OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 26 September 1989 *

Mr President,
Members of the Court,

1. The applicants challenge Council Regulation (EEC) No 1910/88, [1] which suspended the advance fixing of aid for dried fodder for the period from 1 to 7 July 1988.

The legislative background to the present proceedings is described in the Report for the Hearing, to which reference should be made. I will merely point out that the contested regulation is based on Article 12 of Council Regulation (EEC) No 1417/78, [2] which provides for the possibility of advance fixing of the aid in question being suspended in the event of an abnormal situation arising in the dried-fodder market, in particular where the volume of applications for advance fixing bears no relation to the normal disposal of such fodder. I would also point out that pursuant to Article 9 of Commission Regulation (EEC) No 1528/78 [3] (as amended, at the material time, by Regulation (EEC) No 2334/87 [4]), such suspension entails rejection of applications for certificates with advance fixing of the amount of the aid, which would otherwise be issued to the applicant undertakings on the third working day following the date on which the application was lodged.

2. On 28, 29 and 30 June 1988, the applicants submitted applications to the national intervention agency for certificates with advance fixing of the aid in question.

However, in the last days of June, in view of a sharp rise in the world price of dried fodder, a massive influx of applications for advance fixing of the aid was observed in the Community.

The Commission considered that speculation was the cause. The aid in question is determined periodically by reference to the difference between the Community price and the world price (which is normally lower) of dried fodder.

The increase in the world price recorded at the end of June thus led traders to expect a reduction in the amount of the aid with effect from the following month (which is what in fact happened). Hence it was advantageous to apply for advance fixing of the aid in an amount not yet adjusted to the fall in price.

As a result, the Commission intervened, by virtue of the powers conferred on it by Article 12 of Regulation (EEC) No 1417/78, by adopting the contested suspending regulation, which led to the rejection of, *inter alia*, the applications lodged by the applicants.

* Original language: Italian.
1 — OJ L 168, 1.7.1988, p. 111.
2 — OJ L 171, 28.6.1978, p. 1.
3 — OJ L 179, 1.7.1978, p. 10.
4 — OJ L 210, 1.8.1987, p. 63.

3. By way of preliminary, the Commission objects that the application is inadmissible on the ground that the conditions laid down in the second paragraph of Article 173 of the Treaty are not satisfied.

The contested measure is of general application and cannot therefore be seen as a decision which, although purporting to be a regulation, is of individual concern to the applicants.

It should be made clear in that respect that, according to consistent and well-known decisions of the Court: [5]

'Article 173(2) of the Treaty makes the admissibility of proceedings instituted by an individual for a declaration that a measure is void dependent on fulfilment of the condition that the contested measure, although in the form of a regulation, in fact constitutes a decision which is of direct and individual concern to him. The objective of that provision is in particular to prevent the Community institutions, merely by choosing the form of a regulation, from being able to exclude an application by an individual against a decision of direct and individual concern to him and thus to make clear that the choice of form may not alter the nature of a measure.

Nevertheless, an action brought by an individual is not admissible in so far as it is directed against a regulation having general application within the meaning of the second paragraph of Article 189 of the Treaty. The test for distinguishing between a regulation and a decision is whether or not the measure in question has general application. It is therefore necessary to appraise the nature of the contested measure and in particular the legal effects which it is intended to produce or actually produces.

A measure does not cease to be a regulation because it is possible to determine the number or even the identity of the persons to whom it applies at any given time as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in relation to its purpose.

In order for a measure to be of individual concern to the persons to whom it applies, it must affect their legal position because of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as a person to whom it is addressed'.

4. It should also be remembered that the Court, in those cases — those few cases — in which it has been recognized that a measure adopted in the form of a regulation was of individual concern to those who attacked it, has attached particular importance to the fact that, when the regulation was adopted, the persons who were subject to the effects of the measure were *identified* or at least *identifiable*.

