

THE COURT

hereby;

1. Dismisses Applications 10/68 and 18/68 as inadmissible;
2. Orders the applicants to pay the costs, including those of the interventions.

Lecourt

Monaco

Pescatore

Donner

Trabucchi

Strauß

Mertens de Wilmars

Delivered in open court in Luxembourg on 10 December 1969.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER
DELIVERED ON 28 OCTOBER 1969¹

*Mr President,
Members of the Court,*

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

The subject of these proceedings is governed by Regulation No 17/64 of the Council of 5 February 1964 (OJ No 34, 27. 2. 1964.), and more precisely, by the second part of that regulation headed 'Guidance Section'. Article 11 of the regulation sets out the *objectives* of the action taken by the 'Guidance Section' which is concerned with the adaptation and improvement of conditions of production in agriculture, the adaptation and improvement of the marketing of

agricultural products and the development of outlets for agricultural products. These objects are defined in Article 12, paragraph (3) of which states that adaptation and improvement of the marketing of agricultural products means the provision of facilities, on the farms themselves, or within a group of farms, or externally, in respect of the following aspects: improvement of storage and preservation, obtaining the best return from agricultural products, improvement of marketing channels and better knowledge of the data relating to price formation on the markets for agricultural products. Projects (even semi-public or private) which have as their object the improvement of agricultural structures within the meaning of Article 11(1) may receive aid from the Fund provided that they satisfy the

1 — Translated from the French.

criteria set out in Article 14. The criterion of paragraph (1)(a) of that article is, however, tempered by a provision which prescribes that for a period of two years from the entry into force of the regulation, projects which concern a given action may receive aid from the Fund even without a programme adopted by the Council covering such action. This period was extended to 31 July 1966 by Regulation No 68/66 and, further, Regulation No 224/66 provides that Article 14(1)(a) of Regulation No 17/64 is not applicable to projects which are the subject of requests for aid from the European Agricultural Guidance and Guarantee Fund, 'Guidance Section', submitted for the years 1966 and 1967. According to the terms of Article 15 of Regulation No 17/64, projects 'which are part of a comprehensive system of measures aimed at encouraging the harmonious development of the overall economy of the region where such projects will be carried out' shall be given priority for receiving aid from the Fund. Applications for aid from the Fund must be submitted to the Commission by the Member State in whose territory the project is to be carried out and must have been approved by that State. For any given project, the subsidies granted by the Fund may not exceed 25% of the investment made. The financial contribution of the party benefiting must not be less than 30%. Besides that, it is also provided that the Member State in whose territory the project is to be carried out shall contribute to the financing of the project. Besides the provisions already quoted I may mention also Regulation No 206/66 of the Council of 7 December 1966 (Official Journal of 10 December 1966, No 229) which is also applicable in this case and provides for special measures concerning the contribution of the EAGGF 'to the repair of damage caused by the catastrophic floods in certain areas of Italy during the autumn of 1966'. Under this regulation certain

sums to be obtained from the resources of the Guidance Section for the years 1966 and 1967 must be used to finance the measures enumerated in Article 1(2) of the regulation. According to that provision, the subsidies are to be used to contribute to the reconstruction and improvement of conditions of production in agriculture or in agricultural undertakings as well as to installations for marketing or processing agricultural products. Article 2 provides that certain provisions of Regulation No 17/64 are not applicable to the subsidies paid under Article 1(2). Furthermore, Article 3 lays down special conditions for the grant of subsidies. It is stated, *inter alia*, that the subsidies granted by the Fund may not exceed 45% of the investment to be made. Here too, there is provision as to the remainder, for a financial contribution by the Italian Republic as well as a reduced contribution by the parties benefiting. Lastly, Article 4 also contains certain special rules of procedure.

It is on the basis of this set of provisions that Italy has approved and submitted to the Commission the requests for aid in favour of the Cooperativa Produttori Bieticoli Co.Pro.B., which works a sugar refinery at Minerbio, of the Società Cooperativa Produttori Agricole Ostelato, working a sugar refinery at Ostelato, as well as the Zuccherificio Castiglione, a limited liability company which owns a sugar refinery at Castiglione Fiorentino. (For the sake of simplicity I will speak henceforth of the Minerbio, Ostelato and Castiglione cases).

On 27 July 1967 the Commission adopted, on the basis of Regulation No 17/64 of the Council, a decision granting a subsidy of 480 000 units of account to the Minerbio cooperative in order to help that undertaking to increase its production capacity from 2 000 to 4 000 metric tons (daily capacity for processing sugar-beet). By another decision of 2 October 1967 the Commission granted, on the basis of Regulation No 206/66 of the Council, a subsidy of 767 000

units of account to the Ostellato co-operative to help it to increase the capacity of its sugar refinery from 2 200 to 3 600 and even to 4 000 metric tons. Lastly, on 7 March 1968, the Commission adopted a decision, also based upon Regulation No 17/64, granting a subsidy of 300 000 units of account to the Zuccherificio Castiglione company with a view to assisting it to increase the daily processing capacity of its sugar refinery from 2 000 to 3 000 metric tons. That decision provides further that the payment of the subsidy is dependent upon the willingness of the Italian Government to grant a *basic quota* to the recipient undertaking corresponding to the increase in capacity envisaged. The concept which I have just quoted and which applies to the organization of the market in sugar leads me now to say a few words on the structure of that organization. The first measures in this sphere appeared with the adoption of Regulation No 44/67 of 21 February 1967 which, it is true, took certain measures only for the 1967/1968 marketing year. At present the matter is governed by Regulation No 1009/67 of 18 December 1967, which established a common organization of the market in sugar with effect from 1 July 1968. The principal characteristic of this organization is a set of rules which is expected to guarantee to a certain level of prices with the assistance of a system of levies, refunds and interventions applied to the internal market. The price guarantee is not however unlimited; it applies within the framework of basic quotas fixed for each undertaking producing sugar on the basis of the average annual production of that undertaking during the marketing years 1961/1962 to 1965/1966 by the Member State in whose territory it is situated in accordance with the basic quantity allocated to that State. Any quantity of sugar produced which exceeds the basic quota without exceeding the maximum quota, which is also fixed by each appropriate Member State, bene-

