately'; see the judgment in Case 74/76 *Iannelli & Volpi* v *Meroni* [1977] ECR 557, paragraph 14.

14 — Previously cited, in footnote 9; see paragraph 8.

15 — See also the similar statement made by the Court in the judgment in Case 74/76 *Iannelli & Volpi* (previously cited, in footnote 13) at paragraph 11.

replacement of the national organizations by one of the forms of common organization provided for in Article 40(2) (...).

(...)

The Council shall, on a proposal from the Commission and after consulting the Parliament, acting unanimously during the first two stages and by a qualified majority thereafter, make regulations, issue directives or take decisions, without prejudice to any recommendations it may also make.

3. The Council may, acting by a qualified majority and in accordance with paragraph 2, replace the national market organizations by the common organization provided for in Article 40(2) if:

(...).'

B — *The establishment of a common organization of the market in wine*

16. The Council adopted, in pursuance of Articles 42 and 43 of the Treaty, Regulation No 822/87, [16] which made a new codification of the basic provisions on the common organization of the market in wine. That organization constitutes a complex body of rules governing production and control of the development of wine-growing potential (Title I, Articles 2 to 14) and rules governing oenological practices and processes (Title II, Articles 15 to 26), lays down a price system and rules governing intervention and other measures to improve market conditions (Title III, Articles 27 to 51), regulates the system of trade with third countries (Title IV, Articles 52 to 63), lays down rules governing free circulation and release to the market (Title V, Articles 64 to 73) and, finally, contains general provisions (Title VI, Articles 74 to 87).

17. As regards the consequences of the establishment of a common organization of the market in an agricultural product, in this case wine, the Court reproduced, in its judgment in Case C-86/89 *Italy* v *Commission*, [17] its consistent case-law [18] according to

16 — Regulation No 822/87 (previously cited, in footnote 1) replaced Council Regulation (EEC) No 337/79 of 5 February 1979 on the common organization of the market in wine (OJ 1979 L 54, p. 1).

17 — [1990] ECR I-3891; that case concerned the legality of an aid granted to wine-producers by Italy by a national scheme of supplementary aid for the use in wine-making of concentrated grape must and rectified concentrated grape must.

18 — See the judgment previously cited, in footnote 17, Case C-86/89 *Italy* v *Commission*, at paragraph 19. See also the judgments in Case 51/74 *Hulst* [1975] ECR 79, paragraph 25; in Case 216/84 *Commission* v *France* [1988] ECR 793, paragraph 18; and in Case 90/86 *Zoni* [1988] ECR 4285, paragraph 26.

which 'once the Community has established a common market organization in a particular sector, it is for the Community to seek solutions to problems, such as those posed by wine surpluses, arising in the context of the common agricultural policy. Member States must therefore refrain from taking any unilateral measure even if that measure is likely to support the common policy of the Community'. The Court also stated: 'It is therefore for the Community and not for a Member State to seek a solution to this problem in the context of the common agricultural policy'. [19]

18. In the context of the common organization of the market in wine, Regulation No 822/87 provided *inter alia*, as factors for economic stabilization and measures for improvement of the market, preventive distillation (Article 38) and compulsory distillation (Article 39), decided upon by the Commission in the conditions laid down and according to the procedure defined in Articles 38 and 39. [20]

19. The withdrawal from the market of certain quantities of wine of mediocre quality for distillation has the purpose of maintaining prices. However, the measure also has the purpose of managing, or more exactly reabsorbing, surpluses as well as redressing a severe imbalance of the market. Producers may deduct the quantity of wine delivered for preventive distillation from the quantity to be delivered for compulsory distillation.

20. Article 38(1) and (4) of Regulation No 822/87, relating to the conditions for preventive distillation, provides as follows:

'1. Where necessary, having regard to harvest forecasts or in order to improve the quality of products put on the market, preventive distillation of table wines and wines suitable for yielding table wines may be decided on in each wine year, from 1 September until a date to be determined.

(...)

4. The Council, acting by a qualified majority on a proposal from the Commission, shall adopt general rules concerning the distillation referred to in paragraph 1, and in particular:

— the conditions under which distillation is to be carried out;

19 — See the judgments cited in footnote 18, Case 216/84 *Commission* v *France* at paragraph 18 and Case 90/86 *Zoni* at paragraph 26.

20 — See the 44th and 45th recitals in the preamble to Regulation No 822/87.

— the criteria for determining the amount of aid which will enable the products obtained by distillation to be disposed of.'

21. Article 38(3) provides that the buying-in price for wine delivered for distillation shall be 65% of the guide price. [21] Preventive distillation is a voluntary procedure on the part of the producer.

22. Preventive distillation of certain quantities of wine for the 1993/94 wine year was decided upon by Commission Regulation (EEC) No 2094/93 of 28 July 1993. [22]

23. That Commission regulation was intended to meet the need for stabilization and sound management of the market in table wines. More specifically the second subparagraph of Article 1(1) provided that the quantity of wine which producers might cause to be distilled was limited to 12 hectolitres per hectare (hereinafter 'hl/ha'). In France that amounted to a maximum quantity of 3 000 000 hl.

24. Article 39(1) and (2) of Regulation No 822/87, [23] regarding conditions for compulsory distillation, provides as follows:

'1. Where, in respect of a given wine year, the market in table wine and wine suitable for yielding table wine is in a state of serious imbalance, compulsory distillation of table wine and of wine suitable for yielding table wine shall be decided on.

A state of serious imbalance as referred to in the first subparagraph shall be deemed to exist where:

(a) availabilities recorded at the beginning of the wine year exceed the level of normal utilization by more than four months' supply; or

21 — Article 27(2), (3) and (4) of Regulation No 822/87 provides as follows:
'2.For each of the types of table wine referred to in paragraph 1, a guide price shall be fixed before 1 August for each marketing year.
3.The guide price shall be fixed on the basis of the average of price recorded for the type of wine in question during the two marketing years preceding the date of fixing and on the basis of price trends during the current marketing year.
(...)
4.The guide price shall be fixed at the production stage and shall be expressed, according to the type of wine, either in ECU per % vol/hl or in ECU per hl.'

22 — Regulation introducing preventive distillation as provided for in Article 38 of Regulation (EEC) No 822/87 for the 1993/94 wine year (OJ 1993 L 190, p. 23).

23 — The first subparagraph of Article 39(1) is given as amended by Article 1(3) of Council Regulation (EEC) No 1236/89 of 3 May 1989 amending Regulation (EEC) No 822/87 on the common organization of the market in wine (OJ 1989 L 128, p. 31).

(b) production exceeds the level of normal utilization by more than 9%; or

(c) the weighted average of representative prices for all types of table wine remains below 82% of the guide price from the beginning of a wine year for a period to be determined.

2. The Commission shall fix the quantities that are to be delivered for compulsory distillation to eliminate production surpluses and thus restore a normal market situation, in particular as regards the levels of foreseeable availabilities at the end of a wine year and prices.'

25. The price for compulsory distillation is such that this is a dissuasive measure for producers. It varies in the region of 25% of the guide price, since in pursuance of Article 4 of Commission Regulation (EC) No 343/94 [24] which provided for compulsory distillation for the 1993/94 wine year, the buying-in price for table wine to be delivered for compulsory distillation was to be ECU 0.83 per % vol alcohol and per hectolitre.

26. The serious imbalance noted on the market for table wine during the 1993/94 wine year caused the Commission to decide, by Regulation No 343/94, upon the compulsory distillation of a quantity of 18 200 000 hectolitres for the whole Community. The quantity relating to Italy was 12 000 000 hectolitres, that is, two-thirds of the quantity to be distilled.

