

JUDGMENT OF THE COURT (Fifth Chamber)  
29 January 1998 \*

In Case C-161/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesfinanzhof for a preliminary ruling in the proceedings pending before that court between

**Südzucker Mannheim/Ochsenfurt AG**

and

**Hauptzollamt Mannheim**

on the validity of Commission Regulation (EEC) No 2670/81 of 14 September 1981 laying down detailed implementing rules in respect of sugar production in excess of the quota (OJ 1981 L 262, p. 14), read in conjunction with Commission Regulation (EEC) No 3183/80 of 3 December 1980 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (OJ 1980 L 338, p. 1),

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, J. C. Moitinho de Almeida (Rapporteur), D. A. O. Edward, P. Jann and L. Sevón, Judges,

\* Language of the case: German.

Advocate General: P. Léger,  
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Südzucker Mannheim/Ochsenfurt AG, by Hans-Joachim Prieß, of the Brussels Bar,
- the Commission of the European Communities, by Klaus-Dieter Borchardt, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Südzucker Mannheim/Ochsenfurt AG and the Commission at the hearing on 25 September 1997,

after hearing the Opinion of the Advocate General at the sitting on 6 November 1997,

gives the following

### Judgment

- 1 By order of 19 March 1996, received at the Court on 13 May 1996, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the validity of Commission Regulation (EEC) No 2670/81 of 14 September 1981 laying down detailed implementing rules in respect of sugar production in excess of the quota (OJ 1981 L 262,

p. 14), read in conjunction with Commission Regulation (EEC) No 3183/80 of 3 December 1980 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (OJ 1980 L 338, p. 1).

2 That question was raised in proceedings between Südzucker Mannheim/Ochsenfurt AG ('Südzucker'), a sugar manufacturer established in Mannheim, Germany, and the Hauptzollamt (Principal Customs Office), Mannheim, concerning a demand for retrospective payment of the amount referred to in Article 3(1)(a) of Regulation No 2670/81.

### **The relevant provisions**

3 Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector (OJ 1981 L 177, p. 4, 'the basic regulation') was adopted, according to the first recital in its preamble, to redraft the basic provisions concerning the common organization of the markets in sugar.

4 Price and disposal guarantees, introduced by the basic regulation for the purpose, in particular, of stabilising the Community sugar market, vary depending on the production quotas allocated to undertakings. The basic regulation established a production quota system valid for the marketing years 1981/82 to 1985/86, in order to control sugar production within the Community. Council Regulation (EEC) No 934/86 of 24 March 1986 amending Regulation No 1785/81 (OJ 1986 L 87, p. 1) provided that the production quota system should be maintained for the marketing years 1986/87 to 1990/91.

- 5 Quantities produced within the A quota (A sugar) allocated to undertakings, which are less than Community requirements, qualify for guaranteed intervention prices and export aid in the form of refunds; quantities produced within the B quota (B sugar) allocated to undertakings qualify only for the export refund scheme, since the sum of the A and B quotas usually exceeds consumption within the Community.
  
- 6 Support measures in favour of A and B sugar production are financed by the manufacturers by means, in particular, of production levies (Article 28 of the basic regulation) and storage cost levies (Article 8). As the 11th recital in its preamble indicates, the basic regulation establishes a system intended to ensure in a just yet efficient way that the producers themselves meet in full the cost of disposing of the surpluses of Community production over consumption.
  
- 7 Finally, production in excess of the quota (C sugar), namely the quantity of sugar attributable to a specific marketing year and produced outside the sum of the A and B quotas allocated to a particular undertaking, while not subject to any quantitative restriction, does not qualify for any guarantee as to price or disposal. Moreover, C sugar may not, as a rule, be disposed of on the internal market and must, consequently, be exported in the natural state before 1 January following the end of the marketing year in question (Article 26(1) of the basic regulation).
  
- 8 Article 26(3) of the basic regulation provides:

'Detailed rules for the application of this Article shall be adopted in accordance with the procedure laid down in Article 41.

These rules shall provide, in particular, for the levying of a charge on the C sugar and C isoglucose referred to in paragraph 1 in respect of which proof of its export in the natural state within the prescribed period was not furnished at a date to be determined.'

9 In accordance with Article 13 of the basic regulation, all exports from the Community are conditional upon the presentation of an export licence, the issue of which is in turn conditional upon the lodging of a deposit to guarantee that exportation will be effected during the period of validity of the licence, which is forfeit in whole or in part if the transaction is not effected, or is only partially effected, within that period.

