Avis juridique important

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Judgment of the Court of 21 February 1991. - Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn. - References for a preliminary ruling: Finanzgericht Hamburg et Finanzgericht Düsseldorf - Germany. - Jurisdiction of national courts, in proceedings for interim relief, to suspend enforcement of a national measure based on a Community regulation - Validity of the special elimination levy in the sugar sector. - Joined cases C-143/88 and C-92/89.

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Keywords

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1. Measures adopted by the Community institutions - Regulations - Dispute before a national court as to the legality of a regulation during an action brought against a national implementing measure - Grant of suspension of enforcement of the national measure - Whether permissible -Conditions - Prima facie case - Question of validity referred to the Court by way of a reference for a preliminary ruling - Serious and irreparable damage - Account to be taken of the interest of the Community

(EEC Treaty, Arts 177 and 185 and second paragraph of Art. 189)

2. European Communities' own resources - Levies and other charges provided for under the common organization of the markets in the sugar sector - Concept - Special elimination levy - Inclusion

(EEC Treaty, Art. 201; Council Regulation No 1914/87; Council Decision 85/257, Art. 2)

3. Measures adopted by the Community institutions - Application in time - Principle of non-retroactivity - Exceptions - Conditions - The particular case

(Council Regulation No 1914/87)

4. Agriculture - Common organization of the markets - Sugar - Special elimination levy - Application by producers of the principle that the common organization be fully self-financing - Creation of unreasonable financial burdens - None - Infringement of the right to own property and of the freedom to pursue an economic activity - None

(Council Regulation No 1914/87)

5. Agriculture - Common organization of the markets - Discrimination between producers or consumers - Special elimination levy in the sugar sector - Heavier charge on the production of sugar other than A quota sugar - Difference in treatment objectively justified - No discrimination

(EEC Treaty, second subparagraph of Art. 40(3); Council Regulation No 1914/87)

Summary

1. Article 189 of the Treaty does not preclude the power of national courts to suspend enforcement of an administrative measure based on a Community regulation.

In the first place, in the context of actions for annulment, Article 185 of the Treaty enables applicants to request suspension of enforcement of the contested act and empowers the Court to order such suspension. The coherence of the system of interim legal protection therefore requires that, in the context of a preliminary reference to be made by a national court, the latter should also be able to order suspension of enforcement of a national administrative measure based on a Community regulation, the legality of which is in dispute and which only the Court of Justice may declare to be invalid.

Secondly, the Court, for the purpose of ensuring the effectiveness of Article 177 of the Treaty, has already acknowledged that national courts which refer to it for a preliminary ruling questions of interpretation in order to resolve a problem of compatibility between national legislation and rules of Community law may suspend the application of that national legislation. The interim protection guaranteed to individuals before national courts cannot vary according to whether they contest the compatibility of national legal provisions with Community law or the validity of Community measures by way of secondary law, if the dispute in both cases is based on Community law itself.

In order for a national court to be entitled to grant such a suspension, it must entertain serious doubts as to the validity of the Community measure and, should the question of the validity of the contested measure not already have been brought before the Court, itself refer that question to the Court; there must be urgency in the sense that the applicant is threatened with serious and irreparable damage, and due account must be taken of the interests of the Community. It follows from the last-mentioned requirement that the national court must examine whether the Community measure in question would be deprived of all effectiveness if not immediately implemented. It also follows from that requirement that the national court should be in a position to require the applicant to provide adequate guarantees if there is a possibility that suspension of enforcement may involve a financial risk for the Community.

2. The special elimination levy in the sugar sector, introduced by Regulation No 1914/87, must be included among the "contributions and other duties provided for within the framework of the common organization of the markets in sugar", within the meaning of Council Decision 85/257 on the Communities' system of own resources, because it complements the levies which already existed when that decision was adopted. Even if it was in the nature of a financing levy within the meaning of Decision 85/257, its introduction would not have required the procedure laid down in Article 201 of the Treaty. The purpose of that decision, as a measure of budgetary law, was to define own resources allocated to the Community budget and not to specify the Community institutions which are competent to impose duties, taxes, charges, levies or other forms of revenue.

3. Although as a general rule the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise when the purpose to be achieved so demands and when the legitimate expectations of those concerned are duly respected.

This was precisely the case as regards the introduction by Regulation No 1914/87 of 2 July 1987, within the framework of the common organization of the markets in the sugar sector, of a special elimination levy for the marketing year which had closed on the previous 30 June.

In order to ensure compliance with the principle that producers themselves should be responsible for the entire financing of the common organization, they were required to bear all the charges for the marketing year in progress, including those resulting from exceptional events, the impact of which could be precisely ascertained only after the end of that year. Furthermore, producers had been informed that they would be required to provide an additional financing for that year.

4. The common organization of the markets in the sugar sector is based on the principle of full self-financing by producers. It was pursuant to that principle and in order to cope with an exceptional increase in expenditure, brought about by fluctuations on the world market, on which Community producers have to dispose of part of their production, and closely reflecting the high cost of export refunds, that the special elimination levy was introduced for the 1986/87 marketing year. As the counterpart of the advantages which that common organization entails, the levy did not result in unreasonable financial burdens for producers, since they were for the greater part entitled to require reimbursement from their suppliers of sugar beet and sugar cane. By virtue of its nature, the levy cannot be regarded as an infringement of the right to own property. Finally, both its purpose and its characteristics preclude it from being described as an unreasonable and intolerable interference which encroaches upon the substance of the right of the producers concerned freely to pursue their economic activities.

5. The purpose of the special elimination levy for the 1986/87 marketing year, introduced within the framework of the common organization of the markets in the sugar sector, was to eliminate the exceptional losses occasioned by the grant of high export refunds designed to promote the disposal of the Community' s surpluses on the markets of non-member countries. The fact that this levy imposed burdens which were proportionately higher for sugar produced in excess of the A quota cannot be regarded as constituting discrimination prohibited under the second subparagraph of Article 40(3) of the Treaty. Any amount of sugar produced in excess of the A quota gives rise to surpluses. As the only normal means of disposal of such surpluses is by way of exportation to non-member countries, those surpluses entail the grant of refunds that are costly for the Community budget.

Parties

In Joined Cases C-143/88 and C-92/89,

REFERENCES to the Court under Article 177 of the EEC Treaty by the Finanzgericht Hamburg (Federal Republic of Germany) and the Finanzgericht Duesseldorf (Federal Republic of Germany) for a preliminary ruling in the proceedings pending before those courts between

Zuckerfabrik Suederdithmarschen AG

and

Hauptzollamt Itzehoe,

and between

Zuckerfabrik Soest GmbH

and

Hauptzollamt Paderborn,

on the interpretation of Article 189 of the EEC Treaty (Case C-143/88) and on the validity of Council Regulation (EEC) No 1914/87 of 2 July 1987 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year (Official Journal L 183, p. 5) (Cases C-143/88 and C-92/89),

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Díez de Velasco (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, R. Joliet, F. A. Schockweiler, F. Grévisse and M. Zuleeg, Judges,

Advocate General: C. O. Lenz,

Registrar: H. A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

Zuckerfabrik Suederdithmarschen and Zuckerfabrik Soest, by Messrs Ehle, Schiller and Associates, Rechtsanwaelte, Cologne,

the Italian Government, by Professor L. Ferrari Bravo, Head of the Contentious Diplomatic Affairs Department of the Ministry of Foreign Affairs, acting as Agent, assisted by I. M. Braguglia, Avvocato dello Stato,

the United Kingdom, by J. A. Gensmantel, of the Treasury Solicitor' s Department, acting as Agent,

the Council of the European Communities, by A. Braeutigam, a member of its Legal Department, acting as Agent,

the Commission of the European Communities, by D. Booss and G. zur Hausen, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument presented by Zuckerfabrik Suederdithmarschen and Zuckerfabrik Soest, represented by D. Ehle and J. Sedemund, Rechtsanwaelte, Cologne; by the Italian Government; by the United Kingdom, represented by C. Bellamy, acting as Agent; and by the Council and Commission, at the hearing on 20 March 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 November 1990,

gives the following

Judgment

Grounds

1 By order of 31 March 1988, which was received at the Court Registry on 20 May 1988, the Finanzgericht (Finance Court) Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions relating, on the one hand, to the jurisdiction of national courts, in proceedings for interim relief, to suspend the enforcement of a national measure based on a Community regulation and, on the other hand, to the validity of Council Regulation (EEC) No 1914/87 of 2 July 1987 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year (Official Journal L 183, p. 5).

2 Those questions were raised in proceedings between Zuckerfabrik Suederdithmarschen, a sugar producer, and the Hauptzollamt (Principal Customs Office) Itzehoe. By decision of 19 October 1987 the Hauptzollamt Itzehoe required Zuckerfabrik Suederdithmarschen to pay DM 1 982 942.66 in respect of the special elimination levy for the 1986/87 sugar marketing year.

3 The object of that levy, which was introduced by way of the abovementioned Regulation No 1914/87, adopted on the basis of Article 43 of the Treaty, is to eliminate in full the losses suffered by the Community in the sugar sector during the marketing year which ran from 1 July 1986 to 30 June

1987. Those losses had been occasioned by the particularly high export refunds which the Community was required to pay during that marketing year in order to ensure that excess sugar production within the Community could be disposed of in non-member countries.

4 Zuckerfabrik Suederdithmarschen lodged an objection against that decision, but this was rejected. It thereupon brought proceedings before the Finanzgericht Hamburg seeking suspension of enforcement of that decision. It also brought an action for annulment of that decision before the same court. In support of its actions, Zuckerfabrik Suederdithmarschen claimed that Regulation No 1914/87, on which the Hauptzollamt' s decision was based, was invalid.

5 The Finanzgericht Hamburg granted the application for suspension of enforcement of the decision taken by the Hauptzollamt Itzehoe and referred the following questions to the Court of Justice for a preliminary ruling:

"(1) (a) Is the second paragraph of Article 189 of the EEC Treaty to be interpreted as meaning that the general application of regulations in Member States does not preclude the powers of national courts to suspend, by way of an interim measure, the operation of an administrative measure based on a regulation until a decision is reached in the main action?

(b) If so, under what conditions may national courts adopt interim measures? Is there an applicable criterion of Community law and if so which? Or do interim measures depend on national law?

(2) Is Council Regulation (EEC) No 1914/87 of 2 July 1987 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year valid? In particular, is it invalid because it infringes the principle that regulations imposing taxation must not be retroactive?"

6 The Finanzgericht Hamburg also ordered that the proceedings on the substance of the case should be stayed pending a preliminary ruling by the Court of Justice on the two questions referred to it.

7 In addition, the Finanzgericht Duesseldorf, by order of 19 October 1988 received at the Court on 20 March 1989, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty five questions which also concern the validity of Council Regulation No 1914/87.

8 Those five questions were raised in proceedings between Zuckerfabrik Soest GmbH, which is also a sugar producer, and the Hauptzollamt Paderborn. By a decision of 20 October 1987 the Hauptzollamt Paderborn required Zuckerfabrik Soest to pay DM 1 675 013.71 in respect of the special elimination levy already referred to.

9 Zuckerfabrik Soest lodged an objection against that decision, but this was rejected. It then brought proceedings before the Finanzgericht Duesseldorf seeking suspension of enforcement of the decision taken by the Hauptzollamt Paderborn. It also brought an action for annulment of that decision before the same court. In support of its application for suspension and its action for annulment, Zuckerfabrik Soest claimed, as did Zuckerfabrik Suederdithmarschen in the other proceedings, that the regulation introducing the special elimination levy, on which the Hauptzollamt Paderborn had based its decision, was invalid.

10 By order of 10 February 1988 the Finanzgericht Duesseldorf, adjudicating on the application for interim relief, granted the application for suspension of enforcement of the decision adopted by the Hauptzollamt Paderborn on the ground that serious doubts existed as to the validity of the regulation introducing the special elimination levy.

11 By order of 19 October 1988 that court also stayed the proceedings on the substance of the case and requested the Court of Justice to give a preliminary ruling on the following questions:

"(1) Is Regulation No 1914/87 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year (Official Journal 1987 L 183, p. 5) invalid because the special elimination levy constitutes a financing levy which could be introduced only on the basis of Article 201 of the Treaty?

In the alternative,

(2) Is the introduction of the special elimination levy in the sugar sector for the 1986/87 marketing year by Regulation No 1914/87 compatible with the limitation on self-financing which is laid down in Article 28 of Regulation No 1785/81 and with the principle of non-interference with the legislative system of the Community?

In the alternative,

(3) Is the introduction of the special elimination levy in the sugar sector for the 1986/87 marketing year compatible with the prohibition on subjecting a sector of the economy to risks which constitute extraneous risks within the context of an organization of the market and with the principle of the prohibition of unreasonable financial burdens?

In the alternative,

(4) Does Article 1 of Regulation No 1914/87 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year conflict with the prohibition of discrimination (second subparagraph of Article 40(3) of the EEC Treaty) because the levy applied to B sugar is considerably higher than that applied to A sugar?

In the alternative,

(5) Does Article 1 of Regulation No 1914/87 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year conflict in such cases with fundamental rights applying in Community law, namely the right to property and freedom to pursue economic activities, when the levy can no longer be financed out of earned profits but only out of reserves and as a result the existence of the undertaking concerned is threatened?"

12 Reference is made to the Report for the Hearing for a fuller account of the facts in the main proceedings, the provisions of Community law at issue, the course of the procedure before the Court and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

13 Having regard to the similarity of subject-matter in and the connection between the two cases, which were confirmed by the oral argument presented to the Court, it is appropriate to join the cases for the purposes of the judgment, in accordance with Article 43 of the Rules of Procedure.

Suspension of enforcement of a national measure based on a Community regulation

The principle

14 The Finanzgericht Hamburg first seeks, in substance, to ascertain whether the second paragraph of Article 189 of the EEC Treaty must be interpreted as meaning that it denies to national courts the power to suspend enforcement of a national administrative measure adopted on the basis of a Community regulation.

15 In support of the existence of the power to grant such a suspension, the Finanzgericht Hamburg states that such a measure merely defers any implementation of a national decision and does not call in question the validity of the Community regulation. However, by way of explanation of the reason for its question, it points out, as a ground for denying that national courts have such jurisdiction, that the granting of interim relief, which may have far-reaching effects, may constitute an obstacle to the full effectiveness of regulations in all the Member States, in breach of the second paragraph of Article 189 of the Treaty.

