JUDGMENT OF THE COURT
10 DECEMBER 1969[1]

Società 'Eridania' Zuccherifici Nazionali and Others v Commission of the European Communities, supported by Co.Pro.B.—Cooperativa Produttori Bieticoli and Others

Joined Cases 10 and 18/68

Summary

1. *Measures adopted by an institution — Application by an individual against a decision addressed to another person — Decision of individual concern to him — Criteria*
   (EEC Treaty, Article 173)

2. *Procedure — Action for failure to act — Measures referred to by Article 173 of the EEC Treaty — Inadmissibility*

1. The mere fact that a measure may exercise an influence on the competitive relationships existing on a particular market cannot suffice to allow any trader in any competitive relationship whatever with the addressee of the measure to be regarded as directly and individually concerned by that measure. Only the existence of specific circumstances may enable a person subject to Community law and claiming that the measure affects his position on the market to bring proceedings under Article 173.
2. The Treaty provides, particularly in Article 173, methods of recourse by which an allegedly illegal Community measure may be disputed and if necessary annulled on the application of a duly qualified party. The party concerned who has requested the institution adopting the measure to revoke it cannot if the institution fails to act, bring such an omission before the Court as being an illegal omission to deal with the matter. Such proceedings would amount to providing those concerned with a method of recourse parallel to that of Article 173, which would not be subject to the conditions laid down by the Treaty.

In Joined Cases 10/68 and 18/68

SOCIETÀ 'ERIDANIA' ZUCCHERIFICI NAZIONALI, having its registered office at 2 Corso A. Podestà, Genoa,

SOCIETÀ ITALIANA PER L'INDUSTRIA DELGLI ZUCCHERI, having its registered office at 19 Via Corsica, Genoa,

SOCIETÀ DISTILLERIA DI CAVARZERE, having its registered office at 39 Via S. Fermo, Padua,

1 — Language of the Case: Italian.

SOCIETÀ ROMANA ZUCCHERO, having its registered office at 29/4 Via XX Settembre, Genoa,

SOCIETÀ ZUCCHERIFICIO DEL VOLANO, having its registered office at 29/4 Via XX Settembre, Genoa,

ASSOCIAZIONE NAZIONALE FRA GLI INDUSTRIALI DELLO ZUCCHERO DELL' ALCOOL E DEL LIEVITO, having its registered office at 57/4 Via B. Bosco, Genoa,

all assisted by Nicola Catalano of the Rome Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34b rue Philippe-II,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Giancarlo Olmi, acting as Agent, with an address for service in Luxembourg at the Chambers of Emile Reuter, 4 boulevard Royal,

defendant,

supported by:

I. CO.PRO.B – COOPERATIVA PRODUTTORI BIETICOLI, having its registered office at 15 Via San Felice, Bologna, and CO.PRO.A., COOPERATIVA PRODUTTORI AGRICOLI, having its registered office at Ostellato (Ferrara), both represented and defended by Francesco Vittorio Bianchi, Guido Giordani and Giuseppe Bertani of the Bologna, Bar, with an address for service in Luxembourg at the Chambers of André Elvinger, 84 Grand-rue,

and

II. SOCIETÀ PER AZIONI ZUCCHERIFICIO CASTIGLIONESE, having its registered office at 3 Via Curtatone, Rome, assisted by Professor Gaetano Castellano, with an address for service in Luxembourg at the Chambers of Félicien Jansen, 21 rue Aldringen,

and

III. GOVERNMENT OF THE ITALIAN REPUBLIC, represented by Adolfo Maresca, Minister Plenipotentiary, acting as Agent, assisted by Pietro

Peronaci, Deputy State Advocate-General, with an address for service in Luxembourg at the Italian Embassy,

interveners,

Application in Case 10/68 for the annulment:

1. of Decision No 1/22/66 of the Commission of 27 July 1967, on the grant of aid from the European Agricultural Guidance and Guarantee Fund amounting to 480 000 units of account for the enlargement and development of the capacity of the Minerbio (Bologna), sugar refinery, the property of the Cooperativa Produttori Bieticoli Co.Pro.B.;

2. of Decision No 1/17/INON of the Commission of 2 October 1967, on the grant of aid from the European Agricultural Guidance and Guarantee Fund amounting to 767 000 units of account for the enlargement of the sugar refinery at Ostellato (Ferrara), the property of the Società Cooperativa Produttori Agricoli Co.Pro.A.;

3. of Decision No 1/73/67 of the Commission of 7 March 1968 on the grant of aid from the European Agricultural Guidance and Guarantee Fund amounting to 300 000 units of account for the enlargement and development of the capacity of the sugar refinery at Castiglion Florentino (Arezzo), the property of the Zuccherificio Castiglionese SpA, the registered office of which is in Rome;

in Case 18/68:

for the annulment of the implied decision of refusal resulting from absence of a reply to the memorandum addressed by the applicants on 7 May 1968 to the Commission of the EEC in which they requested the annulment or revocation of the said decisions,

THE COURT

composed of: R. Lecourt, President, R. Monaco and P. Pescatore, Presidents of Chambers, A. M. Donner (Rapporteur), A. Trabucchi, W. Strauß and J. Mertens de Wilmars, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

By the three decisions contested in Application 10/68 the Commission granted aid from the Guidance Section of the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as 'the Fund' or 'the EAGGF') for the enlargement of three Italian sugar refineries.

The first and third decisions, concerning the sugar refineries at Minerbio and Castiglion Fiorentino respectively, were adopted in application of *Regulation No 17/64 of the Council of 5 February 1964 on the conditions for granting aid from the European Agricultural Guidance and Guarantee Fund (OJ 1964, p. 586)*. The second decision, concerning the sugar refinery at Ostellato, was adopted in application of *Regulation No 206/66 of the Council of 7 December 1966 on the contribution of the EAGGF towards the repair of the damage caused by the catastrophic floods in certain regions of Italy during the autumn of 1966 (OJ 1966, p. 3869)*. According to the wording of Article 1 of the said regulation, a sum of 10 million units of account 'shall be set aside to contribute for the years 1966 and 1967 to the reconstruction and improvement of :

— the conditions of production in agriculture or in agricultural undertakings,

— installations for the marketing or processing of agricultural products,

which have become necessary in the regions of Italy affected by the catastrophic floods of October and November 1966'.

In respect of the common organization of the market in sugar, Regulations Nos 1009/67 and 1027/67, in order to prevent surplus production and to promote regional specialization in production, have, for a transitional period, instituted a quota system involving the fixing for each undertaking or sugar factory of a basic quota, for which the price and sales guarantee is borne by the Community, such guarantee being limited or excluded for quantities manufactured above the said basic quota.

For this purpose each Member State is given a basic quantity to divide among the undertakings and factories producing sugar on their territory, in respect of 85% to 90% in accordance with a mathematical formula set out in Article 23 of Regulation No 1009/67, based on their production during a reference period (the marketing years 1961/1962 to 1965/1966), and in respect of the remaining 10% to 15% at the discretion of the Government by reason of special circumstances and to take into account possible changes in the sugar industry and sugar beet cultivation.

By Ministerial Decree of 26 February 1968, the Italian Government adopted certain criteria for the division of the 10% of the basic quantity, that is to say, 1 230 000 quintals (123 000 metric tons), constituting the national 'margin' and provided that this should be distributed as follows:

— 615 000 quintals proportionally to the difference between the production obtained by the various undertakings during the 1966/1967 marketing year and that resulting from the application of the mathematical formula,

— 430 000 quintals to the sugar refineries situated in the provinces developing the growing of sugar beet which showed, in relation to the average of the basic period, an increase in the cultivated area exceeding 35%,

— 123 000 quintals to the sugar refineries managed by cooperatives of agricultural producers or with the par-

ticipation of development boards (taking into account the great agricultural and social interest of the areas supplying these factories),

— 61 550 quintals to the sugar refineries of Calabria (because of the necessity both from the agricultural and the social point of view of ensuring the consolidation of local sugar beet cultivation).

