

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

13 April 2011 \*

In Case T-576/08,

**Federal Republic of Germany**, represented initially by M. Lumma and B. Klein, and subsequently by M. Lumma, B. Klein, T. Henze and N. Graf Vitzthum, acting as Agents,

applicant,

supported by

**Kingdom of Sweden**, represented by A. Falk, K. Petkovska, S. Johannesson and A. Engman, acting as Agents,

intervener,

\* Language of the case: German.

**European Commission**, represented by F. Erlbacher and A. Szmytkowska, acting as Agents,

defendant,

supported by

**Kingdom of Spain**, represented by B. Plaza Cruz, acting as Agent,

by

**French Republic**, represented by G. de Bergues and B. Cabouat, acting as Agents,

by

**Italian Republic**, represented initially by I. Bruni, acting as Agent, and subsequently by P. Gentili, avvocato dello Stato,

and by

**Republic of Poland**, represented initially by M. Dowgielewicz, and subsequently by M. Szpunar, and finally by M. Szpunar, B. Majczyna and M. Drwiecki, acting as Agents,

interveners,

APPLICATION for the annulment in part of Commission Regulation (EC) No 983/2008 of 3 October 2008 adopting the plan allocating to the Member States resources to be charged to the 2009 budget year for the supply of food from intervention stocks for the benefit of the most deprived persons in the Community (OJ 2008 L 268, p. 3),

THE GENERAL COURT (Fifth Chamber),

composed of M. Prek (Rapporteur), acting as President, S. Soldevila Fragoso and S. Frimodt Nielsen, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 9 September 2010,

gives the following

## Judgment

### Legal context

- <sup>1</sup> Recital 10 in the preamble to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products ('Single CMO Regulation') (OJ 2007 L 299, p. 1) is worded as follows:

'In order to stabilise the markets and to ensure a fair standard of living for the agricultural community, a differentiated system of price support for the different sectors has been developed ... These measures take the form of public intervention or the payment of aid for the private storage of products of the cereals, rice, sugar, olive oil and table olives, beef and veal, milk and milk products, pigmeat and sheepmeat and goatmeat sectors. Given the objectives of the present Regulation, there is, therefore, a need to maintain price support measures where they are foreseen in the instruments as they were developed in the past, without making any substantial changes as compared to the previous legal situation.'

- 2 Recital 18 in the preamble to that regulation is worded as follows:

‘Due to its intervention stocks of various agricultural products, the Community has the potential means to make a significant contribution towards the well-being of its most deprived citizens. It is in the Community interest to exploit this potential on a durable basis until the stocks have been run down to a normal level by introducing appropriate measures. In the light of these considerations, Council Regulation (EEC) No 3730/87 of 10 December 1987 laying down the general rules for the supply of food from intervention stocks to designated organisations for distribution to the most deprived persons in the Community has, so far, provided for the distribution of food by charitable organisations. This important social measure, which can be of considerable value to the most deprived persons, should be maintained and incorporated into the framework of this Regulation.’

- 3 Subsection IV, entitled ‘Disposal from intervention,’ of Section II, Chapter I, Title I, Part II of the Single CMO Regulation includes Articles 25 to 27.

- 4 According to Article 25 of the Single CMO Regulation, ‘disposal of products bought into public intervention shall take place in such a way as to avoid any disturbance of the market, to ensure equal access to the goods and equal treatment of purchasers ...’

- 5 Article 27 of that regulation, entitled 'Distribution to the most deprived persons in the Community', provides:

'1. Products which are in intervention stocks shall be made available to certain designated organisations to enable food to be distributed to the most deprived persons in the Community in accordance with an annual plan.

The distribution shall be:

- (a) free of charge, or
  
- (b) at a price which is in no case greater than that justified by the costs incurred by the designated organisations in implementing the action.

2. A product may be mobilised on the Community market where:

- (a) it is temporarily unavailable in Community intervention stocks during implementation of the annual plan referred to in paragraph 1, to the extent necessary to allow implementation of the plan in one or more Member States, and provided that the costs remain within the limits of the costs provided for in the Community budget for that purpose, or

(b) implementation of the plan would involve the transfer between Member States of small quantities of products in intervention in a Member State other than that or those in which the product is required.

3. Member States concerned shall designate the organisations referred to in paragraph 1 and shall notify the Commission in due time each year if they wish to apply this scheme.

4. The products referred to in paragraphs 1 and 2 shall be released free of charge to the designated organisations. The accounting value of such products shall be the intervention price, adjusted by coefficients where necessary to take account of quality differences.

5. Without prejudice to Article 190, the products made available under paragraphs 1 and 2 of this Article shall be financed by appropriations in the relevant budgetary heading within the EAGF of the budget of the European Communities. ...'

6 Article 1 of Commission Regulation (EEC) No 3149/92 of 29 October 1992 laying down detailed rules for the supply of food from intervention stocks for the benefit of the most deprived persons in the Community (OJ 1992 L 313, p. 50) provides:

'1. Member States wishing to apply the measures introduced by Regulation ... No 3730/87 on behalf of the most deprived persons in the Community shall inform the Commission each year no later than 1 February preceding the period of implementation of the annual plan referred to in Article 2.

2. By 31 May at the latest, the Member States concerned shall notify the Commission of:

(a) the quantities of each type of product ... required to implement the plan on their territory for the year in question;

...'

7 According to Article 2 of that regulation:

'1. Before 1 October each year the Commission shall adopt an annual plan for the distribution of food for the benefit of the most deprived persons, broken down by Member State concerned. For the purposes of allocating the resources among Member States, the Commission shall take account of the best estimates of the number of most deprived persons in the Member States concerned. It shall also take account of how operations were carried out and the uses to which resources were put in previous financial years ...

2. Before drawing up the annual plan, the Commission shall consult the major organizations familiar with the problems of the most deprived persons in the Community.

3. The plan shall include in particular:

(1) for each of the Member States applying the measure, the following:

(a) the maximum financial resources available to carry out its part of the plan;

(b) the quantity of each type of product to be withdrawn from the stocks held by the intervention agencies;

(c) the grant made available for each product for purchase on the Community market where the product concerned is found to be temporarily unavailable among the stocks held by the intervention agencies when the annual plan is adopted.

This grant shall be determined for each product taking account firstly of the quantity indicated in the Member State notification referred to in Article 1(2), secondly of the quantities not available in intervention stocks and thirdly of the products applied for and allocated during previous financial years and the actual use made of them.

...'

- 8 Article 3 of that regulation provides that the plan implementation period shall begin on 1 October and finish on 31 December of the following year.
- 9 According to the fourth subparagraph of Article 4(1)(a) of that regulation:

‘A given product may be mobilised on the market only if all the quantities of product in the same group to be withdrawn from intervention stocks for supply purposes in application of Article 2(3)(1)(b), including quantities to be transferred in application of Article 7, have already been allocated. The competent national authority shall inform the Commission of the opening of mobilisation procedures on the market.’

### **Contested regulation**

- 10 The annual plan allocating to the Member States resources for the supply of food from intervention stocks for the benefit of the most deprived persons in the Community for the 2009 budget year was established by Commission Regulation (EC) No 983/2008 of 3 October 2008 (OJ 2008 L 268, p. 3) (‘the contested regulation’).

