FATTORIA AUTONOMA TABACCHI AND OTHERS v MINISTERO DELL'AGRICOLTURA E DELLE FORESTE AND OTHERS

OPINION OF ADVOCATE GENERAL ELMER

delivered on 29 February 1996 *

1. In these cases, the Tribunale Amministrativo Regionale del Lazio (Regional Administrative Court, Lazio) has referred to the Court for a preliminary ruling a number of questions on the interpretation of Council Regulation (EEC) No 2075/92 of 30 June 1992 on the common organization of the market in raw tobacco [1] (hereinafter 'the basic regulation'), as well as on the validity and interpretation of Commission Regulation (EEC) No 3477/92 of 1 December 1992 laying down detailed rules for the application of the raw tobacco quota system for the 1993 and 1994 harvests [2] (hereinafter 'the implementing regulation'). The cases before the national court have been brought by producers and processing undertakings in the tobacco sector which argue that the quotas allocated to them are too small.

Broad outline of the organization of the market in raw tobacco

2. The basic regulation introduces a new organization of the market in raw tobacco to replace the previous organization of the market. [3]

3. The previous market organization was a support system based on target prices and intervention prices. Under that system, tobacco producers could either sell their produce to the intervention bodies, which were obliged to purchase at the intervention price, or sell their produce on the market. There was no limit on the level of production in respect of which aid could be obtained. With a view to limiting an increase in tobacco production and preventing the production of tobacco types which presented marketing difficulties, provisions were subsequently [4] introduced which laid down a maximum

* Original language: Danish.

1 — OJ 1992 L 215, p. 70. For the 1994 harvest, the regulation was amended by Council Regulation (EC) No 711/95 of 27 March 1995 (OJ 1995 L 73, p. 13). However, the actual cases in which questions have been submitted to the Court concern the period prior to 1994.

2 — OJ 1992 L 351, p. 11, as most recently amended by Commission Regulation (EEC) No 1668/93 of 29 June 1993 (OJ 1993 L 158, p. 27). For the 1994 harvest, the implementing regulation was most recently amended by Commission Regulation (EC) No 1754/94 of 18 July 1994 (OJ 1994 L 183, p. 5). The implementing regulation has now been replaced by Commission Regulation (EC) No 1066/95 of 12 May 1995 laying down detailed rules for the application of Council Regulation (EEC) No 2075/92 as regards the raw tobacco quota system for the 1995, 1996 and 1997 harvests (OJ 1995 L 108, p. 5).

3 — See Regulation (EEC) No 727/70 of the Council of 21 April 1970 on the common organization of the market in raw tobacco (OJ, English Special Edition 1970 (I), p. 206), as most recently amended by Regulation (EEC) No 860/92 of 30 March 1992 (OJ 1992 L 91, p. 1).

4 — See Council Regulation (EEC) No 1114/88 of 25 April 1988 amending Regulation (EEC) No 727/70 (OJ 1988 L 110, p. 35).

guarantee quantity for the whole of the common market. [5] In the event of the maximum guarantee quantity being exceeded at Community level, there was a reduction in the intervention price. However, there still continued to be no limit on the extent of the production in respect of which individual producers could obtain aid.

4. The main features of the new organization of the market, applicable from 1993 to 1997, are as follows. [6] A premium system was introduced in order to support producers (farmers) and to make it possible to sell the tobacco within the Community. The premium is payable subject, *inter alia*, to the condition that the producer's supply of the tobacco to the undertaking carrying out the first processing is effected pursuant to a cultivation contract entered into between the producer and the processing undertaking. A cultivation contract contains an obligation on the processing undertaking to pay, in addition to the purchase price, an amount corresponding to the premium at the time of supply, and an obligation on the producer to supply raw tobacco.

5. The basic regulation lays down a maximum guarantee threshold for the entire common market (370 000 tonnes of raw tobacco for 1993 and 350 000 tonnes for 1994), and within these threshold quantities the Council sets the guarantee thresholds for the individual types. In order to ensure compliance with the guarantee thresholds, a system of processing quotas was introduced. For each harvest, the Council allocates among the producer Member States the quantities available for each type, and each Member State allocates in principle, as a transitional scheme for the 1993 and 1994 harvests, the processing quotas among the undertakings carrying out the first processing, in relation to the quantities supplied for processing to the undertakings in question in 1989, 1990 and 1991.

6. The implementing regulation contains *inter alia* provisions requiring processing undertakings to issue a cultivation certificate for each individual producer. The cultivation certificate indicates the portion of the quota of the processing undertaking in question that has been allocated to the individual producer. The purpose served by the introduction of cultivation certificates is to enable producers to change processing undertakings from one harvest year to the next by producing such a certificate.

7. The Member States can elect to allocate quotas directly to the producers, provided that they have sufficient information on the production recorded by the producers in 1989, 1990 and 1991. According to the information in the cases, Italy did not make use of this possibility.

8. It should also be mentioned that the market organization for the 1995, 1996 and

5 — Regulation No 1114/88 also gave rise to two judgments: that in Case C-368/89 *Crispoltoni* v *Fattoria Autonoma Tabacchi* [1991] ECR I-3695 and that in Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* v *Fattoria Autonoma Tabacchi and Donatab* [1994] ECR I-4863.

6 — The relevant provisions will be cited at a later point.

1997 harvests is set out as a scheme with production quotas which the Member States allocate directly to the producers on the basis of the average quantities supplied for processing over the three years prior to the year of the most recent harvest. [7] The rules for the 1993 and 1994 harvests, which are material to the present cases, can therefore be regarded as a transitional system between the previous market organization, based on target and intervention prices, and the most recent market organization, under which all Member States allocate production quotas directly to the producers.

The basic regulation

9. The fifth, sixth, eighth and ninth recitals in the preamble to the basic regulation are worded as follows:

'... competition on the tobacco market calls for some support of traditional tobacco producers; ... such support should be based on a premium system allowing the disposal of tobacco in the Community;

... the premium system can be managed efficiently by means of cultivation contracts between growers and first processors which guarantee stable outlets to the growers and regular supplies to the processor; ... payment of a sum equivalent to the premium by the processor to the producer at the time of delivery of the tobacco covered by the contract, subject to compliance with the quality requirements, provides support for the growers while facilitating management of the premium system;

...

... to ensure that the guarantee thresholds are observed, a processing quota system must be instituted for a limited period; ... for a transitional period the Member States must allocate, within the guarantee thresholds, processing quotas to the firms concerned, the Community rules laid down for the purpose being applied to ensure fair allocation on the basis of quantities processed in the past, but disregarding any abnormal production levels; ... the necessary measures will be taken to permit the quotas to be allocated to the producers subsequently, under satisfactory conditions; ... Member States possessing the necessary data to allocate quotas to producers on the basis of past performance should be authorized to do so;

... first processors must not conclude cultivation contracts for quantities exceeding the quotas allocated; ... reimbursement of the

7 — See Council Regulation (EC) No 711/95 amending the basic regulation (cited in footnote 1). For the 1995, 1996 and 1997 harvests, the basic regulation has been replaced by Commission Regulation (EC) No 1066/95 of 12 May 1995 (OJ 1995 L 108, p. 5), which lays down new rules for the calculation of production quotas.

premium must be limited to an amount corresponding to the quota'.

10. The basic regulation contains the following provisions of significance to the present cases:

'*Article 3*

1. From the 1993 harvest until the 1997 harvest a premium system shall be applied. The amount of the premium shall be the same for the tobacco varieties in each of the various groups.

...