10 Article 1(1) of Regulation No 2670/81, which lays down detailed implementing rules in respect of sugar production in excess of the quota, provides as follows:

'The C sugar and C isoglucose referred to in Article 26(1) of Regulation (EEC) No 1785/81 must be exported from the Member State on whose territory they were produced.

Manufacturers of C sugar or C isoglucose must furnish proof that it has been exported:

- as white sugar or raw sugar, non-denatured, or as isoglucose in its natural state,
- without refund or levy,
- from the Member State on whose territory it was produced.

If no proof is furnished that the sugar or isoglucose was exported from the Community before 1 January following the end of the marketing year during which the C sugar or the C isoglucose was produced, the quantity in question shall be considered to have been disposed of on the internal market.'

11 Article 3(1) of Regulation No 2670/81 provides:

'1. The Member State concerned shall impose on the quantities which, within the meaning of Article 1(1) have been disposed of on the internal market, a charge equal to the sum of:

(a) for C sugar, per 100 kilograms:

— the highest import levy per 100 kilograms of white or raw sugar, as the case may be, applicable during the period comprising the marketing year during which the sugar in question was produced and the six months following that marketing year, and

— 1.25 Ecu'.

12 In accordance with Article 2(2) of that regulation, proof that C sugar has been exported is to be submitted to the competent agency of the Member State on whose territory the sugar was produced by presentation of:

'(a) an export licence issued pursuant to Article 3 of Regulation (EEC) No 2630/81 to the manufacturer by the competent agency of the Member State referred to in paragraph 1;

(b) the documents referred to in Article 30 of Regulation (EEC) No 3183/80 required for the release of the security;

(c) a statement by the manufacturer to the effect that the C sugar or C isoglucose was produced by him.'

13 The second subparagraph of Article 3(1) of Commission Regulation (EEC) No 2630/81 of 10 September 1981 on special detailed rules for the application of the system of import and export licences in the sugar sector (OJ 1981 L 258, p. 16) provides: 'For C sugar and C isoglucose the licence issued shall be valid solely for export from the territory of the Member State in which the product was produced'. In that connection, Article 4 of that regulation states that the manufacturer must provide proof that the quantity for which the licence is requested has actually been produced in excess of the A and B quotas of the undertaking concerned.

14 Article 30(1)(b) of Regulation No 3183/80 makes release of the security subject to production of proof, 'for exports, of completion of customs formalities as referred to in Article 22(1)(b) relating to the product concerned; furthermore:

— in the case of an export from the Community ... that the product has, within 60 days from the day of completion of customs export formalities (*force majeure* excepted), as the case may be, either left the geographical territory of the Community within the meaning of Article 9 of that Regulation or in the cases specified in Article 5 of that Regulation reached its destination,

...'

- 15 In accordance with the first indent of Article 22(1)(b) of that regulation, copy No 1 of the export licence is to be submitted to the office responsible for completing customs formalities relating to exportation from the Community. In accordance with Article 22(3), after attribution and endorsement by that office, copy No 1 of the licence is to be returned to the party concerned. However, Member States may require or allow the party concerned to attribute the licence, in which case the attribution is always to be examined and endorsed by the competent office.
- 16 Article 31(1) of Regulation No 3183/80 provides that the proof required under Article 30(1)(b) is to be furnished, subject to the provisions of paragraph 2, by production of copy No 1 of the licence or certificate and, where appropriate, of copy No 1 of the extract or extracts of the licence or certificate, endorsed as provided for in Article 22 or Article 23 of that regulation.
- 17 In accordance with Article 31(2) of Regulation No 3183/80, in the case of an export from the Community, additional proof is required which, in circumstances such as those of the main proceedings, is to be furnished by production of 'a copy or copies of the control copy provided for in Article 10 of Regulation (EEC) No 223/77'. Article 31(4) of Regulation No 3183/80 provides that, if the party concerned is unable, owing to circumstances beyond his control, to produce the control copy referred to within three months following its issue, he may make application to the competent agency for other documents to be accepted as equivalent, stating the grounds for such application and furnishing supporting documents.
- 18 Under Article 10 of Commission Regulation (EEC) No 223/77 of 22 December 1976 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (OJ 1977 L 38, p. 20), 'Proof that the conditions prescribed by a Community measure as to the use and/or destination of goods imported into, exported from, or moving within the Community have been complied with, shall be furnished by the production of Control Copy T No 5.'