11 Recital 4 in the preamble to the contested decision is worded as follows:

‘Point 1(c) of Article 2(3) of Regulation ... No 3149/92 provides for the allocation of resources for the purchase on the market of products temporarily unavailable in intervention stocks. The stocks of cereals suitable for human consumption currently held by the intervention agencies are very low and measures have already been taken, regarding their sale on the market. Moreover, no stock of rice and skimmed milk powder is at present held by the intervention agencies and no offers of these agricultural commodities into intervention are foreseen for 2008. Therefore, resource allocations should be fixed to enable the purchase on the market of cereals, skimmed milk powder and rice as required to implement the plan for the 2009 budget year.’

12 Article 1 of the contested regulation provides:

‘In 2009, the distribution of food to the most deprived persons in the Community under Article 27 of the [Single CMO Regulation] shall be implemented in accordance with the annual distribution plan set out in Annex I to this Regulation.’

13 According to Article 2 of the contested regulation, ‘allocations to Member States for the purchase of cereals, skimmed milk powder and rice on the market, as required under the plan referred to in Article 1, shall be as set out in Annex II’ to that regulation.

14 Annex I(a) to the contested regulation lays down the financial resources made available to implement the plan in each Member State at a total amount of EUR 496 million.

- 15 Annex II to the contested regulation lays down the allocations to Member States for purchase on the Community market, subject to the maximum amounts laid down in Annex I(a) thereof at a total amount of EUR 431 420 891.
- 16 The general budget of the European Union for the financial year 2009 was adopted on 18 December 2008 (OJ 2009 L 69, p. 1). That budget provided for appropriations amounting to EUR 500 million intended for food programmes for deprived persons in the European Community.

### **Procedure and forms of order sought**

- 17 By application lodged at the Registry of the General Court on 23 December 2008, the Federal Republic of Germany brought the present action.
- 18 By document lodged at the Registry of the Court on 6 April 2009, the Italian Republic sought leave to intervene in the present case in support of the forms of order sought by the Commission of the European Communities.
- 19 By document lodged at the Registry of the Court on 8 April 2009, the French Republic sought leave to intervene in the present case in support of the forms of order sought by the Commission.
- 20 By document lodged at the Registry of the Court on 14 April 2009, the Kingdom of Sweden sought leave to intervene in the present case in support of the forms of order sought by the Federal Republic of Germany.

- 21 By document lodged at the Registry of the Court on 16 April 2009, the Republic of Poland sought leave to intervene in the present case in support of the forms of order sought by the Commission.
- 22 By document lodged at the Registry of the Court on 27 May 2009, the Kingdom of Spain sought leave to intervene in the present case in support of the forms of order sought by the Commission.
- 23 By order of 3 June 2009, the President of the Fifth Chamber of the Court granted the applications of the French Republic, the Italian Republic, the Republic of Poland and the Kingdom of Sweden. Those interveners lodged their statements within the prescribed period.
- 24 Since the application for leave to intervene of the Kingdom of Spain was submitted after the expiry of the six-week period referred to in Article 115(1) of the Rules of Procedure of the General Court, by order of the President of the Fifth Chamber of 8 September 2009, the Kingdom of Spain was granted leave to intervene in support of the forms of order sought by the Commission and to submit its observations during the oral procedure.
- 25 By decision of the President of the Court, the composition of the Fifth Chamber of the Court was changed for the purposes of the present proceedings.
- 26 On hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure.

27 The parties presented oral argument and replied to questions put by the Court at the hearing on 9 September 2010.

28 The Federal Republic of Germany claims that the Court should:

- annul the contested regulation;
  
  
  
  
  
  
  
  
  
  
- limit the effects of the annulment to Article 2 of and Annex II to the contested regulation and ‘suspend’ them;
  
  
  
  
  
  
  
  
  
  
- order the Commission to pay the costs.

29 The Kingdom of Sweden claims that the Court should:

- uphold the Federal Republic of Germany’s application;
  
  
  
  
  
  
  
  
  
  
- ‘maintain’ the effects of the annulled regulation.

30 The Commission contends that the Court should:

- ‘disregard’ all of the references made to the opinion of the Council’s Legal Service of 17 October 2008;
- dismiss the application as unfounded;
- in the alternative, limit and ‘suspend’ the effects of the annulment of the contested regulation;
- order the Federal Republic of Germany to pay the costs.

31 The French Republic claims that the Court should:

- dismiss the application;
- order the Federal Republic of Germany to pay the costs.

32 The Italian Republic claims that the Court should:

- dismiss the application as inadmissible;

- in the alternative, dismiss the application as unfounded;
  
- in the event of the annulment of the contested regulation, declare that all the effects of that regulation must be considered to be final;
  
- order the Federal Republic of Germany to pay the costs.

<sup>33</sup> The Kingdom of Spain and the Republic of Poland contend that the Court should dismiss the application.

## **Law**

*The pleas of inadmissibility raised by the Italian Republic and the Republic of Poland*

### Arguments of the parties

<sup>34</sup> The Italian Republic and the Republic of Poland contend that the present application is inadmissible.

- 35 In particular, the Italian Republic contends that the Federal Republic of Germany should have challenged the 2009 Community budget in the section concerning the allocations for purchases on the agricultural markets. In so far as the contested regulation only distributes those allocations, an application against that regulation is out of time and therefore inadmissible.
- 36 The Republic of Poland, for its part, contends that the present application seeks in fact to call in question the fundamental rules on the system of distribution included in the Single CMO Regulation, on the basis of which the contested regulation was adopted, and the process of enacting annual distribution plans, defined by Regulation No 3149/92.
- 37 The Federal Republic of Germany claims that those two interveners are not entitled to raise such pleas of inadmissibility, since, according to the case-law, interveners cannot put forward a plea that the application is inadmissible where the main party has not done so.

## Findings of the Court

- 38 The Court notes that the Commission has not claimed that the application is inadmissible and has confined itself to requesting that it be dismissed on its merits. According to the fourth paragraph of Article 40 of the Statute of the Court of Justice of the European Union, which applies to the General Court by virtue of the first paragraph of Article 53 of that Statute, an application to intervene shall be limited to supporting the form of order sought by one of the parties. In addition, under Article 116(3) of the Rules of Procedure, the intervener must accept the case as it finds it at the time of its intervention.

39 It follows that the Italian Republic and the Republic of Poland are not entitled to raise a plea that the action is inadmissible and that the Court is not therefore required to consider the pleas on which they rely (see, to that effect, Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125, paragraphs 20 to 22, and Case T-290/94 *Kaysersberg v Commission* [1997] ECR II-2137, paragraph 76). The pleas of inadmissibility raised by the Italian Republic and the Republic of Poland must therefore be rejected.

*The Commission's request that the references, made in the application, to the opinion of the Legal Service of the Council of the European Union of 17 October 2008 be disregarded*

40 The Commission contends that the production of the opinion at issue which relates to the Commission's proposal to amend the Single CMO Regulation was neither authorised by the Council nor ordered by the Court. Consequently, none of the references to that opinion in the application should, according to settled case-law, be taken into account by the Court.