3. The purpose of the premium shall be to supplement the income of producers whose products correspond to market requirements and to facilitate the disposal of tobacco produced in the Community.

...

Article 5

Granting of the premium shall be subject in particular to the following conditions:

(a) ...

(b) ...

(c) the leaf tobacco must be delivered by the producer to the premises of the first processor under a cultivation contract.

Article 6

1. Cultivation contracts shall comprise:

— an undertaking by the first processor to pay to the grower, in addition to the purchase price, a sum equal to the premium at the time of delivery for the quantity under contract and effectively delivered;

— an undertaking by the grower to deliver to the premises of the first processor raw tobacco corresponding to the quality requirements.

2. The competent body shall reimburse the amount of the premium to the first processor against presentation of proof that the grower has delivered the tobacco and that the amount referred to in paragraph 1 has been paid.

...

Article 8

A maximum global guarantee threshold for the Community is hereby fixed at 350 000 tonnes of raw leaf tobacco per harvest. However, for 1993, this threshold is fixed at 370 000 tonnes.

Every year, within this limit the Council shall fix, in accordance with the procedure laid down in Article 43(2) of the Treaty, a specific guarantee threshold for each group of varieties, taking particular account of market conditions and socio-economic and agronomic conditions in the production areas concerned.

Article 9

1. To ensure observance of the guarantee thresholds a system of processing quotas is hereby instituted for the harvests of 1993 to 1997.

2. For each harvest, in accordance with the procedure laid down in Article 43(2) of the Treaty, the Council shall allocate among the producer Member States the quantities available for each group of varieties.

3. On the basis of the quantities allocated pursuant to paragraph 2, ... Member States shall distribute processing quotas on a [transitional] basis for the 1993 and 1994 harvests among the first processors in proportion to the average quantities delivered for processing during the three years preceding the year of the last harvest, broken down by group of varieties. However, production in 1992 and deliveries from this harvest shall not be taken into account. The procedure for allocating processing quotas for the following harvests shall not be affected by this allocation.

First processors who start business after the beginning of the reference period shall

obtain a quantity proportional to the average quantity delivered for processing during their period of business.

For first processors which begin business in the year of harvest or during the preceding year, Member States shall reserve 2% of the total quantities available to them by group of varieties. Within this percentage, the said first processors shall obtain a quantity not exceeding 70% of their processing capacity, provided that they offer adequate guarantees as to the efficiency and long-term viability of their business.

4. However, Member States may distribute quotas directly to producers if they dispose of the necessary data on production of all producers for the three harvests preceding the last harvest, in relation to varieties and quantities produced and delivered to a processor.

...

Article 10

A first processor may not conclude cultivation contracts or be reimbursed the amount of the premium for quantities exceeding the quota allocated to him, [8] or to the producer.

Article 11

Detailed rules for the application of this Title shall be adopted in accordance with the procedure laid down in Article 23. They shall include ... the preconditions for applying the quotas at the level of the producers, in particular in relation to their previous situations.'

The implementing regulation

11. The sixth, eighth and ninth recitals in the preamble to the implementing regulation are worded as follows:

'... care should be taken to ensure that processors share out their quotas fairly and without discrimination between the produc-

8 — The Danish text refers only to the processor, which must be assumed to be a mistake, in so far as the producer ought to have been mentioned as well (cf. the French and English texts).

ers who have delivered tobacco to them during the reference periods concerned; ...

... provision should be made for cultivation certificates to be issued to producers on the basis of their tobacco deliveries during the 1989, 1990 and 1991 harvests in order to permit producers to change processors from one harvest to another on presentation of the certificate; ...

... the quantities allocated to certain producers must be made available to other producers where the persons entitled do not conclude cultivation contracts'.

12. The implementing regulation contains the following provisions material to the present cases:

'*Article 2*

For the purposes of this regulation:

— ...

— producer means any natural or legal person or group thereof who delivers raw tobacco produced by himself or by the members of the group to a processing undertaking in his or the group's own name and on his or its own account, under a cultivation contract concluded by him or in his name,

...

Article 3

1. The Member States shall set processing quotas for each processor and each group of varieties as defined in the Annex to [the basic regulation] by 10 February 1993 for the 1993 harvest ... at the latest.

...

3. No quota shall be allocated to a processor which does not undertake to issue cultivation certificates in accordance with Article 9.

Article 4

— ...

The allocation of a quota or the issue of a cultivation certificate for a harvest shall be

without prejudice to the allocation of quotas or the issue of cultivation certificates for subsequent harvests.

Article 5

1. Quotas of processors shall be equal to the average quantity each produces as a percentage of the total average quantities calculated in accordance with Article 9 [of the basic regulation] ..., without prejudice to the third subparagraph of Article 9(3) of [the basic regulation].

...

Article 9

1. For each group of varieties, processors shall issue cultivation certificates, if need be at the request of the interested party, within the limit of their processing quotas to producers ... in proportion to the tobacco from the same group of varieties which they deliver in the 1989, 1990 and 1991 harvests. ... The abovementioned cultivation certificates shall indicate in particular the holder of the certificate, the group of varieties and the quantity of tobacco for which they are valid.

2. The Member States shall determine the procedures for the issuing of the cultivation certificates, as well as the measures to be taken for the prevention of fraud ...

3. Where a producer shows proof that his production has been abnormally low during a given harvest as a result of exceptional circumstances, the Member State shall calculate, at the request of the producer concerned, the quantity to be taken into consideration for that harvest in making out his cultivation certificate. The reference quantity of the relevant processing undertaking shall be adjusted accordingly. The Member States shall notify the Commission of any decisions they intend to take.

...

6. Cultivation certificates shall be issued by 31 March of the year of harvest at the latest.

If applicable, the competent authorities shall issue these certificates to processors by 24 March of the same year at the latest.

Article 10

1. Each producer shall deliver tobacco from any given group of varieties to a single processing undertaking only. Where he obtains a cultivation certificate from several processors to which he delivered tobacco from the 1989, 1990 and 1991 harvests and from the same group of varieties, the quantities shall be aggregated within the processing undertaking to which he delivered tobacco from the 1991 harvest. If the producer has delivered tobacco to several processors during the harvest, he shall indicate the undertaking from which he wishes to receive the cultivation certificate.

...

2. Producers may conclude cultivation contracts with a processing undertaking other than that which issued the cultivation certificate, on presentation of the latter.

3. The Member State shall transfer quotas between processors where the application of this Article so requires.

Article 11

1. Cultivation certificates which have not been used to conclude contracts at the date fixed for the purpose must be returned to the processor in question by the producer no later than 10 working days after that date.

...

3. Quantities entered in unutilized cultivation certificates and other quantities which may be available shall be distributed by the processors fairly and on the basis of objective criteria before 1 May of the year of harvest. Such criteria may be laid down by the inter-branch organizations recognized in accordance with the provisions of [the basic regulation]. However, for the 1993 harvest, ... Italy [is] hereby authorized to extend the 1 May time-limit to 11 June.

...

Article 21

Where a quota or a cultivation certificate covers a producer group which is also a producer of tobacco in accordance with the

third indent of Article 2, the Member States shall ensure that the quantity is distributed fairly between all members of the group. In that case, the provisions of Title II shall apply *mutatis mutandis* to distribution between the members of the group; however, with the agreement of all the producers concerned, the group may undertake a different distribution with a view to improving organization of production.'

The premium regulation

13. Commission Regulation (EEC) No 3478/92 of 1 December 1992 [9] laying down detailed rules for the application of the premium system for raw tobacco (hereinafter 'the premium regulation') contains, *inter alia*, the following provision:

'*Article 15*

1. On application by processors, the Member State shall pay an advance on the premiums to be paid to producers ...'.

9 — OJ 1992 L 351, p. 17.