fits only from a limited price guarantee; a levy on production may be imposed when the amount produced in the Community exceeds the guaranteed annual quantity and it thus becomes necessary to make exports covered by repayments. Independently of that, it is still important to know that the basic quantity granted to each Member State must not be distributed entirely in the form of basic quotas between existing undertakings. Regulation No 1027/67 authorizes the Member States, in fact, to create a margin not exceeding a total of 10% of the basic quantities granted for the 1968/1969 marketing year. That reserve may also be increased if necessary during the following years by using a certain part of the quotas granted for the 1968/1969 marketing year. Each Member State may use the margin at its discretion according to its evaluation which Regulation No 44/67 already provided concerning the distribution of the whole production quota of each Member State. In this case the decisions adopted by the Commission, to return to the case which concerns us, were notified to the Italian Government and to the three recipient undertakings. Further, in each case the Commission published in the Official Journal a communication concerning the grant of subsidies: in the Official Journal of 4 August 1967 for Minerbio, of 7 October 1967 for Ostellato and of 15 March 1968 for Castiglione. The recipient undertakings immediately commenced the work of enlarging their factories. By the Decree of 26 February 1968 the Italian Government granted them a production quota as provided for in Regulation No 1009/67. That quota amounts to a total of 17 000 metric tons. When other undertakings of the Italian sugar industry (namely 1. the Società Eridania Zuccherifici Nationali, Genoa, 2. the Società Italiana per l'Industria degli Zuccheri, Genoa, 3. the Società Distilleria di Cavarazere, Padua, 4. the Società Romana Zuccheri, Genoa, 5. the Società Zuccherificio del Volano, Genoa)

as well as the Associazione Nazionale fra gli Industriali dello Zucchero dell' Alcool e del Lievito, Genoa, obtained information concerning these measures they became convinced that the decisions of the Commission distorted the conditions of competition and thus infringed the principles of the common agricultural policy for a number of reasons, not least of which was the fact that the Italian Government had refused to give approval to a request for the grant of a subsidy to the factory at Porto Tolle belonging to the second-named undertaking above and which had been devastated by the catastrophic floods of the autumn of 1966. On 10 May 1968, the undertakings already mentioned, as well as their trade association, therefore made a collective application to the Court. For a number of reasons to which I shall return, they asked you to annul the decisions of the Commission of 27 July 1967, of 2 October 1967 and of 7 March 1968.

Further, on 13 May 1968 they also sent a complaint to the Commission asking *by way of an extra-judicial request* for the annulment or the withdrawal of the contested measures. On receiving no reply, they made a second application based on Article 175 of the EEC Treaty asking you to annul the implied decision of rejection which the Commission is considered to have taken by not defining its position on the complaint during a period of two months as from the date of the lodging of the complaint.

In the two cases, which were joined by an order of the Court of 25 October 1968, the Commission asks you to dismiss the applications as inadmissible, or in any event to hold them to be unfounded.

Let us take note also that during the proceedings the undertakings benefiting from the contested decisions and the Italian Government asked to be allowed to intervene in the proceedings. By orders of 25 November 1968, 15 January 1969 and 19 March 1969, the Court

acceded to these requests. In their written observations the interveners, as well as the Commission which they support, ask you to dismiss the applications, in so far as the intervening companies are concerned, to the extent to which the decision favouring each of these undertakings is in dispute.

Lastly it is interesting also to know that from the national point of view the quotas of the applicant undertakings were reduced to a certain extent by the above-mentioned Decree, adopted by the Government on 26 February 1968. An application was made in respect of this to the Italian Consiglio di Stato which has however not yet given judgment.

Legal consideration

When we go on to the examination of the present case we see that the Commission and the intervening undertakings have raised objections which lead me to consider first certain problems of admissibility (which should even have been considered by the Court of its own motion).

A — The admissibility of the applications

I — Case 10/68

Case 10/68 here poses three problems which I will consider successively.

1. Compliance with the period of time for commencing proceedings

As you know, Case 10/68 is an application for annulment which, according to Article 173 of the Treaty and in the interest of judicial certainty, must be brought within a period of two months. Article 81(2) of the Rules of Procedure extends the time-limits on account of distance, which in accordance with Annex II to those Rules is ten days for parties habitually resident in Italy. Going backwards in time as from the

day when the application arrived at the Court Registry (10 May 1968), I am of the opinion therefore that the time-limit for making an application was adhered to only if the period commenced to run at the earliest on 1 March 1968. In respect of the Castiglione case clearly there is no problem from the point of view of time-limits. In fact the Commission adopted its decision on 7 March 1968 and caused a communication on the subject to appear in the Official Journal of 15 March 1968. Consequently even taking these dates as the reference point rather than that on which the applicants knew of the complete contents of the decision (on 27 March, according to their statements), there is no doubt that the time-limit for making an application was observed.

The Minerbio and Ostellato cases are, however, more doubtful. In fact, the Commission adopted the decisions in question on 27 July 1967; the communications with regard to them appeared in the Official Journals of 4 August 1967 and 7 October 1967. If these dates were decisive, it would be clear that the applications were not made within the prescribed periods, and that would be so even if they had not commenced to run until the fifteenth day after the appearance of the Official Journal, in accordance with Article 81(1) of the Rules of Procedure of the Court. The Commission considers apparently that this is the case. According to it, the publications in the Official Journal are sufficient; they amount to publication within the meaning of Article 173 of the Treaty because one may deduce from it that the Commission granted subsidies out of the Guidance Fund with a view to the enlargement of the Minerbio sugar refinery and of the Ostellato factory. The Commission considers that these short statements should already have put the applicants in a position to formulate at least their grounds of complaint, by maintaining that the subsidies of the Guidance Fund cannot go in any

case to the *processing* industry. Further they would have been authorized without any doubt to develop their arguments during the proceedings in accordance with Article 42(2) of the Rules of Procedure, that is to say after production of the contested decisions which in such a case in default of their having been communicated to the applicants, by way of exception from Article 38 of the Rules of Procedure, will be required not from the applicants but from the Commission. It can of course hardly be asserted that such a state of affairs would be satisfactory. In reality it is not a matter simply of the possibility of formulating grounds of complaint; an undertaking concerned must rather be put in a position to judge whether it really has an interest in commencing legal proceedings. For that, it is certainly necessary to know the complete terms of the decisions, for example the extent of the subsidies granted and consequently their effect upon the economic sector where the activities of the applicants are carried on. As the communications appearing in the Official Journal did not allow such an evaluation, I think that the periods for making applications could not begin to run as from such publications. If one uses as a criterion *knowledge* of the terms of the decisions of the Commission, a factor to which Article 173 of the Treaty gives as much importance as the publication and notification of the contested measure, it appears to me to be interesting that applicant No 2 communicated at the end of February 1968 with the President of the Istituto Nazionale di Economia Saccarifera asking him to give it precise information and to obtain for it the text of the contested decisions, which appears from a statement made by the applicants on 31 July 1969 at the request of the Court. In reply to that request, applicant No 1 received on 14 March 1968 a memorandum concerning the legal situation and on 20 March 1968 copies of the decisions in question which