27. In addition the Community legislature, laying down the rules for governing the market in wine, took the view that 'the establishment of a single market based on a common price system would be jeopardized by the granting of a certain aid; ... therefore the provisions of the Treaty which allow the assessment of aid granted by Member States and the prohibition of aid which is incompatible with the common market should be made to apply to the wine sector'. [25] For the same reason Article 76 of Regulation No 822/87 also made applicable to the

24 — Regulation of 15 February 1994 opening compulsory distillation as provided for in Article 39 of Council Regulation (EEC) No 822/87 and derogating for the 1993/94 wine year from certain detailed rules for the application thereof (OJ 1994 L 44, p. 9).

25 — See the 89th recital in the preamble to Regulation No 822/87.

market in wine certain provisions of the Treaty concerning competition providing that:

'Save as otherwise provided in this regulation, Articles 92, 93 and 94 of the Treaty shall apply to the production of and trade in the products listed in Article 1.'

28. Consequently, according to that express provision of Regulation No 822/87, Article 93 of the Treaty, by virtue of which the Commission is required to review the systems of aid existing in the States or plans to grant or alter aid, also applies to the market in wine. That article allows the Council, acting unanimously, to decide that an aid which a Member State is granting or intending to grant is compatible with the common market.

29. The Court has considered in a number of judgments the significance of a reference to Article 92 to 94 of the Treaty by a regulation relating to the common organization of the market in the sector of an agricultural product. In the judgment in Case 78/76 *Steinike und Weinlig* [26] for example it stated, as regards Article 12 of Regulation (EEC) No 865/68 of the Council of 28 June 1968, [27] which is identical to Article 76 of Regulation No 822/87, that 'In accordance with Article 42 of the Treaty, Article 12 declares that the provisions of Articles 92 to 94 shall apply to the agricultural products coming within the ambit of Regulation No 865/68 without however altering the nature and scope of these provisions'.

30. In Case 177/78 *Pigs and Bacon Commission,* [28] Advocate General Warner, on the basis of the fact that Article 21 of Council Regulation (EEC) No 2759/75 of 29 October 1975 [29] rendered Articles 92 to 94 of the Treaty applicable to the common organization of the market in pigmeat but 'save as otherwise provided in this regulation', emphasized in his Opinion that 'that qualification is important in relation to the question of "precedence" as between the provisions of Articles 92 to 94 on the one hand and those of the common organization of the market on the other'.

31. In that case [30] the Court stated that it followed from the provisions of Article 21 of Regulation No 2759/75 that 'although Articles 92 to 94 are fully applicable to the pigmeat sector, their application nevertheless remains subordinate to the provisions governing the common organization of the market established by the regulation. In other

26 — Previously cited, in footnote 9 (paragraph 13).

27 — Regulation on the common organization of the market in products processed from fruit and vegetables (OJ, English Special Edition 1968(I), p. 225).

28 — Previously cited, in footnote 8; that case concerned the question whether certain activities of a body established under Irish public law were compatible with the Treaty and the common organization of the market in pigmeat.

29 — Regulation on the common organization of the market in pigmeat (OJ 1975 L 282, p. 1).

30 — Previously cited, in footnote 8 (paragraph 11).

words recourse by a Member State to the provisions of Article 92 to 94 on aid cannot receive priority over the provisions of the regulation on the organization of that sector of the market'.

32. On the other hand in the judgment in Case 72/79 *Commission* v *Italy* [31] the Court stated as regards Article 41 of Regulation (EEC) No 3330/74, which is identical to Article 76 of Regulation No 822/87, that: 'Although Article 41 of the regulation provides that Articles 92 and 93 of the Treaty shall apply to the production of and trade in the products covered by the common organization of the market in sugar it does so subject to an express reservation concerning any provisions to the contrary in the same regulation'. [32]

II — The facts

33. In October 1993 France notified the Commission pursuant to Article 93(3) of the Treaty of a plan for aid which it had decided to grant to stabilize the market in wine, in the form of an increase in the minimum price of table wine intended for preventive distillation and bringing that price into line with the market price during the wine year in question.

34. France justified that decision by claiming that the price of table wine intended for preventive distillation was a uniform price for the whole Community, which, owing to the devaluation of the national currency of the countries concerned, gave an advantage to Italian and Spanish wine producers, who received larger sums than French wine producers.

35. On 4 February 1994 in the course of the work of the special committee on agriculture, Italy announced that it intended to grant an aid equal to the difference in price between preventive distillation and compulsory distillation, but omitted to notify the Commission as Article 93(3) required it to do. That aid was to be paid for the quantity of 3 000 000 hl subject to compulsory distillation, whilst during the same wine year a total of 12 000 000 hl was to be distilled in Italy.

36. Italy justified its decision by referring to the difficult situation in which, it claimed, Italian wine producers were placed, in particular those of the South, as the Italian Government's Agent emphasized during the oral procedure, by reason of the measure for compulsory distillation which applied to two-thirds of total production, and of the

31 — [1980] ECR 1411; that case concerned compensation to producers for storage costs for sugar, pursuant to the provisions of Regulation (EEC) No 3330/74 of the Council of 19 December 1974 on the common organization of the market in sugar (OJ 1974 L 359, p. 1).

32 — Paragraph 13.

low price paid for the quantities of wine to be distilled.

37. On 10 November 1993 the Commission decided to open the procedure laid down by the first subparagraph of Article 93(2) of the Treaty with regard to the French aid.

38. At the Council meeting on 21 and 22 February 1994, the French and Italian Governments officially requested authorization to grant the aids at issue. On 21 February 1994 the Council unanimously decided, by two decisions, one addressed to France and the other to Italy, in pursuance of the third subparagraph of Article 93(2) of the Treaty, that those aids were compatible with the common market for the wine year 1993/94.

39. Those Council decisions were not published in the *Official Journal of the European Communities*, but the Commission was notified of them by a letter from the General Secretary of the Council of the European Union dated 11 March 1994.

40. To be precise, the Council approved the grant to French wine producers for the 1993/94 wine year of supplementary aid of a maximum amount equal to the difference between FF 24/% vol/hl, which was the market price during that wine year, and the minimum Community price of ECU 2.06/% vol/hl for preventive distillation (a difference of some FF 8). Consequently the preventive distillation price was brought into line with the market price of wine for the wine year in question.

41. According to the Council decision (Article 1), the aid in question was paid to French producers whose output did not exceed 90 hl/ha and who delivered for preventive distillation at least the following quantities:

— 10 hl/ha for an output between 78 and 82 hl/ha; or

— 11 hl/ha for an output between 82 and 86 hl/ha; or

— 12 hl/ha for an output between 86 and 90 hl/ha.

That aid was limited for each producer to 9 hl/ha.

42. The Council also authorized the grant to Italian wine producers, under Article 1 of its decision, a supplementary aid

— for compulsory distillation of a maximum quantity of 3 000 000 hl of table wine and wine suitable for yielding table wine, produced in Italy during the 1993/94 wine year,

— of a maximum amount equal to the difference between the minimum buying-in price for preventive distillation (ECU 2.06/% vol/hl) and that for compulsory distillation (ECU 0.83/% vol/hl).

In other words it brought the price for compulsory distillation into line with that for preventive distillation.

43. The Commission's view is that both the Council's decisions distort competition and introduce a level of price support higher than that of the common organization of the market in wine. It also thinks that they rob the distillation system of its dissuasive effect which is necessary for control of the market; they make it impossible for the Commission to perform its management duties and encumber the success of any subsequent reform of the existing system designed to solve the numerous problems of the market in question. The Commission is therefore claiming, by application lodged on 25 April 1994, the annulment of the Council decisions at issue. The French Republic and the Italian Republic have intervened, by lodging written statements in intervention, in support of the forms of order sought by the Council.

III — The grounds relied upon for annulment

44. The Commission emphasizes that during the past few decades an increase has become noticeable in the number of cases in which the Council has made use, in the agriculture sector, of the possibility afforded it by the third subparagraph of Article 93(2) of the Treaty and has regarded various State aids as compatible with the common market, [33] although the Commission has raised objections as to the legality of the procedure followed. That is why the Commission, by its application, is claiming that the two Council decisions of 21 February 1994 be declared void.