The relevant provisions of national law

14. Pursuant to Article 9(3) of the basic regulation, in conjunction with Articles 3(1) and 9(2) of the implementing regulation, the Italian Ministry of Agriculture and Forests issued Circular No 368/G of 1 March 1993 containing rules on the allocation of processing quotas and the issue of cultivation certificates. The Circular was issued pursuant to a letter of 20 January 1993/VI003136, translated by letter of 25 January 1993/VI003733 from the Commission to the Ministry of Agriculture and Forests, which will be discussed in more detail below in connection with the reply to the second and fifth groups of questions.

The proceedings before the national court

15. The Fattoria Autonoma Tabacchi (hereinafter 'FAT') is a producers' association which has as its objective to promote and benefit members' tobacco production and to ensure the processing of the tobacco at the association's own works. FAT has brought proceedings against the Ministry of Agriculture and Forests and against AIMA, the national intervention agency, seeking the annulment, following prior suspension, of Circular No 368/G of 1 March 1993, along with all previous and connected measures, particular reference being made in this

connection to the implementing regulation and Decision VI/003136 of 20 January 1993, and the annulment of the administrative measure adopted pursuant to that Circular, under which FAT was allocated a processing quota of 2 800 962 kg of tobacco, a decision confirmed by way of cultivation certificates issued to producers belonging to FAT. FAT argues that the association was allocated a processing quota which is much lower than that to which it is entitled. FAT also submits that this is attributable to the fact that there was no allocation of a single production quota or a single cultivation certificate calculated on the basis of the sum of the quotas to which the various members are entitled and subsequently divided among them. FAT further argues that this again follows directly from the provisions in the implementing regulation at variance with the basic regulation and from Circular No 368/G of 1 March 1993, pursuant to which the contested administrative measure on the allocation of the processing quota was adopted (Case C-254/94).

16. Lino Bason and others and Silvano Mella and others are tobacco producers and, in their capacity as members of the Cooperativa Produttori Bright Verona and the Società Cooperativa per la Coltivazione del Tabacco respectively, have brought proceedings against the Ministry of Agriculture and Forests and AIMA on the same grounds as in Case C-254/94. The applicants submit that they have been allocated a processing quota which is much lower than that to which they are entitled. They also argue that this is attributable to the invalidity of the implementing regulation and the defective implementation of Community-law provisions at national level by way of Circular No 368/G of 1 March 1993 (Case C-255/94).

17. The Associazione Professionale Trasformatori Tabacchi Italiani — APTI — and others operate within the sector for the processing of raw tobacco. APTI is an organization covering all processing undertakings in Italy. APTI and others have brought proceedings against the Ministry of Agriculture and Forests seeking annulment of Circular No 368/G of 1 March 1993 on the ground that the Circular gives effect at national level to the implementing regulation, which in their view is contrary to the basic regulation (Case C-269/94).

The questions submitted for preliminary ruling

18. The three sets of proceedings are pending before the Tribunale Amministrativo Regionale del Lazio, which, by orders of 27 January 1994, stayed the proceedings with a view to submitting questions to the Court of Justice for preliminary ruling.

In Cases C-254/94 and C-269/94, the following identical questions have been submitted:

'1. Are Articles 3(3), 9 and 10 of [the implementing regulation] and, in particular, the rule that no quota is to be allocated to a processor which does not undertake to issue cultivation certificates in accordance with

Article 9, the introduction of those certificates and the option for processors to conclude cultivation contracts and obtain reimbursement of premiums in respect of quantities greater than the processing quotas allocated to them, compatible with the principles underlying the reform of the sector as set out in [the basic regulation], and in particular with the prohibition in Article 10 of that regulation, or do they in fact "completely undermine the objectives and strategy" on the basis of which the Council launched the first stage of the reform of the common organization of the market in raw tobacco?

2. Independently of the first question, are the administrative requirements incumbent upon the processors under [the implementing regulation] in connection with the issue of cultivation certificates compatible with the principle of proportionality, which requires that burdens imposed on individuals be proportionate to the aims to be achieved, or do they constitute a "needless administrative complication" which conflicts with that fundamental principle of Community law?

3. If the first two questions are answered in the affirmative, may Article 9(3) of [the implementing regulation] be interpreted as permitting Member States to establish appropriate reserves of the different groups of varieties, for allocation on a percentage basis between the undertakings concerned, in accordance with the mechanism established by Circular No 368/G of 1 March 1993 (point 8, p. 9) of the Ministry of Agriculture and Forests?'

The following question has also been submitted in Case C-254/94:

'4. Is Ministerial Circular No 368/G of 1 March 1993 compatible with the third indent of Article 2 and with Article 21 of [the implementing regulation] in so far as it does not allow the issue of a single cultivation certificate and/or a single production quota to "producer groups" and, in particular, to a *società semplice* (association), which has no legal personality and was founded with the aim of promoting and facilitating the cultivation of tobacco by its members, whilst at the same time undertaking the first processing of that tobacco on its own premises and which annually decides how much land should be given over to the cultivation of tobacco, dividing it between its members on condition that they render to the association all the tobacco produced?'

The following questions have been submitted in Case C-255/94:

'1. Is the introduction of the "cultivation certificates" provided for by Article 9 of [the implementing regulation] incompatible with the principles on which [the basic regulation] is based and with the objectives and strategy of the Council in the first phase of the reform of the common organization of the market in tobacco, inasmuch as it constitutes a covert means of anticipating the introduction of production quotas (which are envisaged in the first stage as merely an exception, in Article 9(4) of [the basic regulation]), thus making it more difficult, if not impossible, to adapt quality to suit market requirements?

2. Are Article 10 of, and the eighth recital in the preamble to, [the basic regulation] to be interpreted as meaning that the processing quotas allocated to undertakings carrying out the initial processing or to producers are to be invariable, and if so is the statement regarding the relevant Commission regulation in Memorandum No VI/003136 that processing quotas may be increased or decreased according to the preferences of individual producers compatible with that principle?

3. Independently of the first question, do the cultivation certificates provided for in [the implementing regulation] constitute a "needless administrative complication" which conflicts with the Community-law principle of proportionality requiring an appropriate balance to be achieved between the administrative burdens imposed on the individual and the aims pursued by the Community institutions?

4. Is it not a significant departure from the Community rules (in particular from Article 3(3) of [the implementing regulation]) for "appropriate reserves, in sections representing each group of varieties" to be provided for in point 8, p. 3, G, of Ministerial Circular No 368/G of 1 March 1993, based on the national "levelling" of the percentage quantity of reserves, an approach which prevents the adjustment of the total reference quantity to take account of production losses suffered by individual producers as a result of natural disasters?

5. Is there also, in essence, a circumvention of, and a failure to implement, the Community rules contained in Articles 9(1) and 10(1) of [the implementing regulation] in the provision made in the ministerial circular referred to a number of times (Annex 4, p. 9) for initially dividing processing undertakings into seven groups, each with a different

method of calculating the average of the three-year reference period, so that, for the same quantity and type of tobacco produced, the producer's production quota varies depending on its choice of processing undertaking for the last three-year period?'