The applicants lodged their applications for annulment at the Court Registry on 10 May 1968 (Case 10/68). On 7 May 1968 they sent the Commission of the EC a formal request, received on 13 May 1968, for the annulment or revocation of the disputed decisions.

On 1 August 1968 the applicants lodged at the Court Registry an application against the implied decision of rejection resulting from the silence of the Commission concerning the said formal request (Case 18/68).

By a letter of 8 October 1968, the Court asked the parties whether they considered that they could waive lodging a reply and a rejoinder in Case 18/68.

By telex message of 15 October 1968 and letter of 22 October 1968 the Commission and applicants respectively agreed to the Court's suggestion.

By order of 25 October 1968 the Court joined Cases 10/68 and 18/68 for the purposes of procedure and judgment.

By applications lodged at the Registry on 30 October 1968 the two cooperatives Co.Pro.B. — Cooperativa Produttori Bieticoli of Bologna (the addressee of Decision No 1/22/67) and Cooperativa Produttori Agricoli — Co.Pro.A. of Ostellato (the addressee of Decision No 1/17/INON) sought leave to intervene in the joined cases in support of the conclusions of the defendant.

By order of 25 November 1968 the Court allowed the intervention requested (Intervention No I).

By an application lodged at the Registry on 19 December 1968 the Società per Azioni Zuccherificio Castiglionese (the addressee of Decision No 1/73/67 sought leave to intervene in the joined cases in support of the conclusions of the defendant.

By order of 15 January 1969, the Court allowed the intervention requested (Intervention No II). By an application lodged at the Registry on 21 February 1969 the Government of the Italian Republic sought leave to intervene in the joined cases in support of the conclusions of the defendant.

By order of 19 March 1969, the Court allowed the intervention requested (Intervention No III).

The written procedure followed the normal course.

At the close of the written procedure the Court requested the applicants to indicate how they had obtained information concerning the wording of the disputed decisions and what efforts they had made to obtain the information quickly.

On hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure.

The oral submissions of the parties were presented at the hearings on 17 and 18 September 1969.

The Advocate-General delivered his opinion at the hearing on 28 October 1969.

II—Conclusions of the parties

Case 10/68

The *applicants* have claimed that the Court should:

'— after recognizing the admissibility of this application and entertaining it, annul the disputed measures with all the consequences thereby entailed and with the benefit of costs and expenses.'

The *defendant* has contended that the Court should:

'— declare that the application is inadmissible and in any event dismiss it;

— order the applicants to pay the costs'.

Case 18/68

The *applicants* have claimed that the Court should:

'— join this application to Application 10/68 which is pending between the same parties; entertain it after holding it to be admissible, annul the implied decision of rejection of the formal request made on 13 May 1968 (resulting from the silence of the Commission of the EC), with all the consequences thereby entailed, and with the benefit of costs and expenses.'

The *defendant* has contended that the Court should:

'— declare that the application is inadmissible and in any event dismiss it;
— order the applicants to pay the costs.'

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

Admissibility of the application

A — Case 10/68

1. Time-limits

As the adoption of the decisions of 27 July and 2 October 1967 (Minerbio and Ostellato) was made public by two announcements published in the Official Journal on 4 August 1967 and 7 October 1967 respectively, the *applicants* relying on the third paragraph of Article 173 that with regard to them the time-limits for making an application did not begin to run until the date on which they were to obtain copies of the said decisions.

In its statement of defence the *defendant* leaves this point to the wisdom of the Court. However, in its rejoinder it draws attention to the serious disadvantages which might result from case-law which, by allowing greater access to the Court for the third parties affected by a decision to grant financial aid, does not cause time to start to run until the time when the persons concerned have been able to acquaint themselves with the complete decision. If a notification in the Official Journal of the essential parts of such a decision does not suffice, it is not possible to avoid the alternative of seriously burdening the Official Journal or of exposing the said decisions to a more or less permanent risk of annulment.

In their statements of defence the *first interveners* plead that, in view of the fact that the applicants knew of the measures following publication in the Official Journal, the time-limit fixed by the third paragraph of Article 173 began to run as from the date of such publication. It follows that the prescribed time-limits had already expired at the time when the applications against Decisions Nos 1/22/66 and 1/17/INON were lodged and that, consequently, those applications must be held to be inadmissible.

In their observations in reply to the statements of the first interveners, the *applicants* state that knowledge of the measure envisaged by the third paragraph of Article 173 is knowledge of the complete wording of the measure, or at least of all the essential parts and not only of the mere title.

On the Court's requesting the applicants (letter from the Registrar of 10 July 1969) to give details of the means by which they obtained copies of the contested decisions, the applicants produced two letters from which it appears that following a request (February 1968) by one of the applicants the President of the Istituto Nazionale di Economia Saccarifera obtained the complete versions of the decisions taken in favour of the sugar refineries at Minerbio and Ostellato and sent them to Società Eridania by letter of 20 March 1968.

2. Capacity to act

In their application, the *applicants*, recognizing that the admissibility of the application could be disputed on the basis of previous judgments of the Court, plead that the contested decisions have a scope which is much more individual than those dealt with by the said judgments. By this intrinsically individual nature they are more likely to cause real, individual and direct damages to third parties. Such is the case from a twofold point of view:

— they lead to a disturbance in competition contrary to Articles 92 and 93 of the EEC Treaty;

— they lead to a decrease in the production quota of sugar granted to each of the applicants or, in any event, to increased difficulty in disposing of production 'outside the quota', within the framework of the limitations on the production of sugar established by the Community regulations, and of the distribution of quotas among undertakings laid down in Italy by the Ministerial Decree of 26 February 1968.

The direct scope of this damage is confirmed by Article 1(3) of the third decision which subjects the payment of aid to certification by the Italian Government that 'it is prepared to allot to the recipient a basic quota corresponding to the sugar production capacity consequent upon the accomplishment of the project'.

Furthermore, according to the applicants, there is individual damage and not *uti cives*, having regard to the fact that only the Italian sugar undertakings the number of which is fixed (at a total of 25) have been affected in respect of competitive positions and that the quota assigned to Italy must be divided only among them. The principles of good administration should even have led the Commission to consult the competitors of the favoured undertakings before the grant of aid was decided upon.

In its statement of defence *the defendant* considers that the application is inadmissible. Without considering whether the disputed measures are of direct concern to the applicants, it points out that in any case they are not of individual concern to them, as only the respective recipients of each grant of aid and the Member State in question are individually concerned. Furthermore, there are larger categories of persons concerned such as suppliers of goods and services for the execution of the works financed by the Fund, producers of sugar beet and competing undertakings. These categories are settled in a general and abstract manner and their members cannot be identified individually at the time of the decision.

In respect of all persons other than those to whom they are addressed the decisions must therefore be regarded as measures having general scope not capable of being of individual concern to them. Considering that the present case is similar to those decided by the Court in Cases 25/62 and 1/64, the Commission is of the opinion that the judgment given in Joined Cases 106 and 107/63 cannot be relied upon.

As to the decrease in their production quota, which is alleged by the applicants in order to prove that the disputed decisions are of individual concern to them, the Commission replies that the regulations in question were intended only to limit the increase in the production of sugar and that they did not guarantee to previously existing undertakings a division of that increase among them.