## The main proceedings

- 19 It appears from the order for reference that Südzucker sold to an undertaking established in Germany C sugar which it had manufactured during the 1986/87 marketing year. The consignment of sugar in question was exported to Switzerland, but no export clearance was obtained and no Control Copy T No 5 was issued. In consequence, Südzucker's export licence was marked with neither attribution nor endorsement.
- 20 The Hauptzollamt refused the application for retrospective issue of Control Copy T No 5 and retrospective attribution on the export licence. The Bundesanstalt für Landwirtschaftliche Marktordnungen (Federal Office for the Organisation of Agricultural Markets, 'BALM') acknowledged, however, that the supporting documents supplied by Südzucker, namely consignment documents and export declarations, copies of rail waybills and receipts for duties paid issued by the Swiss customs authorities, were 'equivalent' to a Control Copy T No 5 for the purposes of Article 31(4) of Regulation No 3183/80. BALM then informed the Hauptzollamt that the sugar in question had been exported from the Community.
- 21 At first, the Hauptzollamt considered that Südzucker had complied with its exportation obligations under Community rules; then, following a check, it decided that proof of exportation had not been furnished in the prescribed manner, that is to say in particular by production of an export licence with the required endorsements and attributions (Article 31(1)(b) of Regulation No 3183/80). The Hauptzollamt took the view that while equivalent supporting documents may, in certain circumstances, be produced in place of a copy of Control Copy T No 5, they cannot serve, as proof that the sugar has been exported, in place of an export licence with the required endorsements and attributions. By decision of 9 June 1992, confirmed by decision of 29 September 1993, it therefore demanded retrospective payment of the amount provided for in Article 3(1)(a) of Regulation No 2670/81.

- 22 The action brought against that decision before the Finanzgericht (Finance Court), Baden-Württemberg, was dismissed by judgment of 25 April 1995. Südzucker appealed on a point of law to the Bundesfinanzhof, claiming in particular that the obligation to produce an export licence as proof of export is contrary to the principle of proportionality. It argued that production of a licence was not the appropriate means of proving that the sugar had left the customs territory of the Community; it was not necessary for that purpose, especially where the person concerned held a copy of Control Copy T No 5 or equivalent documentary evidence. Similarly, it claimed that it was contrary to the principle of proportionality to levy the amount provided for in Article 3 of Regulation No 2670/81 where Article 2(2)(a) thereof had not been complied with. In so far as the obligation concerned was a secondary administrative obligation, breach of it should not give rise to penalties as severe as those imposed for failure to fulfil the principal obligation, that is to say, to export the sugar.
- 23 The Bundesfinanzhof states that its decision depends on whether Südzucker could have been required to pay the amount provided for by Regulation No 2670/81 in respect of C sugar, the export of which had quite genuinely taken place but could not, on account of failure to complete the customs formalities, be proved by production of an export licence with the required attributions and endorsements.
- 24 The Bundesfinanzhof's doubts concerning the validity of the applicable Community legislation relate essentially to the obligation to complete customs formalities on export, failure to fulfil which made it impossible for Südzucker to produce the licence bearing the necessary endorsements by the customs authorities. It considers that, contrary to the argument put forward by Südzucker, Article 26(3) of the basic regulation gave the Commission the power to make proof of export conditional upon compliance with the corresponding customs formalities and production of the export licence. The national court does not see in what way that licence is unsuitable as a — further — means of providing conclusive proof. For the same reasons, that court does not regard as disproportionate in themselves the obligation to prove that the customs export formalities were completed and the obligation to produce the export licence with the necessary attributions and endorsements in order to avoid liability for the amount provided for in Article 3 of Regulation No 2670/81.