19. A number of the questions submitted are phrased in such a way that the Court is being asked to consider whether Circular No 368/G of 1 March 1993 is compatible with Community law. The Court has consistently held that it cannot, in a reference for a preliminary ruling, determine whether a national measure is compatible with Community law. Such a determination is for the national court alone. The Court can, however, provide the national court with assistance in interpreting Community law such as to enable the national court to decide whether the national rules are compatible with Community law. [10] In so far as the questions submitted seek a determination as to whether the abovementioned circular is compatible with Community law, the questions must be rephrased so as to relate to the issue of the validity and interpretation of the Community-law rules.

20. The questions submitted, which are not at all clearly formulated, may be divided into five separate groups, the first of which concerns the validity of the implementing regulation and the remaining four a variety of questions relating to the interpretation of the basic regulation and the implementing regulation.

21. The first group of questions consists of the first question in each of the three cases. The questions in fact centre on whether Article 9 of the implementing regulation, under which the processing undertakings are required to issue cultivation certificates, and the related rule in Article 3(3) providing that quotas are not to be granted to processing undertakings that do not undertake to issue cultivation certificates, are invalid as being at variance with the basic regulation. I find it appropriate in this connection to deal with the second question in Cases C-254/94 and C-269/94 and the third question in Case C-255/94. The issue in those questions is whether Article 9 of the implementing regulation is invalid as being contrary to the Community-law principle of proportionality.

22. The second group of questions consists of the second question in Case C-255/94 and also contains part of the first question in Cases C-254/94 and C-269/94. These questions essentially concern the issue whether Article 10 of the basic regulation, which provides that a first processor cannot enter into cultivation contracts and receive premium amounts for quantities in excess of the allocated processing quota, must be interpreted

10 — See most recently the judgment in Case C-55/94 *Gebhard* [1995] ECR I-4165.

as meaning that the quota is fixed and cannot be altered as a result of the producer's choice of processing undertaking.

23. The third group of questions is made up of the third question in Cases C-254/94 and C-269/94, along with the fourth question in Case C-255/94. In practical terms, these questions ask whether Article 9(3) [11] of the implementing regulation should be interpreted in such a way as to prevent a Member State from establishing advance reserves of varying sizes for each group of varieties with a view to allocating them among producers who have incurred losses by reason of special circumstances, without account being taken of the level of individual producers' loss.

24. For the fourth group, the fourth question in Case C-254/94 essentially asks whether Article 21, in conjunction with the third indent of Article 2, of the implementing regulation should be interpreted as precluding a Member State from laying down provisions which make it impossible to issue an individual cultivation certificate and/or fix an individual production quota for producer groups which have the objective of promoting and benefiting members' tobacco production and supervising the first processing of that tobacco in their own factory works.

11 — The questions mentioned refer to Article 3(3). It must be assumed that this is attributable to a mistake, since the provision on the allocation of additional reference quantities is to be found in Article 9(3).

25. Finally, the fifth question in Case C-255/94 asks essentially whether Articles 9(1) and 10(1) of the implementing regulation are to be interpreted as meaning that processing undertakings can be divided into seven different groups with differing rules for calculating the three-year reference quantities, such that producers are covered by different rules for the calculation of the production quota depending on which processing undertaking they have supplied over the reference period.

The first group of questions: are the rules on cultivation certificates contained in the implementing regulation invalid?

26. By the first question in each of the three cases, the national court, as already mentioned, is seeking in essence to ascertain whether Article 9 of the implementing regulation, under which processors are required to issue cultivation certificates, and the associated rule in Article 3(3), which provides that no quota is to be allocated to a processor which does not undertake to issue cultivation certificates, are invalid as being contrary to the basic regulation. By the second question in Case C-254/94 and C-269/94 and the third question in Case C-255/94, the national court further asks whether Article 9 of the implementing regulation is invalid as being at variance with the Community-law principle of proportionality.

27. The applicants contend that, in adopting those decisions in the implementing regulation, the Commission acted contrary to the principles and fundamental provisions set out in the basic regulation. The system of processor quotas was intended to prepare the ground for the definitive system, under which production quotas would be allocated directly to producers. By introducing cultivation certificates, however, the Commission pre-empted the definitive system, deprived the 1993-1997 transitional phase of its purpose and reduced the significance of the processing quota. Cultivation certificates, which are allocated to each individual producer and can be freely applied *vis-à-vis* any processing undertaking whatever, are in reality disguised production quotas. The allocation of cultivation certificates to each individual producer on the basis of production from 1989 to 1991 also implies, they contend, a freezing of earlier decisions on cultivation in so far as each producer is entitled to continue production of the same types as those which he had previously cultivated. This, it is claimed, makes it more difficult or even impossible to adapt to varieties better suited to market requirements.

The applicants argue that the implementation of the cultivation-certificate system goes further than is necessary to secure a satisfactory allocation of quotas among producers. The implementing regulation imposes on processors a needless administrative complication involving them in heavy costs and obliging them, without any return, to set up a complicated accounting system.

28. The Italian Government argues that the system of issuing cultivation certificates guarantees the individual producer's certification of production for the reference period 1989 to 1991 and also makes it possible to change processors from one harvest to the next. The cultivation certificates thus represent an advantage for producers and are for that reason consistent with the objective of intervention in the tobacco sector, which seeks to ensure protection for producers and not for processing undertakings. Cultivation certificates also make it possible to control and regulate the market in tobacco and they thereby serve in securing the objectives of the common agricultural policy.

The system of cultivation certificates further enables processing undertakings to increase their activities when they have secured new customers and to make unused quotas available to other producers. At the same time, cultivation certificates make it possible to monitor processing undertakings. In actual fact, the only administrative task facing undertakings is to collate contractual and accounting information which the undertakings already possess and, indeed, use when preparing applications for the allocation of processing quotas. Cultivation certificates do not therefore involve any additional burden for undertakings.

29. The Commission submits that the implementing regulation was adopted in accordance with Article 11 of the basic regulation, which expressly authorizes the Commission to issue guidelines necessary for the establishment of a quota system, including guidelines for the distribution of quotas among producers. It follows from Article 39(1)(b) of the Treaty that the objective of the common agricultural policy is to benefit producers, not processing undertakings. It also follows from the fifth recital in the preamble to the basic regulation and from Article 3(3) thereof that the organization of the market is aimed at supporting producers.

The issue of cultivation certificates enables processing undertakings to enter into cultivation contracts and thereby obtain the premium payable to producers. The undertakings gain advantage from the cash payment to producers since they can receive advance payments of the premium. The cultivation contracts ensure that the undertakings will have potential suppliers and enable them to enter into cultivation contracts at a lower price than that which they would be obliged to give if they were unable to offer the premium to producers. The cultivation certificates also ensure that the authorities have accurate information on quantity and quality and also on the area in which the tobacco is cultivated and processed. The cultivation certificates thus guarantee transparency and thereby help in preventing fraud. The information collected also forms the basis for the introduction of the definitive organization of the market in the tobacco sector. The administrative burden on undertakings in Italy is limited to filling out a form and the undertakings which carry out the processing have computerized access to the relevant information on quantities processed during the reference period.

30. I would note at the outset that Article 3(3) of the implementing regulation, which provides that quotas are not to be allocated to processors which do not undertake to issue cultivation certificates, must be assumed to have the objective of ensuring that processing undertakings do in fact issue cultivation certificates as required under Article 9. The question of the validity of Article 3(3) therefore depends on that of the validity of Article 9.