33 — On page 3 of its reply the Commission refers to 37 decisions in the agriculture sector, 17 of them in the wine sector. It adds that, whereas there was no decision of that kind from 1960 to 1967 and there were only 14 between 1967 and 1983, the remaining 23 were adopted between 1984 and 1994. As regards more particularly the wine sector, it states that between 1960 and 1984 there were only two decisions (in 1975 and 1976), whereas the remaining 15 were adopted during the last decade, 8 of them between 1989 and 1994.

45. The grounds upon which the Commission relies for the annulment of both decisions concern both their external and their internal legality and they raise essentially two problems. First of all it is necessary to determine the field of application, according to Article 42 of the Treaty and Article 76 of Regulation No 822/87, of the third subparagraph of Article 93(2) of the Treaty to the production of and trade in the products covered by the common organization of the market in wine and to determine the Council's powers in that respect. It is next necessary to determine the extent to which the conditions laid down by the third subparagraph of Article 93(2), which makes a decision to authorize State aid dependent upon the existence of 'exceptional circumstances', were met, and then to determine whether the statement of the reasons on which the decisions were based is defective or incorrect. In brief, the Commission wonders to what extent the conditions, of form and substance, for the application of the third subparagraph of Article 93(2) were satisfied.

(1) Incorrect application of the third subparagraph of Article 93(2) of the Treaty in the context of the common organization of the market in wine

A — *The first ground for annulment*

46. By its first and principal plea in law the Commission claims (p. 3 of the application) that there has been an incorrect application of the third subparagraph of Article 93(2) of the Treaty which is certainly not being applied solely in the sphere of the chapter on competition, but that does not constitute grounds for regarding aids which are contrary to provisions of the Treaty other than those of Articles 92 to 94 as legal. It alleges lack of competence and misuse of powers inasmuch as the contested provision of the third subparagraph of Article 93(2) is used as the basis for derogations from the machinery of the common organization of the market in wine. In referring to the disregard of the procedure set out in Article 43 for the purpose of amending the rules of a common organization of the market, such as the necessity for a proposal from the Commission and consultation with the European Parliament, the Commission indirectly alleges that there has also been an infringement of an essential procedural requirement.

47. First of all I must point out that the Community legislature did not make any new departure in Regulation No 822/87, inasmuch as the last part of every regulation establishing a common organization of the market in a given product contains a series of general provisions, including a specific provision analogous to that in Article 76, by virtue of which Articles 92, 93 and 94 of the Treaty are applicable to the production of and trade in the products listed in Article

1 of the regulation, save as otherwise provided in the regulation. [34]

48. The Commission claims, on the basis of the wording of the third subparagraph of Article 93(2) of the Treaty, that the Council is empowered to derogate, in pursuance of the exceptional powers granted it by that provision, only from the provisions of Article 92 or of the regulations envisaged by Article 94 of the Treaty and cannot rely on that provision to derogate from the rules relating to common organizations of the market.

49. The Commission further claims that the contested decisions clearly infringe the provisions governing the common organization of the market in wine, that is, those provisions of Regulation No 822/87 which envisage the possibility of derogating from the rules of that market according to the management committee procedure in order to deal with short-term difficulties.

50. The Court has considered in a number of cases the problem of the infringement of the rules of the common organization of the market in a given agricultural product by the Member States. The Commission relies on that case-law in support of its arguments.

51. In its judgment in Joined Cases 15/76 and 16/76 *France* v *Commission*, [35] the Court did in fact accept that: 'In applying Community rules the Member States cannot unilaterally adopt additional measures which are such as to compromise the equality of treatment of traders throughout the Community and thus to distort competitive conditions between the Member States'. [36]

52. In a different context from that of the judgment just referred to, namely that of the common organization of the market in pigmeat, the Court accepted, in its judgment

34 — That was the case, for example, with the common organization of the market in the following sectors: beef and veal, with Article 24 of Regulation (EEC) No 805/68 of the Council of 28 June 1968 (OJ, English Special Edition 1968 (I), p. 24); milk and milk products with Article 23 of Regulation (EEC) No 804/68 of the Council of 27 June 1968 (OJ, English Special Edition 1968 (I), p. 176); seeds with Article 8 of Regulation (EEC) No 2358/71 of the Council of 26 October 1971 (OJ, English Special Edition 1971 (III), p. 894; fruit and vegetables with Article 31 of Regulation (EEC) No 1035/72 of the Council of 18 May 1972 (OJ, English Special Edition 1972 (II), p. 437); pigmeat with Article 21 of Regulation (EEC) No 2759/75 (previously cited, in footnote 29); poultry-meat with Article 19 of Council Regulation (EEC) No 2777/75 of 29 October 1975 (OJ 1975 L 282, p. 77); sugar with Article 44 of Council Regulation (EEC) No 1785/81 of 30 June 1981 (OJ 1981 L 177, p. 4); processed fruit and vegetables with Article 19 of Council Regulation (EEC) No 426/86 of 24 February 1986 (OJ 1986 L 49, p. 1); cereals with Article 19 of Council Regulation (EEC) No 1766/92 of 30 June 1992 (OJ 1992 L 181, p. 21); and bananas with Article 24 of Council Regulation (EEC) No 404/93 of 13 February 1993 (OJ 1993 L 47, p. 1).

35 — [1979] ECR 321; that case concerned the procedure for discharge of the accounts presented by the Member States in connection with expenditure financed by the European Agricultural Guidance and Guarantee Fund.

36 — Paragraph 31.

in Case 83/78 *Pigs Marketing Board*, [37] that 'once the Community has, pursuant to Article 40 of the Treaty, legislated for the establishment of the common organization of the market in a given sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it'. [38]

53. In my view the case-law just mentioned is of no help in solving the problems raised in this case since it clearly concerns the obligations of Member States where a common organization of the market is set up in a given sector and does not relate to the powers of the Council in that sector, which are governed by other provisions.

54. The Treaty itself, in Article 42, empowers the Council to apply the provisions of the chapter on the rules on competition (Articles 85 to 95) to the production of and trade in agricultural products. As I said previously, Regulation No 822/87 expressly provides in Article 76 that Articles 92, 93 and 94 of the Treaty are to apply to the common organization of the market in wine. I think therefore that the reference to Articles 92 to 94 means that those provisions have been integrated into the common organization of the market in wine. The Council may, on the basis of the powers conferred upon it, take measures derogating from the provisions governing that market. Accordingly the third subparagraph of Article 93(2) is an appropriate basis for adopting such measures, by which a State aid to the wine-growers of certain Member States is considered to be compatible with the common market. In other words, I think that, in those circumstances, the claim that it would have been necessary to apply the procedures set out in Articles 42 and 43 of the Treaty in order to adopt the aforesaid Council decisions is unfounded. Nor do I think that, in law, the fact that Regulation No 822/87 is based on Articles 42 and 43, which provide that there must be a Commission proposal and consultation with the European Parliament as essential procedural requirements, means that the Council was in this case deprived of the power envisaged in the third subparagraph of Article 93(2) or that it was required to follow a procedure involving such a proposal and such consultation. [39]

55. *In its judgment in Case 78/76 Steinike und Weinlig*, [40] the Court stressed, in the

37 — [1978] ECR 2347, paragraph 56. See also the similar solutions adopted by the Court in the judgment cited in footnote 8, *Pigs and Bacon Commission* (paragraph 14), which concerned the pigmeat sector, and in the judgment in Case 111/76 *Van den Hazel* [1977] ECR 901, paragraph 13, which concerned the common organization of the market in poultry-meat.

38 — It is precisely that consistent case-law which is also reproduced in the judgment, cited in footnote 17, in Case C-86/89 *Italy* v *Commission* (paragraph 19).