were immediately brought to the notice of the other applicants. If we were to accept that these dates have a part to play in this case, it would be necessary also to accept that the application was made within the prescribed periods in the Minerbio and Ostellato cases, since these dates are well within the time-limit which I have obtained by calculating backwards, taking as the point of departure the date on which the application arrived at the Court Registry. It appears to me doubtful, however, whether we may proceed in this manner. To accept such an argument would be equivalent in fact to giving too great an importance to the date on which the applicant took the initiative of asking for the documents in which they were interested to be sent to them, without even asking oneself the question whether they should not have acted in this way at an earlier date. In fact, such an attitude would not sufficiently take into account the requirements of *legal certainty* and more particularly of the interests of the parties benefiting under the contested decisions, who had commenced the work of enlarging their factories after the grant of the subsidies and who must be certain by a given time that the measures of the Commission will not be withdrawn. Consequently, if one must not go so far as considering that the communications published in the Official Journal of the Communities constituted a sufficient reason for making an application against the decisions in question, it is all the less proper to regard them as having essential importance in respect of the initiative of the applicants. On this subject I can refer to the case-law of the French Conseil d'État which has on several occasions stated that knowledge of the existence of a decision constitutes a sufficient reason for obtaining the text of it (quotations to this effect appear in Auby and Drago 'Traité du Contentieux administratif' 1962, vol. 2, p. 200). Applied to our present case one arrives at the following result. We can accept

that as undertakings of the sugar industry interested in the common market in sugar and in all questions connected with it, the applicants are constantly and quickly informed of publications in the Official Journal of the European Communities. If they thus have knowledge of measures the contents of which *concern* them, but of which they could not hope to be informed, it falls to them, in order to safeguard their rights, to make the effort to obtain knowledge in good time of the terms of those measures. In such a case the simplest way is to make a direct approach to the Commission, which it must be supposed will reply to justified requests for information. The method chosen by the applicants, the help of a national institute, may however also appear proper. Nevertheless, in the present case this process ended by the applicants having in their hands the contested decisions four weeks after having made their approach. If we consider now that the Official Journals of August and October 1967 had already mentioned the existence of the contested measures, it is permissible to accept that the applicants had since 1967 had the opportunity of obtaining information concerning the complete text of those measures. The period laid down in Article 173 must consequently be regarded as having begun to run as from a corresponding date. In my opinion, we do not have to seek a precise date, because in any case it is necessary to infer that the application of 10 May 1968 was made outside any reasonably assessable time-limit. As the applicants have provided no explanation concerning the lateness of their action (there is no doubt in fact that the burden of proof here is on them), it only remains for you to dismiss the applications as inadmissible to the extent to which they concern the Minerbio and Ostellato decisions, as the period laid down in Article 73 of the Treaty had already expired at the time when they were made.

2. Capacity to act

My examination will henceforth be limited to the Castiglione case. Without leaving the sphere of admissibility, I shall keep to an examination of the principal objections raised by the Commission and the interveners concerning the conditions laid down by the second paragraph of Article 173 of the Treaty according to which 'Any natural or legal person may, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'. There is no doubt that we are dealing with a decision within the meaning of that provision and of the fourth paragraph of Article 189; what is disputed is only the question whether the applicants stand in such a relationship to the measure so described as to make it possible for them to institute proceedings against that measure. I shall thus once more deal with a much disputed topic which we have already considered on several occasions from the point of view of the constitutional law of the Member States but concerning which this time I have to consider certain aspects hitherto ignored by case-law.

I will not pause for long on the condition defined by the words: decisions 'in the form of a regulation or a decision addressed to another person'. That requirement is set out in a phrase which also mentions regulations; it is generally interpreted in respect of the latter as applying only to *apparent* regulations. When one concludes from this that it is necessary to do similar research to know to whom a decision is addressed, and that it is therefore necessary to prove that the applicant is the real addressee of the decision, which in fact is intended to have effect in respect of him, I think I should say that such an interpretation appears to me to be unten-

able. It might be justifiable when it is a matter of the *legal nature* of a measure, because it often happens that this point is not completely clear. In the same way, it is certain that that phrase mentioned was chosen for the regulations in order to exclude any controversy of the type to which the second paragraph of Article 33 of the ECSC Treaty gave rise and therefore to establish clearly that Article 173 of the EEC Treaty does not authorize individuals to institute proceedings except against genuine *decisions*. It cannot, however, be imagined that there should be any doubt concerning the identity of the addressee of an individual measure. The unfortunate drafting of the second paragraph of Article 173 cannot consequently lead to an interpretation entailing an unconscionable restriction on the right of appeal, with the consequence that no appeal would be possible against measures creating a subjective privileged situation (for example measures within the framework of cartel law) and consequently measures the addressees of which are known without any possible doubt but which may nevertheless have adverse effects on third parties. The fact that the Community legislature cannot have intended this appears in fact from one of the arguments relied upon by the applicants. According to them, the only condition laid down for proceedings by the addressee of the contested measure is that he should put forward a complaint based on an interference with his legally protected rights. On the other hand, the other parties concerned, to whom Article 173 refers, must satisfy a further condition; the measure must be of direct and individual concern to them. That in fact is explained only if he need not show that in reality *it is he* who is the addressee of the measure. Consequently it is clear to me that Article 173 applies also to the so-called 'Janus-faced' administrative measures and that in such a case it gives a right to take proceedings not only to those

whom the measure principally affects but also to third parties whom it affects incidentally. It is sufficient thus to consider whether the applicants are *directly* and *individually* concerned by the contested decision.

In order to do this it is essential to establish how the applicants show that they are concerned. They maintain that the conditions of competition have been distorted in a manner contrary to the principles of the Treaty in that the Commission put one of their competitors in a position to increase its production capacity with the assistance of subsidies from EAGGF, being necessarily on a par with subsidies from the State. That intervention also has an effect upon the distribution of quotas within the framework of the common organization of the market in sugar, that is to say, on the calculation of the basic quotas benefiting from an absolute price guarantee. The Castiglioni decision has exactly this effect; but apart from that, the increase in capacity encouraged by the Commission's measure also makes disposal of production *beyond* the quotas more difficult.

In my opinion one cannot dispute that the applicants have thus proved that they have a certain interest in taking proceedings (leaving aside for the moment other requirements). We can return at least on this point to the case-law concerning the ECSC Treaty. It shows in fact that measures by public organizations in favour of certain undertakings, which have an effect on the conditions of competition, may be disputed by the undertakings which suffer damage from them. I would recall in this respect the case concerning the approval of special tariff measures on the German railways which was brought by French undertakings (Case 24/58, Rec. 1960, p. 573); I would also recall the 'Schichtprämien' case (Case 30/59, Rec. 1961, p. 1) in which a Netherlands undertaking made an application against the grant of a financial subsidy to the underground workers of the *German coal mines*. I

would also mention in the sphere of national case-law an important decision of the Bundesverwaltungsgericht of 30 August 1968 (NJW 69, p. 522) which also held an application made against subsidies granted to competitors to be admissible. In those cases, as in the present case, one may thus accept that there has been interference with legally protected interests. That is sufficient; it is not necessary, on the other hand, that there should have been interference with subjective rights. Furthermore, it is obvious that there is no longer any need to consider on the level of admissibility whether the principles relied upon by the applicants have actually been infringed. Such an examination belongs to the substance of the case, whereas to prove the capacity to take action it is sufficient to *allege* in a decisive manner that there has been an interference with legally protected interests.