In fact on the basis of the various regulations, the Member States may freely distribute the whole quantity produced during the marketing year 1967/1968 as well as a margin during the subsequent marketing years. Whilst stating that it is absolutely inconceivable that in respect of administrative measures of the Community the authors of the Treaty only intended to give to those subject to

Community law a judicial guarantee inferior to that which the Member States grant them, the *applicants* allege in their reply:

(1) that it follows from the case-law of the Court that it is the basic scope of a decision which determines the admissibility of applications from third parties which are affected; that the inadmissibility of the application in Case 1/64, for example, was due to the fact that the contested decision had a scope which was clearly general but that in the present case it is a matter of purely individual decisions and thus of a new question;

(2) that, although it is true that the authors of the Treaty wished to exclude the possibility of any form of action open to all against the legislative measures of the Community, it is unacceptable that third parties should have the right to act only against individual decisions which are clearly addressed to them; that it is the effect of a decision which is more important than the person to whom it is addressed and that if a third party can prove that his individual rights or interests suffer direct damage he proves by that very fact that the contested measure is of direct and individual concern to him;

(3) that this interpretation of Article 173 supports the case-law of the Court, inasmuch as it holds applications from individuals against decisions addressed to Member States, which although not being regulations nevertheless have a general scope, to be inadmissible; such actions may be classified as *uti cives* actions and the person concerned suffers direct damage only at the time of the concrete application of the general decision, so that the indirect protection of Articles 177 and 184 of the Treaty remains available to him and that in the present case the situation is completely different, in view of the fact that the decisions in question have had their final effects both with regard to the persons to whom they were addressed and to the applicants;

(4) that the defendant's statement that decisions are of individual concern only to the persons to whom they are addressed is in contradiction to the case-law of the Court regarding the second paragraph of Article 33 of the ECSC Treaty and that in respect of the concept of a sufficient interest to take proceedings the only difference between Article 33 of the ECSC Treaty and Article 173 of the EEC Treaty lies in the fact that the wording of the latter article is more precise;

(5) that the fact that the applicants belong to an abstract category does not exclude the possibility of concrete and immediate damage to their individual rights and interests and that by way of example one may quote the system established by Article 85 and by Regulation No 17 which allows a right of appeal against a decision authorizing a cartel for third-party undertakings suffering injury to their rights and interests;

(6) in reply to the arguments of the defendant that the regulations concerning the common organization of the market in sugar would not cause a reduction in the production of sugar and that the proportional distribution of the increase provided for is not guaranteed to previously existing undertakings:

— that in the absence of the contested decisions the Italian Government would have been obliged to distribute a supplementary production quota of 17 000 metric tons, which is now granted to the three sugar refineries, among the other undertakings;

— that, far from having a discretion, the said government was not free in respect of the distribution of production quotas and that this is a consequence of the third decision which makes the grant of aid subject to the condition

that the government in question should grant the undertaking concerned a corresponding basic quota, a clause which the other decisions contain by implication.

In its rejoinder the *defendant* denies that the applicants are directly concerned by the contested decisions, as the disturbance of competition which is the consequence of an enlargement of the sugar refineries does not immediately result from the said decisions. Such a disturbance would in fact be caused by the allocation of production quotas, increased by the Member State, to the three sugar refineries, as appears in particular from the third decision. In this sphere—and more particularly in respect of the distribution of the margin—the Member States have a discretion.

The Commission maintains that the decisions in question are not of individual concern to the applicants and that they may, at the most, claim a general interest in not having the production of competitors increased, an interest which is common to the whole, open and abstractly defined category of sugar producers, and alleges:

(1) that the interpretation of the second paragraph of Article 173 suggested by the applicants and based exclusively on the general or individual nature of the disputed decision is wrong; that both in the case of a decision addressed to a Member State, which moreover is of an individual nature, and in that of a decision addressed to an individual, the interest in instituting proceedings accepted by the case-law on the second paragraph of Article 33 of the ECSC Treaty is insufficient (see the opinion in Joined Cases 16 and 17/62 and Case 25/62); that it is necessary, on the other hand, to require a substantial link with the decision such as that which the Court has defined by the words 'affects them by reason of certain attributes which are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed' and that it follows from this that it is not the general or individual nature of the measure in itself but its effects with regard to the applicant which are decisive;

(2) that it follows that the present case cannot be put forward as new and that there is no reason to reconsider the previous case-law, as the legal protection which it grants is inferior to that of the Member States;

(3) in reply to the support given by the applicants for the case-law of the Court, to the extent to which it holds applications by third parties concerned against decisions of general scope to be inadmissible:

— that the actions brought by undertakings in so far as they belong to a certain economic category interested in the annulment of the measure must also be classified as an action by members of the public;

— that there are also decisions of general scope which have a direct bearing on the positions of individuals;

— that neither Article 177, which applies to Community measures of both general and individual scope, nor Article 184, which applies only to regulations, requires decisions of general scope to be treated as if they were regulations;

(4) that the distribution of production quotas depends upon the exclusive, and to a large extent discretionary, power of the Italian Government as the applicants themselves recognized by disputing that distribution before the Italian Consiglio di Stato without asking for a reference under Article 177 of the Treaty; that, furthermore, even if the distribution carried out had been a consequence of the contested decisions, those decisions caused effects not in respect

of the applicants, but in respect of the whole of the undefined group of undertakings eligible to receive a quota.

The *interveners Co.Pro.A. and Co.Pro.B.* in their statements submit that in Community law the capacity to make an application against a given measure does not depend, as in Italian law, upon the mere claim that the measure has damaged an individual interest of the applicant even though it has done so in an immediate and concrete manner. In fact it is necessary that, because of its particular purpose, the measure should be intended to alter the legal situation of the applicant, although the applicant is not expressly mentioned as the addressee of that measure ('effective addressee' of the measure). The 'effective addressee' of a decision is identifiable with the help of the criteria laid down by the words 'individual' and 'direct' in the second paragraph of Article 173. The contested measures cannot be regarded as capable of applying directly to the applicants.

Even supposing that damage caused to certain interests might have the consequence that those suffering damage are recognized as having the capacity to act, the first interveners deny both the existence of a direct link between the contested decisions and the alleged damage suffered by the applicants on the one hand and individual damage on the other.

In respect of the alleged disturbance of competition contrary to Articles 92 and 93 of the EEC Treaty, the first interveners, whilst reserving the right to set out their arguments more fully on the substance of the case, state that one cannot claim to subject cases of financing by the EAGGF to the rules quoted, which apply only to the Member States.

In respect of the alleged decrease in production quotas of sugar allocated to the applicants, according to the first interveners there is no direct link between the rules governing the system of production quotas (Regulation No 1009/67) and the contested decisions taken in direct application of Regulation No 17/64 alone.

Nevertheless, the first interveners consider that by this discussion a debate has begun on the substance of the matter. They point out that the Court should not agree to consider the problem of the admissibility of the application jointly with the substance of the case.

In their observations in reply to the statements of the first interveners, the *applicants* summarize the position already set out in their previous statements, adding in particular:

(1) that the problem of interpretation of the second paragraph of Article 173 cannot be solved on the basis of the compulsory effect of the decision in respect of its addressee; that, in fact, decisions which do not impose an obligation to do or to give, but by which requests from addresses are fulfilled, have no compulsory effect in respect of the latter; that consequently an application from addressees against such a decision is inadmissible for lack of interest; that, on the other hand, such a decision requires third parties concerned to accept the effects of it which are detrimental to them and which may be regarded in a certain sense as obligations; and that because of this third parties suffering damage from such a decision have an interest to act and consequently have the capacity to make an application;

(2) that there is direct and immediate damage, even if the injurious effects can occur only in the future, as soon as it appears that they follow inevitably from the contested measures.