39 — That was precisely the view of Advocate General Sir Gordon Slynn in his Opinion in Case 253/84 *GAEC de la Ségaude* v *Council and Commission* [1987] ECR 123, which raised the problem of the validity of a Council decision considering compatible with the common market an aid granted by the Federal Republic of Germany in the form of relief from VAT up to a maximum of 5% of the price (excluding VAT) paid by the purchaser of the agricultural product (see in particular p. 146). The Court dismissed the claim for damages made by the applicant company, GAEC, and did not express a view on this particular problem.

40 — Previously cited, in footnote 9 (paragraph 13).

context of a similar reference to Articles 92 to 94 of the Treaty, that the reference in question: 'In accordance with Article 42 of the Treaty, ... declares that the provisions of Articles 92 to 94 shall apply to the agricultural products coming within the ambit of' the regulation in question 'without however altering the nature and scope of these provisions'. Consequently, in accordance with a prima facie approach to the case-law, I am inclined to the view that that reference means that all those provisions, that is, including the third subparagraph of Article 93(2), may be applied to the extent to which the Council thinks it appropriate and, of course, subject to the conditions for which it provides. That seems to me to be in accordance with the logic of the reference in Article 76 of Regulation No 822/87 to Articles 92 to 94 of the Treaty.

56. According to the Commission, an aid intended to maintain producers' income, such as the aid in Case 253/84 *GAEC de la Ségaude*, [41] is characterized by the fact that it lies outside the scope of the common organization of the market for a given product, so that it might have the third subparagraph of Article 93(2) as its legal basis, and does not affect the system established by the common organization of the market in question, contrary to the contested Council decisions, which run directly counter to the legislative framework of the common organization of the market in wine.

57. In my view the fact that Regulation No 822/87 refers also to the third subparagraph of Article 93(2) means that it is permissible for the Council to derogate from Article 92, which concerns State aid, and from the regulations envisaged by Article 94, but always for State aid granted or to be granted concerning the common organization of the market in wine.

58. The contested provision of the third subparagraph of Article 93(2) is intended to make it possible, in a specific case, to lay down a special system or a measure for special aid for a given period (for example the 1993/94 wine year) for reasons the legality of which I shall consider later. In other words, the decision which the Council takes in a given case is of an individual and not of a legislative nature, since it refers to specific produce, concerns a specific aid granted by a Member State to wine-growers and does not represent a modification of the existing legislative framework of the common organization of the market in wine. For that same reason Regulation No 822/87 remains in force in its entirety. In other words, contrary to the powers which Articles 92(3)(e) and 94 confer on the Council for laying down general measures, the question here is one of the grant of the power to authorize *in concreto*, in a given case, a measure of special aid.

59. My view is that the aids granted by France and Italy are covered by the reference to Articles 92 to 94 of the Treaty. Moreover

41 — Previously cited, in footnote 39.

an additional legal basis would be necessary in order to avoid an infringement of Article 92 of the Treaty only if a State aid authorized by the Council derogated from special provisions outside the agricultural sector covered, for example fiscal provisions. [42]

60. Were we to accept the Commission's point of view and to interpret the provision in question strictly, accepting that it concerns the competition sector and not the agriculture sector, that is, not accepting that the third subparagraph of Article 93(2) is in principle applicable for the purpose of the adoption by the Council, when special circumstances make it necessary, of measures in the wine sector, thus running counter to the spirit of the relevant provisions of Articles 92 to 94 of the Treaty, we should end up with arbitrary discrimination contrary to the express provision in Article 42 of the Treaty.

61. The provisions of Articles 92 to 94 were certainly made applicable to the products covered by Regulation No 822/87 and, as the Court has stated, [43] 'without however altering the nature and scope of these provisions' as a result of that reference. The Council confined itself to fulfilling the task entrusted to it by the Treaty, namely that, according to the Court, [44] as I shall analyse later, of appraising within the framework of the common organization of the market in an agricultural product, 'whether the special economic circumstances obtaining in one of the Member States justify adjustments to the Community system'.

62. It may therefore be said, to sum up, that, as regards State aids, the Treaty embodies certain safety valves and expressly leaves the last word to the Council subject to certain conditions.

63. More precisely, it emerges from a study of the provisions of the Treaty relating to State aids, first, that the Council is empowered to extend the range of aids which may be considered to be compatible with the common market. To be more specific, it is empowered, acting by a qualified majority on a proposal from the Commission [Article 92(3)(e)], to determine what other categories of aid 'may be considered to be compatible with the common market', [45] that is to say that the Council may determine the aids in question by regulation. [46]

42 — That may be seen also from points 17 and 18 of Advocate General Jacobs's Opinion in Case C-438/92 *Rustica Semences* [1994] ECR I-3519.

43 — Case 78/76 *Steinike und Weinlig*, previously cited, in footnote 9 (paragraph 13).

44 — Case 72/79 *Commission* v *Italy*, previously cited, in footnote 31 (paragraph 18).

45 — See the judgment of the Court in Joined Cases C-356/90 and C-180/91 *Belgium* v *Commission* [1993] ECR I-2323, paragraph 26.

46 — In the judgment in Joined Cases C-356/90 and C-180/91 *Belgium* v *Commission*, previously cited in footnote 45, which concerned the Sixth Council Directive 87/167/EEC of 26 January 1987 on aid to shipbuilding (OJ 1987 L 69, p. 55), the Court stated that 'the Council, acting in accordance with the logic of Article 92(3), noting to begin with that aid to shipbuilding was incompatible with the common market, then took into account a series of economic and social requirements which caused it to make use of its power under the Treaty to consider such aid nevertheless compatible with the common market, provided that it complied with the criteria for derogation contained in the directive' (paragraph 30).

64. Secondly the third subparagraph of Article 93(2) leaves the last word to the Council to decide, acting unanimously, upon the adoption of a measure, considering a given State aid to be compatible with the common market. In other words the Council is the institution which, in the last resort, is called upon to decide, in the event of 'exceptional circumstances', that certain aids are compatible with the common market.

65. Thirdly, under Article 94 of the Treaty, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 92 and 93, but has not hitherto done so.

66. Consequently according to that analysis the Council has not, by using the procedure set out in the third subparagraph of Article 93(2), made an incorrect application of that provision to the common organization of the market in wine, nor has it altered the legislative framework governing that market without applying the procedure set out in Article 43(2) and (3) of the Treaty as the Commission alleges. It was therefore *ratione materiae* the competent institution to adopt both decisions subject to the conditions laid down by the provision in question.

67. The Commission also argues that the Council has infringed certain essential procedural requirements including, without any doubt, the requirement that there should be a proposal from the Commission and consultation with the European Parliament, laid down by the third subparagraph of Article 43(2) of the Treaty, which it is required to follow in the case of the adoption of rules for the establishment of a common organization of the market in an agricultural product. Having regard to this analysis, my view is that the two contested decisions do not modify any provisions of Regulation No 822/87 on the common organization of the market in wine and that consequently it was not necessary for the procedure set out in Article 43 of the Treaty to be followed.

(2) Abuse of process

68. Abuse of process as a ground for annulment of a measure adopted by a Community institution constitutes a special category of ground for annulment wider than misuse of powers. [47] It implies that by circumventing the relevant provisions laying down the procedure to be followed in taking a decision the institution in question has adopted the measure by following another procedure, prescribed for a different purpose.

69. According to the Commission, instead of amending Regulation No 822/87 by observing the procedure set out in Article

47 — See, by way of guidance, the judgments in Case 2/57 *Compagnie des Hauts Fourneaux de Chasse* v *High Authority of the ECSC* [1957 and 1958] ECR 199 and in Joined Cases 32/87, 52/87 and 57/87 *ISA* v *Commission* [1988] ECR 3305, paragraph 19. In the judgment cited in footnote 10, Case C-225/91 *Matra* v *Commission* (paragraph 25), the Court expressly states that it takes abuse of process also into consideration.