41 The Federal Republic of Germany points out that that opinion, which is not fundamentally important for the outcome of the present dispute, had already been the subject of an official report and that, in the application, it was referred to in a very general way.

42 It should be noted that, according to settled case-law, it is contrary to public policy, which requires that the institutions can receive the advice of their legal service, given in full independence, to allow such internal documents to be produced by persons other than the services at whose request they have been prepared in proceedings before the Court, unless their production has been authorised by the institution concerned or ordered by the Court (order in Case C-445/00 *Austria v Council* [2002])

ECR I-9151, paragraph 12; Case T-44/97 *Ghignone and Others v Council* [2000] ECR-SC I-A-223 and II-1023, paragraph 48; and order in Case T-357/03 *Gollnisch and Others v Parliament* [2005] ECR II-1, paragraph 34).

- 43 Therefore, it is necessary to grant the Commission's request that the references, made in the application, to the opinion of the Council's Legal Service of 17 October 2008 be disregarded.

### *Substance*

#### Arguments of the parties

- 44 The Federal Republic of Germany, supported by the Kingdom of Sweden, raises a single plea, according to which the contested regulation was adopted in breach of Article 27 of the Single CMO Regulation, read in the light of recital 18 thereof setting out the Community's interest in exploiting agricultural products until stocks have been run down to a normal level, and of Article 33 EC and Article 37 EC. The contested regulation has, it submits, 'lost all connection' with the Common Agricultural Policy (CAP) and is in reality an aspect of social policy.
- 45 In the first place, Article 27 of the Single CMO Regulation, forming part of subsection IV, entitled 'Disposal from intervention', of part II, title I, chapter I, section II of the Single CMO Regulation, authorises the supplementary purchase on the markets

of food solely in the case where a product is temporarily unavailable in the intervention stocks during implementation of the annual plan, to the extent necessary to allow implementation of that plan in one or more Member States.

- 46 First, the contested regulation does not concern the purchase of products which are only 'temporarily unavailable in the intervention stocks.' Although that condition would require that the existing intervention stocks be distributed first and that supplementary purchases be transitional and exceptional, the relationship between the goods coming from intervention stocks and those purchased additionally is inverted, the proportion of the latter in relation to the total volume of the plan having changed from 18.06 % in 2006 to 85.35 % in 2008 and to 86.98 % in 2009. Furthermore, according to the Commission's forecast regarding the development of intervention stocks, that situation should continue in the long term.
- 47 With regard to the budget available for the implementation of the plan in 2009, it was increased to EUR 500 million, without the possibility of that increase in relation to previous years being justified by the increase of the price of products covered by the plan. The Federal Republic of Germany also questions the compliance of the process of approval of the plan with Regulation No 3149/92 by claiming that, on the basis of the stated increase of the budget available to the plan, the Commission requested the Member States, after the deadline laid down in that regard, to reconsider their requests for products necessary to implement the plan.
- 48 Secondly, the lack of availability of products in the intervention stocks should exist 'at the time of the setting-up of the annual plan.' According to the Federal Republic of Germany, that condition should be interpreted as meaning that a purchase could be envisaged in the case of products lacking during the implementation of the annual plan or where it is found, during the establishment of the annual plan, that the existing

intervention stocks are probably or definitely not sufficient. However, the contested regulation made funds available for the purchase of products for which, as of the establishment of the plan, no intervention stock was envisaged during the year.

- 49 Thirdly, the fixed plan is not based on the volumes of existing or expected intervention stocks, but solely on the requirements declared by the participating Member States and, consequently, do not correspond to what is 'necessary' for its implementation. According to the Federal Republic of Germany, the volume of the plan must be connected with the intervention stocks. Thus, Article 43(g) of the Single CMO Regulation empowers the Commission to establish an annual plan solely in compliance with Article 27(1) thereof, providing for the distribution of the products which are in intervention stocks.
- 50 In the second place, the Federal Republic of Germany claims that the plan adopted by the contested regulation does not pursue any of the objectives of Article 33 EC. It draws attention to the Court's case-law according to which the choice of the legal basis for a measure must rest on objective factors amenable to judicial review, including, in particular, the aim and the content of the measure. In its opinion, the regulation at issue does not concern the production and marketing of agricultural products and is not a measure adopted in the context of the CAP.
- 51 Contrary to the Commission's assessment, the plan concerned 'lost all connection' with the CAP and in particular with the objective of stabilising the markets within the meaning of Article 33(1)(c) EC. Since such a great reduction in intervention stocks took place and the plan is principally based on the purchase of food, that measure is no longer part of the agricultural market, but is downstream from it. The disputed plan is affected by Articles 33 EC and 37 EC only as an incidental element of the intervention mechanism, since its main objective is social. According to the Court's

case-law, the scope of the CAP is limited where a legal measure has certain effects on agriculture which are merely incidental in relation to the main objective.

- 52 Likewise, contrary to the Commission's assessment, the Community food aid programme also does not contribute to ensuring that supplies reach consumers at reasonable prices within the meaning of Article 33(1)(e) EC. Since the food is offered to the most deprived persons, the objective of a reasonable price is absolutely unachievable. According to the Court's case-law, the reasonableness of the price cannot be equated with the lowest possible prices.
- 53 According to the Federal Republic of Germany, its claims are borne out by the Commission's draft proposal, of 17 September 2008, for amendment of the Single CMO Regulation, which provided in particular for the removal of the restriction of purchases to situations of temporary unavailability of intervention stocks. That amendment responded to a need to adjust secondary legislation to the actual situation, which was confirmed by the Commission.
- 54 As regards Regulation No 3149/92, it does not in itself infringe European Union law, but must be read in the light of superior rules of law and may not in any case derogate from those rules.
- 55 The Kingdom of Sweden adds, first, that the Single CMO Regulation provides, in principle, solely for the use of intervention stocks and that the significant purchase of goods on the Community market is a 'circumvention' of that regulation. The

conditions for the purchase of goods set out in Article 27(2) of that regulation must be interpreted restrictively, since they are exceptions.

56 With regard to the time when it is possible to carry out the purchases, the Kingdom of Sweden raises the possibility of a certain difference in wording between the different language versions of Article 27 of the Single CMO Regulation. According to the Swedish version, the lack of availability of a product must take place during the implementation of the plan, in which case it suffices to adopt amendments to the annual plan. That interpretation is substantiated by the premiss and purposes of that provision which are that good use be made of the intervention stocks and not, in the first place, to help the most deprived persons. Furthermore, according to Article 4 of Regulation No 3149/92, a given product may be purchased on the market only if the most essential food which must be supplied has already been distributed from intervention stocks and by intra-Community transfers.

57 The European Union legislature never intended to provide for a permanent aid programme. On the contrary, on the basis of recital 18 in the preamble to the Single CMO Regulation, the reduction of the intervention stocks would lead to a reduction of the scope of the plan. By contrast, the social-policy objectives are clearly apparent from Articles 1 and 2 of Regulation No 3149/92.

58 In the second place, the Kingdom of Sweden contends that Article 27 of the Single CMO Regulation does not seek to ensure that supplies reach consumers at reasonable prices, as is provided for in Article 33(1) EC. As regards the objective of stabilising the markets, it points out that it follows from settled case-law that that includes also a desire to reduce surpluses in the Community. The distribution of goods fixed by the contested regulation does not create the necessary link with the intervention

purchases for that purpose. A contrary interpretation could lead to reliance on Article 37 EC as the legal basis of all legislation intended to subsidise the purchase of food.

