2. Orders the applicant to pay the costs including those of the intervener.

Due Chloros Grévisse

Delivered in open in Luxembourg on 30 September 1982.

J. A. Pompe
Deputy Registrar

O. Due
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 23 SEPTEMBER 1982 [1]

Mr President,
Members of the Court,

The case which I turn to now also concerns isoglucose.

The subject of the dispute on this occasion is Regulation No 1785/81 of 30 June 1981 (Official Journal 1981, L 177, p. 4) on the common organization of the markets in the sugar sector, which entered into force on 1 July 1981.

It applies both to sugar and to isoglucose (Article 1) and contains in particular in Article 24 et seq. a system of quotas and provisions concerning a production levy in respect of the marketing years 1981/82 to 1985/86.

The undertaking Roquette Frères, which also brought Case 112/81 and in it submitted that the introduction of a production levy for isoglucose by means of Regulation No 387/81 (Official Journal 1981, L 44, p. 1) was unlawful because the Council did not have the power to create own revenue of that nature, takes the view that the same applies to Regulation No 1785/81 and to the system of levies applying to isoglucose contained in it.

It has therefore brought the matter before the Court and is seeking a declaration that Regulation No 1785/81 is void, at least in so far as its provisions concern the applicant. On the basis of the introductory observations in the application, this is to be understood as meaning that the applicant seeks a declaration of nullity of Articles 24 and 25 in so far as those articles contain a system of quotas and levies for isoglucose.

The defendant Council, which in this case too is supported by the Commission, considers the application inadmissible; it further takes the view that it is in any event unfounded.

My views on this application are as follows:

I — Admissibility

The Community institutions involved in this case question the admissibility of the application mainly for two reasons. They consider that the applicant is not directly affected by the contested provisions; in addition they contend that it has no sufficient interest in law in putting forward its sole submission, namely that the raising of Communities' own revenue in the form of a production levy on isoglucose was unlawful. It is also suggested that the contested provisions are genuinely legislative in nature, so that it is impossible under Article 173 of the EEC Treaty for a private undertaking to challenge them.

1. I should like first to take up the last-mentioned point which, in my view, is of great importance. In doing so, there is no need to have recourse to the fact that Regulation No 1785/81 contains a comprehensive set of provisions for the sugar sector in the wider sense, valid for five years, which of itself compels the conclusion that is *legislative in nature*. Even in so far as it relates to isoglucose and contains provisions relating to quotas and levies there can be no escaping the conclusion that it is a measure of general scope as defined in the decisions of the Court on Article 173 of the EEC Treaty. It is true that doubts may perhaps be entertained as to the legislative nature of those provisions because at present only a relatively small number of isoglucose producers is affected, probably fewer than ten undertakings in the whole Community. That cannot, however, be the decisive point. The determinant factor is whether it may be assumed that the number of parties concerned will remain unchanged. However, nobody can predict that with certainty. It is in fact impossible to rule out certain changes, either through the disappearance of an undertaking or by the founding of new undertakings, even if that does perhaps appear improbable. Finally, the regulation, precisely in order to deal with that point, contains special provisions to which I shall return later.

In my view — even in so far as only the rules on quotas and levies applicable to isoglucose are concerned — we are dealing with a *genuine regulation*, that is to say a legislative measure which applies to an indeterminate number of persons. Since, however, following the case-law of the Court, it is not sufficient, for a finding that a person is individually affected, that the class of persons concerned is ascertainable on the *entry into force* of those rules, the *legal nature* of the contested measure is itself sufficient to rule out the possibility of finding that Roquette Frères have a right to bring an action.

2. There are also serious objections to the admissibility of the application, since under Article 173 of the EEC Treaty the contested measure must be of *direct* concern to private persons.

In that respect the determinant factor is that production quotas which are of importance in connection with the amount of production and thus for the provisions in regard to levies laid down in Article 28 are not immutably fixed for the individual undertakings in the regu-

lation itself, as was the case under the earlier provisions where, as in Regulation No 387/81, the basic quotas applicable to each undertaking were fixed in an annex to the regulation itself.

Article 24 of Regulation No 1785/81 has instead laid down basic quantities A and basic quantities B for isoglucose *according to countries* and provided that Member States are to allocate an A quota and a B quota to each undertaking established in their territory which either had, during the period from 1 July 1980 to 30 June 1981, a basic quota as defined in Regulation No 1111/77 (Official Journal 1977, L 134, p. 4), or, as regards Greece, produced isoglucose during that period.

It is true that the basic quantity A laid down for France is equal to the basic quota of the only isoglucose producer in France, namely the applicant. It is also true that Article 24 (3) expressly states:

"The A quota of each ... isoglucose-producing undertaking shall be equal to the basic quota allocated to it for the period 1 July 1980 to 30 June 1981."

and that Article 24 (5) states:

"The B quota of each isoglucose-producing undertaking shall be equal to 23.55% of its A quota as determined in accordance with, as the case may be, the first or third subparagraph of paragraph (3)."