31. It follows from the eighth recital in the preamble to the basic regulation that measures will be taken to ensure subsequent allocation of quotas among producers under satisfactory conditions. The fact that it was already the intention under the basic regulation that processing undertakings should carry out the further allocation of quotas to producers in relation to their previous deliveries of raw tobacco to the undertakings follows not only from Articles 11 and 23 of the basic regulation, under which the Commission lays down the implementing provisions, including the conditions for the allocation of quotas among producers in relation to their previous position, but also from the special rule in Article 9(4) of the basic regulation, which provides that Member States may distribute quotas directly to producers if they dispose of the necessary data on producers'

supply of raw tobacco to the processing undertakings over the reference period. This formula presupposes that the general system was intended to be that producers would obtain their quota indirectly, that is to say via the processing undertakings, in proportion to their deliveries over the reference period. The Commission was thus not merely entitled but also obliged to lay down provisions requiring processing undertakings to allocate quotas to producers in proportion to their previous production. It is therefore entirely in accordance with the basic regulation for Article 9(1) of the implementing regulation to provide for cultivation certificates to be issued to producers in proportion to their deliveries in the 1989, 1990 and 1991 harvests.

32. It follows from the eighth recital in the preamble to the implementing regulation that the purpose of the cultivation certificates is to permit producers to change processors from one harvest to another. This generates meaningful competition between processors as regards the price which, in addition to the actual premium, is to be paid to producers for their deliveries. Were it not for this possibility of changing processors, individual producers would in fact become dependent on a particular undertaking, which would thus be in a position to fix the price for deliveries by the producer concerned without any fear of competition from other undertakings.

33. The introduction of cultivation certificates is consequently advantageous for producers and is thus in keeping with the purpose of intervention in the tobacco sector, which is precisely to protect producers, and not processors (in this connection, see the fifth recital in the preamble to the basic regulation and Article 3(3) thereof, along with Article 39(1)(b) of the Treaty).

34. I find it difficult to see the relevance of the applicants' submission that the rules in the implementing regulation on the allocation of cultivation certificates to individual producers on the basis of production over the period from 1989 to 1991 represents a freezing of earlier decisions on cultivation. As already mentioned, the basic regulation assumes that positions may be frozen. Moreover, Title III of the basic regulation contains provisions dealing with aid for conversion of production to more popular and less harmful qualities. Thus, it also cannot be accepted that the transitional phase has been deprived of its special adaptation function.

35. Likewise, it is difficult to identify any justification for the argument that the introduction of cultivation certificates pre-empts the definitive organization of the market, consisting in the allocation of production quotas directly to producers. Even in the transitional phase, it may be necessary to allocate quotas not merely at the level of undertakings but also at the level of producers. Otherwise, producers, whom, as already

mentioned, the system is designed to help, would be entirely subject to the discretion of the processing undertakings. The fact that producers are already able during the transitional period to change processors from one harvest to another promotes competition which, in my view, is also advantageous for the processing undertakings.

36. With regard to the position of the system in the light of the Community-law principle of proportionality, the questions submitted must be regarded as relating to the bearing of the principle of proportionality on the whole range of administrative burdens which the system of cultivation certificates imposes on processing undertakings.

The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of a measure is subject to the condition that it is appropriate and necessary in order to achieve the objective pursued. Where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. [12]

12 — See, for example, the judgments in Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13, and in Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others*, cited above in footnote 5, paragraph 41.

37. I take the view that the cultivation certificates are both an appropriate and a necessary means by which to enable producers to change processors and thereby promote competition among processors and make producers less dependent on them. Cultivation certificates also ensure that the authorities will have accurate information and thereby help to prevent fraud. There does not appear to be any evidence to suggest that these objectives could be secured using other means less onerous than cultivation certificates.

38. The allocation of quotas to producers in proportion to their previous deliveries is both an appropriate and necessary criterion by which to ensure an equal and fair allocation of production on which premiums may be payable. No evidence appears to have been put forward to suggest that this could be achieved by applying some other, less onerous, method.

39. On that basis, the administrative burdens connected to the issue of the cultivation certificates, including the application of the indicated allocation criterion, must be regarded as being relatively limited, with the result that there are no grounds on which to assume that they are not reasonably proportionate to their objective. I note in this connection that, in return for the administrative burdens, the undertakings secure payment of the premium, which places them in a position to buy raw tobacco at a relatively low

price, just as they can also secure a certain liquidity advantage through advance payment of the premium amounts.

40. I accordingly propose that the Court's reply to the above questions should be that consideration of Articles 3(3) and 9 of the implementing regulation, in the light of the comments in the orders for reference and other matters which have emerged during the proceedings, has disclosed no factor of such a kind as to affect their validity.

The second group of questions: are the rules on the alteration of processing quotas contrary to the basic regulation?

41. By the second question in Case C-255/94, the national court seeks to ascertain whether Article 10 of the basic regulation, which provides that a first processor may not conclude cultivation contracts or be reimbursed the amount of the premium for quantities exceeding the quota allocated to him, must be interpreted as meaning that the quota is fixed and cannot be altered as a result of the producers' choice of processor. That question is also contained as part of the first question in Cases C-254/94 and C-269/94.

42. Following a prior inquiry by the Italian Ministry of Agriculture and Forests, the Commission confirmed, by letter of 20 January 1993, that processing quotas can be increased or decreased according to producers' annual choice of processor.

43. The applicants submit that the possibility, provided by the implementing regulation, of having processing quotas increased or decreased as a result of the producers' choice of processing undertaking is contrary to the prohibition under Article 10 of the basic regulation of processors concluding cultivation contracts and receiving reimbursement of amounts of premium for quantities exceeding the processing quota allocated. The stability of the processing quota, and consequently the capacity to calculate in advance the amount to be processed, constitutes a necessary condition for a processing undertaking's ability to meet its contractual obligations towards the tobacco industry.

44. The Commission argues that there is already an assumption in the basic regulation that allocated processing quotas can be altered. This applies not least in relation to the guarantee thresholds set each year by the Council. The third sentence in the first subparagraph of Article 9(3) of the basic regulation provides that the procedure for the allocation of processing quotas for subsequent years is not to be affected by allocation under the provisions of the first and second sentences in that subparagraph. The

second and third subparagraphs of Article 9(3) lay down additional guidelines for the allocation of quotas to processing undertakings which first commenced operating after 1989. Thus, it is the basic regulation which expressly provides that processing quotas can be altered at Community or national level, or at the level of undertakings. The implementing regulation enables producers to conclude cultivation contracts with undertakings other than those which issued the cultivation certificates. This is designed to prevent producers being brought into a relationship of dependency with the undertakings. Tying an individual producer to a specific undertaking would be contrary to Article 39(1)(b) of the Treaty and to the basic regulation's objectives. It would prevent competition between undertakings as to the price to be paid to producers over and above the premium. Article 10 of the basic regulation does not prevent this. That provision merely specifies that the quota system is exhaustive in the sense that an undertaking cannot conclude cultivation contracts or be reimbursed the amounts of premiums outside the quota system. Article 10 must be understood as meaning that an undertaking cannot secure reimbursement of premiums in excess of the quotas to which, pursuant to the cultivation certificates, producers using the processing undertaking in the particular harvest year are entitled. This implies that a producer may, within the limits of his cultivation certificate, have recourse to whichever processing undertaking he prefers.

45. I have stated above that the rules on cultivation certificates contained in the implementing regulation are in accordance with the basic regulation. The purpose served by the cultivation certificates is to enable producers to change processors from one harvest to the next. Any system not making this possible would moreover, in my view, give rise to serious misgivings.

46. It may well be thought that producers of raw tobacco will only to a limited extent avail of the opportunity to change processors from one harvest to the next. After all, it can easily be imagined that the inclination to change processors will be affected by a wide variety of factors, such as the effectiveness of price competition, ownership of the processing undertakings, including the possibility that they may be cooperative undertakings to which the producers themselves belong, and the physical distances between the processing undertakings and producers. Thus, it is far from certain that producers make use to any significant extent of the opportunity to change processors.