- 59 Moreover, according to settled case-law, if examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the act must be based on the latter. The Kingdom of Sweden considers that a measure such as the contested regulation could be adopted on the basis of Article 308 EC.
- 60 Supported by the Kingdom of Spain, the French Republic, the Italian Republic and the Republic of Poland, the Commission contends that the contested regulation complies with the Single CMO Regulation and with Regulation No 3149/92.
- 61 In the first place, the Commission contends that the Federal Republic of Germany's argument concerning the interpretation of Article 33 EC is irrelevant. However, in order to respond to the criticism that the contested regulation does not pursue the objectives of that article, the Commission notes the case-law according to which a regulation must be related to the field of agriculture, and therefore to Article 37 EC, where the goods concerned by that regulation are listed in Annex I to the EC Treaty and where the regulation at issue contributes to achieving one or several objectives of the CAP, which is the case of the goods concerned by Article 27 of the Single CMO Regulation.
- 62 The purpose of Article 33 EC is the stabilisation of the markets by the disposal and temporary purchase of goods on the Community market and to ensure that supplies

reach consumers at reasonable prices, including the most deprived persons, by offering them agricultural products at affordable prices. The Commission adds that the social objective of the distribution plan had always been clearly expressed by the basic provisions and by Articles 2 EC and 3 EC, in the light of which the CAP should be interpreted. That plan maintained its connection with the CAP.

<sup>63</sup> In the second place, with regard to the alleged infringement of Article 27 of the Single CMO Regulation, the Commission contends that the condition of unavailability of stocks ‘during the implementation of the annual plan’ is fulfilled where the intervention stocks are not available during the implementation of the annual plan. Furthermore, it follows from Regulation No 3149/92 and the premiss and purposes of Article 27 of the Single CMO Regulation that the availability of stocks must be determined at the time of the adoption of the annual plan. In accordance with Regulation No 3149/92, the planning of the distribution takes place from May of the previous year (communication by the Member States of their requirements) for the plan to be adopted before 1 October, the date at which it will begin to be implemented. According to Article 2(3)(1)(c) of that regulation, the grant shall be made available to the Member States in the event of temporary unavailability of a product, established during the adoption of the annual plan. Furthermore, the Federal Republic of Germany’s arguments on that point in the reply seem to be in line with that reasoning.

<sup>64</sup> Concerning the ‘temporary unavailability’ of intervention stocks, the Commission shares the Federal Republic of Germany’s point of view as regards the subsidiary nature of the purchases in relation to the intervention stocks. However, it contends that, in the absence of information concerning that condition, it should be interpreted in the light of the purposes of the Single CMO Regulation, taking account of the fact that public intervention on the market is a permanent instrument in the context of the CAP which requires appropriate possibilities for disposal, which is not contested by the Federal Republic of Germany. In order to retain such possibilities, the purchases concerned are not only permitted, but indispensable. Thus, so long as the creation of intervention stocks of certain products is legally possible and in fact sufficiently

likely, the Commission is obliged to provide for the supplementary purchase of those products.

- <sup>65</sup> Moreover, the concept of ‘temporary unavailability’ should be understood in the context of a global assessment carried out over several years. Thus, in accordance with Article 2 of Regulation No 3149/92, the Commission is obliged, at the time of the adoption of the plan, to take account of the use of resources in previous years. In the light of the Commission’s wide discretion with regard to that question, the purchases concerned are prohibited solely in the case of a cancellation or long-term suspension of the intervention mechanism for a product.
- <sup>66</sup> That was not the case with regard to the contested regulation. In order to fulfil the requirement of Article 27 of the Single CMO Regulation, the Commission is obliged to carry out the review of availability for each product separately and not for all of the intervention stocks. First, under that regulation, the products concerned by the plan are eligible for supplementary purchases for the purposes of intervention. Secondly, the level of intervention stocks of different products is not constant, but varies over the years. Thirdly, the products which should have been mobilised in 2009 were unavailable only for a short time. Moreover, the new intervention stocks which are being created could cover a large part of the annual plan for the 2010 budget year. It follows that the Commission was justified in considering that the unavailability of those stocks was only temporary and that it could provide for the mobilisation of those products on the Community market.
- <sup>67</sup> The Commission considers that the Federal Republic of Germany’s argument on that point is contradictory and does not answer the question concerning the threshold of existing intervention stocks beyond which it could order supplementary purchases. The quantitative element put forward by the Federal Republic of Germany does not

follow from the relevant provision of the Single CMO Regulation. It is also contrary to the purposes thereof and would lead to legal uncertainty during its implementation. In any event, its arguments are not such as to rebut the Commission's interpretation of that provision or to call in question the lawfulness of the contested regulation. The biannual document produced by the Federal Republic of Germany concerns long-term predictions which are not designed to serve as a basis for the Commission's decision relating to the implementation of annual plans. In any event, for the purposes of assessing the lawfulness of the contested regulation, only the legal situation at the time of its adoption is relevant.

<sup>68</sup> As regards the condition of necessity, the Commission points out that the annual plan for the 2009 budget year is limited to the expenses envisaged for that purpose in the European Union budget, as is provided for in Article 27(2)(a) of the Single CMO Regulation. In accordance with that provision, the necessity should be assessed not on the basis of the relation between the volume of the plan and the intervention stocks, but on the basis of the mobilisation necessary to ensure the implementation of the plan in the participating Member States. Thus, it contends that, during the budget years in which there was a very large volume of intervention stocks, the plan had disposed of only a small part of the stocks. In the context of the distributed budgetary resources, the annual plan has the objective of covering the requirements declared by the Member States by taking account of their best estimates concerning the number of the most deprived persons.

<sup>69</sup> In that regard, the Commission disputes the Federal Republic of Germany's argument concerning the increase of the budget and contends that it is fixed not on an abstract basis, but on the basis of the costs for the purchase of a certain quantity of products at market price which greatly increased in 2008 and were much higher than the intervention prices.

- 70 According to the Commission, a reduction or short-term cancellation of the plan as a result of a temporary reduction of intervention stocks in general and the unavailability of certain products in particular would be contrary to its purposes. That would lead to the withdrawal of charitable organisations which depend on it from participation in that plan and the cancellation of infrastructure connected with the disposal instrument of stocks during the following years, which would be characterised by an increase in stocks. That would call into question the objectives of stabilising the market and guaranteeing a high level of social protection pursued by the plan.
- 71 Finally, the Commission contends that its proposal for amendment of the Single CMO Regulation does not produce any binding legal effects and that it cannot therefore be the subject of the application.
- 72 In its observations on the Kingdom of Sweden's statement in intervention, the Commission disputes the interpretation that the supplementary purchases are possible only where the unavailability of products in the intervention stocks arose during the implementation of the plan. The great majority of language versions of Article 27 of the Single CMO Regulation are rather compatible with the interpretation given by the Commission. Moreover, the Commission contends that it does not at all follow from recital 18 in the preamble to that regulation that the legislature intended a reduction of the scope of the plan in the event of a reduction of the volume of available intervention stocks.
- 73 The Italian Republic considers, furthermore, that the judgment in Case C-269/97 *Commission v Council* [2000] ECR I-2257, in which the Court held that Articles 33 EC and 37 EC could serve as a legal basis for the adoption of a measure with perhaps the principal aim of protecting public health, may be applied to the present case. It also follows from Articles 2 EC, 136 EC and 137 EC that Articles 33 EC and 37 EC can constitute the exclusive legal basis for the adoption of measures which also have a social purpose, even predominantly so, on condition that they employ provisions

relating to the regulation and to intervention on agricultural markets, which is the case of the contested regulation.