However, the decisive factor is that Article 25 (2) provides

"Member States may reduce the A quota and the B quota of each ... isoglucose-producing undertaking situated in their territories by a total quantity not exceeding, for the period referred to in Article 23 (1), 10% of the A quota or of the B quota, as the case may be, fixed for each of them in accordance with Article 24."

The withdrawn quantities are then allocated by the Member States, in pursuance of Article 25 (3) to one or more other undertakings, whether or not in possession of a quota, situated in the same region (as defined in Article 24 (2)) as the undertakings from which those quantities were withdrawn. That clearly shows that the Member States are now authorized to participate and are also given a margin of discretion in fixing the quotas. Even though that discretion was not exercised in the marketing year in which the action was brought and it is perhaps unlikely that it will be exercised in the foreseeable future (it should be remembered, however, that the provisions apply for five years) it cannot be said that the production quotas were *directly* fixed in the regulation and that therefore the regulation, to that extent, is of direct concern to the applicant. The requirement of direct concern is not met because of the interposition of a discretion in favour of the Member States, a situation identical to that dealt with in Cases 103 to 109/78 [1] in which, since the allocation and the alteration of the basic sugar quota applicable to a certain area was left to a Member State, it was held that only relevant measures adopted by the Member State having jurisdiction over the applicant undertaking could be of direct concern to it.

A number of specific arguments put forward by the applicant cannot, moreover, alter that conclusion.

1 — Judgment of 15 January 1979 in Joined Cases 103 to 109/78 *Société des Usines de Beaumont v Council* [1979] ECR 17

(i) As to its observations that a similar arrangement — allocation of quotas to undertakings entering into production — applied under the earlier system and yet it was acknowledged that the system of quotas was of direct concern to the existing producer undertakings, it is not hard to discern an essential difference between the two systems. Whilst under the system applicable previously a Community reserve was created amounting to 5% of the sum of the basic quotas which had been fixed for undertakings already in production, that reserve was at the disposal of the Council and not of the Member States and in any event the basic quotas of existing undertakings remained unchanged. Now, on the other hand, it is provided that the quotas of existing undertakings do not have to remain intact but that they may be reduced and that the amounts which become available in that way are to be used for the fixing of quotas for undertakings entering into production.

(ii) Equally irrelevant in my view is the fact, mentioned by the applicant, that provisions in implementation of Article 25 of Regulation No 1785/81 have not yet been adopted, as also is the fact that the transitional measures adopted by the Commission in Regulation No 3041/81 on 23 October 1981 (Official Journal 1981, L 323, p. 12) came into being too late and therefore were of no effect. The applicant's view that a Commission proposal for a regulation of 13 November 1981 deprives the transfer provisions contained in Article 25 of any practical effectiveness also appears to me to be incorrect.

In regard to these matters the Council was with justification able to point to the fact that implementing provisions are not indispensable to Article 25 (2). In any event, according to the Council, since by virtue of Article 49 of Regulation No 1785/81, Regulation No 3331/74 (Official Journal 1974, L 359, p. 18) was not repealed in its entirety, the provisions contained in Article 8 of the latter regulation are to be regarded as constituting adequate implementing provisions. The question whether Commission Regulation No 3041/81 was adopted too late and thus could not have effect in respect of the marketing year already commenced is irrelevant because Article 25 which is at issue here is valid for a period of five years. The Commission's draft regulation, mentioned by the applicant, is immaterial because it relates to the transfer provisions contained in Article 25 (1) of Regulation No 1785/81 but not otherwise to the application of Article 25.

Since for the purpose of the question at issue here the only factor of importance is the *legislative character* of Regulation No 1785/81 and not the greater or larger degree of *probability* that the isoglucose situation will alter during the period of validity of the regulation, the system of quotas is not of direct concern to the applicant; therefore it cannot object to the system of levies based upon it.

3. I could thus dispense with examining the third objection of inadmissibility. But that objection is well-founded too.

In that connection the Council pointed out that the applicant made no submission challenging the justification of the production levy on isoglucose as an instrument of market organization and that instead it takes the view that the

Council, in view of its Decision of 21 April 1970, ought not to treat the revenue resulting from the levy as Communities' own resources without following the procedure under Article 201 of the EEC Treaty. If the applicant were right in its argument it would not as a result be exempted from the levy; at most the consequence would be that the revenue could not accrue to the Community budget. It is clear from this, however, that the applicant cannot be said to have an interest requiring legal protection and that therefore the application, not being based on any other submission, must also be regarded as inadmissible in this respect.

The applicant responded to that argument by referring to the intended purpose of the levy, namely to cover losses arising from the financing of exports of sugar surpluses. That purpose may only be achieved, according to the applicant, if the revenue from the levies is treated as own resources within the meaning of the Council Decision of 21 April 1970 but not if it accrues to the budgets of the Member States. Its correct budgetary treatment is therefore crucial. The charging of the levy is therefore not permissible so long as no provision is made, in the procedure laid down for that purpose, by which the Community may make use of the revenue as own resources.