In the eyes of the EEC Treaty, however, what matters is that the applicants must be concerned *in a particular manner*, a fact which however, as I have already emphasized on several occasions, prevents the case-law of the ECSC Treaty from being followed closely or the drawing of inspiration in a decisive manner from the criteria of national law. The first restrictive criterion of the EEC Treaty is defined by the words 'individual... concern'. The Commission and the interveners dispute that the applicants fulfil that condition and they rely on the famous formula of the *Plaumann* judgment. They maintain that the disputed decision concerns a very great number of persons whom it is not possible to specify at present in view of its subsequent effects. To the other competitors of the recipient undertaking (all the producers of beet sugar) it is necessary also to add undertakings whose requests for subsidies have been refused, all those which collaborate in the increase of the productive capacity of the recipient firms, as well as the sugar-beet

growers benefiting from the increase in capacity.

It appears to me, nevertheless, that this method of considering matters may be criticized in many respects. It omits first of all to draw the inevitable distinction between persons affected by the contested decision and it thus has the effect of artificially increasing the number of persons concerned. As the applicants show, it is more appropriate to establish which persons suffer *damage* from the disputed decision — to specify which persons are wronged. That is what the Court clearly asserted in Joined Cases 106 and 107/63 [1965] E.C.R. 405 where it contented itself by considering which persons suffered damage by the protective measure then in question. If the Court had also considered the favourable effects of the measure examined, it would certainly not have accepted that the number of persons concerned was *certain*. Among the persons mentioned by the Commission it is necessary consequently to eliminate all those who obtained a benefit from the contested decision; the undertakings participating in the enlargement of the factory and the sugar-beet growers benefiting from that increase in capacity.

In the same way, I am convinced that it is mistaken also to take into consideration the future effect of a project. It is the date of the entry into force of the decision which must be decisive; otherwise it would never be possible to claim to be concerned individually by a measure having a permanent effect, even if it is clearly individual, a result which would hardly be compatible with the requirement contained in the *Plaumann* judgment of an *extensive* interpretation of Article 173. This method of proceeding, which I believe to be proper, is justified furthermore by the mere fact that a clear difference already exists between the sugar refineries concerned at present and those which may be added to them in the future. As the applicants emphasize, the latter lack a present in-

terest, without even taking into account the fact that it is highly improbable that a great number of undertakings will be established in this sector, in view of the situation on the sugar market. If, however, one keeps to undertakings concerned *at present*, which may be regarded as competitors of the recipient undertaking and, consequently, as having suffered damage, it cannot be denied that the contested decision affects in a special way precisely the applicant undertakings which carry on a part of their activities in the same province as the recipient undertaking, and perhaps also some others which are part of the group of 25 Italian refineries. In order to give a logical meaning to the wording of the *Plaumann* judgment they are specified in a manner similar to that of the addressees of the decision because they are in a factual situation in which 'they are differentiated from all other persons'; they are therefore entitled to make an application at least as regards the aspect now being considered.

It remains only for me to consider consequently whether these undertakings are *directly* concerned. The Commission excludes that possibility for two reasons: an effective change in the conditions of competition depends on the realization of the project by the recipient undertaking and, looking at another facet, there must be an intervention by the Italian Government, in this case the grant of a production quota corresponding to the implications of the project.

The relevance of these objections is only apparent. As, in fact, only the legal effects of a decision of the Community are decisive, it is necessary for us first of all to exclude from our examination the private acts of the recipient upon which the realization of the project and, consequently, its actual effects depend. In fact a Community measure can have only an *indirect* effect when it cannot take effect without the intervention of a measure by a public authority and more specifically by a discretionary measure.

When the Commission then states that this measure by the public authority consists in the granting of a quota by the Italian State it does not convince me either. Certainly I admit that the Member States here have a certain discretion and it cannot be denied also that the Castiglione decision binds the payment of the subsidy to the grant of a production quota. That consideration must not however lead us to an examination of pure legal technique. It appears to me that you have already rejected this view in Joined Cases 106 and 107 ([1965] E.C.R. 405). According to that judgment it is necessary rather to consider in depth all the facts, which would put the discretionary power of the Member States in its proper perspective and, according to the circumstances, lead to the conclusion that in fact the Community measure puts the final touch to a procedure in which there are also elements of State collaboration. That means in this instance that if, after considering requests for subsidies from the EAGGF closely, the Italian Government gives its approval to certain of them, sends them to the Commission and consequently involves itself on the financial level it is certain that concerning the grant of quotas it will draw the necessary inferences. That is how the Minerbio and Ostellato decisions which *assume* merely that it is *accepted* that the Italian Government will grant the production quotas which its approach implies; must be understood. Although there thus appear to be a break in the chain of causation between the Community measure and its legal effects in respect of the powers of the Member States concerning the granting of quotas, that does not exclude it in so far as the applicants are directly concerned, provided that one applies the method which I have just described and which alone is reasonable in the present case; an examination in depth of the effects of the decision.

Summing up, I believe that the action of the applicants in the Castiglione case

is justified without any doubt in respect of the conditions of the second paragraph of Article 173.

3. The capacity of the Associazione Nazionale fra gli Industriali dello Zucchero etc.

There is another problem of admissibility which has not been examined during the proceedings but which the Court might raise of its own motion. It is the problem caused by the fact that the Associazione Nazionale fra gli Industriali dello Zucchero clearly amounts to a trade association. Although the ECSC Treaty expressly grants these groups the right to institute proceedings before the Court, it is not the same in the EEC Treaty. That Treaty considers them only within the framework of the general concept of the 'legal person'. It follows without doubt that they must furnish proof that they have a *personal* interest in acting. You will remember how the other applicants justified their action: they have relied essentially upon a threat to competition. As the Associazione clearly does not manage a sugar refinery, being (according to its rules) entrusted in a general way with the defence of the interests of its members (which also include undertakings belonging to other economic sectors) it cannot rely upon such an argument. It cannot thus have the capacity to bring proceedings unless our procedure allows the defence of the interests of third parties. The case-law of the Bundesverfassungsgericht rejects that possibility in respect of constitutional appeals (see judgment of 22 May 1963, NJW 63, p. 1243). As it is admitted in a general manner that the EEC Treaty does not grant individuals the same capacity to act as national law, it seems in fact that it is necessary to consider whether the Associazione has that capacity. I leave it to your judgment to decide that question. Should you share the doubts which I have just formulated, the application by that body ought to be entirely dismissed as inadmissible

without taking into account the objections which I formulated at the beginning of this opinion concerning observance of time-limits.

II — Case 18/68

As you know, the applicants have made a second application based upon Article 175 of the EEC Treaty with a view to obtaining in any event the revocation of the contested decisions. The admissibility of this application also calls for certain remarks.

Adherence to time-limits for making an application presents no problem here. This follows merely from the closeness of the dates. On 13 May 1968 the applicants asked the Commission to withdraw the contested decisions. On receiving no reply, they made an application to the Court on 1 August 1968. There is thus no doubt that their application was made within the period laid down by the Treaty.