47. Furthermore, it may be imagined that changes of processors on the part of producers will be reciprocal, with the result that the total quantity of raw tobacco in respect of which an individual processing undertaking concludes cultivation contracts will not be appreciably affected.

48. However, it can also, of course, be imagined that a processing undertaking will offer such attractive conditions to producers that the total quantity in respect of which that undertaking concludes cultivation contracts will be appreciably increased. In contrast, it can also be imagined that an undertaking may offer such unattractive conditions or otherwise give rise to such dissatisfaction among producers that it may encounter extreme difficulty in obtaining any raw tobacco at all to keep its production lines operating and may perhaps be obliged to shut down. It is for that reason necessary to have a mechanism under which unused quotas can be made available to undertakings which do not have a sufficient processing quota to satisfy demand from producers.

49. The system of quota transfer between processors, set out in Article 10(3) of the implementing regulation, is thus a necessary link in a system which makes it possible for producers to choose their processors. The phrase 'quota allocated to him' in Article 10 of the basic regulation must therefore be interpreted as referring to the quota which the Member State has allocated to the processor on the basis of the quantities processed over the reference period, with any amendments resulting from producers' change of processor. Reimbursement of premiums must therefore be effected within the processing quotas as thus amended. The sole purpose of Article 10 is to specify that an undertaking cannot conclude cultivation contracts and obtain reimbursement of premiums outside the quota system, and there is no basis on which to assume that Article 10 is intended to freeze processing quotas previously allocated.

50. Nor does this interpretation seem capable of creating particular difficulties for processing undertakings. Under Article 3(1) of the implementing regulation, Member States were required to set processing quotas for each processor by 10 February 1993 for the 1993 harvest at the latest, and under Article 9(6) cultivation certificates must be issued by 31 March of the year of harvest at the latest. Regardless of the size of their processing quota, processing undertakings will, when they have concluded cultivation contracts with producers, first want to know how large the quantities will be which they are to receive for processing after the harvest. The fact that there can be transfer of quotas in accordance with the quantities for which the cultivation contracts were concluded, irrespective of whether or not these exceed the quotas originally set, ensures for processing undertakings that, already at the time when they conclude the cultivation contracts, there will be an adequate basis on which to adapt the conclusion of their contracts with the tobacco industry in accordance with the quantities which can be expected to be supplied for processing.

51. I therefore propose that the Court's reply to the questions submitted should be that Article 10 of the basic regulation must be interpreted as not precluding processing undertakings from concluding cultivation contracts and being reimbursed for the premium in respect of quantities exceeding the

processing quotas originally allocated to them, in so far as there has been a transfer of quotas pursuant to Article 10(3) of the implementing regulation.

The third group of questions: can reserves fixed in advance be established?

52. By the third question in Cases C-254/94 and C-269/94 and the fourth question in Case C-255/94, the national court, as mentioned above, is essentially seeking to ascertain whether Article 9(3) of the implementing regulation should be interpreted as precluding a Member State from establishing advance reserves of varying sizes for each group of varieties with a view to allocation thereof among producers who have incurred losses by reason of special circumstances, without account being taken of the level of individual producers' loss.

53. The applicants submit *inter alia* that Article 9(3) of the implementing regulation must be interpreted as requiring the national authorities to fix additional reference quantities in the light of criteria that take account of the loss incurred by individual producers. In Italy, an average figure is first calculated for production by an individual producer over the reference period 1989 to 1991 and an additional reference quantity is then allocated. Article 9(3) of the implementing regulation, however, must be interpreted as meaning that there must first be an allocation of an additional reference quantity taking account of the loss incurred and subsequently calculation of an average for the production thus regulated.

54. The Italian Government argues that the allocation of reserve quantities for different groups of varieties is consistent with Article 9(3) of the implementing regulation. The reserve quantity allocated among producers who have suffered loss by reason of abnormal circumstances along with the quotas allocated to the processing undertakings must together not exceed the quota of the Member State in question. It is for that reason necessary to subtract the reserve quantity from the processing quota.

55. The Commission submits that Article 9(3) confers on Member States a degree of discretion when fixing additional reference quantities. A producer who has suffered loss by reason of abnormal circumstances in only one single harvest year must have the opportunity to provide evidence of that loss and have his production for the year in question adjusted upwards to the average level for the sector. If this is complied with, the determination of a reserve quantity, calculated in proportion to the quantities of the various types and bearing in mind that certain types are more susceptible to natural disasters than others, will be in accordance with Article 9(3) of the implementing regulation.

56. In my opinion, there can scarcely be any doubt, having regard to the wording of Article 9(3) of the implementing regulation, that the provision does apply in cases of abnormally low production in one single year. Article 9(3) requires Member States, on request, to calculate 'the quantity to be taken into consideration for that harvest in making out [the producer's] cultivation certificate'. That wording must mean that there is first an allocation of an additional reference quantity for the year in which production has been abnormally low, and thereafter a calculation of the average of the production, thus regulated, during the 1989-1991 reference period.

57. Article 9(3) of the implementing regulation does not contain any provision as to the size of the additional reference quantity to be allocated to a producer who has suffered loss as a result of abnormal circumstances. Thus, Article 9(3) does not impose any requirements regarding the fixing of an additional reference quantity corresponding to the producer's actual loss. Member States are thus given a considerable margin of discretion when fixing the additional reference quantity. Considerations of equality, however, dictate that the additional reference quantity must be fixed objectively in proportion to the individual producer's loss. There is nothing in the basic regulation requiring a mathematically accurate allocation of additional reference quantities among producers who have suffered loss in proportion to their actual loss. The case is precisely one of discretion, which also falls to be applied with regard to fixing the level of any reserve quantities.

58. According to Article 3(1) of the implementing regulation, Member States were, for the 1993 harvest, thus required to set processing quotas for each processor by 10 February 1993 at the latest. Under Article 9(6), cultivation certificates must be issued by 31 March of the year of harvest at the latest. Additional reference quantities under Article 9(3) form the basis for fixing the level of cultivation certificates and must therefore at the latest be allocated when those certificates are being issued. Additional reference quantities are subtracted from the Member State's quota, from which processing quotas for undertakings must also be subtracted. Unless additional reference quantities are allocated prior to the fixing of processing quotas for undertakings, it will thus be necessary to reserve a portion of the Member State's quota for use in the subsequent distribution of additional reference quantities. Subsequent distribution of additional reference quantities within the framework of a reserve fixed in advance may — depending on how the reserve is fixed — mean that it is not possible to provide an individual producer with an additional reference quantity corresponding in full to the loss actually incurred. As mentioned above, however, this cannot be regarded as constituting a requirement under Article 9(3). Article 9(3) leaves the fixing of reserve quantities to the discretion of the Member States.

59. The fixing of a reserve quantity calculated in proportion to the quantities of the different types and in the light of the fact that certain types are more susceptible to natural disasters than others must, in my view, imply that account requires to be taken of any material differences between the various types and must therefore satisfy requirements of objectivity and equality with regard to the management of reserve quantities.

60. I accordingly propose that the Court's reply to the questions submitted should be that Article 9(3) of the implementing regulation must be interpreted as not precluding a Member State from establishing advance reserves — of various sizes for each group of types calculated in proportion to the quantities of the various types and in light of the fact that certain types are more susceptible to natural disasters than others — with a view to ensuring that the Member State allocates these among producers who have suffered loss as a result of exceptional circumstances, in the light of the individual producer's loss but without him necessarily being compensated in full for that loss.