<sup>74</sup> The Italian Republic points out that Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1), provides that the European Agricultural Guarantee Fund (EAGF) finance the stabilisation of agricultural markets. Since Article 27 of the Single CMO Regulation confers on the EAGF the task of financing the purchases in question, those purchases also constitute expenses of stabilisation of agricultural markets, in accordance with Article 4 of Council Regulation (EEC) No 3730/87 of 10 December 1987 laying down the general rules for the supply of food from intervention stocks to designated organisations for distribution to the most deprived persons in the Community (OJ 1987 L 352, p. 1), within the limits of the expenses permitted for that purpose by the budgetary authority.

<sup>75</sup> It follows from the first recital in the preamble to Council Regulation (EC) No 2535/95 of 24 October 1995 amending Regulation No 3730/87 (OJ 1995 L 260, p. 3), that, despite the gradual reduction of the system of intervention stocks, the European Union legislature wanted to retain the plan concerned by providing for the purchase on the market to be an ‘interim measure’, that is to say equivalent and not subsidiary, or accessory, in relation to the disposal of the stocks, which would still be compatible with the objectives of the CAP. On the basis of the finding of unavailability of a product, the freedom to manoeuvre between the disposal of stocks and the purchases on the market would therefore be limited solely by the obligation to use the first before proceeding to the second. That finding is confirmed by the second recital in the preamble to Regulation No 3730/87, the third recital and Article 4 of Regulation No 3149/92, the third and fourth recitals in the preamble to Commission Regulation (EC) No 267/96 of 13 February 1996 amending Regulation No 3149/92 (OJ 1996 L 36, p. 2), and by the fifth recital in the preamble to Commission Regulation (EC) No 1127/2007 of 28 September 2007 amending Regulation No 3149/92 (OJ 2007 L 255, p. 18).

- 76 The Italian Republic treats as necessary all the purchases intended to cover the requirements envisaged in the plan which cannot be satisfied at the outset by means of the use of intervention stocks. That condition is not however connected with the existence of a minimum amount of usable stocks and still less with the fact that that minimum be greater than that purchased on the market.
- 77 As regards the unavailability of a product during the implementation of the plan, the Italian Republic contends that Article 27 of the Single CMO Regulation is so worded, because it is only at that time that the necessary purchases on the market must be made, which is also compatible with Article 3 of Regulation No 3149/92. The purchases are therefore carried out solely where the unavailability of stocks is confirmed during the implementation of the plan. That reference to the implementation period of the plan does not prevent the assessment of the insufficiency of the stocks at the outset, since that would be indispensable to determining the budget allocation assigned to the purchases. That is confirmed by the first recital in the preamble to Regulation No 267/96.
- 78 The French Republic, for its part, focuses on the objective of the contested regulation which is to ensure that supplies reach consumers at reasonable prices, which is disputed by the Federal Republic of Germany. Whether it is in consideration for the transfer of a sum of money or without consideration, that regulation seeks precisely to ensure the only price which could be considered as reasonable for the most deprived persons, in particular where that price is taken together with the prices paid by those persons for food purchased in the normal distribution channel.
- 79 It adds that the CAP is one of the Community activities listed in Article 3(1) EC the implementation of which must in particular allow, in accordance with Article 2 EC, the promotion throughout the Community of a high level of social protection. The Court held that the pursuit of the objectives of the CAP, in particular in the context of common organisations of the market, cannot disregard public interest requirements

such as the protection of consumers or the health and life of persons and animals. Aid to the most deprived persons is also a public interest requirement.

- 80 Concerning the temporary nature of the lack of availability of intervention stocks, the French Republic contends that the reduced use of those stocks was particularly significant only for the last two years, namely from 2008.
- 81 The Republic of Poland contends that since the wording of Article 27 of the Single CMO Regulation is vague and very general, the Commission enjoys a wide discretion concerning the conditions for the purchase of food on the market. In any event, the only correct interpretation of that article is that given by Regulation No 3149/92. By contrast, if the Federal Republic of Germany's argument concerning purchases on the market set out by the contested regulation must be accepted, that would add a new condition to the distribution mechanism that the Single CMO Regulation does not currently provide for. Moreover, in the context of the Commission's wide discretion in the field of the CAP, the lawfulness of a measure adopted in that field is only affected where it is clearly inappropriate.
- 82 Concerning, more particularly, the condition of lack of availability of products, it does not refer to the concerned measure's past, but its 'foreseeable future'. Thus, in the absence of certainty that the stocks will not be created in a 'foreseeable future', that condition remains fulfilled.
- 83 With regard to the objectives of the CAP, the Republic of Poland contends that, according to the Court's case-law, the interpretation thereof must take account of the general social and economic objectives of the European Union as they are defined in Article 2 EC, the current economic and social situation and constantly changing

circumstances. The interpretation put forward by the Federal Republic of Germany does not fulfil those criteria. In particular, it does not take account of the fundamental changes to the agricultural situation since the latest enlargements of the European Union.

<sup>84</sup> According to the Republic of Poland, the objectives of the CAP, listed in Article 33(1) EC, can be divided into two similar groups, the first seeking to guarantee agricultural development and a fair standard of living for the agricultural community and the second seeking to assure the availability of supplies and that they reach consumers at reasonable prices, directed principally at consumers of food. In that regard, it considers that the Federal Republic of Germany wrongly treats the concept of reasonable price in the same way as that of market price, since the first is to be interpreted by taking account of the specific circumstances of the case in point and will therefore not always be the same as the second. Furthermore, the Federal Republic of Germany incorrectly interpreted the Court's case-law concerning the concept of reasonable price, since that does not cover the specific category of consumers made up of the most deprived persons.

<sup>85</sup> Finally, the Republic of Poland contends that, independently of their origin, the agricultural products used in the context of the system of distribution reduce the surplus of products on the market, which contributes to the stabilisation and improvement of the incomes of persons working in the agricultural sector.

<sup>86</sup> At the hearing, the Kingdom of Spain stressed the requirement of stability of the measure of distribution of food to the most deprived persons by pointing out that the supplementary purchases were indispensable in order to ensure the proper functioning of the measure over several years. The establishment of material and human resources for the implementation of the plan solely during years in which there are

surplus stocks would be far too onerous from a financial and functional point of view. Furthermore, that measure is not only social, since it does not benefit only the most deprived persons, but also the agri-food market as a whole.