43 of the Treaty and adopting a new regulation, the Council has preferred to attain the same object, that is, to alter the common organization of the market in wine, by following the procedure set out in the third subparagraph of Article 93(2) and by adopting for that purpose the two contested decisions. The Commission states that that course of action has been frequently adopted, particularly since the 1980s and, as regards the distillation of wine sector, since 1989. Thus the Council has essentially altered the rules governing the common organization of the market in wine without observing the procedure set out in Article 43. At the same time it has infringed the provisions of Regulation No 822/87, which contains special rules for dealing with short-term difficulties, with the difference that those derogations permit the adoption of measures for structural ends which do not, however, affect the fundamental machinery for the management of the common organization of the market in wine. In other words, the plea in law regarding the annulment of the decisions taken following that procedure is well founded since the practice in question reveals, in the sector of the common organization of the market in wine, more particularly in the case of France and Italy, the existence of an abuse of process.

70. As emerges from the analysis I have made with regard to the field of application of the third subparagraph of Article 93(2), I think that by adopting the two decisions in dispute the Council committed no abuse of process and did not encroach upon the Commission's power to be in principle the prime mover in the procedure for the adoption of provisions concerning the common organization of a market according to Article 43 of the Treaty. Nor does the use of these exceptional powers by the Council disregard the need for consistency with the other provisions of the Treaty, as the Court has also declared. [48]

71. In conclusion, I think that the grounds relied upon by the Commission for annulment of the disputed Council decisions, which I have discussed above, cannot be upheld in view of the fact that there has been no incorrect application of the third subparagraph of Article 93(2) of the Treaty. Consequently the Council was the institution empowered to take the decisions, the essential procedural requirements laid down by Article 43 of the Treaty have not been infringed and there has been no abuse of process.

B — *The second ground for annulment*

72. By its second plea in law regarding annulment, upon which it relies in the alternative, the Commission claims on the one hand that there were no 'exceptional circumstances', the existence of which is one of the conditions laid down by the third subparagraph of Article 93(2) of the Treaty for considering an aid granted or to be granted by a

48 — See the judgment in Case C-225/91 *Matra* v *Commission*, previously cited in footnote 10 (paragraphs 41 and 42).

Member State to be compatible with the common market (p. 6 of the application and p. 12 of the reply). In other words, it claims that the facts relied upon by the Council do not come within the concept of 'exceptional circumstances' and that there has been an incorrect legal characterization and consequently an incorrect application of a rule of law. For that reason also it is claiming that both decisions be declared void because the statement of the reasons on which they were based is not lawful (pp. 7 and 8 of the application). Moreover it claims that those decisions be declared void on the ground that the Council has made an inappropriate use of the discretion conferred upon it by the third subparagraph of Article 93(2) by making a manifestly incorrect appraisal of the facts when it adopted the two decisions (p. 6 of the application). The Commission's Agent also repeated those grounds for annulment at the hearing.

73. For the second plea in law (or more exactly group of pleas) to be upheld by the Court it must be established that the consequences of the characterization made by the Council are objectively and undeniably incorrect.

74. I shall therefore consider in turn the extent of the Council's power under the third subparagraph of Article 93(2), the concept of 'exceptional circumstances' and the question whether there was an incorrect legal characterization or manifestly incorrect appreciation of the facts in the case of France and of Italy.

(1) The extent of the Council's power under the third subparagraph of Article 93(2) of the Treaty

75. It may be seen from a prima facie approach to the third subparagraph of Article 93(2) that the Council has a wide discretion with regard to the expediency of adopting certain measures ('the Council may, acting unanimously, decide') and furthermore it determines when the exceptional circumstances, which constitute the *sine qua non* for deciding that a State aid granted or to be granted is considered to be compatible with the common market, are present.

76. As the Court has consistently held, [49] particularly on the subject of the common agricultural policy: 'The Community institutions have a wide discretionary power ... which reflects the responsibilities which the Treaty imposes on them'. In other words, 'when a situation necessitates the evaluation of a complex economic situation, as is the case concerning the common agricultural

49 — This case-law is reproduced in the judgment in Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 31.

policy, the Community legislature enjoys a wide discretion as to the nature and scope of the measures to be taken'. [50]

77. The Court has also given its views in numerous cases on the extent of the powers of the Community institutions in the framework of powers conferred by provisions of the Treaty relating to competition and agricultural policy and on its powers of review where those institutions have a wide discretion. [51] It therefore accepts that, as regards the common organization of a produce market, the Council has a wide discretion, and on the basis of that assessment it also lays down the limits of the review which it carries out. [52] In the judgment in Case 138/79 *Roquette Frères* v *Council*, [53] the Court accepted that: 'When the implementation by the Council of the agricultural policy of the Community involves the need to evaluate a complex economic situation, the discretion which it has does not apply exclusively to the nature and scope of the measures to be taken but also to some extent to the finding of the basic facts inasmuch as, in particular, it is open to the Council to rely if necessary on general findings. In reviewing the exercise of such a power the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority in

50 — See the judgment in Case 84/87 *Erpelding* [1988] ECR 2647, paragraph 27. See also the judgments in Case 179/84 *Bozzetti* [1985] ECR 2301, paragraph 30; in Case 265/87 *Schräder* [1989] ECR 2237, paragraphs 23 and 24; and in Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraph 14.

51 — The Court's case-law offers numerous examples of judgments concerning the powers of the Commission under Articles 92 and 93(2) and (3) of the Treaty. For example in Case C-225/91 *Matra* v *Commission*, previously cited in footnote 10 (paragraph 24), the Court stated that it is settled law that, 'as regards the application of Article 93(3) of the Treaty, the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context'. It then stated (paragraph 25) that in its review of legality the Court must therefore restrict itself to determining whether the Commission has exceeded the scope of its discretion by a distortion or manifest error of assessment of the facts or by misuse of powers or abuse of process. See also the similar solutions (concerning the extent of the Commission's powers under Article 92(3)) given in the previous judgments in Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 18; in Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 49; in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 56; and in Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 34. See also the judgments in Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 34, which concerned a review of the determination of the permissible duration of a non-competition clause in an agreement for the transfer of an undertaking in the context of the application of Article 85(1) of the Treaty; in Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, paragraph 21, which concerned the imposition by the Council of a definitive anti-dumping duty on imports of ball-bearings originating in Japan and Singapore; and in Case 55/75 *Balkan-Import-Export* [1976] ECR 19, paragraphs 8 and 9, concerning the legality of the collection of monetary compensatory amounts on trade between Member States and third countries effected in pursuance of Regulation (EEC) No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (OJ, English Special Edition 1971 (I), p. 257).

52 — In Case 253/84 *GAEC de la Ségaude* v *Council and Commission*, previously cited in footnote 39, the Council had adopted the contested decision on the basis of the third subparagraph of Article 93(2) with a view to offsetting the loss of income suffered by German farmers as a result of the progressive dismantling of the system of monetary compensatory amounts. The GAEC brought an action and claimed compensation for the damage it had suffered. Advocate General Sir Gordon Slynn questioned, in his Opinion, the extent to which the presence of exceptional circumstances within the meaning of the third subparagraph of Article 93(2) was established, but the Court, taking the view (paragraphs 20 and 21) that the applicant had not adduced sufficient evidence in support of its claim, did not express any opinion on that point. The Advocate General, it is true, accepted that the dismantling of positive monetary compensatory amounts, allowing a country to have at one and the same time a strong currency and relatively low export prices, involved a loss of income for German farmers. He concluded that the Council decision was 'not unlawful simply because it is based on the third subparagraph of Article 93(2) of the EEC Treaty, but is *ultra vires* because it has not been shown to be justified by "exceptional circumstances" as required by that provision' ([1987] ECR at p. 147).

53 — [1980] ECR 3333, paragraph 25, on the fixing of quotas for isoglucose production. That judgment reproduced the solution adopted by the Court in the judgment in Case 166/78 *Italy* v *Council* [1979] ECR 2575, paragraph 14, which dealt with the premium for the production of potato starch.

question did not clearly exceed the bounds of its discretion.' [54]

78. As the Court has no jurisdiction in such cases to substitute its own appreciation for that of the body making the decision, it must, on the basis of the evidence produced by the parties and the responses made to it by the opposite party, conclude with a reasonable degree of certainty that there has been neither a mistake with regard to the facts which would have an effect on the validity of the two Council decisions, [55] nor an incorrect legal characterization of those facts so that they do not come within the concept of 'exceptional circumstances', nor a manifestly incorrect appraisal of those facts.