16 It should first be emphasized that the provisions of the second paragraph of Article 189 of the Treaty cannot constitute an obstacle to the legal protection which Community law confers on individuals. In cases where national authorities are responsible for the administrative implementation of Community regulations, the legal protection guaranteed by Community law includes the right of individuals to challenge, as a preliminary issue, the legality of such regulations before national courts and to induce those courts to refer questions to the Court of Justice for a preliminary ruling.

17 That right would be compromised if, pending delivery of a judgment of the Court, which alone has jurisdiction to declare that a Community regulation is invalid (see judgment in Case 314/85 Foto-Frost v Hauptzollamt Luebeck-Ost [1987] ECR 4199, at paragraph 20), individuals were not in a position, where certain conditions are satisfied, to obtain a decision granting suspension of enforcement which would make it possible for the effects of the disputed regulation to be rendered for the time being inoperative as regards them.

18 As the Court pointed out in its judgment in Foto-Frost, cited above, (at paragraph 16), requests for preliminary rulings which seek to ascertain the validity of a measure, like actions for annulment, constitute means for reviewing the legality of acts of the Community institutions. In the context of actions for annulment, Article 185 of the EEC Treaty enables applicants to request suspension of the enforcement of the contested act and empowers the Court to order such suspension. The coherence of the system of interim legal protection therefore requires that national courts should also be able to order suspension of enforcement of a national administrative measure based on a Community regulation, the legality of which is contested.

19 Furthermore, in its judgment in Case C-213/89 (The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others [1990] ECR I-2433), delivered in a case concerning the compatibility of national legislation with Community law, the Court, referring to the effectiveness of Article 177, took the view that the national court which had referred to it questions of interpretation for a preliminary ruling in order to enable it to decide that issue of compatibility, had to be able to grant interim relief and to suspend the application of the disputed national legislation until such time as it could deliver its judgment on the basis of the interpretation given in accordance with Article 177.

20 The interim legal protection which Community law ensures for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself.

21 It follows from the foregoing considerations that the reply to the first part of the first question must be that Article 189 of the Treaty has to be interpreted as meaning that it does not preclude the power of national courts to suspend enforcement of a national administrative measure adopted on the basis of a Community regulation.

Conditions for suspension

22 The Finanzgericht Hamburg then goes on to ask under what conditions national courts may order the suspension of enforcement of a national administrative measure based on a Community regulation, in view of the doubts which they may have as to the validity of that regulation.

23 It must first of all be noted that interim measures suspending enforcement of a contested measure may be adopted only if the factual and legal circumstances relied on by the applicants are such as to persuade the national court that serious doubts exist as to the validity of the Community regulation on which the contested administrative measure is based. Only the possibility of a finding of invalidity, a matter which is reserved to the Court, can justify the granting of suspensory measures.

24 It should next be pointed out that suspension of enforcement must retain the character of an interim measure. The national court to which the application for interim relief is made may therefore grant a suspension only until such time as the Court has delivered its ruling on the question of validity. Consequently, it is for the national court, should the question not yet have been referred to the Court of Justice, to refer that question itself, setting out the reasons for which it believes that the regulation must be held to be invalid.

25 As regards the other conditions concerning the suspension of enforcement of administrative measures, it must be observed that the rules of procedure of the courts are determined by national law and that those conditions differ according to the national law governing them, which may jeopardize the uniform application of Community law.

26 Such uniform application is a fundamental requirement of the Community legal order. It therefore follows that the suspension of enforcement of administrative measures based on a Community regulation, whilst it is governed by national procedural law, in particular as regards the making and examination of the application, must in all the Member States be subject, at the very least, to conditions which are uniform so far as the granting of such relief is concerned.

27 Since the power of national courts to grant such a suspension corresponds to the jurisdiction reserved to the Court of Justice by Article 185 in the context of actions brought under Article 173, those courts may grant such relief only on the conditions which must be satisfied for the Court of Justice to allow an application to it for interim measures.

28 In this regard, the Court has consistently held that measures suspending the operation of a contested act may be granted only in the event of urgency, in other words, if it is necessary for them to be adopted and to take effect before the decision on the substance of a case, in order to avoid serious and irreparable damage to the party seeking them.

29 With regard to the question of urgency, it should be pointed out that damage invoked by the applicant must be liable to materialize before the Court of Justice has been able to rule on the validity of the contested Community measure. With regard to the nature of the damage, purely financial damage cannot, as the Court has held on numerous occasions, be regarded in principle as irreparable. However, it is for the national court hearing the application for interim relief to examine the circumstances particular to the case before it. It must in this connection consider whether immediate enforcement of the measure which is the subject of the application for interim relief would be likely to result in irreversible damage to the applicant which could not be made good if the Community act were to be declared invalid.

30 It should also be added that a national court called upon to apply, within the limits of its jurisdiction, the provisions of Community law is under an obligation to ensure that full effect is given to Community law and, consequently, where there is doubt as to the validity of Community regulations, to take account of the interest of the Community, namely that such regulations should not be set aside without proper guarantees.

31 In order to comply with that obligation, a national court seised of an application for suspension must first examine whether the Community measure in question would be deprived of all effectiveness if not immediately implemented.

32 If suspension of enforcement is liable to involve a financial risk for the Community, the national court must also be in a position to require the applicant to provide adequate guarantees, such as the deposit of money or other security.

33 It follows from the foregoing that the reply to the second part of the first question put to the Court by the Finanzgericht Hamburg must be that suspension of enforcement of a national measure adopted in implementation of a Community regulation may be granted by a national court only:

(i) if that court entertains serious doubts as to the validity of the Community measure and, should the question of the validity of the contested measure not already have been brought before the Court, itself refers that question to the Court;

(ii) if there is urgency and a threat of serious and irreparable damage to the applicant;

(iii) and if the national court takes due account of the Community' s interests.

Validity

34 The Finanzgericht Hamburg has called in question the validity of Regulation No 1914/87 on the ground that it runs counter to the principle of non-retroactivity and thereby fails to comply with the principle of legal certainty.

35 The Finanzgericht Duesseldorf, for its part, has expressed doubts as to the validity of that regulation by referring to the Court five questions which disclose a number of grounds of objection concerning the proper legal basis for the introduction of the special elimination levy, the compatibility of that regulation with the basic Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector (Official Journal L 177, p. 4), breach of the principle that a branch of the economy is not to be burdened with risks extraneous to it and with unreasonable financial charges, and breach of the principles of protection of the right to own property and of the freedom to pursue an economic activity.

36 As the questions referred to the Court in these two cases represent no more than different angles from which the same legal measure might be criticized, they may be considered together.

Breach of the procedure established by Article 201 of the EEC Treaty

37 The Finanzgericht Duesseldorf considers, essentially, that for a levy to be capable of being adopted on the basis of Article 43 of the EEC Treaty, within the framework of the common organization of agricultural markets, its purpose must be to regulate the market in question. A measure of this kind can relate only to the present or the future. This, according to the Finanzgericht Duesseldorf, is not so in the case of the special elimination levy, since its objective is to eliminate losses incurred during a previous marketing year. Furthermore, sugar manufacturers alone are required to pay this levy, whereas a measure designed to regulate the market should primarily affect the sugar-beet producers. Therefore, according to the Finanzgericht Duesseldorf, the contested levy is in the nature of a financing charge which could have been validly introduced only on the basis of Article 201 of the Treaty.

38 It should be pointed out in this regard that Article 2 of Council Decision 85/257/EEC of 7 May 1985 on the Communities' system of own resources (Official Journal L 128, p. 15), which was in force when the contested regulation was adopted, distinguishes between "contributions and other duties provided for within the framework of a common organization of the markets in sugar", which already constitute own resources, and "revenue accruing from other charges introduced within the framework of a common policy", in accordance with the provisions of the Treaties. That revenue constitutes own resources only in so far as the procedure laid down in Article 201 of the EEC Treaty and the corresponding provisions of the other founding Treaties has been completed.

39 In view of the developments which could not fail to take place in sugar production and on the Community market in sugar, it could not have been intended, in subparagraph (a) of the first paragraph of Article 2 of the abovementioned Decision of 7 May 1985, that the decision should apply only to those levies already provided for when it was adopted, namely the levies fixed at that time by Council Regulation No 1785/81 (hereinafter referred to as "the basic regulation"). Since the special elimination levy complements the levies which already existed when the Decision of 7 May 1985 was adopted, it must be included among the "contributions and other duties provided for within the framework of the common organization of the markets in sugar" within the meaning of that decision.

40 It should in any event be stressed that, as the Court has already held in its judgment in Case 108/81 Amylum v Council [1982] ECR 3107 with regard to the Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (Official Journal, English Special Edition 1970 (I), p. 224), the Decision of 7 May 1985, as a measure of budgetary law, has as its purpose to define own resources allocated to the Community budget and not to specify the Community institutions which are competent to impose duties, taxes, charges, levies or other forms of revenue.

41 It therefore follows that it was not necessary to have recourse to the procedure laid down in Article 201 in order to adopt a measure such as the special elimination levy provided for in Regulation No 1914/87, even if that measure was in the nature of a financing charge.

42 The question whether Article 43 of the EEC Treaty may serve as a legal basis for the introduction of a levy designed to charge economic operations that have already terminated is identical to the question whether a levy may be introduced with retroactive effect on the basis of Article 43. This objection therefore overlaps with that concerning failure to comply with the principle of non-retroactivity, which will be examined below.

The compatibility of Regulation No 1914/87 with the basic regulation

43 The Finanzgericht Duesseldorf, referring to the judgment of the Court in Case 113/77 NTN Toyo Bearing Company v Council [1979] ECR 1185, claims that once the Council, in Article 28 of the basic regulation, had laid down a maximum percentage for the levies which sugar manufacturers could be required to pay, it was prohibited from introducing, by way of another regulation based directly on Article 43 of the Treaty, a levy which exceeded that maximum percentage.

44 It should be recalled in this regard that both the basic regulation and the contested Regulation No 1914/87 were adopted on the basis of Article 43 of the Treaty. Regulation No 1914/87 cannot therefore be regarded as a regulation implementing the basic regulation, as was the regulation criticized in the case which gave rise to the judgment of the Court in Case 46/86 Romkes v Officier van Justitie [1987] ECR 2671.

45 The Council may amend, complement or repeal a basic regulation adopted under Article 43 of the EEC Treaty, provided that the provisions amending, complementing or repealing that regulation are adopted pursuant to the same procedure; it is not required to insert these provisions into the basic regulation.

46 The position in the present case is different from that which gave rise to the judgment in NTN Toyo Bearing Company. In that case the Council had adopted a general regulation in order to implement one of the objectives set out in Article 113 of the Treaty and had subsequently derogated, in an implementing regulation designed to deal with a particular case, from the rules thus laid down.

47 In those circumstances it must be held that the basic regulation did not preclude the Council from adopting Regulation No 1914/87, since it complied with the procedure laid down in Article 43 of the Treaty.

Breach of the principle of non-retroactivity

48 The Finanzgericht Hamburg, like the Finanzgericht Duesseldorf, considers that Regulation No 1914/87 breaches the principle of non-retroactivity because it was adopted on 2 July 1987, that is to say, after the end of the 1986/87 marketing year on 30 June 1987, the losses in respect of which it is designed to eliminate. That regulation thus links payment of the levy to events which occurred in the past, namely the production of sugar during the aforesaid marketing year. Furthermore, according to the national courts, the legitimate expectations of sugar producers were not respected inasmuch as they were entitled to expect that the levies provided for under the basic regulation would not be increased and that, if they were increased, they would be passed on in full to the sugar-beet producers.

49 The Court has already held, in particular in its judgments in Case 98/78 Racke v Hauptzollamt Mainz [1979] ECR 69, Case 99/78 Decker v Hauptzollamt Landau [1979] ECR 101 and in Case 108/81 Amylum v Council [1982] ECR 3107, that although as a general rule the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise when the purpose to be achieved so demands and when the legitimate expectations of those concerned are duly respected.

50 With regard to the first of those two conditions, it is necessary to bear in mind certain matters of fact and of law. Surpluses arising from the ratio of production to consumption of sugar within the Community must be disposed of on the markets of non-member countries. The difference between rates and prices on the world market and prices in the Community is covered by export refunds. The basic regulation provided that the resultant financial charges were to be borne in full by the producers themselves.

51 In order to keep as close as possible to economic reality and thereby to enable the market to be stabilized, which is one of the objectives of Article 39 of the Treaty, Article 28 of the basic regulation provided that in principle the levies were due before the end of each marketing year and would consequently be calculated on the basis of normally foreseeable losses in respect of export obligations for the marketing year in question.

52 However, at the time when the levies were introduced the influence of certain exceptional events such as, in the present case, the sharp fall in the value of the dollar and the collapse of world sugar prices, both of which occurred during the marketing year in question, may not have been predicted with sufficient accuracy. It is legitimate in such a case that the charges to be financed by the producers may be established only after determination of the full effects of such events and, if necessary, after the expiry of the marketing year during which they occurred.

53 If the Council, after determining all the losses for the marketing year 1986/87, had failed to adopt any measure to complement the charges already borne by producers, the objective pursued by it, namely the stabilization of the sugar market in the common interest, in particular by means of export refunds, could have been achieved only through charging the Community budget, whereas total financing by producers is a principle of the common organization of the market in sugar.

54 The Council was thus entitled to consider that the objective to be attained in the common interest, namely the stabilization of the Community market in sugar, required that the contested regulation should apply to the 1986/87 marketing year. Consequently, the first of the conditions governing the applicability of a Community measure on a date prior to its publication may be regarded as satisfied.

55 In order to determine whether the second of the conditions mentioned above is also satisfied, it is necessary to examine whether the action by the Council was in breach of a legitimate expectation which was entertained by the persons concerned as to the maximum amount fixed for the levies by the basic regulation and which was disappointed by the publication on 2 July 1987 of Regulation No 1914/87.

56 The applicants in the main proceedings are, however, not entitled to rely on any legitimate expectation deserving of protection.

57 In the first place, the 11th recital in the preamble to the basic regulation informed sugar producers that they would be required to meet in full the cost of disposing of the surpluses of Community production over consumption.

58 Secondly, the Commission had published on 9 September 1986 an estimate bearing the reference number VI PC 2 - 408, which clearly revealed the likelihood of a deficit for the marketing year 1986/87.

59 Thirdly, sugar producers were aware, by reason of the publication of the proposal in the Official Journal of 3 April 1987 (Official Journal C 89, p. 18), that it to say, before the end of the marketing year, that the Commission had submitted to the Council a proposal for a regulation introducing a special elimination levy in the sugar sector for the 1986/87 marketing year, which was subsequently incorporated in the contested Regulation No 1914/87.