- 25 In the Bundesfinanzhof's view, however, it is questionable whether the obligation to pay the amount provided for in that provision, as the consequence of failure to comply with customs formalities on export, is not contrary to the principle of proportionality. In this connection, the national court refers to decisions of the Court (Case 181/84 *R v Intervention Board for Sugar ex parte Man (Sugar)* [1985] ECR 2889 and Case 21/85 *Maas v Bundesanstalt für Landwirtschaftliche Marktordnung* [1986] ECR 3537), according to which, where Community legislation makes a distinction between primary obligations, compliance with which is of fundamental importance to the proper functioning of the system concerned and secondary obligations, which are essentially of an administrative nature, infringement of a secondary obligation cannot, without breaching the principle of proportionality, be penalised as severely as failure to comply with a primary obligation.
- 26 According to the Bundesfinanzhof, in this case it is not denied that the primary obligation, to export C sugar, was fulfilled. It is more doubtful whether that primary obligation also includes proof of completion of customs export formalities and production of the licence. If consideration had to be confined exclusively to the economic result, namely exportation, the fact that there was no customs export treatment and that the licence was not produced would not on its own justify charging the amount provided for in Article 3 of Regulation No 2670/81, with the consequence that the contested provision of Community law might prove to be incompatible with the principle of proportionality.
- 27 In the light of those considerations, the Bundesfinanzhof decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is Commission Regulation (EEC) No 2670/81 of 14 September 1981 laying down detailed implementing rules in respect of sugar production in excess of the quota (OJ 1981 L 262, p. 14), read in conjunction with Commission Regulation (EEC) No 3183/80 of 3 December 1980 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (OJ 1980 L 338, p. 1), valid, having regard in particular to the Community law principle of proportionality, in so far as its result is that sugar

is deemed to have been disposed of on the internal market — that being the basis for levying the charge on sugar production — if it has actually been exported but without completion of the customs formalities, and proof consequently cannot be furnished by means of copy No 1 of the export licence bearing the attributions and endorsements of the customs authorities?’

### The question

- 28 The national court’s question asks, in essence, whether it is compatible with the principle of proportionality to charge the amount provided for by Article 3 of Regulation No 2670/81 on C sugar, where the sugar in question has unarguably been exported from the Community but the customs formalities have not been completed, with the result that proof of exportation cannot be produced by means of copy No 1 of the export licence bearing the necessary attributions and endorsements, in accordance with Article 2(2) of Regulation No 2670/81, read in conjunction with Regulation No 3183/80.
- 29 Südzucker argues that the legal consequences of non-compliance with the obligation to produce the export licence bearing the necessary attributions and endorsements breach the principle of proportionality. The objective of Article 26 of the basic regulation is to ensure that C sugar is actually exported from the Community. Compliance with the obligation to export — which is the primary obligation — is proved by means of Control Copy T No 5 or equivalent documents (Article 2(2)(b) of Regulation No 2670/81). The purpose of producing the export licence (Article 2(2)(a) of Regulation No 2670/81) is to ensure fulfilment of the secondary administrative obligation under Article 13 of the basic regulation, which authorises export transactions only on the basis of those licences. Neither the wording nor the system of the first subparagraph of Article 26(1) supports the conclusion that, in addition to the obligation to export, there is another primary obligation, namely to prove exportation by means of an export licence.

- 30 From that point of view, Südzucker points out that it is indisputable that it has fulfilled its obligation to export and that it has produced the necessary supporting documents. In accordance with the *Man (Sugar)* and *Maas* judgments cited above, failure to fulfil the secondary obligation to produce an export licence cannot be penalised in the same way as breach of the primary obligation to export C sugar from the Community.
- 31 It should be noted that in order to establish whether a provision of Community law is in conformity with the principle of proportionality it is necessary to ascertain whether the means which it employs are appropriate and necessary to attain the objective sought. Where Community legislation makes a distinction between a primary obligation, compliance with which is necessary in order to attain the objective sought, and a secondary obligation, essentially of an administrative nature, it cannot, without breaching the principle of proportionality, penalise failure to comply with the secondary obligation as severely as failure to comply with the primary obligation (see *Man (Sugar)*, paragraph 20, and *Maas*, paragraph 15).
- 32 It is common ground that in the case in the main proceedings the obligation to export imposed on manufacturers of C sugar by Article 26 of the basic regulation is a primary obligation within the meaning of the case-law referred to.
- 33 The contested obligation to produce copy No 1 of the export licence bearing the attributions and endorsements of the customs authorities, on pain of liability to pay the amount levied on production of C sugar, is inseparable from the primary obligation to export.
- 34 Contrary to Südzucker's argument, the obligation to prove that the requirements relating to the export of C sugar have been complied with by production of the export licence bearing the attributions and endorsements made when the customs formalities were completed, in addition to production of Control Copy T No 5 and of a statement by the manufacturer of the sugar concerned, is essential to the

proper functioning of the quota system established by the basic regulation, which is intended to stabilise the sugar market through support measures favouring the production of sugar within the A and B quotas which must be financed by the producers themselves.