<sup>87</sup> The Federal Republic of Germany considers that, in contrast to the judgment in *Commission v Council*, paragraph 73 above, referred to by the Italian Republic, in the present case, the objective of the contested regulation is not the production and marketing of agricultural products, but concerns, as to 90%, the purchases of agricultural products which are carried out entirely independently of the CAP instruments. It disputes the Italian Republic's argument that food aid has become an ongoing objective of the CAP, since that would be incompatible with the rules on the delimitation of competences between the Community and the Member States. Moreover, it is not possible to justify the classification of a measure as covered by the CAP by claiming that it follows *de jure* from the attribution of corresponding resources to the EAGF.

<sup>88</sup> The Federal Republic of Germany points out also that Regulation No 2535/95 is not relevant in the present case and that the Italian Republic's claim does not refer to the last part of the first recital in the preamble thereto. As regards Regulation No 1127/2007, it cannot influence the interpretation of superior legal norms. Finally, Regulation No 3730/87 must not be interpreted as if it provided in itself for a widening of measures in the context of the food programme.

<sup>89</sup> With regard to the French Republic's arguments concerning the pursuit of the objectives of the CAP in the contested regulation, the Federal Republic of Germany points out that, according to the Court's case-law, the objective of market stabilisation amounts to the establishment of market equilibrium between supply and demand, so

that the measures at issue must contribute to the functioning of the common market, which was not the case with the purchases provided for by the contested regulation. Furthermore, the maximum price which could be demanded for the supply of food is calculated solely by reference to the costs incurred and could not therefore also pursue the objective of ensuring reasonable prices. Moreover, that objective is not mentioned either explicitly or implicitly in any of the measures constituting the legal basis of the contested regulation.

- <sup>90</sup> The Federal Republic of Germany also disputes the French Republic's analysis of the temporary nature of the unavailability of stocks and claims that a proportion of 20 to 30 % of purchases on the market should in itself be considered important and that, consequently, there have been supply problems for at least four years.
- <sup>91</sup> Concerning the Commission's wide discretion which follows from the case-law referred to by the Republic of Poland, according to the Federal Republic of Germany, it does not concern the interpretation of the objectives of a measure and, consequently, the present case.
- <sup>92</sup> With regard to the criterion of temporary unavailability of the products, the Federal Republic of Germany considers that there is a connection between that unavailability and the value of the supplementary purchases, since such a programme cannot be based on increasing purchases over a fairly long period by constituting almost the entirety of supplies during the last two years. When assessing that character, it is entirely appropriate to take account of the past.

- <sup>93</sup> The Federal Republic of Germany refers to Special Report No 6/2009 of the Court of Auditors of the European Communities, entitled ‘European Union food aid for deprived persons: an assessment of the objectives, the means and the methods employed’, in which it considered that a food aid programme was, admittedly, politically desirable as a social measure, but that it was not compatible with the provisions of the CAP and its financing. The Court of Auditors also expressed doubts with regard to that programme’s contribution to regulating the market.

### Findings of the Court

- <sup>94</sup> As a preliminary point, it is necessary to note the connections between the Single CMO Regulation, Regulation No 3149/92 and the contested regulation.
- <sup>95</sup> First, it follows from the recitals of the contested regulation that it was adopted on the basis of the Single CMO Regulation, and in particular Article 43(g) thereof, in conjunction with Article 4 of that regulation, since those two articles refer to the adoption by the Commission of implementing rules for the setting up of the annual plan referred to in Article 27(1) of the Single CMO Regulation, and to the procedure to be followed by it.
- <sup>96</sup> Moreover, it follows from Article 1 of the contested regulation that the distribution of food to the most deprived persons of the Community, in application of Article 27 of the Single CMO Regulation, is carried out in accordance with the annual plan.

97 Secondly, concerning the connections between the contested regulation and Regulation No 3149/92, it should be pointed out that, by the latter, the Commission set itself a number of rules which affect the exercise of the powers it derives from the Single CMO Regulation.

98 Thus, at the time of adopting the annual plan, the Commission was also required to comply with Regulation No 3149/92. In that regard, it should be noted that recital 1 in the preamble to the contested regulation is worded as follows:

‘In accordance with Article 2 of ... Regulation ... No 3149/92 of 29 October 1992 laying down detailed rules for the supply of food from intervention stocks for the benefit of the most deprived persons in the Community, the Commission should adopt a distribution plan to be financed from resources available in the 2009 budget year. The plan should lay down in particular, for each of the Member States applying the measure, the maximum financial resources available to carry out its part of the plan, and the quantity of each type of product to be withdrawn from the stocks held by the intervention agencies.’

99 It follows that the lawfulness of the contested regulation must be assessed in the light of, first, the Single CMO Regulation, which is its legal basis, and, secondly, Regulation No 3149/92.

100 In the event of a conflict between those provisions and those two regulations, it must be recalled that, in accordance with the principle of the hierarchy of norms, an implementing regulation may not derogate from the rules contained in the act to which it gives effect (see Case T-219/04 *Spain v Commission* [2007] ECR II-1323, paragraph 66 and the case-law cited).

- 101 However, it should be noted that, in the present case, the parties do not contend that there is any incompatibility between the Single CMO Regulation and Regulation No 3149/92, but each of them defends a different interpretation of Article 27 of the Single CMO Regulation.
- 102 The outcome of the present case depends therefore on the preferred interpretation of Article 27 of the Single CMO Regulation.
- 103 According to settled case-law, when the wording of secondary European Union law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty. An implementing regulation must also be given, if possible, an interpretation consistent with the provisions of the basic regulation (*Case C-90/92 Dr Tretter* [1993] ECR I-3569, paragraph 11, and *Case C-61/94 Commission v Germany* [1996] ECR I-3989, paragraph 52).
- 104 Therefore, the Single CMO Regulation should be given the interpretation which renders it consistent with the relevant provisions of the Treaty concerning the CAP of which it forms part.
- 105 In that regard, it should be borne in mind that, according to settled case-law, in interpreting a provision of European Union law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it forms part (see *Case C-17/03 VEMW and Others* [2005] ECR I-4983, paragraph 41 and the case-law cited).
- 106 Furthermore, since the textual and historical interpretations of a regulation, and in particular one of the provisions thereof, do not permit its precise scope to be assessed, the provision in question must be interpreted by reference to its purpose and

general structure (see, to that effect, Joined Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] ECR I-1375, paragraph 168, and Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paragraph 148).

107 It is in the light of those principles that the lawfulness of the contested regulation must be considered.

— The single plea, alleging that the contested regulation was adopted in breach of the Single CMO Regulation and in particular of Article 27 thereof

108 As is apparent from recital 10 in the preamble to the Single CMO Regulation, the intervention purchases constitute a CAP instrument to stabilise the agricultural markets and to guarantee a fair standard of living for the agricultural community. The public intervention is currently governed by the provisions in Part II, Title I, Chapter I of the Single CMO Regulation. One of the methods of disposal of the intervention stocks is, according to Article 27 of that regulation, their distribution to the most deprived persons.

109 In that regard, it is necessary to bear in mind the historical context of that provision.

110 The measure for the distribution of food to the most deprived persons in the Community was established by Regulation No 3730/87. It follows, in particular, from the third recital in the preamble to that regulation that, 'the Community has through its intervention stocks of various agricultural products the potential means to make a

significant contribution towards the well-being of its most deprived citizens' and that 'it is in the Community interest, and in line with the objectives of the [CAP], to exploit this potential on a durable basis until the stocks have been run down to a normal level by introducing appropriate measures.'