In respect of the joinder of the examination of admissibility to that of the substance of the case, the applicants observe that an application for a preliminary decision on a procedural issue within the meaning of Article 91 of the

Rules of Procedure must be made by a separate document and that it is within the unfettered discretion of the Court to decide whether it will rule upon the procedural issues or join them to the substance of the case.

As to the direct link between the rules governing the quota system and the contested decisions, the applicants repeat the observations already contained in their reply.

In their observations on the statement of the second intervener, the applicants again assert that the argument of their opponents is the result of confusion between abstract effects (appropriate to a regulation or a measure having general scope) and the concrete effects of an individual decision, which may cause injury to several persons without that amounting to an obstacle to the admissibility of the application made.

The *Italian Government,* the third intervener, considers that the Commission has a discretion in the application of the provisions in question. Consequently the submissions other than those concerning misuse of powers and infringement of essential procedural requirements are *a priori* inadmissible.

That argument is repeated by the *defendant* in its observations.

The *applicants* in their reply state that the Community legal system is inclined fundamentally to ensure complete review by the Court of Justice over the legality of the measures of the Commission.

B — Case 18/68

The *applicants* state that their application seeks the annulment of the refusal following from the absence of a reply to the formal request addressed to the Commission under Article 175 of the EEC Treaty and is of a contingent, precautionary and alternative nature. If their application in Case 10/68 were held to be inadmissible as being made against decisions of which they are not the apparent or hidden addressees, the application based on Article 175 gives them sufficient legal protection against direct injury to their individual rights or interests.

The applicants dispute the possible objection that the measure requested does not concern them, as the last paragraph of Article 175 affords an appeal only to persons to whom the institution has failed to address any act other than a recommendation or an opinion. The application concerns the refusal to comply with the formal request and not directly the fact of not having annulled or revoked the disputed decisions. Article 175 applies in particular to the case of an action for failure to annul or to revoke a measure taken in favour of third parties which directly injures the individual rights or interests of the applicant, which is confirmed by the fact that the second paragraph of Article 175 employs the expression 'defined its position' instead of 'decision'. No other interpretation is possible unless in such a case an application could be made under Article 173.

On the other hand the applicants allege that the admissibility of the application in Case 10/68 does not exclude that of the present application, because an application made under Article 173 which concerns the mere legality of a measure does not exempt the Commission from the duty of 'defining its position' concerning a request made under Article 175, which may include complaints both on the substance of the matter and of the opportune nature of the measure.

In its statement of defence the *defendant* submits that the application is inadmissible because

— of the principle *ne bis in idem,* in view of the fact that the application has the same purpose as that in Case 10/68, namely the annulment of the three decisions, and that Application 10/68 must be regarded as the more important;

— with regard to the expression 'any natural or legal person', Article 175 appears more restrictive than Article 173, because it presupposes that the institution has failed to address a measure to such person: that prevents the extension of the application of the second paragraph of Article 175 to cases which do not even come within the framework of the concept of 'direct and individual concern' appearing in Article 173;

— the Commission has defined its position on the substance of the formal request of 7 May 1968 in the statement of defence in Case 10/68 which it lodged on 17 June 1968;

— Article 175 applies only to cases in which the institution was required to act, which excludes the admissibility of that part of the application concerning the revocation of the decisions in question for reasons of mere expediency.

In their observations in reply to the statements of the first interveners the *applicants*, whilst noting that the interveners refrain from commenting on Case 18/68, define their position on the observations set out by the Commission. In so doing, they argue in particular:

(1) that reliance on the principle *ne bis in idem* in the present case disregards the alternative and subsidiary scope of Application 18/68;

(2) that the Commission is not absolved from its obligation to define its position on the formal request because it lodged a statement of defence in Case 10/68;

(3) that—even accepting that the withdrawal of a decision following a re-examination sought by way of an extra-judicial request amounts only to a discretion—failure to exercise that discretion, when the circumstances which allow it to be used are present, is vitiated by misuse of powers.

The substance of the case

A — Case 10/68

Complaints common to the three decisions

Introductory comment

In their observations on the statement by the second intervener, the *applicants* summarize the essential points of their application as follows:

(1) On the one hand, the aid granted by the three contested decisions cannot contribute to the improvement of agricultural production.

(2) On the other hand, the contradiction between the grant of aid and the whole Community policy on sugar is undeniable.

(3) Lastly, the aid undeniably interferes with competition in this sector, and in so doing infringes one of the fundamental principles of the Treaty which is repeated verbatim by Article 17 of Regulation No 17/64.

1. Infringement of Articles 11(1)(c) and 12(3) of Regulation No 17/64

In their application the *applicants* allege in the first place that the said articles, by referring to the marketing of and the obtaining of the best return from agricultural products, exclude any financing of the sugar beet processing industries from the field of application of the Fund. Further, they state that there was no need to increase processing capacity, since in Italy the capacity of the sugar undertakings shows a surplus in comparison with the production of sugar beet, as appears moreover from the statement of reasons in the first decision. Finally, the applicants consider that, even though the financing of the processing industries may come within the activities of the Fund, which is true in respect of the second decision under Article 1 of Regulation No 206/66, such financing must contribute to the improvement of agricultural production.

That condition is not fulfilled in the present case, because the equipment and productivity alone of industrial undertakings already having surplus capacity receive benefit; it has not been fulfilled either because of the fact that those benefiting from the first and second decisions are sugar beet cooperatives, the benefits received by them being too marginal and their proper remuneration being secured by the minimum purchase price provided for by Regulation No 1009/67.

In its statement of defence the *defendant* states that the majority of the complaints of the applicants cannot affect the second decision because they are based upon provisions of Regulation No 17/64 which are not re-enacted by Regulation No 206/66.

It disputes the contention that Articles 11 and 12 of Regulation No 17/64 exclude the financing of processing industries and states:

— that Annex II of the Treaty regards processed products such as sugar as agricultural products;

— that Article 38 of the Treaty, which applies not only to agriculture but to trade in agricultural products, including processed products, gives the Community legislature the power under Article 43 to adopt any appropriate measure concerning trade in agricultural products and their processing, which are operations closely linked to the prosperity of the farmer;

— that the proposal for a regulation of the Commission on the conditions for aid from the Fund shows as an example of obtaining the best return from agricultural products, among others, the construction or the improvement of sugar refineries; and that, although for reasons of drafting the final wording had the examples removed from it, its meaning has remained unaltered, which is shown by the fact that in the past the Fund has, with the favourable opinion of the respective committees, financed projects relating to slaughterhouses, dairies etc.

As to the assertion that aid from the Fund must in any case contribute to the improvement of agricultural production, the Commission argues that, when it allows the financing of improvements in marketing, and particularly the obtaining of the best return from agricultural products, Regulation No 17/64 does not in any way require proof of a specific beneficial effect on basic production. Although the Commission was not therefore required to make a particular examination of the favourable effects on the growing of sugar-beet, it states that it nevertheless did so and arrived at positive conclusions. In fact, it is of little moment that in 1963/1964 there was surplus production capacity, because that does not necessarily mean that such capacity was well distributed over the territory. Furthermore, production of sugar-beet had been considerably increased, particularly in the areas in question, during the last few years. Moreover the minimum purchase price could not ensure proper remuneration for the farmers. On the other hand, the enlargement of sugar refineries allows the price of sugar-beet to develop above the minimum.

In their reply the *applicants* state on the one hand that Regulation No 17/64 has not followed the proposal of the Commission, and on the other hand that Regulation No 206/66 speaks expressly of processing plants, which proves that the authors of the said regulations considered that the wording of Regulation No 17/64 excludes them.