60 It follows that the ground of objection relating to the failure to comply with the principle of non-retroactivity cannot be upheld.

The prohibition of subjecting a sector of the economy to risks extraneous to the organization of the market applicable to that sector or to unreasonable financial burdens

61 The Finanzgericht Duesseldorf believes that the disturbances of the market which may be remedied by measures adopted within the context of common organizations of the market are those which may be attributed to causes within that market. In organizations of markets other than that of sugar, risks resulting from a fall in world market prices and a reduction in the value of the dollar are financed exclusively by the EAGGF. This proves that the Community legislature regards them as risks which are beyond the control of traders, who cannot therefore be made to bear them.

62 It should first be observed that it is indeed true that risks of this kind are most often financed by the EAGGF. However, this is not prescribed by the Treaty, Article 40(4) of which authorizes the setting-up of such a fund, without however requiring that it participate in every measure of market organization. If the sugar sector is the only one which is subject to the principle of self-financing, the reason for this, as the Council stated in its reply to a question put by the Court, is that producers in other agricultural

sectors enjoy lower guaranteed prices, a fact which explains why they should not be made liable for the financing.

63 It should next be pointed out that Community sugar producers, by virtue of the system of export refunds, have access to the world market in order to dispose of part of their production. The risks which producers incur must be assessed in the light of that world market. Factors such as excess sugar production or fluctuations in the exchange rates between European currencies and the dollar are likely to have an effect on supply and demand and consequently on the price of the product. The risks connected with these factors cannot therefore be regarded as extraneous to the market in question.

64 Furthermore, the special elimination levy does not in any way impose unreasonable financial burdens on sugar producers. In the first place, it is a counterpart to the advantages represented by the opportunity which they had to qualify for export refunds for the purpose of disposing of quantities which they produce in excess of Community consumption. Secondly, sugar manufacturers may, under Article 1(3) of Regulation No 1914/87, require from sellers of beet or of cane growing in the Community reimbursement of the greater part of the levy in question.

65 For those reasons, the ground of objection put forward by the national court cannot be upheld.

Discrimination

66 The Finanzgericht Duesseldorf considers that the fact that the special elimination levy affects producers of B sugar to a greater degree than it does producers of A sugar, even though the product is the same in both cases, constitutes discrimination prohibited under the second subparagraph of Article 40(3) of the Treaty.

67 In that connection it should be pointed out that the basic regulation fixes a basic A quantity and a basic B quantity for each sugar marketing year and for each production area. The Member States allocate their basic A quantity to undertakings in the form of A quotas and their basic B quantity in the form of B quotas. The total of A quotas allocated for a particular marketing year corresponds approximately to human sugar consumption in the Community during that particular year. Sugar produced within the limits of the A and B quotas (A sugar and B sugar) may be freely marketed within the Community: prices and disposal are guaranteed through the intervention system. The sugar may also be exported to non-member countries, if necessary with the help of export refunds. Finally, all sugar produced by an undertaking in excess of its A and B quotas (C sugar) may be marketed only in non-member countries and does not qualify for export refunds.

68 It follows from this system that any undertaking which produces sugar in excess of its A quota, that is to say, in excess of its share in the production of sugar intended for Community consumption, necessarily produces surplus quantities for which the sole normal means of disposal is exportation to non-member countries.

69 As has already been pointed out, the purpose of the special elimination levy is to eliminate the exceptional losses caused by the granting of large export refunds intended to promote the disposal of surplus Community production on the markets of non-member countries.

70 It was for that reason justified that proportionately higher levies should be imposed in respect of sugar produced in excess of the A quota.

71 For that reason, the argument based on an alleged infringement of the second subparagraph of Article 40(3) of the Treaty must also be rejected.

Infringement of the right to own property and of the freedom to pursue an economic activity

72 The Finanzgericht Duesseldorf considers that the right to own property and the freedom to pursue an economic activity, which constitute fundamental rights, are adversely affected in an unlawful manner where an undertaking is not in a position to pay out of the normal profits made during a

particular marketing year the successive levies which have built up during that year and must draw upon its reserves, that is to say, its very economic substance.

73 In this regard, the Court has already held (see in particular the judgment in Case 265/87 Schraeder v Hauptzollamt Gronau [1989] ECR 2237, at paragraph 15) that the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organization of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.

74 The obligation to pay a levy cannot, as the United Kingdom has rightly pointed out, be regarded as a measure restricting the right to own property.

75 It must therefore be held that the special elimination levy in no way adversely affects the sugar producers' right to own property.

76 With regard to the freedom to pursue an economic activity, it has already been pointed out that the special elimination levy constitutes a response to objectives of general interest since it ensures that losses incurred by an economic sector are not borne by the Community. Such intervention cannot be regarded as disproportionate. The levy, which may in part be passed on to the sugar-beet producers, was introduced with the essential objective of "not [calling] in question before the date laid down the production quota arrangements", as stated in the fourth recital in the preamble to Regulation No 1914/87. As the Commission correctly pointed out, any reduction in quotas, which would have resulted in the long term in a diminution of the share of the Community sugar-processing industry on the world market, would have represented a much more serious interference with the interests of sugar producers and sugar-beet growers.

77 The argument based on infringement of the right to pursue an economic activity cannot therefore be accepted.

78 It follows from all the foregoing considerations that the reply to the questions referred to the Court by the Finanzgericht Hamburg and the Finanzgericht Duesseldorf must be that consideration of the questions referred has disclosed no factor of such a kind as to affect the validity of Council Regulation No 1914/87 of 2 July 1987 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year.

Decision on costs

Costs

79 The costs incurred by the Italian Government, the United Kingdom, the Council of the European Communities and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the actions pending before the national courts, a decision on costs is a matter for those courts.

Operative part

On those grounds,

THE COURT,

in reply to the questions referred to it by the Finanzgericht Hamburg, by order of 31 March 1988, and by the Finanzgericht Duesseldorf, by order of 19 October 1988, hereby rules:

(1) Article 189 of the EEC Treaty must be interpreted as meaning that it does not preclude the power of national courts to suspend the enforcement of an administrative measure adopted on the basis of a Community regulation;

(2) Suspension of enforcement of a national measure adopted in implementation of a Community measure may be granted by a national court only if that court entertains serious doubts as to the validity of the Community measure and, should the question of the validity of the contested measure not already have been brought before the Court of Justice, itself refers that question to the Court of Justice, if there is urgency and a threat of serious and irreparable damage to the applicant and if the national court takes due account of the Community' s interests;

(3) Consideration of the questions referred to the Court has disclosed no factor of such a kind as to affect the validity of Council Regulation No 1914/87 of 2 July 1987 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year.

Important legal notice

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Opinion of Mr Advocate General Lenz delivered on 8 November 1990. - Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn. - References for a preliminary ruling: Finanzgericht Hamburg et Finanzgericht Düsseldorf - Germany. - Jurisdiction of national courts, in proceedings for interim relief, to suspend enforcement of a national measure based on a Community regulation - Validity of the special elimination levy in the sugar sector. - Joined cases C-143/88 and C-92/89.

European Court reports 1991 Page I-00415
Swedish special edition Page I-00019
Finnish special edition Page I-00029

Opinion of the Advocate-General

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Mr President,

Members of the Court,

A - Facts

1. The case with which I shall be dealing today concerns a reference for a preliminary ruling made by the Finanzgericht Hamburg. The questions referred to the Court deal with two quite separate groups of issues.

2. The national court first raises a problem of an institutional nature. This concerns the jurisdiction of national courts in proceedings for interim relief, where the contested administrative measure is based on a provision of Community law, the legality of which is put in doubt. The national court seeks to ascertain whether the general validity of regulations precludes a national court from staying proceedings in the context of an application for interim relief. If it should transpire that courts in Member States are entitled to grant interim relief without having previously requested the Court of Justice to rule on the validity of the Community legislation in question, the national court wishes further to know whether the criteria for the granting of the interim measures of protection requested are

derived from the procedural law of the Member State in question or from the Community' s legal system.

3. As the second main issue in its reference for a preliminary ruling the national court directly raises the question of the validity of the regulation on which the decision in the national proceedings will turn. At issue is the legality of the introduction, by way of Regulation No 1914/87, (1) of a special elimination levy for sugar during the 1986/87 marketing year. The national court believes that this regulation infringes the prohibition of retroactivity. The plaintiff, which is the judgment debtor in respect of a decision concerning levies based on the regulation, puts forward further grounds which cast doubt on the legality of that regulation.

4. Apart from the present proceedings, a number of German courts are in doubt as to the validity of Regulation No 1914/87. (2) One of those courts, the Finanzgericht Duesseldorf, has also sought a preliminary ruling from the Court of Justice on the question of validity. (3) The Finanzgericht Hamburg has referred the following questions to the Court of Justice:

"1. (a) Is the second paragraph of Article 189 of the EEC Treaty to be interpreted as meaning that the general application of regulations in Member States does not preclude the powers of national courts to suspend, by way of an interim measure, the operation of an administrative measure based on a regulation until a decision is reached in the main action?

(b) If so: under what conditions may national courts adopt interim measures? Is there an applicable criterion of Community law and if so which? Or do interim measures depend on national law?

2. Is Council Regulation (EEC) No 1914/87 of 2 July 1987 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year valid? In particular, is it invalid because it infringes the principle that regulations imposing taxation must not be retroactive?"

5. I would refer to the Report for the Hearing for the facts of the case, the reasoning of the Finanzgericht and the arguments of the parties, which I shall mention or discuss hereinafter only in so far as is necessary for the understanding and reasoning of my Opinion.

B - Opinion

I - The first question

6. The parties in the main proceedings have very different views on the answer to be given to the first question.

7. The national court is itself uncertain as to the jurisdiction of national courts to suspend enforcement of a measure, on the ground that such a decision could cast doubt on the direct applicability of regulations in all Member States in accordance with the second paragraph of Article 189 of the EEC Treaty. At the same time, it acknowledges that suspension of enforcement, in the same manner as the suspensory effect of an appeal in ordinary administrative proceedings, does not affect the existence of the administrative measure and consequently does not strictly encroach on the validity of the Community legislation.

8. Another source of doubt for the national court is the fact that the suspension of acts or the adoption of interim measures under Articles 185 and 186 of the EEC Treaty is subject to criteria different from those which apply in the case of interim protective measures under German law. Reference to applicable national criteria may result in discrimination between Community citizens.

1. The views of the parties

9. The plaintiff does not share the doubts of the national court, if only because the suspension of enforcement in no way places in question the effectiveness of the Community regulation. The only thing which is postponed is the date on which the amount due must be paid. Furthermore, no doubt is cast on the effectiveness of the regulation in the economic sense, since the person claiming interim

relief must, in the event that he should fail in his claim, pay interest for delay at 3% above the discount rate of the Deutsche Bundesbank, regardless of any security lodged.

10. The plaintiff also argues that if the Court admitted an exception to its monopoly on ruling on the validity of Community legal measures in proceedings for interim relief in Case 314/85 (Foto-Frost (4)), a case which concerned the validity of a decision by the Commission in a specific case with respect to a Member State, this must apply a fortiori in the case of enforcement measures adopted by national authorities.

11. Adequate interim relief against measures of execution are in any case included among the guarantees of legal protection referred to in Article 19(4) of the Grundgesetz (Basic Law). Any reduction in the power of national courts, in proceedings on an application for interim relief, to ascertain the legal rule to be applied would constitute a major restriction of legal protection and would lead to uncertainties in the law.

12. Finally, the granting of interim relief follows necessarily from the system of protection under the Community legal order, under which, depending on the implementing measures of Community law, interim measures may be ordered by the European Court of Justice or by national courts.

13. Although the plaintiff considers it unnecessary to address Question 1(b) in view of its opinion on Question 1(a), it does submit that national authorities and courts may grant interim relief against national enforcement measures only in accordance with the requirements of national procedural law. As is the case with other procedural questions under the national legal systems, it has to be accepted that there may be discrepancies between the various Member States of the Community.

14. The Commission also proceeds essentially on the basis of the idea that a national court may suspend the execution of an administrative measure "without having to await the outcome of a reference under Article 177 to confirm its doubts as to the validity of the Community measure which forms the basis for the administrative act in question". (5)

15. In support of this contention, the Commission first of all argues that the court does not determine the existence or non-existence of a right, but merely postpones the execution of an administrative measure. Although there are differences in the conditions governing the restoration of the status quo ante in the individual Member States, the court in all those proceedings does not rule on the validity or invalidity of the administrative measure, but solely decides the question whether individual interests deserving protection prevail over the public interest in the enforcement of the measure prior to the Court' s decision on the substance of the case.

16. On the other hand, according to the Commission, the urgency which is normally a characteristic of an interim decision argues against prior completion of the preliminary ruling proceedings in view of the length of time required for the Article 177 procedure, if only because of the participation therein provided for under Article 20 of the Statute of the Court of Justice of the EEC.

17. However, the Commission raises the question whether specific circumstances deriving from Community law must exist in order for suspension of enforcement to be permitted. One might, for example, think of criteria deriving from Article 83 of the Rules of Procedure of the Court, namely the need "to prevent serious and irreparable damage" or the initiation of the main proceedings at the same time as the application for interim relief. Even though this latter criterion will in general be satisfied where an order is made for the suspension of enforcement of an administrative measure, the Commission does not believe it justified to impose such additional conditions "because this would in fact require an amendment to the rules of the courts in the Member States".

18. The Commission also bases its arguments on the case-law of the Court of Justice, according to which it has to be accepted that demands for repayment are treated in a different manner from one Member State to another, provided that the legal systems of the Member States endeavour to strike a balance between, on the one hand, the principle that their administrative authorities should act within the law and, on the other, the principles of legal certainty and protection of legitimate expectations, that the scope and effectiveness of Community law are not restricted, and that full account is taken of the Community' s interests.

19. The Commission develops a point of view of its own as to how full account is to be taken of the Community' s interests.

20. According to this view, the question of the validity of the legal measure must be submitted to the Court of Justice at the same time as enforcement is suspended, even though this is at variance with dogmatic reservations and reservations concerning procedural economy which are based on the fact that no decision has yet been taken on the validity of the measure of Community law and a reference to the Court of Justice might subsequently prove to be unnecessary. According to the Commission, the following arguments militate in favour of the manner of proceeding proposed by it: in the first place, the temporary interference with the decision-making monopoly of the Court of Justice with respect to the validity of Community law measures is kept to a minimum. That monopoly is recognized, while at the same time effective legal protection is granted.