79. Moreover I note in this case that the unsatisfactory situation of the market in wine, which requires the adoption of certain drastic measures and more particularly recourse to distillation, highlights, if not a form of conflict, at least an effort to reach an acceptable compatibility between two equally important objectives of the common agricultural policy under Article 39 of the Treaty, namely, according to paragraph 1(b), 'to ensure a fair standard of living for the agricultural community', and, according to paragraph 1(c), 'to stabilize markets'. The solutions adopted by the Council and the Commission to resolve this form of conflict are different, as is shown also by the procedural documents they have lodged, since the Council, by its decisions, seeks the first objective and the Commission the second.

80. In the judgment in Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni*, [56] the Court determined the method of reconciling any conflicts between the various objectives of the common agricultural policy. To be more specific, it declared that: 'In pursuing the objectives of the common agricultural policy set out in Article 39 of the Treaty, the Community institutions must secure the permanent harmonization made necessary by any conflicts between those aims taken individually and, where necessary, allow any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made.' [57] It then added: 'That harmonization must preclude the isolation of any one of those objectives in such a way as to render impossible the realization of other objectives' [58] and that 'pursuing the sole objective of ensuring a fair standard of living

54 — In the judgment in Case 74/76 *Iannelli and Volpi*, previously cited in footnote 13 (paragraph 11), the Court declared that 'both Article 92 and Article 93 give the Commission a wide discretion and the Council wide powers to accept State aid in derogation from the general prohibition in Article 92(1).'

55 — See also the end of section A of the Opinion of Advocate General Gand in Case 8/65 *Acciaierie e Ferriere Pugliesi* v *High Authority of the ECSC* [1966] ECR 1.

56 — Previously cited in footnote 49 (paragraph 32); that judgment concerned the common organization of the market in raw tobacco, which is similarly characterized by overproduction and the system of maximum guaranteed quantities for the whole of the Community market in the sector in question.

57 — See, for example, the judgment in Case 5/73 *Balkan-Import-Export* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091, paragraph 24.

58 — See, in particular, the judgment in Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle* v *Council and Commission* [1981] ECR 3211, paragraph 41, which concerned the common organization of the market in cereals and the threshold price of durum wheat.

for producers and processors of raw tobacco, in particular by increasing their individual earnings, would involve a serious risk of rendering impossible in a market characterized by excess production the realization of the abovementioned objective of stabilizing the relevant market'. [59]

81. In my view the Council is trying first of all by the two contested decisions to reconcile contradictory objectives of Article 39 of the Treaty in the context of the market in wine and, since it has a wide discretion, it was the competent institution to assess the extent to which the present dysfunctioning of the market in the case of one Member State justified the ad hoc adoption of a corrective measure.

82. I shall first deal with the concept of 'exceptional circumstances' and shall then have to consider in this specific case whether the Council judged incorrectly that the facts established that 'exceptional circumstances' were present or whether it manifestly overstepped the limits of its discretion when it adopted the two decisions of 21 February 1994.

59 — Paragraph 34 of the judgment in Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni*, previously cited in footnote 49.

(2) The concept of 'exceptional circumstances'

83. In my view the expression 'exceptional circumstances' referred to in the third subparagraph of Article 93(2) involves the idea of something extraordinary and unforeseen or at least something not permanent or continuous and of course something other than normal. In other words a chronic unsatisfactory situation in one sector of economic activity, in particular in an agricultural sector, cannot *ipso facto* come within the concept of 'exceptional circumstances' unless other extraordinary and non-permanent events which have supervened justify their coming within it. I think that the question of which facts or which situations ultimately constitute 'exceptional circumstances' must be appraised sector by sector, regard being had to numerous factors. [60]

84. The idea of the extraordinary and the exceptional, which constitutes the quintessence of the expression 'exceptional circumstances', emerges from both the earliest and

60 — One example in recent case-law is the judgment in Case C-105/90 *Goldstar* v *Council* [1992] ECR I-677, paragraphs 17 and 18, on defence against dumping practices, in which the Court declared that the criterion of 5% for an 'assessment made by the Community institutions of the question whether or not sales on the domestic market are representative ... may be departed from only in exceptional circumstances. Such circumstances may arise where the total volume of sales on the domestic market is not sufficiently large for selling prices to be determined by supply and demand.'

the most recent case-law of the Court in the field of competition. [61]

85. Consequently I think that 'exceptional circumstances' within the meaning of the third subparagraph of Article 93(2) are facts or situations which may relate to one sector in particular or to the economy in general but which, assessed in each case in a reasonable manner in the context of a specific Member State and a specific agricultural sector, show that there has been a change on such a scale, as compared with what was previously considered normal or at least not extraordinary, that it has become clear that the situations previously obtaining have changed, that new situations have arisen and that corrective measures are needed for which there is no provision in the existing rules governing the sector in question.

86. In other words, in the sector of the common organization of the market in wine the situation would have to be such that it was impossible to deal with such changes by means of existing rules and the intervention of the Council was needed for the adoption of appropriate measures to deal with that short-term dysfunction and hence with that imbalance in the machinery of the common organization of the market affecting more particularly one Member State or another.

(3) Incorrect legal characterization: absence of 'exceptional circumstances'

87. The situation in the wine sector — but also in other sectors such as milk and milk products, sugar, raw tobacco and the like [62] —, at least during the past two decades, has not been good. Whilst average wine production is showing a constant increase, as may be seen from the European Community

61 — For example in the judgment in Case 28/66 *Netherlands* v *Commission* [1968] ECR 1, the Court, in reviewing the legality of special internal rates by reason of changes in the structure of transport, clarified the concept of the exceptional nature of circumstances justifying the adoption of such measures. More precisely, it referred to 'exceptional difficulties resulting from unforeseeable circumstances' and subsequently emphasized that 'the unforeseeable nature of the circumstances justifying the grant of special rates and conditions must be assessed in the light of the facts of each case and according to a reasonable assessment of the situation'. Finally it stated that modifications in the infrastructure of transport bringing about a change in the existing economic situation constitute such unforeseeable circumstances. In the judgment in Case 10/73 *Rewe-Zentral* [1973] ECR 1175, paragraph 20, on the validity of provisions fixing monetary compensatory amounts between Member States by reason of fluctuations of the rates of exchange in the context of the common agricultural policy, such amounts were described, in spite of constituting a partitioning of the market, as having a corrective influence on variations in fluctuating exchange rates and being therefore conducive to the maintenance of a normal flow of trade under exceptional circumstances created temporarily by the monetary situation.

62 — For example, so as to control the growth of milk production, Article 5d of Regulation No 804/68 (previously cited, in footnote 34), which was inserted by Article 1 of Council Regulation (EEC) No 856/84 of 31 March 1984 (OJ 1984 L 90, p. 10), provided for a supplementary levy on quantities of milk or other milk products exceeding a reference quantity to be determined. In the same sector the Council had previously introduced by Regulation (EEC) No 1079/77 of 17 May 1977 (OJ 1977 L 131, p. 6) a co-responsibility levy to reduce structural surpluses in the milk and milk-products market. Regulation (EEC) No 1785/81 (previously cited, in footnote 34), which introduced rules governing the common organization of the market in the sugar sector, also introduced a system of quotas to control sugar production. Similarly Council Regulation (EEC) No 2075/92 of 30 June 1992 (OJ 1992 L 215, p. 70), which set up a new common organization of the market in raw tobacco, provides for the introduction of maximum guaranteed quantities to control the increase in the Community production of raw tobacco.

statistics, [63] there is at the same time a continual tendency for consumption of table wines to fall so that there is a corresponding increase in stocks. That situation shows that it is necessary to stabilize the market in wine, but realization of such an objective will have unfavourable consequences in that sector for those engaged in agriculture.

