OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 21 JANUARY 1976 [1]

Mr President,
Members of the Court,

The cases which have led to the present requests for a preliminary ruling come procedurally from two different levels. Case 65/75 is concerned with criminal proceedings against a dealer who is charged with having sold 500 sacks of caster sugar in bags of 50 kg above the maximum price which was laid down by Order of the Italian Comitato Interministeriale dei Prezzi (CIP) No 39/74 of 13 August 1974 on the composition of the price of sugar. The other cases are proceedings in the administrative court brought by various Italian companies dealing in sugar for the annulment on the one hand of the said Order No 39/74 and of Order No 28/74 of 28 June 1974 (likewise adopted by the CIP) on the price of sugar (Cases 88-90/75) and on the other hand of Regulation No 9/74 of 20 February 1974 laying down the maximum price for sugar (Case 89/75).

Although the case before the Pretura di Padova is not the same as that before the Tribunale Amministrativo Regionale del Lazio, the questions are basically the same.

In Case 65/75 they are:

1. Does the system of prices established by the common organization of the sugar sector, dealt with in Regulation No 1009/67/EEC preclude a Member State from fixing unilaterally a maximum selling price?
2. In any case do the provisions on the free movement of goods, to which reference is made in Article 30 of the EEC Treaty and those more particularly relating to sugar in Article 35 of Regulation No 1009/67/EEC, especially the prohibition against the application in intra-Community trade of measures having an effect equivalent to quantitative restrictions, prohibit the fixing of maximum prices valid only for the territory of a single Member State?
3. Do the abovementioned Community provisions create for Community traders individual rights which the national courts must protect so as to render a national system of maximum prices inapplicable as regards them?

In Cases 88-90/75 the questions in each case seek a ruling on:

(a) the competence, exclusive or otherwise, of the European Economic Community to exercise legislative power to control the prices of sugar, and the use made of such power in Regulation No 1009/67/EEC and subsequent additions thereto;
(b) the legality, in relation to a conjunctural policy and to Article 103 of the Treaty, of unilateral interventions by a Member State in the sector concerned, and of the type in question, which virtually determine the maximum price on sale to the consumer exclusively in and throughout the national territory;
(c) the compatibility with the principle referred to in Article 30 of the Treaty concerning the free movement of goods within the common market, and with the prohibition against isolation of the national markets, of the system of selling the product and of the maximum price imposed, within the confines of the national territory, and of determining the components thereof, the said system constituting a hindrance to the

1 — Translated from the German.

establishment of the said common market and having been justified as an exception by the need to protect the economy from speculative operations and to guarantee the necessary consumer supplies against the upsetting of the conditions on which the Community rules are based both by the deficit in Community production and by the doubling of the world price of this product.

I therefore consider it expedient to give a single opinion covering the two groups of cases.

1. In considering the questions referred I shall compare the national rules with the Community rules.

(a) As regards the Community rules, what Mr Advocate-General Mayras said in his opinion in Case 40-48/73, 50/73, 54-56/73, and 113 and 114/73 (Judgment of 16 December 1975, *Cooperative Vereniging Suiker Unie UA, Rotterdam, and Others* v *Commission of the European Communities)* applies, namely that the common organization of the sugar market compared with other organizations of the market is characterized by a sharply graded price scale extending from the finished product to the raw material.

Regulation No 1009/67 (OJ English Special Edition 1967, p. 304) provides that the Council shall annually lay down a target price and an intervention price for sugar produced in the common market.

The target price is fixed for the Community area having the largest surplus and it is the price which it is desirable to attain or nearly to attain in dealings on the domestic market. The intervention price is fixed at 5 % lower than the target price. It is the price at which the intervention agencies appointed by the Member States are obliged to buy in sugar which is offered to them by producers. It is thus a guarantee price because where it functions normally intervention offers undertakings a guarantee that the market price will not in principle sink below the intervention price. The intervention agencies can in principle re-sell the sugar offered to them on the internal market only at a higher price than the intervention price. The derived intervention price for Italy which is about 5 % above the intervention price in other Member States should also be mentioned. Also relevant is the threshold price which determines the import levies and which is derived from the target price plus transport charges from the area having the largest surplus to the most distant deficit area. Finally reference should be made to the fact that the intervention price applying to the relevant area of cultivation is the criterion for determining the minimum price for the basic product, that is sugar beet.