- <sup>111</sup> Following a series of reforms to the CAP, the intervention stocks were gradually reduced and the periods during which those stocks were low or empty have increased. Also, Regulation No 3730/87 was amended by Regulation No 2535/95. That regulation inserted the possibility, under certain conditions, to mobilise certain products on the market.

- <sup>112</sup> The first recital in the preamble to Regulation No 2535/95 is worded as follows:

'Whereas the arrangements laid down by Regulation ... No 3730/87 for the supply of food to the most deprived persons in the Community are based on the availability of public stocks as a result of buying-in by intervention agencies ...; whereas implementation of the annual plan for the supply of food can be made difficult by the temporary unavailability of certain basic products over the year; whereas this threat is liable to increase in the light of the measures taken to control markets more effectively and to adapt production to requirements; whereas it seems appropriate, as an interim measure in such circumstances and in order not to jeopardize implementation of the supply programmes, to provide for the possibility of mobilizing the products concerned on the Community market, but on terms which will not undermine the principle of the supply of products from intervention.'

- 113 The provision in Regulations No 3730/87 and 2535/95 was restated in Article 27 of the Single CMO Regulation, recital 18 of which notes that '[d]ue to its intervention stocks of various agricultural products, the Community has the potential means to make a significant contribution towards the well-being of its most deprived citizens,' stating that '[i]t is in the Community interest to exploit this potential on a durable basis until the stocks have been run down to a normal level by introducing appropriate measures'. It follows from that recital that it is in the light of these considerations that Regulation No 3730/87 had laid down the 'social measure' of the distribution of food to the most deprived persons in the Community and that it was necessary to maintain it and incorporate it in the Single CMO Regulation.
- 114 As noted in paragraph 3 above, Article 27 of the Single CMO Regulation is part of subsection IV entitled 'Disposal from intervention,' of part II, title I, chapter I, section II of that regulation. That article, entitled 'Distribution to the most deprived persons in the Community,' provides, in paragraph 1 thereof, that products which are in intervention stocks shall be made available to certain designated organisations in accordance with an annual plan. Article 27(2)(a) provides that a product may be mobilised on the Community market in particular where 'it is temporarily unavailable in Community intervention stocks during implementation of the annual plan referred to in paragraph 1, to the extent necessary to allow implementation of the plan in one or more Member States, and provided that the costs remain within the limits of the costs provided for in the Community budget for that purpose.'
- 115 Consequently, that provision must be interpreted as providing for a measure for the good use of intervention stocks.
- 116 It must be noted that the present dispute falls within the framework of the application of a regulation providing for two phases. The main phase, consisting of public

intervention on the market, pursues clearly the objectives of the CAP set out in Article 33(1) EC, and in particular that of market stabilisation. The next phase consists of the disposal of intervention stocks thereby created, one of the procedures of which is the distribution of products to the most deprived persons. That distribution pursues a social objective which can be only secondary and to a certain extent accessory in relation to the primary objectives of the CAP and can therefore, in principle, be carried out solely within the limits of surplus stocks and in view of the fact that it 'complies with the objectives of the CAP to exploit that potential on a durable basis until the stocks are reduced to a normal level'.

<sup>117</sup> With regard to the possibility of supplementary purchases, it follows from the first recital in the preamble to Regulation No 2535/95 that that measure was adopted because 'implementation of the annual plan for the supply of food [could] be made difficult by the temporary unavailability of certain basic products over the year' and it was necessary 'as an interim measure in such circumstances and in order not to jeopardize implementation of the supply programmes, to provide for the possibility of mobilizing the products concerned on the Community market'. By contrast, that recital states that that must be carried out 'on terms which will not undermine the principle of the supply of products from intervention'.

<sup>118</sup> It therefore clearly follows from the foregoing that the justification for that measure is the existence of intervention stocks and the annual plan for their distribution to the most deprived persons. Consequently, the objective of the annual plan and the supplementary purchases it establishes cannot, as the Commission asserts, be to cover the requirements declared by the Member States participating in the plan, but to distribute to the most deprived persons the existing volumes of intervention stocks.

- 119 Thus, Article 27(1) of the Single CMO Regulation provides that ‘products which are in intervention stocks’ are to be made available, whereas, according to Article 27(2)(a) thereof, a product may be mobilised on the market where ‘it is temporarily unavailable in ... intervention stocks during implementation of the annual plan.’ That shows that the supplementary purchase of such products is provided for as an exception to the rule which is the distribution of intervention stocks. That measure, as an exception, must therefore be interpreted restrictively. It cannot in any event be placed on the same level as the rule.
- 120 The restrictive interpretation of the concept of ‘temporarily unavailable ... during implementation of the annual plan’ is also provided for by the supplementary information in Article 27(2)(a) of the Single CMO Regulation, according to which a product can be mobilised on the market only ‘to the extent necessary to allow implementation of the [annual] plan in one or more Member States, and provided that the costs remain within the limits of the costs provided for in the Community budget for that purpose.’
- 121 It follows from that provision that it is only where the temporary unavailability of a product exists during implementation of the annual plan that that product can be purchased on the market. It assumes also that an annual plan and the budget provided for its implementation were adopted prior to a possible mobilisation.
- 122 It is true that, as the Commission argues, for practical reasons of application, and in order, precisely, to be able to adopt the plan and the budget provided for its implementation, it is at the time of the adoption of the plan that the Commission must be able to know the volumes of products which must be purchased in addition, because they are unavailable in the intervention stocks. That way of proceeding is the only possible way which complies with the relevant provisions of Regulation No 3149/92.

- 123 According to Article 1 of Regulation No 3149/92, the participating Member States are to inform the Commission of their needs no later than 31 May preceding the period of implementation of the plan. According to Article 2 of that regulation, it is before 1 October of that year that the Commission adopts the annual plan which establishes, in particular, 'the grant made available [to the Member States] for each product for purchase on the Community market where the product concerned is found to be temporarily unavailable among the stocks held by the intervention agencies when the annual plan is adopted'.
- 124 However, those provisions can in no way be understood as granting the Commission the power to establish the plan independently of the volumes of intervention stocks existing and/or forecast for the year concerned. Whilst it must, for the purposes of establishing the allocations, take account of the quantities requested by the Member States, of the quantities not available in intervention stocks and of the products applied for, allocated and actually used during previous financial years (the second subparagraph of Article 2(3)(c) of Regulation No 3149/92), it cannot exceed the limits fixed by the superior rule of law, namely the Single CMO Regulation.
- 125 It is at the time of the adoption of the plan that the Commission has the responsibility for adapting the volume thereof to the volumes of intervention stocks. In that context, it has, admittedly, a discretion, granted by Article 27(2) of the Single CMO Regulation, but that must not lead the exceptional nature of that provision to be misconstrued. Since the intervention stocks must be considered as permanently established, only the volume of which changes according to market fluctuations and public intervention, the expression 'temporarily unavailable' cannot be interpreted as referring to a number of months or years, but as designating an exception to the rule of distribution of products in intervention stocks. The proportions of the volume of supplementary purchases must therefore reflect the exceptional nature of that measure in relation to the total volumes of the annual plan, the aim of which is merely to make

good the insufficiencies which, according to the state of the stocks, should exist during the implementation of the plan. If not, an inversion of the rule and the exception would result.