88. All parties are agreed that the poor situation in the wine sector ('abnormal' according to the Commission, 'exceptional' or 'absolutely exceptional' according to the Council and both interveners) means that a comprehensive change in Community policy in the agriculture sector is urgent. Moreover the poor situation and the pessimistic forecasts in the wine sector for the 1993/94 wine year (over-production of wine and fall in consumption) have undeniably justified the need to have recourse to distillation according to the procedure set out in Regulation No 822/87. However, the important factor to be considered is whether it emerges clearly that, apart from the special circumstances justifying recourse to distillation, there are special and exceptional reasons affecting one Member State, which cannot be met by the machinery introduced by Regulation No 822/87 for dealing with such facts and which constitute exceptional circumstances and justify recourse to the procedure set out in the third subparagraph of Article 93(2), as the Council and the French and Italian Governments state. That provision, in fact, works as an escape route from the system and is implemented when policies have not had the desired results.

89. In other words I think that decisive importance must be attached only to the data establishing *in concreto* that exceptional circumstances are present, so that an essential condition may be satisfied for the Council's recourse to the procedure set out in the third subparagraph of Article 93(2). That is a point which it is important to clarify because at the hearing the Commission's Agent emphasized that the Council, by using that measure, is wishing to show that it is free from any obligation which would prevent it from acting as it thinks fit (I might say, to act *ad libitum*), an argument, however, which the Council's Agent rejected, claiming that the provision at issue was not often used and that when it was the conditions envisaged were satisfied on each occasion.

90. In the context of the possibilities afforded it by numerous provisions in Regulation No 822/87, the Commission endeavours to cope with the serious and chronic structural problems of the market in wine, which are endemic above all in Italy and France, on the one hand by distillation (chiefly preventive and compulsory) of considerable quantities of mediocre quality wine

63 — 134 400 000 hl for 1966-1970.
147 200 000 hl for 1971-1975.
Over 150 000 000 hl for 1980-1986.
Some 189 500 000 hl produced on average for 1989-1993.
Some 192 700 000 hl produced during the 1992/93 wine year.

which, in the case of both interveners, that is, France and Italy, represent a significant proportion of the quantities produced during each wine year, and on the other hand by premiums for the grubbing up of vines, by prescribing rules for the replanting scheme, for oenological practices (for example the use of sucrose) and the like. That state of affairs obviously shows that there is no way out and illustrates the chronic problems of present policy in the wine sector and the need for a radical change in the common organization of the market in wine.

91. However, it will certainly be necessary to consider whether there are exceptional circumstances affecting the wine sector. That does not prevent the Council from considering, in the context of an evaluation of a complex economic situation in the sector in question, important facts or situations relating to the agriculture sector or also, more generally, to the economy, which do not concern the market in wine exclusively, but which undeniably have a direct effect on that market and which cannot be dealt with by means of the protective machinery established by Regulation No 822/87.

92. I do not think it is convincing to draw from these initial findings the conclusion that in this case there are 'exceptional circumstances' which would *ipso facto* justify the adoption of the disputed Council decisions regarding a wine year which is simply following the same trend as that in previous years, although admittedly they were not favourable for the wine sector, as may be seen from the statement of reasons in the Council's decisions; I do not therefore agree with that argument.

93. Similarly the statement of the reasons on which the decisions are based (seventh recital in the preamble to the decisions relating both to Italy and to France), which is based on the fact that these decisions concern a sector, the legislative framework for which is in the process of being remodelled does not seem to me *a fortiori* to be legal, since that could not be regarded as an 'exceptional circumstance' within the meaning of the third subparagraph of Article 93(2).

94. In my view factors such as those set out above cannot come within the concept of 'exceptional circumstances' because if that concept were to be taken to extremes it would become null and void through being stretched too far. In other words it is impossible to bring facts such as those relied on by the parties concerned within the concept of 'exceptional circumstances' because to do so would alter the content so that this vague legal concept would have only a nominal value without any specially compelling scope and in the last resort without any special practical value.

95. Having defined the expression 'exceptional circumstances' and stressed that it refers to something extraordinary and unforeseen or at least not permanent or continuous, I think that the chronically unsatisfactory situation of the common organization of the market in wine and its expected reform do not *ipso facto* establish that there are 'exceptional circumstances' which would justify the adoption of these disputed decisions.

96. According to the Council the concept of 'exceptional circumstances' covers not only special situations which may exist at a given moment in the wine sector as compared with situations which were regarded as normal in the past, but above all situations which may distinguish the wine sector from the agriculture sector in general and from other sectors of the economy. I cannot say that I have been convinced by that argument as formulated.

97. As I see it, the question whether, in any Member State, there is in a sector of production a state of crisis which cannot be dealt with by the existing machinery of the regulations governing that sector, constitutes the essential factor for assessing whether there are exceptional circumstances as required by the third subparagraph of Article 93(2). In order to determine whether or not the sector in question is in crisis it is of course important to consider its situation within an actual complex economic setting in which an assessment will also be made of the situation of agriculture in general and of those other sectors of the economy in which any modifications or problems have repercussions on the wine sector.

(a) The case of France

98. In the case of France, since the common organization of the market in wine provides for uniform Community prices, the difference in prices on the market for table wine between the Member States owing to the devaluation of their currencies, the modest price for preventive distillation noted during recent wine years and the effect on the situation of French wine-producers (third and fourth recitals in the preamble to the decision) are factors which the Council must appraise in the framework of a complex economic setting in such a way as to take account of the interests of French wine-producers and of the need to stabilize the market in wine.

99. The price differences for table wine and wine for distillation from one country to another are of course by no means exceptional in themselves and cannot come within the concept of exceptional circumstances, as the Commission points out (p. 8 of the application). However, the Council and France stress that this was not a question of a mere monetary realignment but of important changes which had supervened between September 1992 and September 1993 in the

European monetary system, which were followed by a major devaluation of the Italian and Spanish currencies and which had an unfavourable effect on French growers. Those changes constituted exceptional factors which necessitated the adoption of corrective measures and could not be effectively dealt with by the intervention mechanisms envisaged in the context of the regulation on the common organization of the market in wine.

100. According to the arguments put forward by the Council and France, that devaluation involved an increase in Community prices, expressed in national currency, of 23% for Italy and 26% for Spain and owing to the single Community guide price, that development, combined with the fall in the price for preventive distillation from FF 16.50/%/hl for the 1992/93 wine year to FF 16.40/%/hl for the 1993/94 wine year, due to the amendment of the corrective factors, adversely affected French growers, in view of the fact that in France the price increase was only 1.1%. Whilst in France the price for preventive distillation amounted in October 1993 to 69% of the market price, in Italy that price represented 108% of the market price and in Spain 105% (see Table 3 in Annex I to the French Government's statement in intervention). [64]

64 — The Commission, the Council and France disagree as to the amount of the increases in the representative prices for the different categories of wine between the 1992/93 wine year and the 1993/94 wine year and they put forward different percentages for the increase, though the divergences are small. The Commission also accepts (see the tables on p. 6 of its reply to the statements in intervention) that a difference in price was recorded for table wine in France on the one hand and in Italy and Spain on the other, which is explained mainly by the devaluation of the Italian currency and of the Spanish currency.

(b) The case of Italy

101. In the case of Italy the Council decision authorizing the grant of the State aid is justified, it is contended, because of the reduction in the total production of wine noted in Italy during the 1993/94 wine year, the risk to survival of many Italian vineyards and by wine cooperatives caused by the decision to impose compulsory distillation, in conjunction with the modest price for distillation, which was regarded as insufficient to cover production costs. According to the Council there was a risk that that situation would have serious repercussions of an economic and social nature since the compulsory distillation measure would affect principally Italian wine-growers (third and fourth recitals in the preamble to the decision).