As to the capacity of the Associazione to act, it is necessary here to come to the same conclusion as that made within the framework of Article 173. Consequently, if your Court should accept the objections which I have already been led to formulate previously, it will also dismiss the application based upon failure to act made by the Associazione.

The conclusion at which I have arrived on the subject of the time-limit for instituting proceedings under Article 173 must apply equally to the action for a declaration submitted for the Court's consideration on the basis of Article 175. In fact the applicant who allows the period prescribed for making an application against a measure to expire, cannot ask for annulment within the framework of the procedure of Article 175, unless he can prove that new facts have come to light. There cannot, however, be any question of it in the present case, having regard to the fact that the grounds of Application 18/68 coincide almost exactly with those of Application 10/68. From another point of view, to

the extent to which the applicants rely in addition on considerations of appropriateness which might have led the Commission to withdraw the contested measures, it must be objected that an application under Article 175 cannot be based on such factors.

What is important for such an application is that by its failure to act a Community institution has infringed the Treaty. It follows from this that such institution must have had an *obligation* to act, a mere possibility within the framework of a discretion not being sufficient in the present case. Application 18/68 must therefore be rejected in any case as inadmissible to the extent to which it concerns the Minerbio and Ostellato decisions.

Finally the same goes for the Castiglion case in respect of which I would like to accept the admissibility of the application for annulment. In that case also, arguments of appropriateness of which I have just spoken certainly cannot lead to the admissibility of a new application based upon failure to act.

In the absence of other problems relating to admissibility, or at least relating to certain *submissions*, I can now pass to an examination of the substance of the case. Having regard to the conclusions to which I have come, I will however limit my examination to the Castiglion case.

B — On the substance of the case

The applicants rely on a whole series of arguments in support of their application. Some are of a purely legal nature, whilst others deal with the factual situation in which the contested decision must produce its effects. As the parties are in several respects opposed on this latter point it appears to me to be proper to consider first of all the legal arguments.

Before commencing this examination let me make once more a brief remark con-

cerning an objection raised by the Italian Government and the Commission. According to them, the applicants have available only two submissions, misuse of powers and infringement of essential procedural requirements, because the disputed measure involves a wide discretion for the Commission, the details of which are outside judicial review. However, I cannot entirely follow this reasoning. In fact the Treaty does not provide for any such restriction particularly with regard to the complaints of infringement of the Treaty, of infringement of subordinate Community legislation or of infringement of the general principles of law. These submissions are in no way excluded in consequence. At most, review by the Court must be circumspect when the exercise of sovereign power in respect of economic policy is questioned. As to where or to what extent that is the case I shall indicate during the course of my examination.

I — *Legal Arguments*

1. Can the Guidance Section of the EAGGF grant subsidies to the *processing* industry?

The applicants base their first complaint on the fields of activity of the Guidance Section of the EAGGF as it is defined by Article 11 of Regulation No 17/64, according to which action taken by the Guidance Section of the Fund is to relate, in respect of the present case, to 'the adaptation and improvement of the marketing of agricultural products'. Article 12(3) defines what must be understood by that in the following terms: 'adaptation and improvement of the marketing of agricultural products' means the provision of facilities, on the farms themselves, or within a group of farms, or externally, in respect of the following aspects: (a) improvement of storage and preservation; (b) obtaining the best return from agricultural products; (c) improvement of marketing

channels; etc.'. The applicants consider that the concept of 'obtaining the best return from agricultural products' must be interpreted restrictively, consequently by excluding industrial processing. They are at the very most inclined to include in it first-stage processing plants which are used traditionally within the framework of one or several agricultural undertakings (oil or wine presses) or even processing plants without which the agricultural product would be unable to be sold or would not find adequate markets.

Like the Commission I do not see that such an interpretation is mandatory. In fact the same expression 'obtaining the best return' already includes in a general manner processing and improvement activities and it appears that considered in this way the distinction made by the applicants is purely artificial. Apart from that, one must not lose sight of the fact that in the present context the improvement of agricultural structures represents the central concept. Action taken by the Guidance Section is intended precisely to achieve that objective. It may be achieved in the first place by seeking directly to alter the conditions of national production. For me it is clear however that agricultural structures may also be altered in an *indirect* manner by implementing measures beneficial for agriculture within the processing sector. Sugar-beet growing is a living example of this. Sugar-beet is not consumed as such; it is of no interest on the market except in the form of the finished product which results from processing. If one asks now how the increase in capacity or the modernization of sugar-beet processing plants which are favourably situated in relation to the means of communication affect agriculture, the reply is quite clear. It may encourage agricultural producer to choose products giving greater profit in relation to the climate and the character of the soil. This change or this increase in production may also have favourable effects

on the improvement of soil as well as for other production sectors such as stock farming, for example. The modernization and rationalization of processing undertakings allows, in addition, the best return from agricultural products to be obtained quickly, thus avoiding the depreciation of the products both in quality and in quantity, which moreover allows the rapid re-use of the areas made available. When processing is rationalized, production costs remain low, which allows payment to basic producers of prices above the minima guaranteed to the sugar-beet growers within the framework of the common organization of the market in sugar. Low transport costs have similar effects. From another viewpoint, when processing undertakings are favourably situated in relation to the means of communication, the waste may be used at low prices on farms. All that contributes no doubt not only to the improvement of agricultural structures properly so-called but also to the increase in the prosperity of farms which also is important. It cannot be denied, therefore, that the aid granted to processing plants of the type which concerns us here is of such a character as to contribute to the attainment of the objectives laid down by Regulation No 17/64.

That essential conclusion to which my interpretation has led me cannot be shaken, in my view, by other arguments. In particular, it is of no use to compare the wording of Regulation No 17/64 with that of Regulation No 206/66. As you know, the applicants have made this comparison and emphasize that Regulation No 206/66 refers *expressly* to the processing plants as recipients of subsidies. As a similar reference fails to appear in Regulation No 17/64, they deduce from this that the provisions of that regulation must be interpreted restrictively. I have already had occasion to state several times what should be thought in principle of such terminological arguments within the

sphere of Community law and, more particularly, of subordinate Community legislation. Their value is very small, because the wording of Community provisions is not prepared with as much care as that taken over the drafting of national codes. Further, it is necessary in the present case to bear in mind that Regulation No 206/66 was adopted in very special circumstances, that a great lapse of time separates it from Regulation No 17/64 and that lastly it was prepared in haste and without the assistance of all the parties which contributed to the drafting of Regulation No 17/64. That is also the reason for other terminological differences as compared with Regulation No 17/64, to which the Commission has drawn your attention. They do not, however, allow decisive conclusions to be drawn in favour of the applicants' arguments.