Thus, in *International Fruit* [6] (adjudicating on a regulation extending the system of quantitative limitations on the issue of import licences for dessert apples from non-member countries), the Court stated that

5 — See most recently the judgments of 29 June 1989 in Joined Cases 250/86 and 11/87 *RAR* [1989] ECR 2045, paragraphs 6 to 9 and also of 24 February 1987 in Case 26/86 *Deutz und Geldermann* [1987] ECR 941, paragraphs 6 to 9 and of 6 October 1982 in Case 307/81 *Alusuisse* [1982] ECR 3463, paragraphs 7, 8 and 11.

6 — Judgment of 13 May 1971 in Joined Cases 41 to 44/70 [1971] ECR 411.

'when the said regulation was adopted, the *number* of applications [for import licences] which could be affected by it was *fixed. No new application could be added*' (see paragraphs 16 to 19; emphasis added);

and that,

'accordingly, by providing that the system introduced by Article 1 of Regulation No 565/70 should be maintained for the relevant period, the Commission decided, even though it took account only of the quantities requested, on the subsequent fate of each application which had been lodged' (see paragraphs 20 to 22).

Similarly, in *CAM*,[7] the Court's reasoning is based on the consideration that the contested regulation

'applies to a *fixed* and *known* number of cereals exporters as well as, in respect of each of them, to the amount of the transactions for which advance fixing had been requested' (see paragraph 15; emphasis added).

The identifiability of the persons to whom the measure was found to be applicable was held to be decisive in defining a measure's characteristics as a regulation or a decision in the *Töpfer* judgment.[8]

It should also be noted that although the identifiability of the addressees or, better still, the fact that they represent a *numerus clausus* known to the institution concerned, is a necessary condition for the measure to be recognized as not constituting a regulation, it is not sufficient in itself.

It has already been stated that, according to the cases cited above, 'a measure does not cease to be a regulation because it is possible to determine the number or even the identity of the persons to whom it applies at any given time as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in relation to its purpose'.

It seems equally necessary for the circumstance which enables the addressees of the measure to be identified to have in some way prompted the intervention of the institution and therefore to form part of the *raison d'être* of the measure itself.

As has been observed, 'la connaissance du nombre et de l'identité des personnes concernées, généralement rendue possible par le caractère rétroactif de la mesure, n'est qu'une donnée première qui doit encore être complétée par l'individualisation de leur situation. Cette individualisation résultera non seulement de certaines qualités particulières ou d'une situation de fait spécifique, données objectives, mais de leur prise en considération par l'autorité communautaire'.[9]

7 — Judgment of 18 November 1975 in Case 100/74 *CAM* [1975] ECR 1393.

8 — Judgment of 3 May 1978 in Case 112/77 *Töpfer* [1978] ECR 1021.

9 — A. Barav and G. Vandersanden: *Contentieux communautaire*, Bruylant, Brussels, 1977, p. 172.

In even clearer terms it has been emphasized that 'il ne suffit par que le nombre ou l'identité de ces personnes soient connus, ou puissent l'être; il faut encore qu'ils figurent parmi les éléments ayant déterminé l'adoption de l'acte. En d'autres mots, il faut un *lien de causalité* entre la connaissance qu'a l'institution de la situation du requérant et la mesure adoptée'. [10]

5. With respect to the present case, it must first of all be pointed out that when the contested regulation was adopted, on 30 June 1988, the addressees of the measure did not constitute a clearly defined circle known to the Commission.

The regulation in question — as often occurs in cases where the issue of advance-fixing certificates is suspended — affected both applications which had already been lodged and those which had not yet been lodged but could have been lodged after 30 June 1988.

The contested regulation in fact affected certificates which ought to have been issued between 1 and 7 July 1988. In view of the period of three working days between lodgment of the application and issue of the certificate, it follows that in the present case the suspension affected both applications lodged in the last days of June 1988 and such applications as might have been lodged after 30 June 1988, specifically Friday 1 July or Monday 4 July 1988 (in respect of which, had there been no suspension, the certificates would have been issued on Wednesday 6 and Thursday 7 July 1988 respectively).

10 — M. Waelbroeck: *Rev. int. jur. belge*, 1971, p. 533 (emphasis added).