102. The Commission claims that these contentions cannot justify the Council decision since there was nothing exceptional to distinguish production during the 1992/93 wine year from that of previous years as regards the percentage of the market price as compared with the guide price and the price for compulsory distillation in Italy.

103. On the other hand the Council and the Italian Government maintain that the Italian wine-growers are in a more difficult position than those of other countries because the quantities which must be delivered for

distillation are much larger for the year at issue than for the previous year, but also because there is a constant fall in the average prices paid to producers for distillation (preventive and compulsory). [65]

104. My view is that, in the case of both France and Italy, the grounds advanced in support of the argument that there were 'exceptional circumstances' relate to circumstances for which the existing rules of the common organization of the market in wine provided no special forms or measures for action. I think also that the Council is required to assess such circumstances in the context of a complex economic situation taking account of the interests of the French and Italian producers and of the need to stabilize the market in wine. I think therefore that the Council has not made an incorrect legal characterization of the facts and that accordingly the statement of the reasons upon which the contested decisions were based is lawful, regard being had to the fact that the presence of exceptional circumstances, which ultimately justify the adoption of these decisions, is established.

105. The case-law of the Court also militates in favour of accepting the validity of both decisions. In the judgment in Case 153/73 *Holtz & Willemsen* v *Council and Commission*, [66] the Court declared that: 'At its initiation ... the common organization of the market may not completely measure up to the objectives listed in Article 39 of the Treaty and may contain gaps capable of endangering the stability of the market in a part of the Community. Although it is incumbent upon the institutions responsible to seek with all due diligence the causes of such difficulties and to adapt the regulations on the common organization of the markets as soon as possible to remedy the defects revealed, they are at liberty, in the meantime, to take provisional measures, which are limited to those Member States in which the market has been more particularly affected.' [67] Although that solution concerned a Community aid and not a State aid, I nevertheless think that it reveals the need for the Community institutions to seek ad hoc solutions to problems which affect more particularly one specific Member State.

106. In the judgment in Case 72/79 *Commission* v *Italy* [68] the Court stated even more clearly: 'It is for the Council to appraise ... whether the special economic circumstances obtaining in one of the Member States justify adjustments to the Community system'. That too, in my opinion, is precisely what the Council has done in this case, and that finding militates in favour of the legality of both decisions.

65 — To be specific, the Italian Government claims (Annex 1 to its statement in intervention) that the average price fell from ECU 2.24/% vol/hl in 1990 to ECU 2.09/% vol/hl in 1991, to ECU 1.82/% vol/hl in 1992, to ECU 1.73/% vol/hl in 1993 and to ECU 1.41/% vol/hl in 1994.

66 — [1974] ECR 675 on a claim for compensation by reason of a Community aid which had been granted for the manufacture of natural oils in particular in Italy from oil-seeds harvested from the whole Community.

67 — Paragraph 14.

68 — Previously cited in footnote 31, paragraph 18; that case concerned the common organization of the market in sugar and more particularly storage costs for sugar.

(4) Manifestly incorrect assessment of the facts

107. According to this analysis, since the Council has made use of its wide discretion to assess complex economic situations it has not overstepped the limits of the discretion which the Court assigns to it.

108. In conclusion my view is that in the case of France and in that of Italy the facts relied upon by the Council constitute 'exceptional circumstances' within the meaning of the third subparagraph of Article 93(2) of the Treaty, that is to say that its legal characterization of them is not incorrect. My view is also that in the context of its assessment of complex economic situations the Council has made appropriate use of its discretion and that there has been no manifestly incorrect assessment of the facts. Consequently the second ground for annulment relied upon by the Commission must be declared unfounded.

C — *The third ground for annulment*

Defective statement of reasons

109. By its third and last ground for annulment the Commission claims that both decisions should be declared void because the statement of the reasons on which they are based is brief, contains omissions and is incorrect.

110. First I must refer to the fact that under Article 190 of the Treaty measures adopted by the Community institutions are to state the reasons on which they are based. However, as the Court has consistently held, [69] 'the statement of reasons required by Article 190 of the Treaty must be appropriate to the nature of the measure in question. It must show clearly and unequivocally the reasoning of the institution which enacted the 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. It has also been held that the statement of the reasons for a measure is not required to specify the matters of fact or of law dealt with, provided that it falls within the general scheme of the body of measures of which it forms part'. [70]

111. As regards the third ground for annulment, particularly in so far as it refers to the

69 — See for example the judgment in Case C-353/92 *Greece* v *Council* [1994] ECR I-3411, paragraph 19. That case concerned the fixing of a final date for sowing and for lodging applications for compensatory payments under the support system for producers of certain arable crops. See also the judgment in Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council* [1992] ECR I-5073, paragraph 16, concerning the catch quota for fish and the subdivision between the Member States of the volume of available catches, and the judgment in Case C-466/93 *Atlanta Fruchthandelsgesellschaft and Others* [1995] ECR I-3799, paragraph 16, which concerned the validity of certain provisions of Regulation No 404/93 on the common organization of the market in bananas, previously cited in footnote 34.

70 — See point 44 et seq. of the Opinion of Advocate General Jacobs in Case C-353/92 *Greece* v *Council*, previously cited in footnote 69, and point 107 of the Opinion of Advocate General Fennelly, delivered on 28 September 1995, in Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, I-726.

incorrect nature of the statement of the reasons on which the decisions are based, I would point out that the Commission's arguments concern the pleas in fact relied on by the Council in the context of the said statements of reasons, which means that an analysis thereof is largely identical with that of the previous ground for annulment.

112. As regards the insufficiency of the statement of the reasons on which the decisions are based, I would point out that such a statement is insufficient if it does not set out the facts the appraisal of which has led the institution enacting the measure to consider that exceptional circumstances were present.

113. Moreover I think it may be seen from the analysis of the second ground for annulment that the Council's statement of the reasons in question is not incorrect, since it is possible to take the view that there were 'exceptional circumstances' on which those decisions were based.

114. Furthermore, although in similar decisions which the Council has on occasion adopted as regards State aids granted with a view to stabilizing the wine market of the Member States it has used a similar statement of reasons, that does not justify the Commission's argument that the statement of reasons given for the contested decisions contains omissions, in other words that it is insufficient and brief. Of course the statement of reasons as it appears in both decisions does not contain an exhaustive enumeration of all aspects of the Council's reasoning. However, the two decisions, which are measures enacted in the exercise of a discretion, contain, albeit succinctly, references to the facts which the Council has taken into account and they indicate the legal reasoning distinguishing the cases under consideration and justifying the adoption of both decisions. To be more specific, since they are measures adopted in the exercise of a discretion, a succinct statement of reasons is sufficient, as was also emphasized by Advocate General Lagrange. [71]

115. The recitals in the preambles to both decisions, regarded as a whole, therefore constitute a statement of reasons which, not only from the point of view of wording but also from that of the short-term economic situation in which the decisions were adopted (recourse to 'exceptional measures') and the body of legal rules governing the sector in question — in this case the common organization of the market in wine [72] —, must be regarded as sufficient for the purposes of Article 190 of the Treaty. Consequently the third ground for annulment must also be rejected as unfounded.

71 — See his Opinion in Joined Cases 36/59, 37/59, 38/59 and 40/59 *Geitling and Others* v *High Authority of the ECSC* [1960] ECR 423.

72 — See for example the judgments in Case 185/83 *Rijksuniversiteit te Groningen* [1984] ECR 3623, paragraph 38; in Case 203/85 *Nicolet Instrument* [1986] ECR 2049, paragraph 10; in Case 167/88 *Association Générale des Producteurs de Blé et autres Céréales* [1989] ECR 1653, paragraph 34; and in Joined Cases C-121/91 and C-122/91 *CT Control and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 31.

Conclusion

116. Consequently I propose that the Court should:

1. Dismiss the Commission's application as unfounded;

2. Order the Commission to pay the Council's costs;

3. Order the two interveners, the French Republic and the Italian Republic, to bear their own costs.