21. Furthermore, national courts must, in arriving at their decision ex aequo et bono, take full account of the interests of the Community. They must therefore exercise their discretion in such a way that the "effet utile" of the provision of Community law is obstructed as little as possible.

22. Finally, a preliminary reference made on the occasion of the proceedings for suspension of enforcement could shorten the period of uncertainty as to the validity of the Community measure. In such a case, the court hearing the main proceedings would not have to give its decision until after the Court of Justice had given judgment.

23. The Commission believes that the manner of proceeding proposed by it merely gives concrete effect to the reference to the Court of Justice which is in any case provided for under Community law and makes it possible to avoid interference with the national proceedings relating to suspension of enforcement.

24. The Commission has also put forward substantive arguments against a possible refusal to recognize the power of national courts to suspend enforcement of an administrative act in proceedings for interim relief. Confidence in the Community legal order could be permanently shaken in such a case, since an individual might in certain circumstances be deprived for several years of his rights in view of the length of time taken by proceedings for a preliminary ruling.

25. The Commission also wonders whether the right to effective legal protection must not as such be regarded as a fundamental right. In any event, the situation in point is very close to those protected by the Basic Law. The principle of rapid legal protection also finds expression in the Community legal order, namely in Articles 185 and 186 of the EEC Treaty. In any case, it is a principle that is closely linked to that of the uniform application of Community law.

26. The Council addresses the first question in the reference for a preliminary ruling only very briefly. It takes the view that the question must in principle be resolved in the light of the principle of the primacy of Community law, in accordance with the case-law of the Court, but it refrains from formulating any proposal for a ruling on the question.

27. The Italian Government, on the other hand, adopts a more qualified position. It argues that national courts are at liberty to suspend, by way of interim protection, the operation of administrative measures based on Community regulations, even though the Court of Justice has not yet declared the regulation in question to be invalid. In support of this contention, the Italian Government argues that this conclusion is derived from the allocation of jurisdiction between national courts and the Court of Justice as laid down in the EEC Treaty. Moreover, an interim decision does not affect the validity of the regulation but is simply a protective measure which does not anticipate any future decision.

28. Referring to the Opinion of Mr Advocate General Mancini in Case 314/85, (6) the Italian Government points out that the interim relief sought may not be rendered ineffective by the length of the preliminary rulings procedure. Any refusal to allow a national court to suspend a questionable administrative measure would have serious consequences for individuals, given that they are not entitled to contest the validity of the Community regulation in question directly before the Court of Justice, something which is tantamount to depriving them of any legal protection. If, on the other hand, it is accepted that courts in the Member States do have the power to suspend enforcement of an administrative measure, the conditions governing the exercise of that power must be sought within

national legal provisions. Differences in the conditions governing interim protection under the legal systems of individual Member States are all the less discriminatory when one considers the variation in judicial procedures which must be complied with in order to obtain protection for personal rights guaranteed by Community law. It is not possible to achieve harmonization of procedural rules through the application by analogy of the conditions laid down in the EEC Treaty for the suspension of execution of measures.

29. The United Kingdom takes the opposite view. It believes that national courts should not be recognized as having the power "to suspend, by way of an interim measure, the operation of an administrative measure based on a regulation until a decision is reached in the main action concerning that regulation". If this were not the case, the integrity and uniform application of Community law would be placed in jeopardy. In reaching its view on this question, the United Kingdom starts from the premise that the EEC Treaty was intended "to establish a coherent system of legal remedies and procedures designed to enable the Court of Justice to review the legality of measures adopted by institutions". It also proceeds on the assumption that if national courts were entitled to grant such interim relief, they would be determining "the validity of acts of Community institutions".

30. Finally, the United Kingdom submitted a further argument in support of its contention at the hearing. "Absolute discretion" on the part of national courts regarding the suspension of a decision imposing a levy and based on a Community regulation could lead to distortions of competition. In that event, courts would be at liberty to release national undertakings from their obligation to make payment, and in this way it might be possible to refrain from implementing a regulation within a Member State. In such a case, there would also be reason to fear a distortion of competition by reason of the fact that the period within which payment must be made forms an integral part of the Community provision, whereas the time factor could be eliminated if national courts were empowered to order suspension of execution.

31. The United Kingdom believes that the apprehended distortion of competition could manifest itself in all areas affecting the parties involved, that is to say the undertakings producing sugar as well as the sugar-beet producers, by virtue of the power, for which provision is made, to pass on liability for the levy. Should the Community provision be declared unlawful and invalid, it would always be possible subsequently to repay the levies.

32. It also submits that the uncertainty surrounding the Community regulation is the same in the proceedings for an "interim decision" as in the main proceedings. However, the United Kingdom does accept that there may be exceptions, as, for example, in cases of hardship. In such cases, however, it is necessary to adopt protective measures in accordance with the rules of national procedural law.

2. The obligation to make a preliminary reference in proceedings for interim relief

33. The starting point for my answer to the present question must be the Court' s case-law on the subject. With regard to the obligation to make a preliminary reference, there is first of all the judgment in Case 314/85 (Foto-Frost), in which the Court first of all laid down the rule that it alone has jurisdiction to declare acts of Community institutions to be invalid, and that national courts are not entitled to make such a declaration themselves. However, the Court added that such a rule "may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures"; however, it considered that there was no need to address the issue since "that case is not referred to in the national court' s question". (7)

34. The Court did not on that occasion refer to its earlier case-law, to the effect that the third paragraph of Article 177 must be interpreted as meaning that "a national court or tribunal is not required to refer to the Court a question of interpretation or of validity ... when the question is raised in interlocutory proceedings for an interim order (einstweilige Verfuegung), even where no judicial remedy is available against the decision ..., provided that each of the parties is entitled to institute proceedings ... and that during such proceedings the question provisionally decided in the summary proceedings may be re-examined and may be the subject of a reference to the Court under Article 177". (8)

35. Admittedly, in 1977, the year in which this judgment was delivered, the decision in Foto-Frost did not exist, coming as it did only 10 years later. It is for that reason necessary to examine whether the

decision in Hoffmann-La Roche v Centrafarm can still be upheld in the light of the decision in Foto-Frost.

36. The Court, in its judgment in Foto-Frost, bases itself on the coherence of the system of judicial protection established by the Treaty. (9) Since Article 173 gives the Court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice. (10)

37. According to the decision in Hoffmann-La Roche v Centrafarm, national courts are not required to refer a matter to the Court of Justice, even where there is a question as to the validity of a measure of Community law, provided only that there is a possibility that this issue will be re-examined in the subsequent main proceedings and that it may form the subject of a reference under Article 177.

38. In its reply to the question referred to it for a preliminary ruling, the Court proceeded on the basis that judicial remedies still existed against the decisions of the Finanzgericht Hamburg. (11) It also held that those courts, which moreover are not subject to the obligation to refer a case under Article 177 of the EEC Treaty, have no jurisdiction to decide for themselves that acts of Community institutions are invalid. It is for that reason necessary to examine whether the Court' s reasoning in its decision in Foto-Frost also applies in the case of proceedings for interim relief.

39. In its judgment in Hoffmann-La Roche v Centrafarm, the Court held that there was no obligation to make a reference for a preliminary ruling, on the ground that such a reference could subsequently be made in the main proceedings. That is precisely the reasoning which ought to have led, in Foto-Frost, to a ruling that there was no obligation to make a reference. There was an opportunity in that case to raise such an issue during the appeal proceedings, since the Court of Justice had proceeded on the basis that an appeal could still be brought against the judgment of the court making the reference. After the judgment in Foto-Frost, this point of view is in itself insufficient as a ground for precluding the obligation to make a reference. Rather, it is necessary to examine the individual reasons which led the Court to adopt that decision.

40. Three grounds are mentioned by the Court itself. The first is the uniformity of the Community legal order. This uniformity is placed in jeopardy and the fundamental requirement of legal certainty is impaired if there are divergences between courts in the Member States as to the validity of Community acts.

41. The second ground is the necessary coherence of the system of judicial protection established by the Treaty, under which the Court of Justice has exclusive jurisdiction to declare void an act of a Community institution. The coherence of the system requires that where the validity of such an act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.

42. Thirdly, the Court of Justice is in the best position to decide on the validity of Community acts.

43. These considerations are of course also applicable in the case of proceedings for interim relief. How could it be possible for a court hearing an application for interim relief to cast doubt on the validity of Community measures if it is not empowered to do so in the main proceedings? The only argument possible in this regard is that the interim protection which an applicant seeks in instituting summary proceedings can be frustrated by reason of the time taken up by the proceedings for a preliminary ruling (see the Opinion of Mr Advocate General Mancini, loc. cit., at 4221).

44. Those considerations are based on a factual situation which is different from that in the present case. The Finanzgericht in this case suspended enforcement of the administrative measure on the condition of the lodging of a security and at the same time stayed its own proceedings. (12)

45. There is no danger in the present case that the time taken up by the reference for a preliminary ruling will frustrate the interim relief which the applicant seeks by instituting summary proceedings. The proceedings are stayed until such time as the Court has delivered its ruling on the questions referred to it.

46. However, even if it were conceivable that the proceedings for interim relief were to continue before a different court and it were not possible to await the ruling of the Court of Justice before taking a decision, this argues only against the period of waiting involved, and not against the obligation to make a reference for a ruling. If we suppose that the court before which the matter is brought confirms the suspension of execution in view of its doubts on the validity or efficacity of the Community measure, the question referred by the first court remains relevant and, since it is already before the Court of Justice, the point of law may be clarified all the more quickly.

47. It is thus in the interests of procedural economy that the question at issue has already been submitted to the Court. If the case is settled without any decision in the main proceedings, the doubts previously raised are not dispelled and a decision by the Court is thus necessary despite the settlement reached in the specific case in point.

48. If, on the other hand, the second court does not consider it necessary to suspend the operation of the administrative measure and on that ground dismisses the application for suspension, this (just in case there may be any doubt concerning the validity or effectiveness of the Community measure) has in any event no practical consequences. In such a case, the contrary interpretation of the lower court is no longer capable of limiting the effectiveness of Community law. The question then also arises whether the first or second court could have or ought to have withdrawn the request for a preliminary ruling. (13)

49. If the court dealing with the substantive issues does not share this doubt as to validity, the result may be a decision of the Court of Justice that was unnecessary. This situation corresponds to that in which a lower court makes a reference for a preliminary ruling to the Court of Justice which a higher national court does not consider to be necessary. Even in such a case, the Court of Justice must give its ruling if the reference has not been withdrawn. The same also applies with regard to questions on interpretation.

50. It is not necessary in the present case to decide this matter. Contrary to the theory underlying the present case-law of the Court, therefore, urgency and the obligation to seek a preliminary ruling are in no way mutually exclusive.

51. If the proceedings continue before the court which is dealing with the main issues the argument of urgency loses its force. It may consequently be expected in this regard that the court dealing with the main issues will base its decision on the judgment of the Court of Justice, in so far as it considers that the reservations expressed by the court which made the reference are well founded. If, on the other hand, it takes the view the such reservations are unfounded, the matter will proceed in the same way as the proceedings for interim relief.

52. The question arises as to what effect the judgment of the Court of Justice has for the court dealing with the substantive issues. There is no case-law on this point. The predominant view is that "the preliminary ruling is binding for the purposes of the proceedings which gave rise to the reference by the national court". (14) According to this view, both the higher court and the lower court, which must give a decision following the referral of the case back to it by the higher court, are bound by the ruling. It is also possible to accept this solution for the court dealing with the main proceedings, since its decision is closely linked to the proceedings for interim relief during which the request for a preliminary ruling was made.

53. Nor may it be objected to this that the question referred in the case was judged by the court called upon to decide the case to be quite unnecessary for the purpose of reaching its decision: if that court has such doubts as to the validity or effectiveness of the Community measure in question that it considers it necessary (after weighing all relevant interests) to suspend enforcement of the administrative measure, then it requires this decision so that it may either lift the suspension if its doubts are dispelled or, should its doubts be confirmed, maintain it.

54. If, pursuant to the rules of the courts in the Member State concerned, the case is removed from the court hearing the application for interim relief, with the result that that court can no longer give a decision, and if the court dealing with the substantive issues does not share its doubts, this is not an argument against the admissibility of the reference for a preliminary ruling. Such a situation is analogous to that where a lower court refers a question for a preliminary ruling which the higher court

does not regard as necessary. The Court of Justice must, in this case too, also give a ruling if the request for it has not been withdrawn. The second paragraph of Article 177 of the EEC Treaty takes account of this possibility.

55. The obligation to seek a preliminary ruling is necessary for overriding reasons connected with the need to ensure the uniform validity and effectiveness of Community law. It strikes me as necessary once more to address the central question. What are the consequences for the Community legal order if a court in a Member State declares a measure of Community law to be invalid? It is necessary in this regard to proceed on the basis that the courts of a Member State constitute an autonomous and independent branch of the sovereign authority of that Member State and that for this reason a declaration by such a court that a measure of Community law is invalid is a serious matter and gives rise to consequences which are "undesirable", "improper" or liable to create "grave problems". (15)

56. Those consequences are that, although Community law is not rendered inoperative, its effect is held in abeyance and confidence in its validity is adversely affected. The latter effect increases according to the degree of superiority of the court, while the former is independent of this factor.

57. Advocate General Mancini goes on to cite four anomalies which argue against lower courts' being entitled to declare Community measures invalid: "the first and perhaps the most striking of them is a paradox: according to the theory, inferior courts have a power - that of reviewing the validity of acts - which the third paragraph of Article 177 expressly removes from courts of last instance". (16)

58. The main argument then put forward by Mr Mancini is dogmatic in nature, as it concerns the contradiction engendered by the recognition of such a power within the system which entrusts to the Court of Justice alone the task of reviewing the legality of Community acts. I have already dealt with this argument.

59. Thirdly, this view detracts from the principle laid down by Article 189, according to which measures adopted by the institutions must be applied uniformly throughout the territory of the Community. That principle, according to Advocate General Mancini, has a dual aim: that of securing legal certainty and - which is equally, if not more, important - of guaranteeing the legal cohesion of the Community. (17)

60. I would concur with Advocate General Mancini on these three points.

61. It is of course also necessary to ask in this connection whether the same applies to questions of interpretation or at any event to some of them. Mr Mancini does not wish to extend the obligation to seek a preliminary ruling to questions of interpretation, in view of the fact that "to interpret a rule invariably also assumes an intention to apply it".