(b) I would like to say the following on the national rules in question here:

The Comitato Interministeriale dei Prezzi (CIP) (Inter-departmental Committee Prices) was created in Italy by Decreto Legge No 347 of 19 October 1944.

According to the provisions setting it up the CIP, has powers to control the prices of all goods. The course of the Italian economy and practice has, however, reduced these powers to the fixing of prices alone.

Shortly before Regulation No 1009/67 entered into force the price of refined sugar in Italy was fixed at all stages of production and marketing. In fixing this three equalization funds were established and financed.

At this point the establishment of the Cassa Conguaglio Zucchero by Order No

1195 of the CIP of 22 June 1968 is relevant. The Cassa was required to levy a surcharge (sovraprezzo), borne by the consumer and undertakings with low costs, which was intended in particular for the financing of the aids allowed under Article 34 of Regulation No 1009/67. This *sovrapprezzo,* which at the time was fixed at Lit. 23 per kg and remained unchanged until 1973, represented the difference between the quotations in Italy and the derived intervention price applying there.

Maximum prices were laid down for the whole of the Italian territory both in respect of domestically-produced sugar and imported sugar, most recently by Order No 1119 of the CIP of 6 August 1965; these apply to free ex-factory sales and to sales to the consumer.

These rules were made inapplicable on the establishment of the common organization of the market in sugar but in November 1969 were re-introduced by Order No 1236 of the CIP 'to protect the Italian consumer against price increases which were not a consequence of an alteration in Community prices'.

It may be disputed whether the regulations of the CIP were intended to freeze and prescribe prices or to control only their movement. Order No 1236 of November 1969, it is true, did not expressly prescribe a new maximum consumer price but nevertheless laid down — which in practice amounted to the same thing — that both in the case of sale by the manufacturer and sale at a further stage for immediate consumption the maximum differences, 'resulting from a comparison with the provisions contained in Order No 1119 from the year 1965', between the 'prices varying' according to quality and description, costs of production and trade margins, should remain decisive.

A circular (No 1237) of 14 November 1969 contained particulars of the price 'ex-factory' for sugar. From all this there was little difficulty in deducing the uniform maximum consumer price, the result of the simple addition of various factors, some taken from the provisions of the Community on the fixing of the derived intervention price and others from the provisions adopted by the CIP.

It seems clear therefore, that not only was the maximum price system restored in the said provisions but also these maximum prices applied in practice at the consumer stage and also at the manufacturing stage, that is, on the sale of sugar to processing plants.

The price system so created was applied practically without interruption and in particular was applied in the years 1974 and the beginning of 1975, since Order No 39/74 was not repealed until 18 January 1975. Maximum consumer prices were then fixed by Orders Nos 28 of 28 June 1974 and 39 of 13 August and the profit margins for the manufacture and sale of sugar were laid down.

In view of the close connexion between this price system and the 'sovraprezzo' it may probably be said that it is a system which determines the producer's price by means of the consumer price, the 'sovraprezzo' and taxation. This was, however, contested in the proceedings and it may therefore be left open, since the courts making the references have worded their questions quite generally, that is, they have not limited them to maximum consumer prices.

2. The Italian price system must now be considered against the agricultural provisions of the Community in the sphere of sugar prices, that is, it is necessary to examine whether the national system contains elements which are incompatible with the Community system.

Let me in this connexion first remind you that Mr Advocate-General Mayras seriously doubted whether after

Regulation No 1009/67 entered into force and the Community sugar prices were introduced, the Italian authorities could still fix maximum prices even at the consumer and retail stages, even if it were only through the system of the price margins relating to the derived intervention price.

In answering the questions raised the judgment of 23 January 1975 in Case 31/74, *Galli* [1975] ECR 47, is important. That was concerned with a national price-freezing system in connexion with cereals and flour derived from oil seeds for fodder. Whilst the common organization of the market in cereals provides price rules for basic products and even for products of the first processing stage, the Community rules for fats and oils (apart from olive oil, for which a price system was introduced) comprise, as regards to the other products coming under its scope, nothing more than customs protection in trade with third countries reserving the possibility to take protective measures where the market is disturbed.

Furthermore, exceptions were possible to this national system of price freezing. In these circumstances in the judgment in *Galli* it was declared, with reference to the common price system applicable at the production and wholesale stages, that 'the incompatibility of national measures intended to influence the formation of prices may be particularly apparent in the case of market organizations comprising a Community price formation system' and that 'Member States can no longer interfere through national provisions taken unilaterally in the machinery of price formation as established under the common organization'.