The same remarks apply to the arguments based on the origin of Regulation No 17/64. The parties have told us that the proposal of the Commission gave a certain number of examples of 'obtaining the best return from agricultural products', drawn from the processing industry, including the sugar refineries. The Council did not keep these examples in the final wording of the regulation and the applicants deduce from this that it was not the intention of the Council to include the processing industry within the field of application of Article 12. Together with the Commission I consider, however, that this argument is not convincing either. Much more relevant, on the contrary, is the Commission's argument that by eliminating examples which are found only in Article 12(3) the Council wished only to shorten the wording and to make it more homogeneous. That is confirmed in particular by the fact that it kept the basic concept, the concept of 'obtaining the best return from agricultural products' from which the examples in question were drawn. But it is on the basis of this concept as well

as that of the purpose and objective envisaged by Regulation No 17/64 that it must be interpreted.

The manner in which the competent authorities have applied the wording of Regulation No 17/64 until now gives me one more indication that my interpretation is correct. The Commission has told us that since the beginning, that is, since 1964, the Guidance Section has granted numerous and considerable subsidies to industrial processing plants such as slaughterhouses, creameries or packing houses. The grant of these subsidies was made (as also in the present case) with the unanimous agreement of the Committee on Agricultural Structures and of the Fund Committee, that is to say, with the agreement of the bodies on which representatives of the Member States sit and which, like the Committee on Agricultural Structures, took part in the preparation of Regulation No 17/64. Without any doubt it is therefore conceivable that this agreement would have been withheld if the authors of Regulation No 17/64 had had any other idea in mind.

It still remains to me to consider at the most whether Regulation No 17/64—interpreted in the manner advocated by the Commission—is in accordance with the principles of the Treaty, on which its validity ultimately depends. The applicants dispute it and attempt thus to make their first complaint succeed by relying upon Article 184 of the Treaty. They cannot succeed here either. The Treaty contains particular rules concerning trade and the processing of agricultural products which are set out in Annex II to the Treaty and also for a series of processed products including sugar. As a final natural product of an integral cycle of production, sugar is at the centre of the common organization of the markets established by Regulation No 1009/67. Article 40(4) of the Treaty provides that in order to enable the common organizations for agricultural products to attain their objectives

a Guidance Fund may be set up. Reference is also made in respect of the substance of the case to the aims of Article 39 and particularly to increasing agricultural productivity. From these provisions as a whole and from what I have said on the subject of the concept of increased productivity, it appears therefore that the rules of the Treaty do not prevent the use of the finances of the Guidance Section for subsidizing processing plants producing agricultural products within the meaning of Annex II. Thus, even interpreted widely, Regulation No 17/64 conforms to the rules of the Treaty.

In the present context I must also consider a complaint of a formal character; it is whether the reasons set out in the decision suffice to show that the subsidies in question have a favourable effect upon agriculture in the area concerned. In my opinion, this is clearly the case, since the decision speaks of the advantages of rapid treatment of sugar-beet, of guaranteed outlets for sugar-beet production and of the favourable effects resulting from the return of waste to the sugar-beet growers who use it for raising cattle. Thus it certainly fulfils the conditions which the Treaty lays down in respect of the reasoning of the decisions of the Commission.

It is thus open to me to assert in summing up that neither the considerations of substance nor the considerations of form of the first submission are convincing.

2. Is the contested decision contrary to the principles of the common agricultural policy in sugar?

Article 14(1)(b) of Regulation No 17/64 provides that the grant of subsidies from the EAGGF must meet the requirements of the common agricultural policy. According to the applicants, the common agricultural policy in the sugar sector of the market is characterized by the existence of surpluses. That is why the common organization of the market

provides for restrictions on production. It would be contrary to this objective to grant subsidies for the production of sugar for the purpose of enlarging producing plants and thus increasing the production of sugar.

Certainly one cannot deny that this is an argument of great weight. Let us consider however whether it is entirely relevant. First of all it cannot be disputed that sugar production is in surplus both on the world market and in the Common Market. It is without doubt from this point of view that it is necessary to consider the establishment of national production quotas which must, according to the common organization of the market in sugar, lead to a limitation in production from now until 1975. It is important however not to forget that a large increase in sugar production is provided for in Italy whose production suffers from numerous disadvantages both of a structural and climatic nature. The basic quota (for white sugar) granted to that country was fixed in fact at 1 230 000 metric tons, whilst during the marketing years 1961/1962 to 1965/1966 that production amounted in average to only 947 000 metric tons. We can therefore conclude from this that in Italy the increase in sugar-beet growing, which is in fact considerable, and the increase in processing capacity are not *a priori* in contradiction with the principle of the common agricultural policy. From another viewpoint it is necessary to consider that the common agricultural policy does not recognize the principle according to which no change can be made to the *status quo* of conditions of production. The implementation of such a principle would be carried out in fact in defiance of the requirements of the structural policy which, provisionally, is still national. There was already a question of structural policy in the regulation of the Council of 4 December 1962. For its part Regulation No 1009/67 points out the neces-

sity for regional specialization (which recalls the provisions of Article 39(2)(a) of the Treaty, where it is laid down that account is to be taken of 'structural and natural disparities' between the various agricultural regions). It is particularly in view of this objective that the common organization of the market in sugar created the system of margins, of which I have already spoken, by giving the Member States the opportunity to apportion a part of the national quota at their discretion. Lastly, one must not lose sight of the fact that the common agricultural policy in the market in sugar is intended to create rational conditions of production from now until the end of the special transitional period (1975). To this the general aids for adaptation, which according to the wording of Regulation No 1009/67 the Italian Republic may grant to its sugar industry as well as to its sugar-beet producers, must contribute. But apart from that, *specific* measures of encouragement in favour of certain undertakings, and consequently in favour of certain regions, are clearly not excluded. For even if the total capacity of the existing processing plants were sufficient, their dimensions, their machinery and their geographical dispersal may in fact be such that they do not correspond to the requirements of an adequate national structural policy. Consequently I consider that the applicants have not furnished proof of an infringement of the principles of the common agricultural policy and because of this the second submission must also be rejected.

3. Infringement of Article 15 of Regulation No 17/64

In a third submission the applicants complain that the Commission did not observe Article 15 of Regulation No 17/64. I have already emphasized in my introduction that the application of the rules set out in Article 14 of Regulation No 17/64, according to

which a project benefiting from a grant of aid from the Fund must 'come within the framework of a Community Programme laid down in accordance with Article 16', is *provisionally* suspended by special provisions. On the other hand, Article 15 provides that 'Projects which are part of a comprehensive system of measures aimed at encouraging the harmonious development of the overall economy of the region where such projects will be carried out shall be given priority for receiving aid from the Fund'. To the applicants the contested decision does not meet that condition.

The Commission and the Italian Government reply to that argument by maintaining first of all that such a complaint can be made only by persons claiming that they have been neglected, whilst their own projects had priority as compared with the projects criticized; I can raise the objection that our procedure knows of no such condition. In fact when the application is admissible the applicants may in principle take advantage of all those grounds of action which the Treaty puts at their disposal without having to furnish proof of the existence of a particular interest before relying on each of them. The complaint raised by the applicants can therefore certainly not be rejected *a limine*.

