

OPINION OF MR ADVOCATE GENERAL VAN GERVEN

delivered on 11 January 1990 *

*Mr President,
Members of the Court,*

1. In this action brought under the second paragraph of Article 173 of the EEC Treaty, Triveneta Zuccheri and other Italian sugar traders (hereinafter referred to as 'the applicants') request the Court to declare void Commission Decision No 87/533/EEC on an Italian Government aid scheme to support Italian sugar traders (hereinafter referred to as 'the contested decision').¹

The contested decision declares that an Italian measure, contained in the decision of the comitato interministeriale per la programmazione economica (Interministerial Committee for economic planning) of 11 October 1984² and in Decision No 39/1984 of 24 October 1984³ and Decision No 41/1984 of 16 November 1984⁴ of the comitato interministeriale prezzi (Interministerial Committee on prices), is incompatible with the common market within the meaning of Article 92 of the EEC Treaty and does not qualify for one of the exceptions provided for in Article 92. More particularly, the Commission's decision relates to the grant of aid to Italian sugar traders in the amount of LIT 37.12 per kg

of white sugar held in storage on 29 October 1984, free of manufacturing tax, and in respect of which the *sovrapprezzo* (surcharge) has been paid (that is a price supplement payable by Italian producers and importers to the Cassa congruaglio zucchero (Equalization Fund for Sugar)).⁵

2. In determining whether the action is admissible and well founded the following factors are of relevance. In the Italian Decision No 39/1984 of 24 October 1984, mentioned above, provision is primarily made for a reduction in the maximum prices for sugar with effect from 30 October 1984. The reduction of maximum prices covers sales by retailers, wholesalers and/or importers, and producers.⁶ As a secondary matter and as a transitional provision, the decision then provides for the grant of aid to producers and to traders for sugar held in storage on 29 October 1984.⁷ In the contested decision the Commission refers exclusively to the aid granted to 'Italian sugar traders', without making clear who falls under this term (solely the intermediate traders or also the producers?). In its preliminary objection submitted to the Court on 25 March 1988, in which it claimed that the present action was inadmissible, the Commission did state that the contested decision related to the aid provided for in paragraph 7(b) of the Italian

* Original language: Dutch.

1 — OJ L 313, 4.11.1987, p. 24.

2 — GURI No 313, 14.11.1984.

3 — GURI No 298, 29.10.1984.

4 — GURI No 319, 20.11.1984.

5 — Provvedimento No 39/1984, at paragraphs 5 and 7, and see Article 1 of the Commission's contested decision.

6 — Paragraphs 1, 2 and 3 respectively of the aforementioned Decision No 39/1984.

7 — Paragraph 7(a) and (b) of Provvedimento No 39/1984.

Decision No 39/1984, that is to say aid to intermediate traders.⁸

The applicants' submissions

3. The applicants rely on two arguments to support their submission that the Italian scheme for aid to sugar in storage is not a State aid 'which distorts or threatens to distort competition by favouring certain undertakings for the production of certain goods', and is not 'incompatible with the common market'.

First, the Italian storage aid measure is said to be merely intended to compensate for the damage suffered by traders on account of the application of national rules which are incompatible with Community law. The applicants describe the maximum price rules applicable at the three levels mentioned above (production, wholesale and/or importation, retail) as national rules which are incompatible with Community law. The damage arises in their view as follows: before the maximum prices were reduced, there was a difference of LIT 43.27 per kg between the maximum sale and purchase prices for traders; the LIT 43.27 per kg formed the traders' profit margin since the maximum prices were also the actually applicable prices;⁹ as a result of the

reduction by LIT 40.09 per kg¹⁰ of the maximum prices, the greater part (40.09/43.27) of the profit margin for sugar which was in storage in October disappeared. This loss of profit margin is thus almost completely compensated for by the storage aid of LIT 37.12 per kg.

Secondly, the applicants state that the Italian storage aid was compatible with the Treaty as it was necessary in order to avoid discrimination prohibited by the second subparagraph of Article 40(3) of the EEC Treaty between traders and importers who on 29 October 1984 held stocks of sugar and those who held no stocks on that date.

Admissibility of the action

4. The defendant to the action, the Commission, does not dispute that the contested decision is 'of direct and individual concern' to the applicant. The Court's case-law cited by the applicants does in fact warrant this view.¹¹ The action

10 — LIT 40 for the retail price.