6. The applicants object that the extension of the validity of the regulation so as to suspend applications lodged after 30 June 1988 was a sham.

They say so for two reasons. In the first place, it is contrary to the current practice of undertakings to apply for certificates at the start of the month. In the second place, the contested regulation, which was adopted for anti-speculative purposes, is only ostensibly applicable to applications lodged on or after 1 July. As from that date, the amount of the aid was reduced by Commission Regulation (EEC) No 1895/88, [11] so that it was proportionately correct (duly reflecting the difference between the world price and the Community price of dried fodder). Therefore, any applications lodged on or after 1 July — if it is conceded that there were any — could not in any event have been speculative and should not therefore have been covered by the suspension. In the applicants' view, it follows that the regulation in question, although purporting not to do so, in reality related only to applications lodged on or before 30 June, and thus to a clearly defined group.

That argument does not appear to carry conviction.

In the first place, the practice of not normally applying for certificates at the beginning of the month is a matter of fact, which is merely fortuitous and could not determine the nature of the measure in question.

11 — OJ L 168, 1.7.1988, p. 73.

As regards the non-speculative character of any applications lodged as from 1 July, that is a matter which can only be determined *ex-post facto*. When the suspending regulation was adopted, during a phase of sharp variations in prices on the market in question, the Commission was not in a position to predict with absolute certainty whether the adjustment to the amount of the aid decided upon on 1 July would be sufficient. Until the situation became clearer and more stable, it was appropriate to suspend advance fixing for the maximum period allowed, namely seven days. I do not therefore think it can be concluded that the suspension was designed to affect only applications submitted up to 30 June. On the contrary, it also covered applications lodged subsequently, which could not be reliably classified in advance as speculative or otherwise.

It is true that no application was lodged after 1 July. But that is only the *consequence* of the fact of the suspension, which was effective until 7 July. The traders, having become aware of the suspension, were discouraged from submitting an application which would not produce any useful results. That fact therefore does not detract from — but rather confirms — the view that the suspension, if only potentially, was intended to cover both applications already submitted (about which the Commission knew in any event only in general terms) and any applications which might have been lodged at a later stage.

Then there is a further consideration. The suspending regulation, adopted on 30 June, was published on the following day. Therefore, it was not until 1 July that the traders concerned came to know of the suspension. However, the suspension also applied to applications submitted to the national authorities on 30 June (on which date the amount of the aid had not yet been reduced), of which the Commission, when ordering the suspension in question, could not possibly have been aware.

I do not therefore think it can be concluded that the suspending regulation concerned a clearly defined and identified circle. On the contrary, it appears to be intended to affect the legal situation of traders which were not identifiable when the measure was adopted.

7. That should be sufficient to indicate that the contested regulation cannot be regarded as a set of decisions against which natural or legal persons are entitled to bring an action under the second paragraph of Article 173.

But there is another aspect which seems to me to be important.

I consider that, regardless of its specific effects, it is, in more general terms, the rationale and the objectives of the suspending regulation which conduce to its being classified as a regulation.

The suspension of advanced fixing — and not solely in the circumstances of the present case — is a measure for regulation of the market. It is intended to ensure that, when there are abnormal developments in the economic situation, the advance-fixing system (for aid or any other benefit) is not used for purely speculative purposes, thus diverting it from its proper purpose.

On the other hand, the suspension is not a response or, still less, a *decision* adopted in relation to individual applications for advance fixing. Although the provisions granting the power of suspension state in general that the power confirmed may be exercised 'in particular' when the volume of applications for advance fixing appears to bear no relation to the normal possibilities of disposing of the product on the market (see in this case Article 12 of Council Regulation (EEC) No 1417/78), that is due to the fact that an excessive volume of applications is a particularly reliable indicator of speculative activity and, therefore, of a change in normal market conditions. But there is nothing to prevent the Commission from ordering suspension, even where there is no abnormally high volume of applications, provided that, of course, the market conditions justify such a course. Thus, for example, in the industry in question, if there were an unexpected rise in the world price of dried fodder the Commission could even decide on suspension as a preventive measure, that is to say before applications of a speculative nature started to be submitted to the national authorities.