In order to discover whether it is well founded, let us consider whether we are in fact faced by 'a comprehensive system of measures aimed at encouraging the . . . development of the overall economy' of the region in question. Since there is not yet a Community programme in this sphere it can only be a matter of *national* measures taken by the Italian Government, which, in the eyes of the Community, must also well deserve aid and within the framework of which the projects encouraged by the EAGGF must be included. In order to prove that the conditions of Article 15 have been observed the Commission and the interveners who have received aid have quoted numerous

Italian legislative provisions. It is certain that we can accept only those which have a *general* scope and which are applicable to Italian agriculture as a whole. But apart from that we are faced with a series of provisions which are important in respect of the present case. Thus, in connexion with the Castiglione case, the parties concerned rely on legislative measures concerning the development of the central area of the North as well as special measures concerning the development of Tuscany. I would quote in particular those which were adopted in the interest of mountainous regions as well as in favour of irrigation projects and which also had beneficial effects for the sugar-beet producers established in the region in question. In the same way reference was made to public development organizations such as the Ente di sviluppo in Toscana e Lazio, coming from the Ente Maremma, as well as the Ente autonomo irrigazione per la Valdichiana, which have particular functions to fulfil within the framework of the agricultural restructuring of the region. It is certainly not necessary to enumerate all the details of those regulations; I shall refer therefore on this subject to the detailed statement by the Commission and the interveners. They give, in fact, the impression that it is a matter of measures which correspond to the criteria of Article 15 of Regulation No 17/64 and which were able to be recognized as such by the Commission.

Consequently it is not possible either to annul the disputed decision under the head of the infringement of Article 15 of Regulation No 17/64.

4. Infringement of Articles 92 and 93 of the Treaty; distortion of the conditions of competition; injurious effect on the distribution of production quotas

The following submission covers a series of aspects on which I must successively adopt a position.

(a) I can be relatively brief on the subject of the effect of the contested decision on the distribution of production quotas. We have seen that Regulation No 44/67 'on certain measures of the common organization of the market in sugar for the marketing year 1967/1968' authorized the Member States freely to distribute production quotas. The common organization of the market in sugar (Regulation No 1009/67), which entered into force on 1 July 1968, expressly governs, it is true, the distribution between the sugar refineries of 90% of the basic quantity for each Member State. Each of these has however the power to create a margin amounting to 10% of the basic quantities for the marketing year 1968/1969 and to increase this during the following marketing years by 5% of the quotas distributed for the 1968/1969 marketing year. The Member States can deal with this margin quite freely. We have already learned during the proceedings how Italy distributed it; it amounts to 123 000 metric tons and the recipient undertakings obtained approximately 17 000 metric tons; half of the margin was divided in a certain proportion between all the undertakings and a considerable part of the remainder was given to sugar refineries situated in regions where sugar-beet growing had made considerable progress. It is thus clear that the Italian Government has used its margin for purposes of structural policy, which is in accordance with the regulations already quoted. The applicants cannot therefore complain about it, all the more so as they have received the share to which they were entitled and as, further, they were even granted a part of the margin.

(b) Concerning the applicants' complaint based on an infringement of Articles 92 and 93 of the Treaty, I must emphasize that these provisions dealt only with *State* aids. They are therefore of no direct interest except in regard to the State aid which the contested de-

cision assumes to be granted. Consequently the important element in these articles is whether the State aid affects trade between the Member States. In fact it is hardly possible to prove that such a danger exists in the present case and that is so because, in accordance with Regulation No 1009/67, production quotas are fixed for each State and because the amount of the subsidies and the size of the recipient undertakings make such a situation very improbable. However, it is even more important to take into account the fact that Article 92 expressly mentions a series of aids compatible with the Common Market. This is the case for aid intended to promote the economic development of areas where the standard of living is abnormally low and that applies in particular under Article 92(3)(c) to aid intended 'to facilitate the development of certain economic activities or of certain economic areas'. Lastly, let me emphasize again the reservation in Article 92 which refers to other provisions of the Treaty and concerns precisely the particular provisions in favour of agriculture. Among these provisions I would quote Article 40(3) according to which the common organizations may also provide aids 'for the production and marketing of the various products'. From another point of view I would also quote the second paragraph of Article 42 according to which the Council may authorize the granting of aid for the protection of enterprises handicapped by structural or natural conditions as well as within the framework of economic development programmes. It appears clearly from all these provisions that the aids granted precisely within the framework of structural policy like those provided for by Regulation No 17/64 are not prohibited by the Treaty. Articles 92 and 93 of the Treaty therefore certainly do not permit a negative judgment to be given on the decision in question.

(c) In fact, the applicants appear to base the essential part of their argument on Article 17 of Regulation No 17/64, which similarly to Article 3(f) of the Treaty deals with a system ensuring that competition is not distorted in the Common Market and which lays down that 'Intervention by the Fund must not alter the conditions of competition in such a way as to be incompatible with the principles contained in the relevant provisions of the Treaty'. It is necessary therefore for us to consider whether, in adopting the disputed decision, the Commission disregarded that provision. For this examination it cannot however be a question, as the applicants suggest, of referring simply to the provisions of the Treaty concerning aids which I have just quoted. What Article 17 requires is merely that the principles of the Treaty should be a *guide*, which implies for the Commission, as it rightly mentions, a certain area of discretion. To tell the truth, it must be accepted that it is a matter within this sphere of something analogous to maintaining the equality of economic risks which the Bundesverwaltungsgericht stated in its judgment, already cited, of 30 August 1968, in a similar situation, that they should not be restrained in an 'unacceptable manner'. I think therefore that the necessary evaluation must also be made on the basis of the requirements of the structural policy, as they have been defined by the Commission and the Italian Government. Thus sight must not be lost of the fact that the applicant undertakings which regard themselves as having suffered damage by reason of the decision in question are traders of considerable weight. One might suppose that they are in a position by their own means to overcome the difficulties of adaptation with which they are confronted, particularly so because the production quotas are distributed to undertakings and not to units of production, which leaves the undertakings a certain room for manoeuvre,

and also because the general aid for adaptation granted by the Italian State is estimated in relation to production quotas, which allows each undertaking to use them for the purpose of rational restructuring. On the other hand there is the undertaking benefiting from the contested decision, a relatively small production unit, which one would not expect, according to the statements of the Italian Government and of the Commission, to increase to an optimum size through its own resources. The structural alterations which will be necessary during the next few years may thus condemn it to death in the absence of external aid, and that is so although it is equipped with new plant, the working of which is, still according to a statement of the Commission, very useful to the agriculture of the area concerned. If one considers all that, one cannot really accept that the contested decision alters the conditions of competition in a manner incompatible with the principles of Article 17.

It appears to me thus also to be excluded that it can be annulled on the basis of that provision.