It would be incorrect to conclude from the provisions of Article 38 and of Annex II to the Treaty that the measures adopted in favour of agriculture must necessarily apply to all the products in Annex II. Sugar was placed under the agricultural system only in the interests of agricultural production, which prevents steps being taken favouring merely the industrial activities of the sugar re-

fineries. In other respects, the Commission has not proved that production capacity is not well spread geographically. According to the applicants that capacity is, in the areas of Minerbio and Ostellato, much greater than the production of sugar-beet. In Tuscany also there is not an insufficient number of sugar refineries.

The *interveners Co.Pro.A.* and *Co.Pro.B.* argue in particular that it would be difficult to encourage an increase in consumption which the assistance of the Fund must favour if processing were considered to be outside the scope of the Fund. This applies in particular to agricultural products such as sugar-beet, which can come within the trading system only as basic products intended for necessary processing. This is confirmed by Regulations Nos 44/67 and 1009/67 which regard sugar-beet and sugar as the permanent elements in a single production cycle.

According to the *applicants* that argument applies also to textile fibres which clearly shows the weakness of the argument.

Further, they assert that the definition contained in Article 38 of the Treaty does not justify the disputed decisions. In fact, although it is true that the authors of the Treaty extended the concept of 'agricultural product' to products of a first-stage processing and even to substitute products, they have nevertheless supported the generally accepted concept of 'agricultural undertaking'. The processing of agricultural products is thus regarded as an industrial activity, although these processed products are included in the concept of 'agricultural products'.

2. Infringement of Articles 14 and 15(1) of Regulation No 17/64

The applicants consider that the contested decisions, by granting large sums to increase the production capacity of three sugar refineries, run counter to the common agricultural policy in sugar because that policy is intended to limit the production of sugar, as appears clearly from Regulations Nos 44/67 and 1009/67. It follows from this that there is a clear infringement of Article 14(1)(b) of Regulation No 17/64 which provides that the projects accepted must 'be aimed at an adaptation or guidance of agriculture necessitated by the economic consequences of the implementation of the common agricultural policy or at meeting the requirements of that policy'.

That infringement is all the clearer since the capacity of the Italian sugar refineries is in surplus and since, further, within the framework of the common agricultural policy, the necessity to reduce the production of sugar-beet has been asserted (twelfth recital of the preamble to Regulation No 1009/67). All this also proves that the projects were not able to be regarded as having priority and that there is therefore an infringement of Article 15 of Regulation No 17/64.

In its statement of defence the *defendant* disputes the contention that the common agricultural policy in sugar envisaged a decrease in existing production. By Regulations Nos 44/67 and 1009/67, the Council wished only to avoid an increase in production beyond a certain ceiling. In respect of Italy, the Council even allowed a considerable increase in national production by granting it a basic quantity of 1 230 000 metric tons of sugar, a quantity clearly greater than the average production during the reference period (947 000 metric tons). The benefit of that increase must not be divided among the existing undertakings in proportion to their production, in view of the fact that Regulations Nos 1009/67 and 1027/67 allow the Member States to create a margin to distribute at their discretion, possibly even in favour of new undertakings. That part of the margin granted to the three sugar refineries in question amounts to 17 425 metric tons whilst the total margin is 123 000 metric tons for the year 1968/69.

As to the alleged infringement of Article

15 of Regulation No 17/64, the Commission replies, on the one hand, that such a complaint can be made only by another applicant during the procedure for the granting of aid from the Fund and, on the other hand, that the required priority was satisfied by all the measures implemented by the Italian Government in order to encourage the harmonious development of the regions concerned.

In their reply the *applicants* consider that the Commission has not shown that inconsistency between the limitation on the increase in production and the interventions which favour the creation of new production units does not exist, as Article 14 of Regulation No 17/64 imposes a link of cause and effect between the common policy and the granting of aid from the Fund.

Further, the applicants maintain that they are able to rely upon an infringement of Article 15: once their interest in the proceeding can be shown, they have the right to put forward any submission in support of their request for the annulment of the measures in question.

In its rejoinder the *defendant*:

(1) states that action by the Guidance Section of the Fund falls within the framework of Community structural policy, which is based upon the objectives of Article 39 of the Treaty the necessity for which has been recognized by the Parliament as well as by the Council and the Commission;

(2) alleges that Regulation No 1009/67, by providing in Article 34 for the granting of adaptation subsidies by the Italian Republic to its beet producers as well as the processing industry, shows the intention not of limiting the increase in Italian production but of encouraging it reasonably and of contributing to structural improvements;

(3) disputes the figures put forward by the applicants, according to which in areas in question the processing industry already has a surplus and maintains, on the one hand, that the allegation of the applicants that the improvement of means of transport would permit the producers to send products to a more distant destination does not take into account the advantages for the farmer of a nearer processing plant, that is to say the possibility of dealing with the whole production of sugar-beet in good time, leading to a greater quantity and a better quality of sugar and, consequently, the earning of a higher income and, further, that the disadvantage of a working period which for climatic reasons is shorter than elsewhere may be compensated for by the increase in the capacity of the plants in order to increase daily production;

(4) replies to the applicants' allegation that the productivity of the sugar refineries cannot be improved by increasing their number by maintaining that in the present case it is a problem of structural policy to be resolved by the Community and the Member State concerned, which may distribute according to its free discretion, 'the margin' which is granted to it by Regulations Nos 1009/67 and 1027/67.

In respect of Article 14 of Regulation No 17/64 the *interveners Co.Pro.A and Co. Pro.B* maintain that the system of quotas includes limitations on production which are desirable but not enforced, to which the *applicants* reply that under the present system the production which may be sold at the basic price is strictly limited.

The intervener *Zuccherifici Castiglionese* points out in particular that, in view of the increase in sugar-beet growing in Tuscany and the effect of distances between the fields and processing undertakings on the quality of sugar-beet, it was necessary to set up a processing undertaking in the area and later to

increase its capacity. Further, it observes that the sugar crisis in Italy is a crisis of quality due to obsolete processing systems and not of quantity and that the applicants themselves have moreover increased the capacity of their undertakings during the last few years.

The *applicants* reply in particular to this:

(1) that the production figures provided by the intervener itself show that the increased production in 1967 was due only to the floods of that year which had destroyed the cereal seedlings and cannot be regarded as an indication of a normal increase in sugar-beet cultivation;

(2) that in the absence of sufficient production of sugar-beet in the actual area, the sugar refinery of Castiglion Fiorentino had to obtain supplies from distant areas, which fact, moreover, contradicts the statements concerning the gravity of the problem of the distance between fields and the processing undertaking;

(3) that if the sugar crisis is, in fact, of a qualitative nature and necessitates a complete re-structuring of undertakings, this problem, which is essentially industrial, is a problem which the sugar refineries not receiving aid from the EAGGF must also face, at their own expense, which constitutes unjustifiable discrimination.

As to Article 15 of Regulation No 17/64 both the *interveners Co.Pro.A and Co. Pro.B. and the intervener Zuccerificio Castiglionese* state that the contested decisions accord perfectly with a body of national measures intended to encourage harmonious development of the general economy of the regions concerned.

The *applicants* reply that the requirements of Article 15 are not fulfilled merely if the project in question conforms to national policy; such national policy must be in accord with Community policy which it is not in the present case.

3. Infringement of Articles 92 and 93 of the EEC Treaty

According to the *applicants*, the contested decisions disregard Articles 92 and 93, inasmuch as they grant aid which does not conform to the criteria of Regulation No 17/64 and is inconsistent with the common agricultural policy.