The fourth group of questions: must it be possible to issue a single cultivation certificate to an association of producers?

61. By its fourth question in Case C-254/94, the national court, as already mentioned, is seeking essentially to ascertain whether Article 21, in conjunction with the third indent of Article 2, of the implementing regulation should be interpreted as precluding a Member State from laying down provisions making it impossible to issue an individual cultivation certificate and/or fix an individual production quota for producer groups which have the objective of promoting and benefiting members' tobacco production and supervising the first processing of that tobacco in their own works.

62. FAT submits that it is a producer within the meaning given to that term by the third indent of Article 2 of the implementing regulation in so far as it is a common association of agricultural traders corresponding in full to the form of producer group mentioned in Article 21 of the implementing regulation.

63. The Commission contends that the purpose of Article 21 of the implementing regulation is to ensure that the quantity allocated to a group of producers is divided equally among its members. It must be possible for cultivation certificates to be issued in the name of a producer group if the group can be regarded as a producer under the third indent of Article 2. A producer belonging to a group must be able to leave that group without being subject to any form of sanction when quotas are being fixed.

64. I must stress that the concept of a producer is, under the third indent of Article 2, defined very broadly as a natural or legal person or group thereof who delivers raw tobacco produced by himself or by the members of the group to a processing undertaking in his or the group's own name and on his or its own account, under a cultivation contract concluded by him or in his name. A group such as that referred to in the question comes within the definition in so far as the members are engaged in production and the tobacco is delivered to a processing undertaking (the group in question itself). The provision does not contain anything to the effect that groups cannot be treated as producers in cases where they also carry out processing of raw tobacco. It would thus appear that a group of the type mentioned should be regarded as a producer within the meaning of the third indent of Article 2 of the implementing regulation.

65. Article 21 of the implementing regulation has as its purpose to ensure that a quota or cultivation certificate issued in favour of a producer group which is itself a producer under the third indent of Article 2 is distributed fairly among all the group's members. Article 21 thus assumes that quotas or cultivation certificates can be issued to groups of producers. The Commission's view that a producer who is a member of a group must be able to leave that group without being subject to any form of sanction when quotas are being fixed must for that reason be endorsed and is, moreover, a natural and necessary link in a system designed to establish free competition among undertakings by making it possible for producers to change from one undertaking to another.

66. I accordingly propose that the Court's answer to the question submitted should be that Article 21, in conjunction with the third indent of Article 2, of the implementing regulation must be interpreted as precluding a Member State from laying down provisions making it impossible to issue an individual cultivation certificate and/or fix an individual production quota for producer groups which have the objective of promoting and benefiting members' tobacco production and supervising the first processing thereof in their own works.

The fifth group of questions: may different rules apply for the calculation of reference quantities?

67. By its fifth question in Case C-255/94 the national court, as already mentioned, is seeking essentially to ascertain whether Articles 9(1) and 10(1) of the implementing regulation are to be interpreted as meaning that processing undertakings can be divided into seven groups with differing rules for calculating the three-year reference quantities, such that producers are covered by different rules for the calculation of the production quota, depending on which processing

undertaking they have supplied over the reference period.

68. According to its content, the question also relates to Article 9(3) of the basic regulation. Under that provision (see also Article 5(1) of the implementing regulation), each processing undertaking's share of the quota of the Member State in question must be in proportion to the undertaking's share (= reference quantity) of the sum of the average reference quantities delivered to the processing undertakings in 1989, 1990 and 1991.

69. In a letter of 20 January 1993 to the Italian Ministry of Agriculture and Forests, the Commission stated that the main rule in the basic regulation regarding reference quantities for processing undertakings is to be found in the first subparagraph of Article 9(3), according to which an undertaking's reference quantity is to be set on the basis of the average quantity which the undertaking processed during the three years preceding the year of the last harvest (that is to say, 1989, 1990 and 1991).

According to that letter, this main rule is breached by the second subparagraph of Article 9(3), under which an undertaking which first began processing in 1990 and thus has not been processing during the three years preceding the year of the last harvest is allocated a reference quantity corresponding to the average annual quantity which the undertaking processed during the two years preceding the year of the last harvest. An undertaking which first began processing in 1991 is allocated, on a like basis, a reference quantity corresponding to the quantity which the undertaking processed in that year. In the Commission's view, however, a condition governing the application of these favourable rules is that the undertaking continued its activities in 1991 (if they were begun in 1990) and in 1992, since this involves a derogation from the main rule in the first subparagraph of Article 9(3) of the basic regulation and such derogations must be interpreted restrictively.

The Commission's letter contains a list of five groups which, according to the above, would be covered by the main rule in the first subparagraph of Article 9(3). The first group concerns undertakings which have carried out processing during all of the three years in the reference period. The remaining four groups relate to undertakings which have carried out processing during one or two of the years in the reference period. If the two groups already mentioned as coming within the second subparagraph of Article 9(3) are added, this brings the total to seven different groups in all.

70. The applicants point out that Circular No 368/G of 1 March 1993 similarly divides the processing undertakings into seven different groups, each of which is covered by a different formula for calculating the reference quantities to be used in fixing the

processing quotas. The production quota for an individual producer for 1993 is fixed by applying the same formula as that which is applied when calculating the reference quantity for the processing undertaking to which the producer in question has delivered. What this means is that different formulas are applied for fixing production quotas, depending on the processing undertaking to which individual producers have delivered. Producers who until then produced the same quantities are accordingly allocated widely different production quotas. The resulting damage, they claim, is as obvious as it is fortuitous and is patently inequitable. An undertaking which first began operating in 1991 continues to receive a processing quota solely on the basis of the amount which it processed in that year. This favours new undertakings at the expense of those already established.

71. The Commission points out that the rules for calculating quotas are set out in Article 9 of the basic regulation and that Articles 9(1) and 10(1) of the implementing regulation, which are referred to in the question submitted, are limited to regulating the consequences of this. Broadly, these rules provide that undertakings which have processed more in the reference period are entitled to a larger processing quota, while undertakings which have processed less are entitled to a smaller quota. This appears to be the most proper and reasonable arrangement. In the Commission's view, the purpose served by the second subparagraph of Article 9(3) is to provide newly established processing undertakings with an opportunity to obtain a processing quota. It would be unfair if an undertaking which first began its activities in 1991 were to have the amount processed in that year divided by three, as if it had also been engaged in processing in 1989 and 1990.

72. I must stress that the first subparagraph of Article 9(3) of the basic regulation contains the principal rule for allocating processing quotas among processing undertakings. Under that rule, the reference quantity for an individual processing undertaking is fixed by dividing by three the entire amount which the undertaking processed during the three-year reference period. The processing quota resulting from the reference quantity thus calculated is divided, in accordance with Article 9(1) of the implementing regulation, among the undertaking's producers in proportion to their deliveries over the reference period.

73. As the Commission has pointed out, it would be inequitable for an undertaking which first began to operate in 1991 to have the amount which it processed in that year divided by three when its reference quantity is being set, as if it had also been engaged in processing in 1989 and 1990. It would also be inequitable for an undertaking which first began to operate in 1990 to have the amounts which it processed in 1990 and 1991 divided by three when its reference

quantity is being set, as if it had also been engaged in processing in 1989. The second subparagraph of Article 9(3) of the basic regulation accordingly ensures that such newly established undertakings receive a fixed processing quota proportional to the average annual quantity which those undertakings processed in 1990 and/or 1991. The basic principle under which undertakings which processed more during the reference period are entitled to a larger processing quota, while those which processed less are entitled to a smaller quota, is thus also made applicable to newly established undertakings. The rule contained in the second subparagraph of Article 9(3) of the basic regulation implies that the undertakings which it covers are allocated a processing quota of a size such that the undertakings' producers, at the time of further allocation under Article 9(1) of the implementing regulation, are not placed in a less favourable position than producers who have delivered to undertakings engaged in processing during the entire reference period.