5. Should the applicants have been consulted before the adoption of the contested decision?

Another complaint made by the applicants is based on the idea that before the adoption of measures capable of affecting the conditions of competition, traders who have a contrary interest ought to be consulted.

I think that I should say on this subject that Regulation No 17/64 does not provide for anything like this and that, within the framework of the examination which that regulation imposes upon the Commission, it may thus at the most appear *opportune* according to the circumstances to consult the competitors of those benefiting from subsidies before granting them. Taking account of that legal situation we must consequently

consider whether the *Treaty* includes the principle relied upon by the applicants, which would allow us either to state that Regulation No 17/64 is illegal or to accept that this principle supplements that regulation. In either case the annulment of the contested decision would be inevitable, in view of the fact that the applicants were not put in a position to give their views before the Commission adopted its decision.

It is necessary, however, for me to share the opinion of the Commission which doubts whether the principle put forward by the applicants is actually applicable. In so doing, I may quote Article 93 of the *Treaty* according to which it is only in case of the abolition or alteration of aid that the *parties concerned* must be given notice to put forward their observations; I may also quote Article 80 which lays down that before the approval of exceptional tariffs (and thus also in respect of aids) only the Member States concerned need be consulted. I must also accept that Regulation No 17 on cartels contains no general principle similar to that on which the applicants rely. That regulation provides, it is true, that competitors are to be heard before the grant of a negative clearance certificate. It is necessary however to consider that here it is a matter of a derivative right applicable to a particular situation and that, further, the preamble to that regulation emphasizes that it is by way of a favour and not of an absolute right. As, lastly, the applicants have not been able to prove the existence of a corresponding principle in the law of the Member States, their argument based upon the infringement of rules of procedure must also be rejected as unfounded.

II—*Was the Commission influenced by a mistaken evaluation of the economic and technical circumstances?*

We have not yet exhausted the substances of the case; in fact (as I said in

my introduction) the applicants object in addition that the circumstances of *fact* did not allow the Commission to adopt its decision. It is therefore necessary to consider this complaint again. I am not unaware that in doing so I am going into a sphere which imposes a certain caution upon review by the Court. In fact the Commission has a certain discretion in judging circumstances of fact which also involve elements of economic and structural policy. If that is so, the applicants may at the most claim that there was a *clearly* erroneous evaluation (as is provided for also in Article 33 of the ECSC Treaty). On the other hand, it is not permissible, on the basis of a single complaint that the Commission has based its judgment on mistakes of fact, to order an expert's report with the purpose of correcting that evaluation by the Commission. It is only with this reservation that we can now consider the value of the arguments of fact.

It is a matter essentially of establishing whether the contested decision was such as to promote agricultural interests, and whether it actually gave hope of beneficial effects for the agriculture of the area in question or whether, without the enlargement of the Castiglione factory, the processing plant which was already in existence offered sufficient outlets to the sugar-beet producers which are in fact in question here.

In this connexion, the applicants maintain generally that the processing capacity of the Italian sugar industry is too large in relation to present sugar-beet production and even to a future increase in such production. They rely particularly in this regard on the reasons for the Minerbio decision, according to which Italy produced nearly 913 000 metric tons of sugar during the marketing year 1963/1964, which corresponds to a sugar-beet production of 7 966 300 metric tons, whereas the processing capacity was 8 914 500 metric tons of beet. The Commission and the Italian Government have shown, however, that

these figures do not allow the question to be decided. In fact it is undeniable that, in the interval, sugar-beet production has considerably increased both in respect of the output per hectare as well as in respect of the areas cultivated. If we accept this fact, areas cultivated in the principal growing areas have increased from 54% to 124%; it appears thus at least very doubtful whether there still remains a surplus of capacity in the processing industry, as the Minerbio decision asserts.

Apart from that, it must be admitted above all that the *total capacity* itself is not decisive; what is vital is the geographical dispersal of that capacity and in particular the state of existing plant and consequently the reply to the question whether that plant permits rapid treatment of the raw material, which is indispensable because of the climatic peculiarities of Italy. As I have already emphasized, these are the factors which determine the advantages which the farmers concerned may obtain from the enlargement and modernization of certain production units. This leaves me thus to consider more especially the region directly concerned by the Castiglione decision.

It was maintained in this connexion that during the last few years sugar-beet growing has made considerable progress in Tuscany. Whether the natural conditions and the economic structure of the region justify this increase in sugar-beet growing, or on the contrary the region under consideration does not lend itself particularly to such crops, raises a number of purely agricultural considerations which lie outside review by the Court. But we can say in any case that the data with which we have been supplied on the subject of increases in production since 1963 and of the improvement in quality are really impressive.

When, considering these facts, I ask myself whether the agricultural producers of the region would have had

sufficient opportunities for sales without the increase in capacity of the Castiglione plant, I am inclined seriously to doubt it. The applicant cannot in fact rely on the existence of sugar refineries having a small capacity for processing situated at a considerable distance from the area of production, one of which is clearly saturated by the processing of the products of its own area of supply, whilst the applicants have not maintained in respect of two others, which in the meanwhile have closed down, that they offered adequate processing facilities. From another point of view it would be difficult to resist the necessity for an extension of the production capacity at Castiglione, by the fact that that establishment already processes sugar-beet coming from other regions (Emilia and Fucino) and that, even before the work of enlarging its plant, it had already, consequently, too great a capacity in relation to its area of supply. The facts with which we have been provided prove only the force of attraction exercised by a recipient undertaking which apparently offers better processing conditions than competing undertakings situated in other regions. Further, the increase in capacity may turn out to be useful in respect of the future development of sugar-beet production (on which it is not for me to make forecasts) as well as in respect particularly of the requirements of an optimum dimension which, as I have already emphasized, is alone able to guarantee the existence of the establishment in the future.

Considering all this and also taking into account what I have said on the subject of the limits of power of review by the Court in such a sphere it remains for me thus to say that to the extent to which it depends on circumstances of fact the Castiglione decision shows no irregularity.

The application must consequently be dismissed on this point as unfounded, without any further inquiry.

C — Conclusion

This examination of the case leads me to the opinion that it is very doubtful whether the application made by the economic group *Associazione Nazionale fra gli Industriali dello Zucchero, dell' Alcool e del Lievito* is admissible. In any event, I consider that Application 10/68 is inadmissible to the extent to which it concerns the *Minerbio* and *Ostellato* decisions and that the same applies without any reservation to Application 18/68.

To the extent to which it bears upon the *Castiglione* decision, Application 10/68 may be regarded as admissible but it must be dismissed as unfounded.

Concerning the costs of the proceedings and also those of the interveners one may, on the basis of your case-law, take into account the fact that the objections made by the Commission and the interveners on the subject of the admissibility of the applications are partially unjustified. It follows from this that the applicants should not be ordered to pay the whole of the costs.

I leave it to the discretion of the Court to decide upon the division to be followed in the present case.