11 — In its judgment of 17 September 1980 in Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, which also related to a decision addressed to a Member State on the basis of Article 92, the Court disposed of the admissibility issue at paragraph 5 of its judgment as follows: 'The Commission does not dispute the applicant's right as a potential recipient of the aid referred to in the decision to bring an action for a declaration that the decision is void even though it is addressed to a Member State.' Nor could the Commission contest admissibility, regard being had to the criterion laid down in the judgment of 15 July 1963 in Case 25/62 *Plaumann v Commission* [1963] ECR 95, where it was stated that the Commission's 'decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'. In a case such as the present one, which deals with aid for stocks which were held at a well-determined date in the past, that criterion is, in my view, satisfied since an aid scheme of that kind (and the contested decision relating thereto) concerns a closed category of individuals. Whether it is a large or small number of persons concerned seems to me to be of no importance.

8 — In this light, the phrase 'in respect of which the *sovrapprezzo* has been paid' (see above, at the end of paragraph 1 and footnote 5 hereof) must be regarded as a passage included as a result of an oversight. In paragraph 7(b) of the Italian decision, which relates to aid to traders, this condition is not mentioned.

9 — At the hearing, it was stated by the applicant's representative, who on this point was not contradicted by the defendant's representative, that the various maximum prices imposed by the authorities are in every day economic reality also the market prices, that is to say that sales below the maximum prices rarely take place.

cannot therefore be regarded as inadmissible on that ground.

In the written procedure the Commission did initially raise an objection of inadmissibility in connection with the point at which time begins to run under the third paragraph of Article 173 of the Treaty. According to the Commission, in the absence of the contested decision's publication in the Official Journal, time began to run from the date on which the existence of the Commission's decision is mentioned in a decree of a national body in the *Gazzetta ufficiale*. In a later corrigendum submitted to the Court, the Commission did, however, point out that the contested decision appeared in the *Official Journal of the European Communities* of 4 November 1987.¹² In accordance with the third paragraph of Article 173, the time for bringing an action begins to run from the moment of that publication. Consequently, in its defence, the Commission abandoned this objection.

5. A second ground of admissibility raised by the Commission merits closer inspection. From the considerable attention which is devoted in the application to the alleged incompatibility with the Treaty of the Italian price rules in the sugar sector, the Commission concludes that the applicants are in fact seeking to elicit a declaration by the Court on this question: the challenge made against its decision is really only a roundabout way of bringing an action against it for failure to act on the ground that, contrary to Community law, it omitted to bring proceedings against Italy under Article 169 in connection with the price

rules applicable in that Member State in the sugar sector.

But, the Commission continues, such an action against it for failure to fulfil an alleged obligation to institute infringement proceedings against a Member State is not conferred on individuals by the Treaty.¹³ To confer on individuals the right to bring such an action in a roundabout way, the Court would be depriving the Member State concerned of the procedural guarantees laid down in Articles 169 and 170 of the EEC Treaty, whose importance the Court recognized in its judgment of 1 March 1966 in the *Lütticke* case.¹⁴ Support for this viewpoint may also be found in the judgment of the Court of 14 February 1989 in Case 247/87 *Star Fruit Company* [1989] ECR 291, to which the Commission made reference at the hearing. In that case, the Court stated that an action for failure to act against the Commission on the basis of an omission to institute proceedings under Article 169 would deprive this institution of a discretionary power conferred on it by the Treaty.¹⁵

In the Commission's view, this demonstrates that the applicants are guilty of a 'misuse of procedure' and that, consequently, the application should be held inadmissible.

6. The applicants reject the plea of inadmissibility raised by the defendant: they point to the indissoluble link between the Commission's contested decision and the Italian price rules for sugar. This link is

13 — See Article 169 and the third paragraph of Article 173 of the EEC Treaty.

14 — Case 48/65 [1966] ECR 19 and the Opinion of Mr Advocate General Gand.

15 — ECR 291, paragraphs 11 and 12 of the judgment.