In its statement of defence the *defendant* replies that the decisions in question have the purpose of granting Community subsidies. Articles 92 and 93 of the Treaty, which deal only with State aids, are therefore not applicable. Nevertheless, Regulation No 17/64 includes an *ad hoc* provision in Article 17(2) according to which 'Intervention by the Fund must not alter the conditions of competition in such a way as to be incompatible with the principles contained in the relevant provisions of the Treaty'. That wording refers to the principles laid down in Articles 42 and 92 of the Treaty, both of which however provide for derogations from the rule contained therein, particularly with regard to structural assistance in the agricultural sector. Regulation No 17/64 provides expressly for Community assistance of such a nature and lays down a number of criteria to be observed. As long as these are observed, an alteration in the conditions of competition incompatible with Article 17(2) is relatively rare and, in any event, has not occurred in this instance.

The *applicants* admit in their reply that Articles 92 and 93 of the Treaty prohibit aid granted by States alone but state that this prohibition sets out only a general principle laid down in Article 3(f) of the Treaty, according to which any artificial intervention which distorts or is likely to distort competition is prohibited. That rule is directly applicable (see the judgment in Case 7/54) and binds the Commission. The applicants dispute the contention that they should have based their submissions on Article 3(f) and Article 155 of the Treaty rather

than on Articles 92 and 93. On the one hand, they rely on the principle *jura novit curia*; on the other hand, Articles 92 and 93 would be infringed because the Italian State would be obliged to grant aid more or less equal to that granted by the Fund.

In respect of the infringement of Article 17(2) of Regulation No 17/64, the applicants argue:

— that Article 4 of Regulation No 26/62 extended the application of Article 93(1) and (3) to aid granted in favour of production or of trade in the products enumerated in Annex II to the Treaty;

— that as the disputed aid is granted to industrial undertakings, any link between the needs of agriculture and the subsidies granted is absent;

— that these subsidies distort and threaten to distort competition between industrial undertakings, all the more so since those undertakings are obliged to work within a system of quota restrictions on production.

As article 17(2) of the regulation refers by implication to Articles 92 and 93 of Treaty, it is clear, furthermore, that an infringement of the former provision involves an infringement of these latter provisions.

In its rejoinder the *defendant* adheres to its position by emphasizing that Article 17(2) of the Regulation No 17/64 grants it a wide area of discretion, which is even grater since Articles 92 and 42 of the Treaty already show a bias in favour of structural aids. It adds that in the present case the incidence of Community subsidies on trade between Member States is practically nil because of the system of production quotas instituted by Regulation No 1009/67.

The *interveners Co.Pro.A. and Co.Pro.B.* claim, on the one hand, that there is no link between Article 17(2) of Regulation No 17/64, which applies only to interventions by the EAGGF, and Articles 92 and 93 of the Treaty and, on the other hand, that Article 34 of Regulation No 1009/67 expressly admits the Italian Government's ability to grant 'adaptation subsidies to its beet growers and to its beet processing industry' during the transitional period (1968 to 1975).

According to the *Italian Government* the contested decisions have not distorted competition. In view of conditions of cultivation peculiar to Italy and the state of decay of the majority of processing undertakings, these decisions help only to remedy a deficiency and a well-known inadequacy in the sugar industry.

It observes further that the applicant undertakings obtained quotas which they could have insisted upon in law and that they cannot therefore claim that the contested decisions have led to a diminution in the quotas which they receive.

According to the *applicants*, by authorizing the Italian Republic to grant aids Article 34 of Regulation No 1009/67 prohibits any discrimination in the granting of such aids.

As to the effect of the contested decisions upon the system of quotas, it cannot be denied, according to the applicants, that in the future their respective quotas will be affected by it.

The allegations of the opposite parties concerning the dominant position occupied by the applicants on the Italian market have led the latter to raise during the oral procedure the submission of misuse of powers committed in respect of them. In fact, either the size of the respective undertakings has not influenced the decisions in question and all the arguments referring to them are irrelevant or their size played a role and these decisions in fact took into account the competitive position of the applicants on the Italian market.

The applicants believe, moreover, that it is necessary to consider their position not on the Italian national market alone, but on the whole Common Market where it is far from being dominant.

According to the *defendant* the sub-

mission put forward has no basis. The mere fact of granting structural subsidies to three undertakings does not allow the conclusion to be drawn that its real purpose was to attack the competitive position of the applicants, all the less so since, by fixing quotas based not upon companies but upon undertakings, the Community regulations on sugar allowed the applicants, which are companies made up of several undertakings, to carry out measures of internal reconstruction.

Further, the defendant states that the principle of non-discrimination in the allocation of subsidies by the EAGGF is to a large extent assured by the fact that the Fund acts only upon a request, which may be made by any undertaking concerned.

4. Infringement of the general principle of law which allows persons having a contrary interest the right to be heard before a decision is taken

According to the *applicants* it is a matter of a general principle of law, common to the legal systems of all the Member States and of which account has been taken in the relevant provisions, for example in Article 3 of Regulation No 17/62. The Commission has infringed this principle by failing to put the other Italian sugar refineries in a position to formulate any objections which they might wish to make against the decisions envisaged.

In its statement of defence the *defendant* disputes that such a principle has been adopted by the Treaty:

— Article 93 requires notice to be given to the parties concerned only when the Commission intends to abolish the aid complained of; notice to those who have an interest contrary to the grant of aid is not required;

— for the possible authorization of rates involving any element of support Article 80 has provided only for the consultation of the Member States and not of individuals;

— the case of Article 3 of Regulation No 17 is different from that of aid, as third parties are liable because of a negative decision to suffer damage in law and not merely in fact; the statement of reasons for the regulation distinguishes between undertakings which are addressees of the decision which 'must be accorded' the right to be heard, and third parties who must 'be given the opportunity' of submitting their comments.

In the reply the *applicants* dispute the contention that the case of Article 3 of Regulation No 17/62 is different from that of aid, since the respective articles appear in the same chapter of the Treaty and have the same objective; in the first case, third parties do not suffer different damage.

In its rejoinder the defendant maintains its position.

Complaints peculiar to the decisions of of 27 July 1967 and 2 October 1967

In their application the *applicants* give details, in respect of each of the decisions mentioned above, of the complaints which they have already put forward.

In addition, they set out the following arguments:

1. Infringement of Article 11(2) and Article 20 of Regulation No 17/64 by the decision of 27 July 1967

In their application the *applicants* state that according to Article 11(2) the action of the Fund may extend to agricultural products as soon as they come within the common organization of the market. This was established in the sugar sector as from 1 July 1967. However, as the request for aid for the sugar refinery at Minerbio was made before 1 October 1965, by virtue of Article 20, the Commission should have taken a decision before 31 December 1966. The decision was not taken until 21 July 1967, so that an infringement of Article 20 may be presumed. If this doubt was able to be raised it should be considered that

the grant given must refer to the year 1966, that is to say, to a time when the organization of the markets in sugar did not yet exist.
In its defence, the *defendant* replies that Regulation No 50/67 postponed the time-limit given to the Commission until 31 July 1967. As to the year to which a contribution refers, it points out that the conditions for the grant of aid must be considered as at the time of the decision and not at the time of the request.

2. *Misuse of powers and incorrect, inadequate, ambiguous and contradictory reasoning of the decision of 27 July 1967*

In this part of their application the *applicants* enlarge upon a complaint previously put forward namely the lack of relevance of the recital that the addressees of the contested decisions are 'cooperative sugar refineries'. This fact cannot absolve the Commission from observing the rules and criteria in force. In view of the critical situation of the Italian sugar industry, the desire to benefit the cooperatives and to enable them to absorb the whole sugar-beet production of their present or future members must be only a secondary consideration. Furthermore, the benefits of a cooperative are doubtful in this case and are available to the members only in their capacity as industrial producers and not as agricultural producers.
In its statement of defence the *defendant* disputes the consequence of the distinction between the capacity of members of the sugar undertaking and that of producers of sugar-beet and insists on the advantage which basic production draws from the fact of vertical integration.
The *interveners Co.Pro.A. and Co.Pro.B.* insist upon the capital importance of the fact that the addressees of the first two contested decisions are cooperatives. The fact that one cooperative carries out the processing of agricultural products, which is claimed to be an industrial activity, does not make it possible to attribute an industrial character to that company.
According to the *applicants* no political choice and no social requirement can justify a clear infringement of the Treaty and of Community regulations.