62. I am not sure that this view is valid in all cases.

63. An interpretation which, in the specific case in point, deprives a provision of its effectiveness is often tantamount in practice to contesting its validity: whether a court questions the validity of a provision or interprets it in such a way as to render it inapplicable to the case in hand, the practical consequences are identical. (18)

64. The argument that this may be remedied at a later stage in the proceedings is unconvincing. The proceedings may conclude without there being any subsequent judicial decision, as for instance in the present case, in which the plaintiff paid the levy demanded, since it considered this course of action to be preferable to having to pay interest for delay in the case of postponed payment. (19) In such a case, the decision dispelling doubts as to the validity of Community law would already be in existence. No one would be informed of the subsequent resolution of the dispute, which in any case could also result from grounds other than those derived from a change of opinion on the legal issue.

65. All these considerations argue in favour of the need to require courts hearing applications for interim relief, which intend to cast doubt on the validity or applicability of a provision of Community law, to refer a corresponding question to the Court of Justice.

66. However, even if it is possible to initiate further proceedings, it is not at all certain that the authorities of the Member State, who have been unsuccessful in the first instance, will lodge an appeal on grounds of Community law. (20)

67. Finally, even if this does happen, it is far from certain that the appeal court will be obliged to refer the matter (indeed, the view taken by the Court in Hoffmann-La Roche v Centrafarm is that this is definitely not the case) or that, even if it is so obliged, it will in fact make such a reference.

68. The plaintiff in the main proceedings has put forward two objections to compulsory reference to the Court of Justice.

69. The first of these concerns the summary nature of the documents relating to the case, which do not yet contain all the facts. Although this objection is basically correct, I believe that it constitutes rather an argument against raising questions concerning the validity of the Community measure at this stage in the proceedings. However, if such questions are raised, the court concerned must in my opinion help to remove such doubts as soon as possible. This view does not impose a restriction on the national court' s freedom of action, but it does limit the negative consequences which this may have for the legal order of the Community.

70. The second point made by the plaintiff in the main proceedings refers to the fact that the court hearing the application for interim relief may not be the one which deals with the substance of the case. While this consideration also is relevant, it does not support the conclusion drawn from it. If the court dealing with the substance of the case shares the doubts as to the validity of the Community measure, it is in the interests of procedural economy that the relevant question will already have been referred to the Court of Justice. If the proceedings are concluded without a decision having been taken on the substance of the case, the doubts already raised will not have been resolved. Although the actual dispute may have been settled, a decision by the Court of Justice is none the less necessary.

71. In any event, until such time as the decision to seek a preliminary ruling has been made by the court hearing the case in the later proceedings, there will be a period during which the court to which application was made for interim relief contests the validity of the measure of Community law. In the interest of ensuring the legal coherence of the Community, such a result cannot be tolerated.

72. I am well aware that in expounding these views I am at variance with the position taken by the Court and its Advocate General in Hoffmann-La Roche v Centrafarm. At that period, stress was laid on the summary character of the procedure and the provisional nature of the decision and from this the inference was drawn that "its nature would prevent it from becoming a precedent endangering uniform compliance with Community law, even if it placed an erroneous interpretation on that law". (21)

73. In my view, the decisive factor is the realization that the effectiveness of Community law is deferred and consequently diminished also by such proceedings and its validity or practical effectiveness thereby contested.

74. The great merit of the decision in Foto-Frost is that it brought this realization out into the open. The foregoing considerations are no more than an application of the principles set out in that judgment to the case which it now falls to the Court to decide. The obligation imposed on courts to seek a preliminary ruling is the necessary consequence of their right of judicial review. It is for that reason that the German Grundgesetz (Basic Law) imposes an obligation to refer a case to the Verfassungsgericht (Constitutional Court) where a court considers legislation, on the validity of which the decision in the case turns, to be unconstitutional. (22) In accordance with this, the Federal Government argued in the Foto-Frost case (23) in favour of the obligation to seek a preliminary ruling.

3. Conclusions

75. As a result, I consider that the courts of the Member States are under an obligation, both in the case of summary proceedings and questions of interpretation which cast doubt on the effectiveness of execution, to refer such questions to the Court of Justice.

76. It is still necessary to consider briefly the question of the extent to which the Court hearing an application for interim relief is bound by the legal measure, the validity of which it calls in question. The present case does not cast any light on this issue since the national court has suspended enforcement of the decision imposing the levy on condition of the lodging of security in an amount equal to that of the special elimination levy imposed. In so doing, the national court has taken account, within the limits of the possibilities open to it, of the will of the Community legislature which, by requiring payment to be made by 15 December 1987 at the latest, expressed its desire that the charge be imposed on the undertakings concerned as nearly as possible at the same time.

77. Counsel for the plaintiff, however, produced at the hearing an order of the Bundesfinanzhof (Federal Finance Court) of 11 July 1989 (Reference No VII B 183/88), according to which the decision of another court, namely the Finanzgericht (Finance Court) Baden-Wuerttemberg, suspending implementation of Regulation No 1914/87 without the lodging of a security, is unobjectionable in law. The competent Principal Customs Office also had not contested that decision.

78. For the reasons set out above, that view cannot be accepted. On the contrary, it is necessary even in proceedings for interim relief to proceed on the basis of the supremacy of Community law and to protect the Community' s interest as expressed therein.

79. It finally remains for me to express a view on the question whether the restrictions cited also apply if implementation is suspended for reasons which do not call in question the validity of the legal order of the Community. The implementation of an administrative measure may be suspended in German law "if implementation would result in unreasonable hardship, not justified by any overriding public interest, for the person concerned". (24) The representative of the Italian Republic also addressed this problem at the hearing.

80. Since the validity of Community law is not here called in question, a reference to the Court of Justice is unnecessary. Due regard for the interest of the Community, which in my view is called for by Community law, is here in any event prescribed by national law. When considering whether the time-limit of 15 December 1987 must be complied with or whether the undertaking must be protected against failure ("fallimento"), it may be quite permissible, also from the point of view of Community law, to suspend enforcement of the administrative measure in order to avoid unreasonable hardship not justified by an overriding interest of the Community.

81. This solution complies with the requirements of effective interim legal protection since it does not place any obstacles in its way.

82. It ensures the precedence of Community law, in so far as it requires the courts of the Member States, in this context also, to have due regard for the objectives of Community law.

83. It guarantees the independence of the courts of the Member States and their freedom of decision, since they can give free expression to any doubts they may have as to the validity of Community law or to the ineffectiveness of its provisions.

84. It ensures, within this framework, legal certainty and the legal cohesion of the Communities by requiring, in pursuance of Article 5, courts which have such questions to refer them to the Court of Justice and thereby contribute to the removal of the doubts which they themselves have expressed.

85. All things considered, this solution appears to me to satisfy the legitimate interests of all parties.

86. I would therefore suggest that the Court reply to the first question as follows:

87. Article 189 of the EEC Treaty must be interpreted as meaning that a national court which wishes to suspend the effects of an administrative act based on a measure of Community law, on the ground that it has doubts as to the validity of the measure of Community law on which the national administrative act is based or wishes to interpret it in a way which would deprive the Community law of its practical effectiveness, is obliged to refer the question of validity and effectiveness to the Court of Justice.

88. The national court is bound by Community law with regard to the nature and extent of the suspension.

89. The court dealing with the substance of the case must base its own decision on that of the Court of Justice regarding the validity of the Community measure.

II - The second question

90. The second question in the preliminary reference seeks a review of the validity of Regulation No 1914/87 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year. The special elimination levy is a levy imposed on the production of sugar and designed primarily to make good the budgetary deficits within the sector resulting from the grant of export refunds. The special elimination levy is payable in addition to a basic production levy amounting to 2% of the intervention price for sugar, a B-levy on the production of B-quota sugar of up to 37.5% of the intervention price (25) and an elimination levy. (26) The regulation on the special elimination levy entered into force on 2 July 1987 in respect of the 1986/87 marketing year, which had ended on 30 June 1987.

91. The plaintiff in the main proceedings has submitted a number of arguments which it believes point to the invalidity of the disputed regulation. Those arguments are essentially as follows:

(i) the regulation is founded on an incorrect legal basis. It should not have been based on Article 43 of the EEC Treaty, but on Article 201 of the EEC Treaty in view of its character as a financing levy;

(ii) the regulation is incompatible with the basic regulation inasmuch as it breaches the legal limits of the principle that the sugar sector should be self-financing and the principle of legal certainty.

(iii) the regulation infringes the prohibition of burdening a branch of the economy with extraneous risks which may place an unreasonable charge on sugar producers;

(iv) the regulation infringes the prohibition of retroactivity inasmuch as it was adopted with respect to a situation which had already ceased to exist and breaches the legitimate expectations of the persons subject to the levy;

(v) the regulation breaches the prohibition of discrimination since different charges are imposed on the production of A and B sugar. This also has the result that undertakings in the German sugar industry, which are subject to comparatively high B levies, are burdened to a greater extent than are undertakings in other Member States;

(vi) the regulation infringes the fundamental principles of the protection of property and freedom to pursue economic activities, since the amount of the levy constitutes an interference in the very substance of the undertakings;

(vii) the regulation is vitiated by misuse of powers, since the special elimination levy is in reality a financing levy which is strangulatory in its effect;

(viii) finally, the regulation infringes general principles of law inasmuch as the organization of the levy, and in particular the rules by which the levy may be passed on to sugar-beet producers, is incompatible with constitutional principles of German revenue law.

92. The national court addresses two of the arguments submitted, namely the question as to the correct legal basis and the problem concerning retroactivity. It does not appear in this regard to have any serious doubts as to the legal basis chosen by the Council. However, it takes a different view as to a possible infringement of the principle of non-retroactivity. The national court believes that the adoption of Regulation No 1914/87 does have a truly retroactive effect, entailing in any event a failure to take proper account of the legitimate expectations of the persons concerned, and that is why it has referred the question of validity to the Court of Justice.

1. Is Article 43 or Article 201 of the EEC Treaty the legal basis for Regulation No 1914/87?

93. Objection is taken to the introduction of the special elimination levy under Article 43 of the EEC Treaty on the ground that this does not constitute a measure regulating the sugar market, but is rather exclusively a financing levy. A measure designed to regulate the market can relate only to the present or to the future, but not to the past. Furthermore, the third recital in the preamble to the contested regulation refers expressly to "severe budgetary constraints on the Community".

94. It is argued that since the special elimination levy was introduced outside the framework of the organization of the market in sugar, it does not constitute own resources within the meaning of subparagraph (a) of the first paragraph of Article 2 of the Council Decision of 7 May 1985 on the Communities' system of own resources. (27) According to that provision, own resources are constituted only by "contributions and other duties provided for within the framework of a common organization of the markets in sugar". Since the special elimination levy is not a levy designed to regulate the market and does not constitute own resources within the meaning of the above decision, it ought to have been adopted on the basis of Article 201 of the EEC Treaty. As the procedure outlined in that provision was not complied with, the regulation, so it is contended, is invalid.

95. Finally, the plaintiff in the main proceedings states that it is exclusively sugar producers who have to bear the burden of the special elimination levy, even though the organization of the market in sugar was created for the general benefit of sugar-beet growers. This follows from the third recital in the preamble to the basic regulation which recommends that provision should be made for measures to stabilize the market in sugar in order "to ensure that the necessary guarantees in respect of employment and standards of living are maintained for Community growers of sugar beet ...".

96. In determining the correct legal basis for the adoption of the special elimination levy, it is necessary to decide whether it has the character of a charge for the regulation of the market or whether, as submitted, it is exclusively designed to finance a budgetary deficit and is suitable for that purpose. If it was intended to be a regulatory charge, the objectives of Articles 39 and 40 of the EEC Treaty must to some degree have been determinant when the measure was adopted.

97. The levy ought also to contain a reference of this nature to the regulation of the market in sweeteners in order for it to be capable of being described as Community own resources under subparagraph (a) of the first paragraph of Article 2 of the Decision on own resources, the adoption of which does not require the complicated procedure set out in Article 201 of the EEC Treaty.

98. It has been argued against the applicability of the above provision of the Decision on own resources basically that it could not apply precisely because it relates only to charges which already existed when the decision was adopted. All other charges, the argument runs, must come under the second paragraph of Article 2. So far as concerns the matters here at issue, Article 2 of the Decision on own resources is worded as follows:

"Revenue from:

(a) ... duties established or to be established ... in respect of trade with non-member countries within the framework of the common agricultural policy, and also contributions and other duties provided for within the framework of the common organization of the markets in sugar; (28)

(b) ... shall constitute own resources entered in the budget of the Communities.

In addition, revenue accruing from other charges introduced within the framework of a common policy in accordance with the Treaty establishing the European Economic Community ... shall constitute own resources entered in the budget of the Communities, subject to the procedure laid down in Article 201 of the Treaty establishing the European Economic Community ... having been followed."

99. A literal interpretation of that provision does not lead to any clear conclusion. While the past and future forms were expressly chosen with regard to duties in respect of trade within the framework of the Common Agricultural Policy, it is the present tense which has been used with regard to the imposition of duties within the common organization of the market in sugar. (a) This formulation renders a further interpretation possible.

100. The wording and objective of the provision would suggest that it covers not only charges introduced in the past, since there would otherwise be a danger that charges which are in fact identical would be included automatically among own resources solely on the basis of the date on which they were adopted, whereas others would require compliance with the complicated procedure under Article 201 of the EEC Treaty followed by ratification under the legal systems of the Member States. Thus, in the case of a simple alteration in the modalities of a charge, the question could arise as to whether the charge was still one which had previously been introduced or whether it had to be regarded, in view of the change in its legal nature, as a newly introduced charge.

101. These considerations find confirmation in the case-law of the Court (29) in regard to subparagraph (a) of the first paragraph of Article 2 of the Council Decision of 21 April 1970 on the Communities' own resources, a provision which is identical in content to that of subparagraph (a) of the first paragraph of Article 2 of the Decision on own resources and its relevant amendments: (30) "in view of the developments which were inevitably to take place in Community production and marketing of sugar and, consequently, the need to adapt contributions, levies, refunds and price support measures to those developments in the requirements of the Community markets in sugar, it was not conceivable that the scope of application of the decision of 21 April 1970 could have been limited merely to the levies which were provided for when it was adopted, that is to say to the levies laid down at that time by Regulation No 1069/67 ... establishing a common organization of the market in sugar". (31)

102. The legislative procedure under Article 201 of the EEC Treaty, which requires consultation with the Parliament, unanimity on the part of the Council and adoption by the Member States in accordance with their respective constitutional requirements, as referred to in the second paragraph of Article 2 of the Decision on own resources, finds its justification in the fact that sovereignty in matters of taxation must first be transferred to the Community. However, the sovereign power to levy duties within the common organization of the market in sugar has very clearly been conferred on the Community by way of subparagraph (a) of the first paragraph of Article 2 of the Decision on own resources. Consequently, in so far as the disputed levy comes within the common organization of the market in sugar, it is not necessary, for the purpose of introducing new levy provisions, to have recourse to the second paragraph of Article 2 of the Decision on own resources and thus to Article 201 of the EEC Treaty.