So far as this issue is concerned, the first point to note is that a significant innovation was introduced by Regulation No 1293/81 inasmuch as under it — as is apparent from the 11th recital in the preamble and Article 28 — sugar and isoglucose producers are made to bear the *full cost* of export losses. The production levies to be paid by them do not constitute, as in earlier years, merely a *contribution* to that cost, but must cover the losses in full, if need be by spreading them over several marketing years.

The Council infers from this that we are now concerned with *intervention measures to stabilize the markets* adopted under Article 43 of the EEC Treaty and already approved in principle by the Court in its decisions and that it is consequently not necessary to describe levies, which form part of those measures and which pursue a particular objective in the context of the organization of the markets in sugar, as own resources within the meaning of the Council Decision in respect of which, as the applicant itself has pointed out, a specific compulsory use is not permissible. In fact, the system thus created can also function perfectly well if the levies are regarded as *other revenue* within the meaning of Article 4 (1) of the Council Decision of April 1970 to which, because that revenue does not accrue to the budget, the procedure mentioned in the second paragraph of Article 2 does not apply. In that connection and in support of the view that, as well as the general budget, certain related revenue might have come into existence, the Council was able to rely on the case-law of the Court on the issue of the co-responsibility levy introduced in the context of the organization of the market in milk and milk products (Case 138/78 [1]). The sole decisive factor in that case was that it concerned a measure to stabilize the market which came within the terms of Articles 39 and 40 of the EEC Treaty and for which a legal basis is to be found in Article 43. Mr Advocate General Mayras expressly stated that Article 201 of the EEC Treaty in no way precludes the Council, within the framework of specific rules and particularly in the context of the common agricultural policy, from generating own

1 — Judgment of 21 February 1979 in Case 138/78 *Stölting v Hauptzollamt Hamburg-Jonas* [1979] ECR 713

resources of that nature. In that respect the Council was able to rely on the judgment in Case 66/80 [1] which concerned the provision of securities in connection with the obligation to purchase skimmed-milk powder. Forfeited securities were used to reduce intervention expenditure in the context of the organization of the market in milk and milk products. In the judgment this was found to be justified on the basis of Article 43 of the EEC Treaty and it was expressly declared that the amounts in question constituted Communities' own resources within the meaning of *Article 4* (1) of the Council Decision of 21 April 1970.

Furthermore, the Council was also able — and this also has a bearing on the question of a sufficient legal interest in bringing the action — to claim that, even if the applicant's premise were accepted and it were assumed that there had been an unlawful creation of Communities' own resources, the result would not necessarily be that the charging of the production levy is unlawful because it is possible to envisage *other budgetary techniques* which would enable the objective pursued to be achieved without the Communities' participating in the costs of disposal. It would thus be conceivable, if the production levies had to accrue to national budgets, that additional payments under Article 4 (1) of the Council Decision of 21 April 1970 could compensate for that or it might also be conceivable for the Community provisionally to take up into its general budget the charges arising until ratification by the national parliaments

In my view, these considerations justify the conclusion that as far as the budgetary treatment of the production levies is concerned the applicant has no legitimate interest in taking proceedings and that therefore the application is inadmissible for that reason as well.

II — The substance of the case

Following the unequivocal result to which an examination of the question of admissibility has led, I can confine myself to some very brief subsidiary considerations as regards the question whether the application would be well-founded.

The applicant — particularly in the oral procedure — sought to show from the 1982 budget that the production levies on isoglucose, like those on sugar, are to be considered as own resources within the meaning of the Council Decision and it endeavoured, on the basis of various considerations, to demonstrate that the Council is entitled to treat in that way only the production levies on sugar and not those on isoglucose because the latter, in the legal sense, did not yet come within the organization of the markets in sugar at the time when the Council Decision of April 1970 came into existence. In my opinion, compared with Cases 108 and 110/81, no new weighty arguments or facts have emerged in the present case except that isoglucose, following the adoption of Regulation No 1785/81, now clearly comes within the organization of the markets in sugar. I refer therefore, as regards the correct interpretation of the Council Decision of 21 April 1970, to the analysis contained in my Opinion in those cases and would merely state that, in my view, the introduction of a production levy on isoglucose does not constitute an infringement of the Council Decision of 21 April 1970 even if it is accepted that the revenue arising from those levies is to be regarded as own

1 — Judgment of 13 May 1981 in Case 66 of [illegible] National Cereals Corporation v Amministrazione [illegible] Finanze dello Stato [1981] ECR 1191

resources within the meaning of the Council Decision.

Thus even if, contrary to my views, this application were held to be admissible, Regulation No 1785/81 could on no account be declared void in part, not even in so far as it lays down a *system of levies* for isoglucose producers (as to the *system of quotas* itself no specific arguments were adduced).

III — In conclusion I therefore propose that the application of the undertaking Roquette Frères be dismissed as inadmissible, in the alternative as unfounded, and that the applicant be ordered to pay the costs of the proceedings.