3. *Infringement of Article 1(2) of Regulation No 206/66 by the decision of 2 October 1967*

Having regard to the fact that the damage caused to the Ostellato region by the floods of November 1966 is the decisive reason for the aid, the *applicants* argue that no damage to the recipient sugar refinery was mentioned in the statement of reasons. Furthermore, the area of Ostellato did not suffer damage, as is shown by the Presidential Decrees of 9 and 15 November and 12 December 1966 and the Ministerial Decree of 21 December 1966, which in giving details of the communes of the province of Ferrara affected by the floods, makes no mention of the commune of Ostellato. For these reasons Article 1(2) of Regulation No 206/66 has been infringed.
In addition, the applicants point out that a request for a contribution comparable to that of the Ostellato undertaking was made by one of the applicant companies in favour of a sugar refinery situated in the commune of Porto Tolle which was wrecked by the flood. The Italian Government took the view that it should not send this request to the Commission, considering that the repair of this damage 'has no link with directly agricultural interests and does not particularly relate to the restoration of farms within the areas which have suffered damage'. Consequently, it is not possible to justify the large amount of aid intended not for the repair but for the enlargement of the sugar refinery of Ostellato. It amounts to a misuse of powers on the part of the Commission.
In its statement of defence the *defendant* replies that Regulation No 206/66 does

not require that the plant itself and the place where it is situated should have been involved. According to Article 3(1) the project must contribute 'to allowing economic revival in the agricultural sector'. The majority of the farms of members of the recipient cooperative were damaged and, further, many farmers in the region affected changed to the growing of sugar-beet so that the enlargement of the sugar refinery in question allowed the new production to be absorbed.

In their reply the *applicants*, repeating that the sugar refinery like the territory of Ostellato and even the greater part of the province of Ferrara did not suffer from the floods state with documentary support that the allegations of the Commission are without foundation. Even if the farms of the members of the cooperative are situated in the areas of damage, the November floods did not affect sugar-beet growing, in view of the fact that in this area the sugar-beet is sown in the spring and harvested in August and September. Further, even if sugar-beet growing had been intensified following the floods, which was not the case, such accidental increase would not suffice to justify the grant of aid for the extension of the sugar refinery of Ostellato, to be carried out some years later. The applicants consider in addition that in order to absorb the new production of sugar-beet it is not necessary to enlarge the sugar refinery concerned because, on the one hand, existing sugar refineries would have been able to absorb the whole increase in production and, on the other hand, the production capacity of the Ostellato sugar refinery was too great even before the extension of its plant.

In its rejoinder the *defendant* disputes the documentary information provided by the applicants. It annexes a list of 184 members of the Ostellato cooperative whose farms are situated in communes flooded in 1966 and a table showing the number of sugar-beet producers in the damaged area who are interested in the supply of their products to the Ostellato sugar refinery. The Commission replies to the arguments of the applicants that the increase in production of sugar-beet in the flooded areas of the province of Ferrara was not a fortuitous phenomenon but a permanent one, in view of the fact that the growing of sugar-beet was the only type of agriculture able to bear such a salinity rate as resulted from the floods, and that the growing of hemp which had previously been predominant had almost totally disappeared.

In their statements the *interveners Co. Pro.A and Co.Pro.B.* maintain that Regulation No 206/66 allows aid not only for the reconstruction of farms and agricultural undertakings but also for their improvement (Articles 1 and 2, first part). Further, Article 1(2) shows the intention to intervene in favour of the whole regional economy and not only of isolated crops or agricultural undertakings which have suffered damage. The cooperatives allege, with documents in support, that a large number of the members supplying the sugar refinery live in the communes which have suffered damage.

In their reply the *applicants* dispute that the flood affected the 'majority' of the members of the cooperatives, since only 14% of the total number of members have their undertakings in the territory of the communes declared to be flooded. As to the fact pointed out by the applicants that the Italian Government did not forward to the Commission a request for aid made by the Porto Tolle undertaking, the *Italian Government* observes that the company in question did not bring an appeal under national law against that decision of the national authority and adds that the Commission is not concerned with requests which have not been forwarded to it by a national government.

The *applicants* point out that, if the company concerned did not appeal against the decision of the national

authorities, it was because it accepted the reason for this refusal according to which the said request was not 'related to directly agricultural interests'. And it is because they are still of the same opinion that the applicants are acting not against the refusal of the Italian Government to the request from the Porto Tolle company but against the decision addressed to the Ostellato undertaking.

During the oral procedure, the applicants stressed particularly the wording of Article 1(2) of Regulation No 206/66 '. . . for the restoration *and* the improvement . . .', and the fact that any decision must therefore conform to the first condition, which is clearly not the case in respect of the Ostellato undertaking.

In respect of the discrimination relied upon in the cases of the undertakings at Porto Tolle and Ostellato respectively the *defendant* asserts that it does not have the right to review the decisions of national governments acting within the procedure provided for in Regulations Nos 17/64 and 206/66. Each authority has its own responsibilities and must answer for these actions before the appropriate courts.

B — Case 18/68

The *applicants* consider that the inactivity of the Commission, including the absence of any verification of the points of fact and of law alleged by them, is illegal; all the more so since the decisions of 27 July 1967 and 2 October 1967 expressly provide, in their statements of reasons for the possibility of a suspension, reduction or withdrawal of the amount of the aid when it appears that, contrary to the data supplied in the request or to the data which must be used as a basis for the decision, they do not conform to the provisions of the regulations applied. In respect of the decision of 7 March 1968, the same reservation must be regarded as implied.

In order to show the illegality of the implied rejection of their extra-judicial request, the applicants rely upon the submissions and arguments set out within the framework of their Application 10/68 and refer to these as well as to the documents produced in support of them.

The *defendant* does not adopt any view with regard to the argument of the applicants that the action provided for in Article 175 covers the annulment of an implied measure resulting from the silence of the institution. It emphasizes in its statement of defence that it did not have the power to rescind, for reasons of expediency, measures already adopted which had created vested rights for those to whom they were addressed.

It considers that in any event the decision of 27 July 1967 and probably that of 2 October 1967, have become unassailable, having regard to the fact that the reasonable period accepted by case-law in which an administrative measure may be annulled or revoked has expired.

In respect of the criticisms made concerning the three decisions in question the Commission refers to the submissions in the defence which it set out in Case 10/68.

The *applicants* in their observations on the statement by the Italian Government allege that, particularly as regards the decision concerning the Ostellato undertaking, the Commission should have automatically annulled the contested decision as soon as it had been informed of the flaws of misuse of powers and of infringement of the principle of equality attaching to it.

Grounds of judgment

[1] By Application 10/68 lodged at the Court Registry on 10 May 1968, the applicants requested the annulment of Decisions of the Commission Nos

1/22/66 of 27 July 1967, 1/17/INON of 2 October 1967 and 1/73/67 of 7 March 1968, granting aid from the European Agricultural Guidance and Guarantee Fund to certain sugar refineries established in Italy.

2 By Application 18/68 made under Article 175 of the Treaty and lodged at the Court Registry on 1 August 1968, the same applicants contested the implied decision of rejection which, according to them results from the silence maintained by the Commission in respect of an extra-judicial request by which they had sought the revocation of the abovementioned decisions.