12 — See footnote 1

objective in the sense that the aid challenged in the decision finds its justification in the price rules, which have not been contested by the Commission, and in the decision taken in that context to reduce maximum prices (see on this point the argument which has already been mentioned in connection with the restitution of damage). Moreover, that link is also expressly recognized by the Commission in the preamble to the contested decision.¹⁶ The applicants argue that, owing to this close link, it is impossible to challenge the contested decision without at the same time considering the price provisions in Italy. Consideration of the price rules should not in itself give rise to a binding judgment as to their compatibility or incompatibility with the common organization of the market.

considerable margin of appreciation on the Commission. Moreover, to make this right of action available indirectly to individuals would deprive the Member State of the opportunity of explaining and defending its rules before the Court.¹⁸

The foregoing considerations do not mean, however, that the action must therefore be held inadmissible. On the contrary, there is no reason why the validity of the contested Commission decision should not be examined on its own merits. Consequently, notice may be taken of arguments relating to the Italian price system provided that they imply no judgment as to the compatibility or otherwise of those rules with Community law.¹⁹

Merits of the action for annulment

7. I agree with the Commission that these proceedings for a declaration that a Commission decision relating to the grant of aids is void cannot be used by the applicants as a means of bringing an action against the Commission for failure to act owing to its decision not to institute infringement proceedings against a Member State. The latter right of action occupies a special place in the system of remedies provided for in the Treaty because, as the Court underlined in the aforementioned *Star Fruit Company* case,¹⁷ it confers a

8. I would point out first of all that the applicants do not appear to be contesting the Commission's decision in so far as it is

16 — In part II.1. of the contested decision the Commission quotes its own letter to the Italian Government of 23 November 1984 in which it 'related' (in the authentic Italian version 'sубordinato') its view to its conclusions with regard to the principle of fixing sugar prices at the national level. The decision regarding the entire pricing system then followed on 18 December 1985 to the effect that the national rules were compatible with Community price rules, whereafter, on 7 May 1986, the Italian Government was informed that proceedings under Article 93(2) were being introduced.

17 — Judgment of 14 February 1989 in Case 247/87, mentioned above in footnote 15, and see the Opinion of Advocate General Lenz, particularly at paragraphs 17 and 18.

18 — This does not mean that it is not open to individuals, such as the applicants, to challenge national provisions before national courts as conflicting with (secondary) Community law. In the examination of questions raised in that way national courts must be guided by the Court's case-law and refer any further questions of interpretation of Community law under the Article 177 procedure (see, for example, the judgment of 9 October 1984 in Joined Cases 91 and 127/83 *Heineken* [1984] ECR 3435, paragraph 10). At the hearing, it was moreover announced by the applicants' representative that a case is pending before the tribunale di Roma between (some of) the applicants and the Italian authority in connection with the claim by the Italian authority for the return of the amounts of aid in implementation of the contested decision of the Commission. The case has been stayed pending the Court's decision in the present case.

19 — I shall therefore express no opinion on the arguments deployed by the applicants, on the basis of the Court's abundant case-law, in order to demonstrate the incompatibility, certainly at wholesale level, of the Italian price rules with Community law, and merely state that no concrete answer has been given by the Commission to the question why the rules in question are, in its view, compatible with the common market.

therein stated that the contested storage aid is an 'aid scheme paid for by the resources of the State'. The arguments relate entirely to the question of the compatibility of this aid scheme with the common market.

who apply for such repayment charges or dues which were not payable because they were incompatible with Community law, does not constitute an aid within the meaning of Article 92 of the EEC Treaty'.

Restitution of damage

9. The applicants' first argument for refuting the Commission's view in this regard is, as has already been indicated, that the contested aid is not unauthorized aid because it does no more than provide (almost complete) restitution to traders holding stocks of sugar on 29 October 1984 for the damage they had sustained as a result of the reduction of maximum prices as from 30 October 1984.

Both judgments concerned claims for the repayment of undue amounts consisting of charges levied in breach of Article 13 of the EEC Treaty. This case concerns aid paid by a Member State as compensation for loss of profit which was the result of a measure forming part of a system of price rules which is claimed to be in conflict with Community law. Quite irrespective of the other differences, the comparison between the cases cited and the present case only holds good if the Italian system of prices in the sugar sector is considered to be incompatible with the Treaty. However, for the reasons mentioned above (at paragraph 7), this point is not at issue in this case.

In reply to this argument the Commission points out that the loss of a profit margin on stocks is not the same as a genuine loss so that it cannot be regarded as 'damage'.

If one considers on its own the argument that the aid scheme is intended to be restitution of damage, it must be stated in any event that such an objective cannot be brought within one of the exceptions mentioned in Article 92(2) and (3) of the Treaty.

10. The distinction between loss of profit and other pecuniary loss does not seem to me to be relevant here. That still does not mean, however, that the applicants' argument based on 'the restitution of damage' can be accepted. At the hearing, the applicants relied on the judgments in the *Denkavit*²⁰ and *Ariete*²¹ cases, in which the Court held that 'the duty of the authorities of a Member State to repay to taxpayers

Prevention of discrimination, distortion of competition and effect on intra-Community trade

11. The applicants' second argument put forward against the Commission's contested decision is that the contested aid was indispensable in order to prevent discrimination prohibited by Community law, namely

20 — Judgment of 27 March 1980 in Case 61/79 [1980] ECR 1205, paragraph 31.