In the present cases we are concerned with national rules which, without exception, fix the selling price of processed products, probably in the result at all stages, although Community rules exist for fixing the producer and wholesale price for this product.

(a) If the arguments in the judgment in *Galli* are adhered to — and this seems to me imperative, first having regard to the requirements of the free movement of goods and the uniformity of the market and then the fact that all measures necessary to prevent an undesirable price trend are taken under the common organization of the market — it follows that any national fixing of prices for producers and wholesalers is no longer possible due to the existence of the organization of the market in sugar.

(b) With regard to the fixing of national maximum prices for consumers the answer is not so clear. In this respect the judgment in *Galli* contains the statement that the provisions on the organization of the market left Member States free 'to take the appropriate measures relating to price formation at the retail and consumption stages'; it is true there is the proviso that they should not jeopardize the aims or functioning of the common organization of the market.

Although it was objected in the proceedings, not without good reason, that the distinction made appeared artificial since fixing prices for consumers necessarily had effects on the prices at the previous commercial stages, in my view, however, the said distinction must at present be regarded as justified since most Member States are convinced of the importance and efficiency of consumer price rules and, moreover, in the present state of integration the necessary machinery is lacking at the Community level.

Accordingly it is necessary, when considering maximum consumer prices, to enquire whether the provisos in the judgment in *Galli* apply.

(aa) Let us turn first to price Order No 9/74 which is important in Case 89/75.

On this the Commission has provided a summary from which it appears that the

maximum consumer prices in question — a break-down of figures is possible if profit margins and legal charges are taken into account — corresponds to a producer price which is exactly at the level of the derived intervention price for Italy. It adds the conclusion that 'this fixing of the price was compatible neither with the objectives nor the implementation of the common organization of the market'.

The Italian Government on the other hand has made another calculation applicable for sugar of the first category and it comes to the conclusion, because it has regard to the increase in the Italian consumer prices due to the proportion of the 'sovraprezzo', that the Community price level is not affected.

On this point I think it must be stated that the choice of the category of sugar has no influence on the carrying out of the necessary calculations since it is possible to make the necessary conversions by means of certain co-efficients. It is also clear to me that of course the 'sovraprezzo' should not be taken into account since according to the Community rules it was expressly allowed to Italy as an aid. On this basis it would appear — precise findings are naturally for the national court — that the inference drawn by the Commission is correct. At the same time this means, however, that the national price system is not in harmony with the Community rules precisely because Order No 9/74 gives producers only the intervention price and price formation up to the threshold price is thus prevented.

(bb) With regard to Order Nos 28/74 and 39/74, which are relevant in the other actions, on making the corresponding calculations the Commission comes to another conclusion. Tracing back the maximum consumer prices governed by the regulations to the level of production and wholesale prices in fact warrants the finding that a level was possible for the latter prices which was above the Community target price, intervention price, and threshold price. It may therefore be said that the proviso in the judgment in *Galli* is not an issue in the same way as it is with regard to Order No 9/74.

That is not to say, however, that it does not apply at all, but rather that in this connexion another consideration is important which, if I may anticipate my conclusion, likewise justifies speaking of an impermissible intervention by the Italian rules in the price system of the Community. I refer to the measures which the Community took to relieve the shortages particularly noticeable in Italy at a time when there was obviously no longer the possibility of importing into Italy sugar from third countries or other Member States at the target price.

The following details should be known:

Because of the finding that the cif price for sugar was higher than threshold price and supplies to the Community as a whole could no longer be assured, that in addition sugar prices on the Community market, particularly in the deficit areas, were appreciably higher than the prices fixed for the Community by Regulation No 2931/74 (OJ No 311 of 22. 11. 1974, p. 8) of 18 November 1974, the Council introduced a subsidy on the import of white and raw sugar from third countries. During the first stage the quantity for which the subsidy was to be granted was limited to 200 000 metric tons. It was provided that tenders were to be invited for the purpose of determining the amount of the subsidy (Article 3); the contract was to be awarded to the tender involving the lowest subsidies; the expenses occasioned by these subsidies were to be regarded as intervention measures intended to regularize agricultural markets (Regulation No 2932/74 of the Council of the same day ibid. p. 10).