- 126 That finding does not go against any of the provisions of Regulation No 3149/92. Furthermore, it is compatible with the wording of the first recital in the preamble to Regulation No 2535/95 which introduces the possibility of supplementary purchases, according to which that possibility must be provided for in order not to jeopardize implementation of the supply programmes.
- 127 In the present case, by the contested regulation, the Commission fixed, for the 2009 budget year, the annual plan for the distribution of food to the most deprived persons, in the context of which, in Annex II, it provided for the allocations to Member States for the purchase of products on the market for a total amount of EUR 431 420 891, that is to say approximately 89.98 % of the total volume of the plan which was EUR 496 million (Annex I(a) to the contested regulation).
- 128 It must therefore be held that the main objective of the annual plan contained in the contested regulation was not the disposal of intervention stocks, but to cover the requirements declared by the Member States participating in the plan.
- 129 Moreover, it follows from the annexes to the reply that, following the declaration of the President of the Commission relating to the increase by two-thirds of the budget provided for the programme of distribution of food to the most deprived persons, the Commission requested the participating States to re-assess the requirements declared for the 2009 budget year, that is to say after the time-limit laid down in Article 1(2) of Regulation No 3149/92.

130 In those circumstances, the annual plan for the 2009 budget year cannot be held to comply with Article 27 of the Single CMO Regulation, as interpreted above.

131 That finding cannot be called into question by any of the arguments of the Commission, the Kingdom of Spain, the French Republic, the Italian Republic or the Republic of Poland.

132 The Commission, the Kingdom of Spain, the French Republic and the Republic of Poland assert in particular that a reduction or short-term cancellation of the plan as a result of a temporary decrease or the unavailability of certain products in the intervention stocks would be contrary to its purposes, since that would cause charitable organisations which are dependent thereon to cease to participate in that plan and the cancellation of infrastructure connected with the instrument of disposal of stocks over the following years, during which there would be an increase of such stocks. That would be contrary to the objectives of the CAP and make it impossible for the programme to contribute to the objective of ensuring a high level of social protection.

133 That argument cannot be accepted. First, it should be noted that the establishment itself of the annual plan for the distribution of food to the most deprived persons is not called into question in the present application. In accordance with Article 27 of the Single CMO Regulation, the principal objective of that plan is the distribution of products in the intervention stocks and not the stability of cover of the requirements of charitable organisations participating in the programme. Secondly, it is apparent from the file and the above findings that the plan for the 2009 budget year fixed by the contested regulation was not only disconnected from the volumes of available intervention stocks, but provided for allocations for supplementary purchases in the context of a much larger budget than those of the three previous years. In those

circumstances, it is impossible to hold that the contested regulation sought to ensure the stability of the programme concerned.

- <sup>134</sup> The arguments of the Commission, the French Republic, the Italian Republic and the Republic of Poland, according to which Article 27 of the Single CMO Regulation and the contested regulation pursue the various objectives of the CAP, as defined in Article 33(1) EC, even assuming they are correct, are not such as to cast doubt on the finding that the contested regulation, as follows from the considerations set out above, infringes Article 27 of the Single CMO Regulation, the lawfulness of which is not, in any event called into question in the present action.
- <sup>135</sup> In that context, the case-law referred to by the Commission, the Italian Republic, the Republic of Poland and the Federal Republic of Germany, concerning determining the appropriate legal basis of a measure in relation to the objectives pursued by that measure, is not relevant in the present case. The present case does not concern the question of the choice of the legal basis of a measure.
- <sup>136</sup> Finally, as regards the various parts of the recitals of the regulations which were not taken into account during the interpretation of Article 27 of the Single CMO Regulation carried out above, namely Regulation No 267/96 and Regulation No 1127/2007, amending Regulation No 3149/92, referred to by the Italian Republic on the ground that they indicate that the supplementary purchase is affected solely by the unavailability of the product in the intervention stocks whose volume is reduced, it should be noted that they are not such as to call into question the interpretation of Article 27 of the Single CMO Regulation accepted by the Court. The interpretation of Article 27 of the Single CMO Regulation cannot be determined by provisions of inferior regulations, adopted for the purposes of its application.

137 In the light of the foregoing, it must be held that the contested regulation was adopted in breach of Article 27 of the Single CMO Regulation.

— The consequences of the infringement of Article 27 of the Single CMO Regulation

138 On the assumption that the application is granted, the Federal Republic of Germany, supported by the Kingdom of Sweden, requests the Court to make use of its power to limit the effects of the annulment to Article 2 of and Annex II to the contested regulation and to ‘suspend’ them in order to prevent that annulment affecting the implementation of the plan in favour of charitable organisations during the 2009 budget year or — where the Court rules after the end of that budget year — later.

139 The Commission, supported by the Italian Republic and the Republic of Poland, formulated the same plea.

140 In the first place, it should be noted that, by such a formulation, the Federal Republic of Germany, supported by the Kingdom of Sweden, effectively requests an annulment in part of the contested regulation, namely of Article 2 thereof and Annex II thereto.

141 It must be noted that, in the present case, it is not the lawfulness of the mechanism itself for the allocation of resources in favour of the most deprived persons which is called into question, but the fact that the plan for the 2009 budget year adopted by the contested regulation is based principally on the supplementary purchases of products

on the market. In the light of the finding in paragraph 137 above, it is consequently necessary to annul only the provisions providing for the allocations for such purchases, namely Article 2 of and Annex II to the contested regulation.

- <sup>142</sup> Secondly, it should be pointed out that the annulment in part of the contested regulation takes place at a time when all the allocations have in principle been paid. In those circumstances, and in order to prevent the retroactive effect of the annulment from creating a repayment obligation on the part of the Member States which benefited from those allocations, it is appropriate for the Court to make use of its power to indicate the effects of the annulled measure which must be considered as final.
- <sup>143</sup> In the specific circumstances of this case, it must be held that Article 2 of and Annex II to the contested regulation are annulled and that that annulment in part does not affect the validity of allocations already made.

## **Costs**

- <sup>144</sup> Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those of the Federal Republic of Germany in accordance with the latter's pleadings.

145 Furthermore, under Article 87(4) of those Rules, Member States which have intervened in proceedings are to bear their own costs. Accordingly, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Poland and the Kingdom of Sweden must bear their own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

- 1. Annuls Article 2 of and Annex II to Commission Regulation (EC) No 983/2008 of 3 October 2008 adopting the plan allocating to the Member States resources to be charged to the 2009 budget year for the supply of food from intervention stocks for the benefit of the most deprived persons in the Community;**
- 2. Orders that the validity of allocations already made is not affected by the annulment of Article 2 of and Annex II to Regulation No 983/2008;**
- 3. Orders the European Commission to bear its own costs and to pay those incurred by the Federal Republic of Germany;**

**4. Orders the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Poland and the Kingdom of Sweden to bear their own costs.**

Prek

Soldevila Fragoso

Frimodt Nielsen

Delivered in open court in Luxembourg on 13 April 2011.

[Signatures]