74. Undertakings which processed during the entire three-year period, and thus also in 1989, a year in which, according to the available information, the harvest for some producers was poor because of the climate, have as a consequence a lower average processing quantity over the reference period than have undertakings which first began processing after 1989. As a result of the processing undertakings' lower quotas, those producers who in 1991 delivered raw tobacco to undertakings which also carried out processing in 1989 also receive a lower quota than producers who in 1991 delivered to undertakings which first began processing after 1989 and were thus not affected by the poor results for that year. However, Article 9(3) of the implementing regulation, dealing with the allocation of additional reference quantities where there are special circumstances, is precisely designed to counteract the consequences of exceptional circumstances. Thus, Article 9(3) of the implementing regulation must be applied in an attempt to correct the above imbalance between undertakings which carried out processing during the entire three-year reference period and undertakings which did not begin processing until after 1989.

75. It will be clear from my analysis that the two regulations represent a logical and coherent system which seeks to ensure as reasonable and fair a distribution of processing and cultivation quotas as possible in proportion to the quantities harvested during the reference period.

76. The rules in Article 9(3) of the basic regulation do not, however, distinguish seven different groups as mentioned in the question, the Commission's letter of 20 January

1993 and the Italian Circular No 368/G of 1 March 1993, but rather distinguish only three separate groups:

— first, pursuant to the main rule in the first subparagraph of Article 9(3);

— second, the second subparagraph of Article 9(3), dealing with undertakings which first start business after the beginning of the reference period;

— third, the third subparagraph of Article 9(3), dealing with undertakings which first start business in the year of harvest or during the preceding year.

77. The possibility cannot, of course, be ruled out that subdivisions may be established within the three groups mentioned when it is necessary to explain who is covered by the individual groups. Such subdivisions, however, can be merely in the nature of instructive or administrative aids, for instance in connection with the preparation of guidelines or forms. Irrespective of such subdivisions, it is necessary that processing undertakings within each of the above three groups should be treated equally in the allocation of quotas, so that the reference quantity and therefore the processing quota are fixed using the method of calculation prescribed for the group to which the subdivision belongs.

78. Article 9(1) of the implementing regulation provides for each processor to issue cultivation certificates to its producers within the limits of its processing quota. This is a necessary consequence of the quota system at the producer level. A system under which producers are made subject to the same calculation formula as the undertaking to which they have delivered raw tobacco implies precisely that the producers, in accordance with Article 9(1) of the implementing regulation, are allocated a quota within the limits of the processing quota allocated to their processing undertaking. Article 9(1) must accordingly be interpreted as meaning that producers are covered by different rules for the calculation of production quotas depending on the processing undertaking to which they have delivered during the reference period.

79. Given the manner in which the cases have been submitted by the national court and the proceedings conducted before the Court, I do not find it necessary for the Court to consider in any greater detail whether each of the seven groups mentioned in the Italian Circular and in the Commission's letter of 20 January 1993 is correctly classified in relation to the three separate methods of calculation in the first, second

and third subparagraphs of Article 9(3) of the basic regulation.

80. I accordingly propose that the Court's reply to the question submitted should be that Article 9(3) of the basic regulation must be interpreted as meaning that processing undertakings must be assigned to one of three different groups, corresponding to the first, second and third subparagraphs of Article 9(3) of the basic regulation, with corresponding different rules for the allocation of processing quotas. There is nothing to preclude subdivisions within each of those groups for purposes of administering the system, on condition, however, that the reference quantity and consequently the processing quota for the individual processing undertaking are fixed using the method of calculation prescribed for the group to which the subdivision belongs. Article 9(1) of the implementing regulation must be interpreted as meaning that producers are covered by different rules for the calculation of production quotas depending on the processing undertaking to which they have delivered during the reference period.

Conclusion

81. In the light of the foregoing, I propose that the Court give the following replies to the questions submitted by the Tribunale Amministrativo Regionale del Lazio, the numbering corresponding to my above grouping of the questions:

(1) Consideration of Articles 3(3) and 9 of Commission Regulation (EEC) No 3477/92 of 1 December 1992 laying down detailed rules for the application of the raw tobacco quota system for the 1993 and 1994 harvests, as amended most recently by Commission Regulation (EEC) No 1668/93 of 29 June 1993, in the light of the comments in the orders for reference and other matters which have emerged during the proceedings, has disclosed no factor of such a kind as to affect their validity.

(2) Article 10 of Council Regulation (EEC) No 2075/92 of 30 June 1992 on the common organization of the market in raw tobacco must be interpreted as not precluding processing undertakings from concluding cultivation contracts and being reimbursed for the premium in respect of quantities exceeding the

processing quotas originally allocated to them, in so far as there has been a transfer of quotas pursuant to Article 10(3) of Commission Regulation (EEC) No 3477/92 of 1 December 1992 laying down detailed rules for the application of the raw tobacco quota system for the 1993 and 1994 harvests, as amended most recently by Commission Regulation (EEC) No 1668/93 of 29 June 1993.

(3) Article 9(3) of Commission Regulation (EEC) No 3477/92 of 1 December 1992 laying down detailed rules for the application of the raw tobacco quota system for the 1993 and 1994 harvests, as amended most recently by Commission Regulation (EEC) No 1668/93 of 29 June 1993, must be interpreted as not precluding a Member State from establishing advance reserves — of various sizes for each group of types calculated in proportion to the quantities of the various types and in light of the fact that certain types are more susceptible to natural disasters than others — with a view to ensuring that the Member State allocates these among producers who have suffered loss as a result of exceptional circumstances, in the light of the individual producer's loss but without him necessarily being compensated in full for that loss.

(4) Article 21, in conjunction with the third indent of Article 2, of Commission Regulation (EEC) No 3477/92 of 1 December 1992 laying down detailed rules for the application of the raw tobacco quota system for the 1993 and 1994 harvests, as amended most recently by Commission Regulation (EEC) No 1668/93 of 29 June 1993, must be interpreted as precluding a Member State from laying down provisions making it impossible to issue an individual cultivation certificate and/or fix an individual production quota for producer groups which have the objective of promoting and benefiting members' tobacco production and supervising the first processing thereof in their own works.

(5) Article 9(3) of Council Regulation (EEC) No 2075/92 of 30 June 1992 on the common organization of the market in raw tobacco must be interpreted as meaning that processing undertakings must be assigned to one of three different groups, corresponding to the first, second and third subparagraphs of Article 9(3), with corresponding different rules for the allocation of processing quotas. There is nothing to preclude subdivisions within each of those groups

for purposes of administering the system, on condition, however, that the reference quantity and consequently the processing quota for the individual processing undertaking are fixed using the method of calculation prescribed for the group to which the subdivision belongs. Article 9(1) of Commission Regulation (EEC) No 3477/92 of 1 December 1992 laying down detailed rules for the application of the raw tobacco quota system for the 1993 and 1994 harvests, as amended most recently by Commission Regulation (EEC) No 1668/93 of 29 June 1993, must be interpreted as meaning that producers are covered by different rules for the calculation of production quotas depending on the processing undertaking to which they have delivered during the reference period.