21 — Judgment of 10 July 1980 in Case 811/79 [1980] ECR 2545, paragraph 15.

Article 40(3) of the Treaty, between traders who held, and those who did not hold, sugar in storage on 29 October 1984 (wherever the sugar in storage originated within the Community: in practice, 20% of it came from other Member States). The discrimination lay in the fact that the first group had their profit margin on their sugar stocks reduced to nothing, the second did not.

12. The Commission shifts the discussion of possible discrimination — in my view, rightly²² — to the relevant issue in this case: the compatibility of the contested decision with Community law, and in particular with Article 92 of the Treaty. Consistently with its contested decision, the Commission attaches much importance to the fact that only traders who held sugar in storage *in Italy* were to receive the aid of LIT 37.12 per kg, which placed competitors from other Member States who held no sugar in storage in Italy at a disadvantage. It seems to me that the criteria for the application of Article 92(1), namely the distortion of competition and effects on trade between Member States, two conditions which, as the Court has stressed, are closely interconnected,²³ are concerned here.

13. As regards the first condition for the application of Article 92(1), it is stated in the contested decision that the aid distorts competition inasmuch as 'it favours Italian traders who held stocks of white sugar on

29 October 1984 at the expense of their competitors in the other Member States which trade in sugar and who have sought to market sugar after that date'.²⁴ As far as the second condition is concerned, the scheme 'also affects trade in sugar between Italy and the other Member States from which it imports the product: as from 30 October 1984, economic operators in those States will have found it more difficult to export to Italy because Italian traders will have preferred, as from that date, first to dispose of the stocks of sugar which they held on 29 October 1984 — for which they can receive aid at the rate of LIT 37.12 per kg — before selling imported sugar, which has received no aid from the other Member States'.²⁵ After therefore coming to the conclusion that the Italian aid satisfies the conditions of Article 92(1), the Commission examines and rejects the applicability of the exceptions provided for in Article 92(2) and (3).

14. It is for the Court, even of its own motion, to examine any deficiencies in the statement of reasons which would make the examination by the Court more difficult.²⁶ As far as the first criterion is concerned, namely the likely distortion of competition, the Commission pointed out in the contested decision that traders selling in

24 — Section IV(1), first paragraph of the contested decision.

25 — Section IV(1), fourth paragraph of the contested decision.

26 — As far back as March 1959 in the judgment of 20 March 1959 in Case 18/57 *Nold v High Authority* [1959] ECR 41, the Court held that 'the obligation under Article 15 of the ECSC Treaty on the High Authority to state the reasons for its decisions is not only for the protection of interested parties, but also has as objective to enable the Court to review the decisions fully from the legal point of view as required by the Treaty. As a result the Court can and must of its own motion take exception to any deficiencies in the reasons which would make such review more difficult'. In the context of an action for annulment under Article 173 of the EEC Treaty, the Court has confirmed that principle in connection with Article 190 of the EEC Treaty, which has wording identical to Article 15 of the ECSC Treaty, in its judgment of 7 July 1981 in Case 158/80 *Rewe v Hauptzollamt Kiel* [1981] ECR 1805, paragraphs 18 and 19.

22 — I do not see how discrimination allegedly brought about by the Italian price system which, according to the applicants, is in breach of Community law, in particular Article 40(3) — assuming that this also prohibits discrimination between traders — can be made good by another national measure which, in its turn, creates discrimination prohibited by Community law, in this case Article 92 of the Treaty.

23 — See *Philip Morris v Commission* (cited above at footnote 11), paragraphs 10 and 11 of the judgment.

Italy, with sugar in storage there who received aid,²⁷ were placed at an advantage compared with their competitors from other Member States, for whom the new lower maximum prices were also applicable, whenever they should wish to sell in Italy their previously acquired stores of sugar after 29 October 1984.²⁸ It seems to me that this is a statement of reasons which makes it sufficiently clear that competition was being distorted, or was likely to be distorted, within the meaning of Article 92(1), 'by favouring certain undertakings or the production of certain goods', which the applicants have not challenged with any convincing argument.