- 35 So the proper functioning of the quota system, in addition to the prerequisite that C sugar has physically left the territory of the Community, requires reliable evidence to be available to the competent authorities, enabling them to ensure that the amount is paid by those producers who have produced sugar in excess of the quota which has not been exported by 1 January following the end of the marketing year in question.
- 36 Contrary to what Südzucker claims, proof that C sugar has been exported, by means of Control Copy T No 5 or documentary evidence recognised as equivalent for the purposes of Article 31 of Regulation No 3183/80, is not sufficient to prove that all the requirements relating to the export of C sugar have been satisfied.
- 37 In order to attain the objectives pursued by the quota system, the competent customs authorities must have available to them clear, reliable evidence that the sugar intended for export has been exported from the Member State on whose territory it was produced, that it was exported as white sugar or as non-denatured raw sugar, that it does not fall within the A and B quotas allocated to the undertaking in question and that it was exported before 1 January following the end of the marketing year in question (see Article 1 of Regulation No 2670/81).
- 38 In specific terms, it is the export licence bearing the attributions and endorsements required on completion of the customs formalities which confirms that those requirements have been satisfied. Accordingly, with respect to C sugar, Regulation No 2630/81 limits the validity of the licence to export from the territory of the Member State in which the sugar was produced (Article 3) and makes its issue conditional upon proof by the manufacturer that the quantity for which it is requested, or an equivalent quantity, has actually been produced in excess of the A and B quotas of the undertaking concerned (Article 4). The attributions appearing

on the export licence give information about the quantities exported and the other customs statements confirm the place of origin and the place of destination of the sugar in question, as well as the day on which it was exported. Thus, in accordance with Article 29(b) of Regulation No 3183/80, the obligation to export is considered to have been fulfilled on the day when the customs formalities referred to in Article 22(1)(b) of that regulation are completed, which in respect of C sugar consist of submitting the export licence to the competent customs office for the quantities exported to be attributed and the other information to be endorsed.

- 39 By contrast, neither Control Copy T No 5 nor the documentary evidence treated as equivalent thereto can supply the information which appears on the licence when it bears the attributions and endorsements required by the competent customs office. Accordingly, Control Copy T No 5 proves merely that the quantity of sugar mentioned in the document has left the Community customs territory but does not contain any information concerning completion of the particular requirements relating to the export of C sugar.
- 40 In the first place, it says nothing about the producer of sugar exported out of the Community and does not make it possible to ascertain whether the sugar was actually exported from the Member State on whose territory it was produced. Nor is it possible to tell from Control Copy T No 5 whether the C sugar was exported before 1 January following the end of the marketing year in question, as required by the applicable legislation. Finally, it is not possible to attribute the quantities of sugar exported on Control Copy T No 5, whereas it is such attribution which proves that the producer has fulfilled his obligation to export in order to ensure the proper functioning of the quota system.
- 41 In addition, to allow other evidence, such as shipment certificates, when the products in question have already been exported, would make it quite impossible for the competent customs authorities to check whether the information given in those documents was accurate and would entail excessive administrative work for the Member States responsible for evaluating that evidence (see, to that effect, Case 15/83 *Denkavit Nederland v Hoofdprodukschap voor Akkerbouwprodukten* [1984] ECR 2171, paragraph 30).

- 42 It follows that the Commission could legitimately consider that production of the export licence bearing the required attributions and endorsements is necessary in order to ensure compliance with the requirements relating to the export of C sugar.
- 43 In those circumstances, compliance with the customs formalities provided for on the export of C sugar, like the actual exportation, must be regarded as forming part of the primary obligations under the system in question, in so far as those formalities are not only intended to simplify administrative procedures but are also necessary to the proper functioning of the quota system in the sugar sector. They are not therefore to be classed as secondary obligations of an essentially administrative nature, failure to comply with which cannot be penalised as severely as infringement of a primary obligation without breaching the principle of proportionality.
- 44 Consequently, the answer to be given to the national court must be that consideration of the question referred has not revealed any factor of such a kind as to affect the validity of Regulation No 2670/81, read in conjunction with Regulation No 3183/80.

### Costs

- 45 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Bundesfinanzhof by order of 19 March 1996, hereby rules:

Consideration of the question referred has not revealed any factor of such a kind as to affect the validity of Commission Regulation (EEC) No 2670/81 of 14 September 1981 laying down detailed implementing rules in respect of sugar production in excess of the quota, read in conjunction with Commission Regulation (EEC) No 3183/80 of 3 December 1980 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products.

Gulmann

Moitinho de Almeida

Edward

Jann

Sevón

Delivered in open court in Luxembourg on 29 January 1998.

R. Grass

C. Gulmann

Registrar

President of the Fifth Chamber