The justification for a measure suspending advance fixing is therefore merely a deterioration in the balance of the market, not the submission of individual applications by traders.

From that point of view, the situation in the present case appears to differ significantly from the circumstances of *International Fruit,* cited earlier. In that case, the basic regulations provided that the Commission should be informed weekly by the Member States of the quantities for which import licences were applied for and that, on the basis of such communications, the Commission would assess the situation and *decide* whether licences should be issued. In that case, not only — as I have said — did the measure adopted by the Commission (a precautionary measure in that case) relate to a specific and closed circle of traders but, what is more important, the import licence applications submitted by them (and, in particular, the quantities indicated) were the essential element taken into consideration by the Commission in defining the scope of the precautionary measure to be adopted. In those circumstances, therefore, there was a causal link between the applications for import licences submitted and the precautionary measure. Therefore, that measure — as pointed out by the Court — was not of general application, even though it was to be regarded as a set of decisions of individual concern to the separate applicants.

However, that causal link does not appear to exist in the present case since the suspension of advance fixing is logically — as is apparent from the basic regulations — attributable to an assessment of the market situation and not necessarily to an evaluation of the applications submitted for advance fixing.

It seems to me in fact that suspending regulations, like the one at issue here, must, regardless of the fact that they affect applications already submitted (that is to say specific applications) or even future and potential applications, nevertheless be considered, in view of their rationale and objective, as measure of a legislative nature applicable to legal situations defined in abstract and general terms.

Moreover, that conclusion is supported by a precedent which is substantially analogous to the present case. I refer to the judgment in *Moksel*,[12] in which the Court declared inadmissible an application for the annulment of a regulation suspending the advance fixing of export refunds in the beef and veal industry, observing that:

'Consequently it must be deduced from the purpose of the contested measure, from the framework of the regulations of which it forms part, and also from its very nature that it is indeed a regulation which is of general application; it follows that the objection raised by the Commission must be accepted in so far as it concerns the application that Regulation No 3318/80 should be declared void' (Paragraph 19).

I therefore consider that the present application is inadmissible.

8. Let me deal now, *in limine*, with a last point.

The power to suspend advance fixing is provided for in various market sectors and in relation to various circumstances (processing aids, export refunds and so forth). Even though the specific circumstances may vary from time to time, the function and essential features of the suspending regulations are nevertheless similar. In all cases, indeed, it is a question of verifying within a few days (between lodgment of the application and issue of the certificate) whether the market situation has changed in such a way that suspension of advance fixing is necessary for a certain period.

Not infrequently, therefore, such regulations are contested either by way of preliminary-ruling proceedings or direction actions, as in this case and in the *Moksel* case referred to earlier.

It therefore seems to me important that the Court should make clear to the interested parties which remedy should be pursued when they seek to challenge a suspending regulation: whether they may seek annulment under Article 173 or whether, on the other hand, they should allege invalidity in proceedings before a national court against implementing measures taken by the national authorities, at that time requesting the national court to submit a question to the Court of Justice for a preliminary ruling on the validity of the suspending regulation.

For the reasons given earlier, I believe that the second solution is preferable. I also think that, precisely in order to dispel any uncertainty in the future, the Court, in confirming its judgment in *Moksel*, should analyse the nature of the measure in question having regard above all to its rationale and objectives: in general the latter aspects are common to all suspending regulations, regardless of the sector in which they are adopted.

On the other hand, the fact that the contested regulation does not — as we have seen — relate to a closed and clearly defined circle of traders, although decisive in the present case, is in fact an incidental

12 — Judgment of 25 March 1982 in Case 45/81 *Moksel* [1982] ECR 1129.

matter and therefore not a proper basis for a general assessment as to the nature (that of a regulation or otherwise) of suspending measures. That is not therefore a reliable criterion by which the traders affected should be guided, particularly since they may not be in a position to know whether or not, when it is adopted, a suspending regulation relates to a *numerus clausus* of addressees.

9. I therefore propose that the Court declare the application inadmissible and order the applicants to pay the costs.