103. With regard to the identical provision contained in the second paragraph of Article 2 of the Council Decision of 21 April 1970, the Court has held that the only purpose of that provision is to allow new own resources to be created within the framework of a common policy, provided that the procedure laid down in Article 201 is followed. "However, that provision cannot be interpreted, contrary to its wording, as making the procedure laid down in Article 201 compulsory for the adoption of a measure which is part of a common policy merely because the measure entails the collection of revenue". (32)

104. The only thing that would not be permissible would be for the levy to be attached to the organization of the market in sugar purely in a formal manner, while in reality pursuing a completely different objective, in order to circumvent the procedure set out in Article 201 of the EEC Treaty.

105. It does not matter if, apart from its function of regulating the agricultural market, the levy also has a financial aspect in so far as, for instance, it contributes to limiting expenditure connected with the organization of the market in the agricultural sector. Indeed, as the Court has stated, Article 201 does not concern agricultural charges which apply in a specific agricultural sector and are allocated to the financing of costs in that sector alone. (33)

106. In the event that the special elimination levy falls to be treated as a levy within the context of the common organization of the market in sugar and therefore comes under subparagraph (a) of the first paragraph of Article 2 of the Decision on own resources, this cannot in any way justify the conclusion that the Council had no power to adopt that measure, on the ground that it relates by definition to "own resources". The Court has held on numerous occasions with regard to the Decision on own resources and the legislation preceding it "that its purpose is to define own resources allocated to the Community budget and not to stipulate the Community institutions which are competent to impose duties, taxes, charges, levies or other forms of revenue". (34) The power of the Council to create a levy has its basis in the provisions of the Treaty relating to the Common Agricultural Policy. (35)

107. In considering whether Article 43 of the EEC Treaty was properly selected as the legal basis for Regulation No 1914/87, it is necessary to proceed on the basis that Article 43 must be interpreted in the light of Articles 39 and 40 of the EEC Treaty. (36) This means that in order to attain the objectives set out in Article 39 a common organization of agricultural markets must be established under Article 40 and "this organization may include all measures required to attain the said objectives". (37) In considering whether a measure adopted on this basis is lawful, it is necessary, according to the case-law of the Court, to recognize that the Council carries the political responsibility and must be accorded a corresponding discretion. (38) By seeking to restrain production in the face of surpluses that have been found to exist, the imposition of a levy contributes to the attainment of the objective of stabilizing markets. (39) The principle of self-financing for the sugar sector was introduced by way of the basic regulation (40) in force at the time of the adoption of the special elimination levy. Express reference is made in the recitals in the preamble to the basic regulation to the desire "to provide the Community with the instruments necessary to ensure, in a fair yet efficient way, that the producers themselves meet in full the cost of disposing of the surpluses of Community production over consumption". (41) The specific legal particulars of the measures for attaining that objective are set out in Article 28 of the regulation and have hitherto been subject on numerous occasions to amendments in view of the fact that the provisions in force were in each case sufficient only to cover a part of the costs.

108. The measures designed to rectify the consequences of surplus production, (42) which were originally intended to be for a limited period only, may be described in terms of an evolutionary period during which legal rules were created to deal with events on the market and if necessary to direct them. These measures comprise, on the one hand, the rules governing production quotas and, on the other, those relating to the imposition of production levies designed to finance export refunds. When it became apparent that the basic production levy and the B levy were inadequate to cover the deficits which were being created, it was decided to levy a charge spread over the marketing years 1986/87 to 1990/91 for the actual expenditure incurred in respect of exports during the 1981/82 to 1985/86 marketing years. This was done through the insertion into the basic regulation of provisions relating to an elimination levy.

109. Market developments soon revealed that there would also be considerable deficits in respect of the marketing years succeeding those from 1981/82 to 1985/86 and that the existing legal instruments would be insufficient to enable those deficits to be made up. In order to counter this emerging trend as quickly as possible, the disputed special elimination levy for the 1986/87 marketing year was introduced by way of a separate regulation. (43)

110. Although the basic regulation was not formally amended by Regulation No 1914/87, the latter does fit substantially into the framework established by the basic regulation. Regulation No 1914/87 is inseparable from the basic regulation, both with regard to the method of collecting the special elimination levy and to the grounds on which it is based. The common organization of the market in sugar, as introduced by the basic regulation, constitutes the only basis which is put forward in the preamble to Regulation No 1914/87. With regard to the anticipated losses, reference is made to the forecasts in Article 28 of the basic regulation and the provisions of Article 28 are also referred to as constituting the basis for calculating the special elimination levy. Reference is even made to the procedure provided for in the basic regulation for the purpose of adopting detailed rules of application. (44)

111. Finally, it should be pointed out that the introduction of the special elimination levy is regarded as being an alternative to the amendment of existing rules on production quotas which might otherwise have become necessary, (45) and is consequently inextricably associated with the rules relating to the existing organization of the market. The argument that Regulation No 1914/87 was adopted outside the framework of the common organization of the market in sugar and for that reason cannot be regarded as a regulatory measure ultimately emerges as the expression of a purely formalistic point of view. In truth, the special elimination levy must, if we consider both its intention and purpose, be regarded as complementing existing provisions on the organization of the market. The choice of Article 43 of the EEC Treaty as the legal basis for the regulation cannot therefore be questioned.

112. To finish with the question of proper legal basis, it is still necessary to address the argument to the effect that, unlawfully, sugar-producing undertakings alone are made subject to the levy, a situation contrary to the objectives of the organization of the market in sugar which was expressly adopted only for the benefit of sugar-beet growers.

113. It is of no account whether the sugar-producing undertakings are to be regarded as producers or as consumers within the meaning of Articles 39 and 40 of the EEC Treaty. It is in any event beyond doubt that they benefit from the Community' s price guarantees through the common organization of the market in sugar at least to the same extent as the sugar-beet growers. Reference is made to this fact in the recitals in the preamble to the basic regulation, which state that:

"it is necessary that these regulatory measures [price guarantees] should provide guarantees which are fair both to manufacturers and to producers of the basic product". (46)

114. The entire price-regulation mechanism applies not only to basic products but also to sugar. Title I of the basic regulation provides that a target price for white sugar is to be fixed for each marketing year. Likewise, an intervention price is to be fixed both for raw sugar and white sugar (Articles 2 and 3 of the basic regulation). The pricing arrangements governing trade with non-member countries therefore also apply to sugar (Title II of the basic regulation). Under the conditions there specified, sugar producers can thus qualify for export refunds when they export their products outside the Community. The Community quota rules, one element in the price guarantees, also apply to the production of sugar (Article 19).

115. It is on the basis of the allocation of quotas that contracts of supply are concluded between sugar producers and sugar-beet growers. (47) Moreover, since the introduction of production levies on sugar, it is primarily the sugar producers who are liable for the levy, although it is possible to pass this on in part to the sugar-beet growers. (48) The method for charging the special elimination levy is based on the existing system. Finally, in its method of imposition and in its effects the special elimination levy is derived from the method for calculating production levies. It follows that the apportionment of the financial charges relating to the special elimination levy corresponds to that of production levies under the basic regulation. Regulation No 1914/87 is therefore not invalid on the ground that it introduced a levy which runs counter to the system, something which, in law, would only have been possible on a different legal basis.

2. The legal limits of the principles of self-financing, legal certainty and the prohibition of retroactivity

116. In order to be in a position to decide whether Regulation No 1914/87 is invalid by reason of retroactivity, it is first necessary to address the issue of whether and to what extent it must be regarded as retroactive in its effect. In so far as Regulation No 1914/87 entered into force on the day of its publication, 2 July 1987, and introduced a special elimination levy for the 1986/87 marketing year, which ran from 1 July 1986 to 30 June 1987, (49) its effects were attached to a specific period in the past. The determining factor for the computation of this special elimination levy was the sugar production during the marketing year which had just ended. The amount of the special elimination levy due was quite simply to be calculated by multiplying the production levy owed by the undertaking in question by a coefficient to be determined. (50) Undertakings subject to the levy were therefore not in a position to modify their business arrangements in any way so as to have any influence on the amount due in respect of the levy.

117. The same holds true for sellers of sugar beet, from whom sugar producers were to be entitled to demand reimbursement of up to 60% of the special elimination levy under the provisions of Article 1(3) of Regulation No 1914/87. Since Regulation No 1914/87 thus has an impact on a factual situation in the past, in respect of which it imposes charges a posteriori, it can truly be said to be retroactive in its effect.

118. So far as the possible retroactive effect of legal consequences is concerned, it can be said that there is indeed such an effect. Although the date from which the regulation is operative is not shifted to a point in time prior to its entry into force, all the facts to which it relates predate, as has already been seen, its entry into force. The legal consequence of the regulation, that is to say, the creation of the liability to pay the levy, had already ended at that date. It is of no account in this regard that the final amount due from the undertaking concerned in respect of the levy remained to be determined. That is a purely administrative procedure for the completion of which all factual elements were already present.

119. This is also true of the date on which the levy is due. The regulation provides that the special elimination levy must be paid before 15 December 1987. However, liability to pay the levy as such is

quite independent of the date by which it must be paid. Consequently, Regulation No 1914/87 can be valid only if the objective which it pursued necessitated its adoption and the legitimate expectations of parties concerned were properly respected.

(a) Objective of Regulation No 1914/87

120. The objective of Regulation No 1914/87 is to reinforce the principle that the sugar sector should be self-financing, a principle anchored in the common organization of the market in sugar since the beginning of the 1980s. The initial introduction of production levies and the subsequent imposition of the solidarity levy were designed to realize that objective.

121. The legislature has in principle a wide discretion with regard to defining in concrete terms the detailed rules for the organization of agricultural markets and the selection of objectives to be pursued therein, subject to the condition that such objectives must not constitute a misuse of powers. It is indisputable that the market in sweeteners is the only Community agricultural sector so far to which the principle of "full financing of costs by producers themselves" (51) has expressly applied.

122. The detailed legal rules for the attainment of an objective also come in principle within the discretion of the legislature. Nevertheless, it must for reasons of legal certainty respect the limits which it itself has defined and it may not make arbitrary alterations. Account must be taken of the legitimate expectation on the part of persons to whom those rules are directed that they continue to be in existence, particularly if those persons arrange their affairs on the basis of the legal position in force, and they must be given the opportunity to adapt their conduct in accordance with changes in the law.

(b) Was there a legitimate expectation on the part of sugar producers that their obligation to make up losses would be limited?

123. This question must be examined in the light of the existing legislation.

124. Regulation No 1785/81 (52) lays down the principle that producers themselves should meet costs in full, although this system should apply for a limited period only and should be regarded as transitional. Article 28, however, sets out maximum amounts for the levies necessary to cover costs, and these maximum amounts may not be exceeded. (53)

125. These texts do not answer the question of what happens if the full financing of the costs by the producers is not achieved by means of the maximum amounts specified. I do not believe that this is sufficient to give rise to a legitimate expectation that the maximum amounts will not be exceeded.

126. The frame established by Regulation No 1785/81 was given detailed content by Regulation No 1738/85, (54) under which the maximum amount for B sugar was raised from 30% to 37%. This regulation also provided that losses resulting from the obligation to export surpluses of Community sugar were to be covered within certain limits. (55)

127. The principle of limitation is clearly expressed in this regulation.

128. Regulation No 934/86 (56) reiterates "the principle that producers are financially liable for all ... losses" and, in addition to changes in the system of financing, introduces an elimination levy for this sector. The regulation also contains a provision to the effect that at the end of the 1987/88 marketing year there is to be recorded cumulatively for the two marketing years 1986/87 and 1987/88 inter alia the total sum of the basic production levies and the B levies charged.

129. This regulation does not alter the maximum limits for existing contributions, but it does introduce a new elimination levy "designed to eliminate the ECU 400 million deficit recorded following application of the quota arrangements in the period 1981/82 to 1985/86". (57)

130. Although the regulation does refer to specific limits, it goes beyond the limits hitherto defined through its introduction of the elimination levy and it stresses the principle that "producers are financially liable for all ... losses". (58) Every sugar producer was thereby made aware of the Council' s determination to make producers liable for all losses.

131. This however was the situation when the contested Regulation No 1914/87 was adopted. A legislative measure which is self-contradictory cannot give rise to any legally protected expectation. This is particularly the case where public authorities are required to shoulder the costs of their own economic activities. In the absence of a clear, unambiguous and legally binding consent on the part of the person who bears the costs, there can be no legally protected expectation.

132. There could therefore be no justified expectation on the part of producers that the Council would adhere to certain limits and depart from the principle that producers should be fully responsible for all losses. The Council was therefore not precluded by the principle of legitimate expectation from imposing on producers the charges resulting from the principle that producers should be financially liable for all losses.

133. An attempt has also been made to derive from Council Regulation No 1107/88 (59) (concerning the introduction of an additional levy) arguments in support of the existence of a pre-existing legitimate expectation or of the contention that the Council had previously bound itself in the matter. The first observation to be made on this is that the interpretation of earlier legal measures in the light of subsequent measures is, as a method, questionable. In addition, the point that it was not guaranteed in the past that the objective of self-financing could be attained and that, accordingly, it was foreseeable that the mechanism for self-financing would be reinforced is not an effective argument against Regulation No 1914/87.

134. It is quite clear and not open to dispute that the original mechanisms for the self-financing of the sector were inadequate and resulted in deficits which had to be made good. The objective of the additional levy is to prevent such deficits from arising and to ensure "that all future losses resulting from the disposal of the Community' s surplus production are covered, in respect of each marketing year, by the producers' financial contributions". (60) One cannot conclude from this that it would be unlawful also to pass the losses which arose in the past on to the persons responsible for them.

135. Furthermore, it should be pointed out that the Community had to choose at that time between introducing a special elimination levy and reducing production quotas. The latter would have hit sugar producers harder than a financial levy.