3 By order of 25 October 1968 the Court joined the two cases for the purposes of judgment.

Admissibility of Application 10/68

4 The defendant and the interveners dispute the admissibility of Application 10/68 by asserting, on the one hand, that it is out of time, in so far as it is directed against the first two contested decisions the adoption of which was made public by notices published in the Official Journal on 4 August and 7 October 1967 respectively, and on the other hand, that the applicants, who are not addressees of the contested measures, are not directly and individually concerned by them and consequently cannot request their annulment.

As the second part of this objection of inadmissibility refers to the application as a whole, it is appropriate to consider it first.

5 Under Article 173 of the Treaty any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct individual concern to the former.

Under the terms of the last article of each of the contested decisions, those decisions are addressed to the Italian Government as well as to the respective beneficiaries.

Consequently the right of the applicants to act depends on the question whether these decisions are of direct and individual concern to them.

6 The applicants consider that this is so in their case by reason of the fact that, as the aids granted are likely to affect competitive relationships on the Italian sugar market, they suffer damage by the advantage thus given to the addressees of the contested decisions, with whom they are in competition; particularly because of the introduction of the quota system provided for in Regulation No 1009/67 EEC of the Council of 18 December 1967, on the common organization of the market in sugar (OJ No 308) and by Regulation

No 1027/67/EEC of the Council of 21 December 1967 on the fixing of basic quotas for sugar (OJ No 313), the contested decisions affect the position of the applicants on the Italian sugar market in a direct and individual manner.

7 The mere fact that a measure may exercise an influence on the competitive relationships existing on the market in question cannot suffice to allow any trader in any competitive relationship whatever with the addressee of the measure to be regarded as directly and individually concerned by that measure.

Only the existence of specific circumstances may enable a person subject to Community law and claiming that the measure affects his position on the market to bring proceedings under Article 173.

8 The allegation of the applicants that the contested decisions have a direct effect upon their situation in the system of distribution of quotas provided for by Regulations Nos 1009/67 and 1027/67 tends to show the existence of such specific circumstances in respect of them.

In order to assess the relevance of this argument it is appropriate to point out certain peculiarities of the said machinery as operated in respect of the Italian sugar market.

9 In order to prevent surplus production and to promote regional specialization of production, the aforementioned regulations have for a transitional period established a system of quotas consisting in the allocation to each sugar undertaking or factory of a basic quota for which the price and sales guarantee is borne by the Community, such guarantee being limited or excluded for quantities manufactured above the quota.

For this purpose each Member State is allocated a basic quantity to distribute between the national sugar undertakings and factories, in respect of 85% to 90% of the amount in accordance with a mathematical formula laid down in Article 23 of Regulation No 1009/67, based on their production during a reference period (the marketing years 1961/62 to 1965/66), and in respect of the remaining 10% to 15% at the discretion of the government concerned in order to take into account possible changes in the sugar industry and sugar-beet cultivation or special circumstances.

10 By a Ministerial Decree of 26 February 1968, the Italian Government adopted, in respect of the distribution of 10% of the basic quantity, criteria which allowed only undertakings satisfying certain general conditions and objectives to obtain within previously fixed limits, and leaving aside one exception irrelevant to the present case, an automatic increase of their basic quota.

Thus the production capacity of the undertakings and factories did not play any part in the distribution of this 10%, the only variable element of the system, as such distribution was based on criteria relating to completely different circumstances, such as the area where the factory was established, the character and number of units of production of the undertaking or the results of sugar marketing years between the reference period and the entry into force of the said Ministerial Decree.

[11] It appears from these facts that such EAGGF aid as that granted by the contested decisions has no influence upon the distribution of quotas except to the extent to which the criteria adopted by the governments allow it.

Consequently this aid has no direct effect on the said distribution.

[12] The applicants have further alleged that the contested decisions, and in particular that concerning the Castiglion Fiorentino sugar refinery, influenced the distribution of the basic quantity by the Italian Government, by reason of the fact that they made the payment of aid subject to an undertaking from the said Government to allocate to the recipients a basic quota corresponding to their increased capacity.

[13] Nevertheless, the condition mentioned cannot be regarded as having determined the content of the criteria for distribution adopted by the Italian Government.

On the contrary, the Commission could not grant EAGGF aid without being previously assured of the conformity of these decisions with the distribution policy which the Italian Government intended to adopt in accordance with the regulations on the common organization of the market in sugar.

[14] The circumstances relied upon by the applicants do not, therefore, establish that the contested decisions were of direct and individual concern to them.

Consequently, and without its being necessary to consider the other submissions of inadmissibility, Application 10/68 must be held to be inadmissible.

Admissibility of Application 18/68

[15] This application concerns the annulment of the implied decision of rejection resulting from the silence maintained by the Commission in respect of the request addressed to it by the applicants seeking the annulment or revocation of the three disputed decisions for illegality or otherwise because they are inappropriate.

16 The action provided for in Article 175 is intended to establish an illegal omission as appears from that article, which refers to a failure to act 'in infringement of this Treaty' and from Article 176 which refers to a failure to act declared to be 'contrary to this Treaty'.

Without stating under which provision of Community law the Commission was required to annul or to revoke the said decisions, the applicants have confined themselves to alleging that those decisions were adopted in infringement of the Treaty and that this fact alone would thus suffice to make the Commission's failure to act subject to the provisions of Article 175.

17 The Treaty provides, however, particularly in Article 173, other methods of recourse by which an allegedly illegal Community measure may be disputed and if necessary annulled on the application of a duly qualified party.

To admit, as the applicants wish to do, that the parties concerned could ask the instituion from which the measure came to revoke it and, in the event of the Commission's failing to act, refer such failure to the Court as an illegal omission to deal with the matter would amount to providing them with a method of recourse parallel to that of Article 173, which would not be subject to the conditions laid down by the Treaty.

18 This application does not therefore satisfy the requirements of Article 175 of the Treaty and must thus be held to be inadmissible.

Costs

19 Under Article 69(2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. As the applications of the applicants are inadmissible, it is appropriate to order them to pay the costs, including those of the interventions;

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 173 and 175;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

hereby;

1. **Dismisses Applications 10/68 and 18/68 as inadmissible;**

2. **Orders the applicants to pay the costs, including those of the interventions.**

Lecourt Monaco Pescatore

Donner Trabucchi Strauß Mertens de Wilmars

Delivered in open court in Luxembourg on 10 December 1969.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 28 OCTOBER 1969[1]

Mr President,
Members of the Court,

The important case upon which I am required to give my views today is concerned with the grant of aid by the European Agricultural Guidance and Guarantee Fund.

The subject of these proceedings is governed by Regulation No 17/64 of the Council of 5 February 1964 (OJ No 34, 27. 2. 1964.), and more precisely, by the second part of that regulation headed 'Guidance Section'. Article 11 of the regulation sets out the *objectives* of the action taken by the 'Guidance Section' which is concerned with the adaptation and improvement of conditions of production in agriculture, the adaptation and improvement of the marketing of agricultural products and the development of outlets for agricultural products. These objects are defined in Article 12, paragraph (3) of which states that adaptation and improvement of the marketing of agricultural products means the provision of facilities, on the farms themselves, or within a group of farms, or externally, in respect of the following aspects: improvement of storage and preservation, obtaining the best return from agricultural products, improvement of marketing channels and better knowledge of the data relating to price formation on the markets for agricultural products. Projects (even semi-public or private) which have as their object the improvement of agricultural structures within the meaning of Article 11(1) may receive aid from the Fund provided that they satisfy the

1 — Translated from the French.