15. I come now to the statement of reasons given in the contested decision as regards the criterion that 'trade between Member States' must be affected. These reasons are rather summary; they consist exclusively of the paragraph, cited in paragraph 13 above, wherein it is stated that traders from other Member States will, as from 30 October 1984, have found it more difficult to export to Italy because traders holding sugar in storage in Italy²⁹ will have preferred, as from that date, to sell first from their stocks and only then sugar imported without aid from the other Member States.

It cannot, in my opinion, be concluded from the statement of reasons that the Commission has sufficiently shown that an unfavourable effect on trade between the Member States is to be feared as a result of

the contested aid. It is true that conclusive evidence of an actual reduction or deflection of trade in relation to the situation which would have existed in the absence of the aid is not required — on the assumption that it would be possible to prove. Nevertheless, in its decision the Commission must indicate sufficient factual and legal elements and, in so far as they are not obvious, explain its working assumptions and conclusions, so that the Court may examine whether the requirement that trade is being affected is satisfied.³⁰

In my opinion, that has not been done in the abovementioned passage in the decision. On the contrary, it leaves a large number of questions unanswered. For example, it is stated therein that traders would first wish to sell their stocks and only then to replenish those stocks, *inter alia*, by means of imports.³¹ Is that not a normal practice which might just as well be followed in the absence of the aid? It is evident that the traders and producers concerned in any event would wish to sell accumulated stocks

27 — The contested decision refers to 'Italian' traders. It seems to me more correct to speak of 'traders selling in Italy holding sugar in storage there', because, if my understanding is correct (see paragraphs 6 and 7 of the Italian Decision No 39/1984), the Italian aid scheme, although territorially limited to Italy, is not tied to a nationality condition.

28 — Commission Decision, part IV, second paragraph.

29 — The same terminological observation as made in footnote 27.

30 — In its judgment of 26 November 1975 in Case 73/74 *Papiers peints v Commission* [1975] ECR 1491, paragraphs 29 to 34, the Court held that the Commission had fallen short of its obligation to state its reasons in connection with the effect on intra-Community trade (under the closely related Article 85(1) of the Treaty) in so far as concrete elements were lacking in the Commission's statement of reasons. It is true that, in its judgment in *Philip Morris v Commission* (see *supra*, footnote 11) the Court held that the requirement to give reasons in connection with intra-State trade was satisfied, regard being had to the (impressive) evidence provided by the Commission in connection with the 'distortion of competition' requirement, but in the present case it is not possible, in my opinion, to infer from the arguments relating to this condition any clear conclusion as regards the other requirement, as is apparent from the unanswered questions mentioned further on in the text.

31 — It follows from the second subparagraph of paragraph 7 of Italian Decision No 39/1984 that, in the case of both producers and traders, the sale of stocks is a condition for the payment of the aid. It appears from the third subparagraph of paragraph 7 that producers, and from the third subparagraph of paragraph 6, 'sugar undertakings', which could include traders — this however cannot in my opinion be stated with certainty — are obliged to sell first the sugar from the oldest harvest, 1984-85, and only thereafter the newer sugar.

(even if at a loss), and that they would first sell the oldest stocks. Furthermore, it seems to be the case that the stocks also include quantities of sugar imported earlier (said to amount to 20%) — in any event they are not excluded from the Italian aid scheme³² — so that it is not clear, at any rate it is not explained in the contested decision, to what extent intra-Community trade is supposed to be affected by the aid. Nor, finally, is it made clear to what extent the contested aid may have a detrimental effect on intra-Community trade which does not already exist as a result of the (previous) reduction of maximum prices, which also applies to sugar imported from other Member States.

It seems to me that the Commission, by not giving any kind of answer to these questions in its decision, has fallen short of its obligation to state its reasons, in regard to an essential criterion for the application of Article 92(1) of the Treaty on which the contested decision is based.

16. In these circumstances I need not go further into the reasons given in the decision (in my view, well founded) for the non-applicability of the exceptions provided for in Article 92(2) and (3).

Conclusion

17. On the basis of the foregoing considerations I propose that the Court should declare Commission Decision No 87/533/EEC void on the ground that it does not contain an adequate statement of reasons and that the defendant should be ordered to pay the costs of the proceedings.

³² — Paragraph 6, in particular the second subparagraph *in fine*, and particularly paragraph 7, first subparagraph, under (a), first part of the sentence, expressly refer to imported sugar. In the first subparagraph of paragraph 7, at (b), sugar in general which is free of production tax is referred to. In contradistinction to the possible alternative formulation 'on which production tax has been paid', the expression used does not permit the conclusion that imported sugar (on which no production tax is payable) does not fall under its terms.