136. In addition, this solution would have been impossible for the 1986/87 marketing year, since the overall loss only became known after the quotas had already been used up. Moreover, the special elimination levy only affected those economic operators who had been responsible for the deficit to be eliminated. The appropriate solution therefore (and in this I must agree with the defenders of the contested regulation) was not to reduce quotas, but rather to introduce the special elimination levy.

137. If the view is not accepted that sugar producers could not have acquired, on the basis of the existing tests, a legitimate expectation that the Community would cover the deficits for which they were responsible, or in any event that they could not have continued to nurture such an expectation, account must be taken of the matters which the United Kingdom, the Council and the Commission have put into consideration. These are that the Commission published on 9 September 1986 an estimate which clearly indicated the likelihood of a deficit in respect of the 1986/87 marketing year. The Commission submitted in February 1987 the proposal for the introduction of the special elimination levy. On 7 March, the Commission representative explained the proposal before the Advisory Committee on Sugar, and the proposal was finally published in the Official Journal on 3 April 1987. All this information was available to sugar producers through the specialized press, and for that reason they could not have been surprised by the introduction of the special elimination levy. These arguments would also suggest that the Council acted quite properly in adopting Regulation No 1914/87 and did not infringe the principle of the protection of legitimate expectations.

138. My examination of the issues raised has not, up to now, brought to light any factor of such a kind as to affect the validity of the regulation.

3. Prohibition on burdening of an economic sector with extraneous risks and the disproportionate nature of the levies

(a) Burdening of an economic sector with extraneous risks

139. In the reservations which it expresses regarding the validity of Regulation No 1914/87, the national court is obviously proceeding on the assumption that there exists in Community law a prohibition on burdening an agricultural sector with extraneous risks. That court understands an extraneous risk as consisting of factors which give rise to or increase costs which do not have their immediate origin in the common organization of the market and in the conditions existing in the Common Market. It sees such an extraneous risk in the price level of sugar on the international market, a level which is essentially determined by sugar production in non-member countries and the fall in the value of the US dollar. The low price level of sugar on the world market caused substantial export refunds to be paid and these in turn were responsible for the budgetary deficit which had to be offset by the special elimination levy.

140. It is unclear what legal basis exists for the principle that price- forming factors within a common organization of the market, such as in this instance the world market price or the fall in the value of the dollar, may not be passed on to operators within the relevant agricultural sector in the form of financial charges. The description of such factors as "extraneous risks" itself appears questionable. Admittedly, we are dealing here with circumstances which lie outside the sphere of influence of producers within the internal market as well as outside that of the Community institutions invested with public powers, which can only react to such developments, but cannot in any way direct them. None the less, these factors must be regarded as influential factors inherent in the system of the common organization of the market. Both the price regulation mechanism with its system of refunds and levies and the rules which apply to trade with non-member countries constitute an integral part of the common organization of the market in sugar. (61)

141. Despite their effect of increasing costs, export refunds benefit the Community market in sugar in so far as they form part of the price guarantees. Conditions on the internal market cannot be considered separately from developments on the world market. The common organization of the market in sugar is itself based on the interdependencies which exist between those two markets.

142. Given these conditions, the question arises as to how a limit might be placed on the large volume of export refunds. If we proceed in this regard on the basis that price guarantees must be retained, the only appropriate method for consideration will be a reduction in the guaranteed quantities, that is to say, the A and B quotas. This once again demonstrates the mutual dependency and interconnection between regulatory mechanisms in the common organization of the market and developments outside the internal market. It is for that reason not correct to speak of "extraneous risks", which by definition cannot influence the financial burdens of economic operators within a common organization of the market.

(b) Observance of the principle of proportionality

143. It is possible to discern a submission alleging a breach of the principle of proportionality only in so far as it is claimed that the financial charges resulting from the special elimination levy are unreasonable because of the amounts involved and the fact that they are in addition to earlier levies. In order to decide the question whether the special elimination levy is disproportionate and consequently invalid it has to be considered whether and to what extent the principle of self-financing in the sector in question was properly introduced and to what degree the special elimination levy is necessary and suitable for the attainment of that objective.

144. The administration of an agricultural sector within the framework of a common organization of the market comes in principle within the discretion of the Community legislature. No criticism can be levelled at the objective that a market sector should be self-financing. It is immaterial that this objective does not expressly apply to all aspects of the Common Agricultural Policy. In any event, such an objective would be unobjectionable in law. The conception in the Treaty of the common organization of agricultural markets does not require that it must permanently be "a subsidized undertaking" as is de facto the case. The fact that the principle of self-financing was introduced for one market sector and not for others does not in itself present any problems, since economic operators in the different market sectors are not in comparable situations vis-à-vis one another. The implementation of the principle of self-financing, in circumstances which are otherwise legally correct, must therefore be regarded as permissible.

145. If we start from this premiss, it is however essential that the financial charges arising from the system of price and sales guarantees should in some form fall also on those market participants who, as subjects of the common organization of the market, benefit from the regulation of that market. The level of charges deriving from the system cannot be criticized so long as there is an economic correlation between benefits and burdens. At most, one might criticize, on grounds of material justice and the prohibition of discrimination, a requirement to make contributions with respect to budgetary deficits not caused by the production of the undertaking subjected to that requirement.

146. However, the special elimination levy presents no problem in this regard, since it imposes obligations on those economic operators who engaged in the production giving rise to the costs in question. The submissions based on the unlawful burdening of an economic sector with extraneous risks and the disproportionate nature of the levy must therefore be rejected.

4. Breach of the prohibition of discrimination

147. The plaintiff in the main proceedings disputes the validity of Regulation No 1914/87. That regulation, it argues, infringes the prohibition of discrimination under Article 40(3) of the EEC Treaty, in the first place because it imposes different charges on the production of A and B sugar, and secondly because a heavier burden is imposed on the German sugar industry, which has a comparably high B quota, than is imposed on the sugar industry of other Member States. Apart from the fact that comparable situations are involved, differences in the treatment of which cannot be justified on any objective grounds, the discrepancies in the charges imposed on A and B sugar are in particular unlawful because the special elimination levy does not represent a charge for the regulation of the market, but is rather a financing charge, in respect of which the principle that persons subject to a charge should be treated equally must a fortiori be observed. As early as the fixing of the elimination levy under Regulation No 934/86, referred to as a solidarity levy, the objective was to impose an equitable charge on all aspects of sugar production and this ought a fortiori to have been prescribed in the case of the special elimination levy.

148. Before I examine whether the special elimination levy constitutes discrimination, I would point out that, according to the views expressed here, the special elimination levy is a measure designed to regulate the market, which requires to be examined in the context of the common organization of the market in sugar, and is not a purely financial charge.

(a) The heavier charge imposed on the production of B sugar

149. The special elimination levy is calculated on the basis of the different production levies imposed on A and B sugar under Article 28 of the basic regulation. Since the amount of the special elimination levy is determined simply by applying a coefficient to the production levies due, the special elimination levy is imposed on the production of A and B sugar in the same ratio as are the production levies under Article 28 of the basic regulation.

150. In so far as the discrepancy in the charges imposed on A and B sugar does not constitute unlawful discrimination, it is permissible to conclude that the special elimination levy is equally non-discriminatory in its effect. While it has to be admitted, when deciding whether the production of A sugar and that of B sugar represent comparable situations, that both cases concern sugar and consequently the same product, the same observation must also apply to C sugar. It is thus necessary to have regard not only to the product itself, but also to its function within the common organization of the market. In this connection, it should be noted that the difference between A sugar and B sugar has a historical basis. As early as the first common organization of the market introduced by Regulation No 1009/67, (62) a distinction was drawn between a "basic quota" and a "maximum quota" for each undertaking and each marketing year. The recitals in the preamble to that regulation state that:

"This aim [limitation of production] could be achieved by allocating to each factory or undertaking ... a basic quota for which a price and sales guarantee would be given by the Community and by limiting or withdrawing this guarantee for quantities manufactured over and above the basic quota, depending on whether or not they exceed a certain ceiling". (63)

This objective is implemented in Article 22 et seq. of the regulation. This system, the period of application of which had originally been limited to July 1975, was extended with a number of amendments through Regulations No 3330/74 (64) and No 1592/80. (65)

151. During the period of validity of Regulation No 3330/74, the Court described as follows the quota system within the organization of the market in sugar:

"(a) In accordance with Article 24 each undertaking is allotted a basic quota, called 'Quota A' and may sell the sugar produced within that quota directly on the Community market at the intervention price;

(b) Pursuant to Article 25 each undertaking may in addition be allotted a quota, called 'Quota B' , equal to its Quota A multiplied by a coefficient and may also sell on the Community market the sugar produced within these limits on payment of a production levy (Article 27);

(c) The sugar produced over and above the Quotas A and B, called 'Sugar C' may not be disposed of on the internal market and must be exported in the natural state on the world market before 1 January following the end of the sugar marketing year during which it has been produced (Article 26)". (66)

152. That system was replaced, with effect from 1 June 1981, by Regulation No 1785/81, which is here referred to as the basic regulation. The terms "A, B and C sugar", "A quota" and "B quota", were also incorporated, from the point of view of terminology, the basic regulation. That regulation basically retained the system under which both A and B sugar could be marketed in the common market with the aid of price guarantees, although from the outset there was a possibility that an appreciably higher production levy would be charged in respect of B sugar. A consequence of the production levies is a reduction in the guaranteed prices. (67) In contrast to a simple reduction in the intervention price, the system of production levies has the advantage that it takes account of Community interests, such as the principle of regional specialization.

153. With regard to the quantities of quota sugar produced, it should be pointed out that the sugar produced within the A quota corresponds approximately in volume to sugar consumption within the Community. Although the marketing of B sugar is not attached to any specific objective, the Court has stated, against the background of a sugar market characterized by surplus production and in view of the function of production quotas, that "all undertakings which exceed their A quota therefore produce, by definition, surpluses for export". (68) This analysis explains the considerably heavier charges imposed on B-sugar production and the resultant restrictions placed on the special rules applying to its disposal within the common organization of the market in sugar.

154. The above considerations justify the conclusion that A sugar and B sugar do not constitute the same product within the common organization of the market, with the result that it is not possible to speak of comparable situations when examining the problem of equal treatment. However, if one none the less were to proceed on the basis that they are comparable, the grounds already outlined are sufficient to justify the different levels of charges imposed within the common organization of the market. As already mentioned, this reasoning, in so far as it justifies a higher production levy in the case of B sugar, justifies in like degree the imposition of the special elimination levy.

(b) Misuse of powers

155. This appears to be a suitable point at which to examine the objection that the special elimination levy is vitiated by misuse of powers. It is claimed that the true objective of the regulation is not to compensate for losses incurred during the 1986/87 marketing year, but rather to dissuade sugar producers from all production of B-quota sugar. It was for this reason that a strangulatory levy was imposed on the production of B sugar.

156. It should first be pointed out that the recitals in the preamble to Regulation No 1914/87, and the general conception of that regulation, indicate very clearly that it was intended to cover the budgetary losses arising in the 1986/87 marketing year by means of the special elimination levy. The only question possible is therefore whether this was the only objective pursued and, if relevant, whether other objectives were legally permissible.

157. It is not disputed that the practical effect of the production levy is similar to that of a reduction in price guarantees. (69) In so far as a heavier charge is imposed on B sugar, the surplus production which cannot be sold within the Community is charged in a purely theoretical manner. The surplus lawfully produced under production quotas is thus the essential cause of the high budgetary deficit, since export refunds must be paid when it is exported from the Community. The fact that it is much less attractive from an economic point of view to produce B-quota sugar than to produce A-quota sugar, in view of the higher charges imposed on surplus production, which may be theoretically defined as B sugar, is a lawful consequence of the method by which deficits are apportioned, which is intended to affect surplus production to a greater degree than sugar which can be disposed of in the common market.

158. This reasoning cannot be countered by the argument that ultimately both A sugar and B sugar contribute to surplus production, that both benefit from the advantages of the intervention system and that both attract export refunds when they are exported. The difference between A sugar and B sugar lies in their legal status. The distinction drawn at the time of the first organization of the market in sugar justifies a factual difference in treatment, with the result that the imposition of additional charges on production of B sugar does not amount to a misuse of powers.

(c) Discrimination in the treatment of the sugar industry from one Member State to another

159. Finally, the plaintiff in the main proceedings argues that the special elimination levy is discriminatory and consequently invalid on the ground that it imposes on the sugar industry a charge which varies in amount from one Member State to another. The discrepancy in the average charge imposed is due solely to the unequal apportionment of A and B quotas among Member States. Heavier charges are accordingly necessarily imposed on the sugar industry in Member States which have a comparably higher B quota. If the inequality in treatment objected to is not in fact based on the method of imposing the special elimination levy, but rather on the allocation of production quotas determined according to differing criteria, it cannot merely for that reason be declared invalid.

160. The complaint of discrimination is ultimately an attack on the allocation of quotas, if it is accepted that the imposition of a higher charge on B sugar is permissible in law. However, as the plaintiff in the main proceedings itself stated, the allocation of quotas is in large measure the result of political negotiations. Any assessment of the results of negotiations conducted in the context of legislative activity must assume a priori a wide measure of discretion on the part of the legislature. Furthermore, the pursuit of objectives which are mandatory or at least permissible under Community law may also have an effect on the final outcome. Thus the allocation of quotas, apart from having the objective of stabilizing markets, also expressly pursues that of regional specialization. Moreover, the Court has already held that this procedure, which results in differences in the treatment of national economies, does not constitute prohibited discrimination. (70) In conclusion, therefore, the objection of discrimination must also be rejected.

(d) Method of charging only in accordance with the example of the "solidarity levy"

161. It remains in this connection to examine the objection that the special elimination levy ought, if at all, to have been charged in the form of the imposition of the solidarity levy under Regulation No 934/86, that is to say, imposed in equal measure on A sugar and B sugar. Against this it should be pointed out that even if one regards the charges as being equivalent within the common organization of the market in sugar, their situations are still not identical. Whereas the solidarity levy, as is already evident from its title, was designed to make good, on the basis of solidarity, a deficit built up over several years, the special elimination levy placed more emphasis on individual responsibility in so far as it was linked to production in the marketing year during which the deficit had arisen. There was therefore no obligation in law to choose the system for collecting the solidarity levy for the purposes of the special elimination levy.

5. Protection of the right to own property and the freedom to pursue an economic activity

(a) Infringement of the right to own property

162. The plaintiff in the main proceedings disputes the validity of Regulation No 1914/87 on the ground that it infringes the fundamental right to own property and the freedom to pursue economic

activities. It claims that the special elimination levy is strangulatory in nature, since it is imposed on top of other financial charges. The total burden placed on the plaintiff constitutes a serious financial interference with the intrinsic value of the business established and pursued by it. The real-asset loss is at the same time an interference with the undertaking' s competitive capacity.

163. The plaintiff claims that the amounts of the levies imposed on the B quota will result in sugar-beet growers growing very little sugar beet, if indeed any at all, under their B quota. The resultant fall in supplies will prevent the proper utilization of the undertaking' s capacity and inhibit its economic recovery.

164. The Court has consistently held that fundamental rights form an integral part of the general principles of law whose observance is ensured by the Court. (71) Quite recently the Court confirmed that it is bound, when safeguarding such rights, to draw inspiration from constitutional traditions common to the Member States, and that it cannot therefore uphold Community measures which are incompatible with fundamental rights recognized by the constitutions of those States. (72) It has been recognized that the right to own property and the freedom to pursue a trade or profession rank among the general principles of Community law. (73) As in the constitutional systems of the Member States, those principles do not constitute an unfettered prerogative, "but must be viewed in the light of [their] social function". (74)

165. The Court outlined as follows the criteria to be used when determining whether there has been an unlawful infringement of protected rights or whether there has been a legitimate restriction on the exercise of personal rights: rights of this nature "are protected by law subject always to the limitations laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched". (75)

166. The Court has also stated elsewhere that:

"Consequently, the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organization of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed". (76)

167. If we apply those criteria to the facts of the present case, the question to be answered amounts to asking whether the special elimination levy can be justified by an objective pursued by the Community in the common interest, and in particular whether it serves the recognized objectives of the common organization of the market, is not disproportionate to the objective pursued and does not encroach upon the very substance of the freedoms protected.

168. I have already drawn attention to the fact that the special elimination levy was designed as a measure to implement the principle of self-financing within the common organization of the market in sugar. It has also already been ascertained that the relatively high charge imposed on the production of B sugar is not disproportionate to the objective pursued, particularly in view of the fact that it is difficult to envisage a less drastic method for achieving that objective.

169. Although production limitation is not one of the declared objectives of the special elimination levy, it may none the less be described as a regulatory measure within the common organization of the market. If a diminution in B-sugar production was indeed intended as a side effect of the special elimination levy, that would still not mean that the measure was disproportionate. Measures for the regulation of the market - which include, considered in their broadest sense, the special elimination levy - must be considered in the light of the whole context of the legislation.

170. It was originally intended that the problem of surplus production should not be resolved by restrictions on production, i.e. a reduction in quotas. It was decided to introduce the special elimination levy in order to avoid, at least temporarily, the need to adopt such a drastic measure. Even if the amount of that levy rendered the production of B sugar uneconomical and consequently resulted indirectly in a limitation on production, such a consequence would still not constitute an encroachment

upon the substance of the right to own property. Even a reduction in production quotas imposed for reasons of market policy would be permissible, given that an undertaking "cannot claim a vested right to the maintenance of an advantage which it obtained from an organization of the market in the form in which it existed at a given time". (77)

(b) Interference with the freedom to pursue an economic activity

171. Finally, the foregoing arguments also preclude acceptance of the view that there has been an interference - in breach of fundamental rights - with the undertaking' s freedom to pursue an economic activity. The economic activity of the undertaking as such is not restricted. On the contrary, the production quotas remain the same as before and as a result the marketing guarantee for the finished product, sugar, continues to apply as previously. The only ascertainable restriction lies in the resultant limits imposed on the preferential regimes. Such interference, however, still remains within the bounds of a lawful regulation of the exercise of a trade or business. Although the reduction in advantages may have serious consequences for the operators affected, it cannot be considered as constituting an infringement of the fundamental right to pursue an economic activity. (78)

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6. Breach of the principles governing the levying of taxes in the German legal system

172. The plaintiff has submitted that the levy system and in particular the system whereby charges are passed on are at variance with principles of German administrative and constitutional law which, as general principles of law, are also protected under Community law. It argues that the legal principles in the light of which the levy system falls to be examined are also recognized in Community law and that consequently the results of such an examination must also apply within the Community legal order, which is not yet so highly developed in this area.

173. It must be pointed out with regard to this submission that the fact that Community legislation is allegedly or effectively at variance with the principles applicable in Member States regarding the levying of taxes may result in the invalidity of such legislation only if the national constitutional principles in question also constitute general principles of law in the Community legal order. Only in that case can they be used as a test of validity. In so far as the plaintiff submits that the relevant principles of constitutional and administrative law, such as for example the principle of proportionality, the prohibition of discrimination and the prohibition of retroactivity, are recognized as such in Community law, it is necessary to point out that those legal principles, as formulated in Community law, have already been used as criteria for testing the regulation at issue.

174. However, no other constitutional principles in the nature of fundamental rights, which ought to be recognized as general principles within the Community legal order and which would result in the invalidity of Regulation No 1914/87, have been put forward in argument. Consequently, the special elimination levy is not invalid on the ground that it infringes national principles governing the levying of taxes.

175. Consideration of the question referred to the Court for a preliminary ruling has therefore revealed no factors of such a kind as to affect the validity of Council Regulation No 1914/87.

Costs

176. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs should be a matter for that court. The costs incurred by the United Kingdom, the Italian Government, the Council and the Commission are not recoverable.

C - Conclusions

On the basis of the foregoing considerations, I propose that the Court reply as follows to the questions referred to it by the national court:

1. The second paragraph of Article 189 of the EEC Treaty must be interpreted as meaning that a court in a Member State which wishes to suspend by way of interim relief the effects of an administrative act based on a measure of Community law, on the ground that it has doubts as to the validity or the effectiveness of the measure of Community law on which the administrative act is based, is under an obligation to refer the question of the validity and effectiveness of the measure of Community law concerned to the Court of Justice.

The national court is bound by Community law with regard to the nature and scope of the suspension.

The court dealing with the substance of the case must baes its decision on that of the Court of Justice regarding the validity and effectiveness of the measure of Community law.

2. Consideration of the question referred has revealed no factor of such a kind as to affect the validity of Council Regulation No 1914/87.

(*) Original language: German.

(1) Council Regulation No 1914/87 of 2 July 1987, OJ 1987 L 183, p. 5.

(2) Inter alia: Order of the Bundesfinanzhof of 11 July 1989, Reference No VII B 183/88.

(3) See Case C-92/89 Zuckerfabrik Soest v Hauptzollamt Paderborn.

(4) Judgment in Case 314/85 Foto-Frost v Hauptzollamt Luebeck-Ost [1987] ECR 4199.

(5) My emphasis.

(6) Opinion in Case 314/85 Foto-Frost v Hauptzollamt Luebeck-Ost [1987] ECR 4199.

(7) [1987] ECR 4199, at paragraph 19 of the judgment.

(8) Judgment in Case 107/76 Hoffmann-La Roche v Centrafarm [1977] ECR 957.

(9) Loc. cit., at paragraph 16.

(10) Loc. cit., at paragraph 17.

(11) Judgment in Foto-Frost, loc. cit. at paragraph 13 (see also point 1 in the summary).

(12) Order of the Finanzgericht Hamburg seeking a preliminary ruling, II.

(13) On this point, see Dauses "Das Vorabentscheidungsverfahren nach Artikel 177 EWG-Vertrag", Luxembourg 1985, pp. 83 to 85.

(14) See Dauses "Das Vorabentscheidungsverfahren nach Artikel 177 EWG-Vertrag", Luxembourg 1985, p. 101; Everling "Das Vorabentscheidungsverfahren vor dem Gerichtshof der Europaeischen Gemeinschaften", Baden 1986, p. 63; in this connection, also with regard to superior courts, see Chevallier and Maidani "Guide pratique article 177 CEE", Luxembourg 1981, p. 96.

(15) Mancini, loc. cit., at 4218; Mancini refers in that context to, inter alia, Brown and Jacobs, "The Court of Justice of the European Communities", London 1983, p. 154 et seq. - see now Third Edition, p. 173.

(16) Loc. cit., at 4218.

(17) Loc. cit., at 4218.

(18) See Brown and Jacobs, loc. cit., p. 174.

(19) Another example is provided by disputes under the German Law against Unfair Competition, which are most often brought by way of proceedings for interim relief (see OLG Frankfurt, decision of 16 January 1990, AZ 6W 146/89 in EuZW 1/90, p. 39.

(20) See the Commission and the Advocate General in Foto-Frost, loc. cit., at 4205 and 4219.

(21) Advocate General Capotorti, loc. cit. [1977] ECR 957, at 983.

(22) See Leibholz/Rinck, Grundgesetz Kommentar, 6th Edition, Cologne 1989, Article 100, note 1.

(23) Loc. cit., at p. 4205.

(24) Finanzgerichtsordnung (Rules of the Finance Courts), second alternative in the second sentence of Paragraph 69(2).

(25) See Article 28(3) and (4) of the basic Council Regulation No 1785/81 of 30 June 1981, OJ L 177, p. 4.

(26) See Article 32a of Regulation No 1785/81, as amended by Council Regulation No 934/86 of 24 March 1986, OJ L 87, p. 1.

(27) Decision on own resources (OJ 1985, L 128, p. 15).

(28) My emphasis.

(a)a Translator' s note: This observation is based on the German text of the provision.

(29) Judgments in Case 108/81 Amylum v Council [1982] ECR 3107, at paragraph 33, and in Case 110/81 Roquette Frères v Council [1982] ECR 3159, at paragraph 39.

(30) Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ, English Special Edition 1970 (I), p. 224): "contributions and other duties provided for within the framework of the organization of the markets in sugar".

(31) Case 108/81, loc. cit., at paragraph 33 of the judgment.

(32) Judgment in Case 265/87 Schraeder v Hauptzollamt Gronau [1989] ECR 2237, at paragraph 11.

(33) Case 265/87, loc. cit., at paragraph 10 of the judgment; see also the judgment in Case 179/84 Bozzetti v Invernizzi SpA [1985] ECR 2301, at paragraphs 19 and 20.

(34) Case 110/81, loc. cit., at paragraph 38 of the judgment, and Case 108/81, loc. cit., at paragraph 32 of the judgment.

(35) Cases 108/81 and 110/81, loc. cit.

(36) Judgment in Case 138/78 Stoelting v Hauptzollamt Hamburg-Jonas [1979] ECR 713, at paragraph 4.

(37) Case 138/78, loc. cit.

(38) Case 138/78, at paragraph 7 of the judgment.

(39) Case 138/78, loc. cit.

(40) Council Regulation No 1785/81 of 30 June 1981 (OJ 1981, L 177, p. 4).

(41) 11th recital in the preamble to the basic regulation, my emphasis.

(42) See the 11th recital in the preamble to the basic regulation.

(43) Regulation No 1914/87.

(44) Article 1(4) of Regulation No 1914/87, with reference to Article 41 of the basic regulation.

(45) Fourth recital in the preamble to Regulation No 1914/87.

(46) Fourth recital in the preamble to the basic regulation.

(47) Article 5 of the basic regulation; see also Regulation No 206/68 of 20 February 1968 on provisions governing contracts and group agreements relating to the purchase of sugar beet, Journal Officiel 1968, L 84, p. 1.

(48) Articles 28 and 5 of the basic regulation.

(49) See Article 2(1) of the basic regulation.

(50) See Article 1(2) and (4) of Regulation No 1914/87 and Commission Regulation No 3061/87 of 13 October 1987 (OJ 1987, L 290, p. 10).

(51) See the preamble to basic Regulation No 1785/81.

(52) 11th recital in the preamble.

(53) See paragraphs 3 and 5 of Article 28 of Regulation No 1785/81.

(54) OJ 1985, L 167, p. 2.

(55) First recital in the preamble.

(56) OJ 1986 L 87, p. 1.

(57) See Article 32a.

(58) Second recital in the preamble.

(59) Council Regulation No 1107/88 (OJ 1988 L 110, p. 20).

(60) Sixth recital in the preamble to Regulation No 1107/88, loc. cit.

(61) See Titles I and II of the basic regulation.

(62) Regulation No 1009/67 of the Council of 18 December 1967 on the common organization of the market in sugar (OJ, English Special Edition 1967, p. 304).

(63) 10th recital in the preamble to Regulation No 1009/67.

(64) Regulation of the Council of 19 December 1974 on the common organization of the market in sugar (OJ 1974 L 359, p. 1).

(65) Council Regulation of 24 June 1980 on the application of the system of production quotas in the sugar and isoglucose sectors during the period 1 July 1980 to 30 June 1981 (OJ 1980 L 160, p. 12).

(66) Judgment in Joined Cases 103 and 145/77 Royal Scholten-Honig and Tunnel Refineries Limited v Intervention Board for Agricultural Produce [1978] ECR 2037, at paragraph 39.

(67) With regard to the system of quotas and sugar production levies, see also the judgment in Case 250/84 Eridania Zuccherifici Nazionali SpA and Others v Cassa Conguaglio Zucchero and the Italian Ministry of Finance and Treasury [1986] ECR 117.

(68) See Case 250/84, loc. cit., at paragraph 32 of the judgment.

(69) See Case 138/78, loc. cit., at paragraph 6 of the judgment.

(70) Judgment in Case 230/78 Eridania-Zuccherifici Nazionali and Società Italiana per l' Industria degli Zuccheri v Minister of Agriculture and Forestry and Others [1979] ECR 2749, at paragraph 17 et seq.; also see Case 250/84, at paragraph 11 et seq. of the judgment.

(71) Judgment in Case 4/73 Nold v Commission [1974] ECR 491; judgment in Case 44/79 Hauer v Land Rheinland-Pfalz [1979] ECR 3727; and judgment in Case 265/87 Schraeder v Hauptzollamt Gronau [1989] ECR 2237.

(72) Case 265/87, loc. cit. at paragraph 14 of the judgment.

(73) Case 44/79, loc. cit., and Case 265/87, loc. cit.

(74) Case 265/87, loc. cit., at paragraph 15, and Case 4/73, loc. cit., at paragraph 14.

(75) Case 4/73, at paragraph 14 of the judgment.

(76) Case 265/87, at paragraph 15 of the judgment.

(77) Judgment in Joined Cases 133 to 136/85 Walter Rau Lebensmittelwerke and Others v Bundesanstalt fuer landwirtschaftliche Marktordnung [1987] ECR 2289, at paragraph 18; see also Case 230/78, loc. cit., at paragraph 21 of the judgment.

(78) See also Case 230/78, at paragraph 22 of the judgment.