At the same time by Regulation No 2932/74 the Council decided to grant a

Community sugsidy on sugar produced in excess of the maximum quota, the so-called 'C'-sugar, to which the export levy was not to be applied.

The provisions implementing Regulation No 2931/74 were laid down by Regulation No 3062/74 of the Commission of 3 December 1974 (OJ No 324 of 4. 12. 1974, p. 7). With regard to this it should be mentioned that before adopting this regulation the Commission obtained not only the opinion of the Management Committee for Sugar but also that of the Monetary Committee set up under Article 105 of the EEC Treaty. According to the said regulation the Member States were to issue a stranding invitation to tender in respect of subsidies for imports from third countries of white and raw sugar, and during the period of validity of the standing invitation to tender they were to issue partial invitations to tender (Article 1). In conjunction with this subsidy granted out of the European Agricultural Guidance and Guarantee Fund this maximum selling price for imported white sugar was fixed at 32·40 u.a. per 100 kg of products, exclusive of packaging, delivered at the cif stage in the Member State in which the sugar was to be put into free circulation (Article 12 (a)).

After the fixed quantity had been exhausted by a partial invitation to tender dated 15 January 1975 the standing invitation to tender was temporarily suspended by Regulation No 122/75 of the Commission of 17 January 1975 (OJ L 13 of 18. 1. 1975, p. 24). The said 200 000 metric tons went mainly to the United Kingdom; no one had come forward from Italy to make an offer.

By Regulation No 191/75 of 21 January 1975 (OJ L 20 of 25. 1. 1975, p. 39) the Council provided for an additional subsidized importation of 200 000 metric tons of sugar. In addition the maximum selling price to be observed by tenderers was adjusted. On this occasion it was not the Commission but the Council itself which fixed the maximum selling price at 35·81 u.a. per 100 kg; moreover it was provided that the subsidized imports could be restricted to deficit areas of the Community.

On the occasion of the first two tenders for the subsidized importations, including the further quantity, Italy was still unable to enjoy the benefits provided for. Italy was not even represented on the occasion of the first call for tenders; on the occasion of the second call for tenders Italian bids exceeded those of other countries by about 30 % (answer of the Commission of 21 April 1975 to the Parliamentary written question No 821/74 of 7 March 1975). (OJ C 122 of 2. 6. 1975, pp. 34-35).

In the light of this experience, the Commission introduced new tendering procedures intended to ensure that Italy would have first call on supplies of sugar on the best possible terms. This was the objective of Regulations Nos 557/75 and 558/75 of 4 March 1975, both of which were adopted after seeking the opinion of the Monetary Committee and the Management Committee for Sugar (OJ L 59 of 5. 3. 1975, pp. 8 and 16).

At the same time, to allow Category C white sugar produced in the Community to be released on to the Community market and to determine the amount of the subsidy to be granted under Regulation No 2932/74 of the Council a standing invitation to tender was provided for by Regulation No 312/75 of the Commission of 7 February 1975 (OJ L 35 of 8. 2. 1975, p. 5). For the supply of this white sugar to Italy the condition was made that the sugar had to reach the retail stage in the natural state. The successful tenderer had to supply it at a selling price which did not exceed 35·56 u.a. per 100 kg of unpacked goods either free Italian frontier or cif Italian ports (Notice of a standing invitation to tender in OJ C 52 of 5. 3. 1975, p. 13).

Finally on 25 March 1975 the Council by Regulation No 821/75 (OJ L 79 of 28. 3. 1975, p. 1) increased the quantity originally provided for in Regulation No 191/75 to 300 000 metric tons.

From the foregoing account which in part goes beyond the period covered by the main action, it emerges that the threshold price and the target price were only theoretical values in view of the scarcity and the doubling of the world market prices. Moreover the Community authorities had created a genuine maximum price system at a Community level specially for Italy. The maximum Community price fixed by the Community authorities had replaced the target price of the Community for the requirements not covered by Community production, that is, essentially the requirements of Italy.

Since, however, the Italian maximum prices were lower than the prices at which sugar imported from third countries with the help of Community subsidies or Community sugar produced above the maximum quotas could be sold in Italy, the Italian refineries or importers had no possibility of participating in the invitations to tender issued by the intervention agencies of the Member States. Looked at in this light it may be said, in respect of Orders Nos 28/74 and 39/74 of the CIP as well, that their price rules are incompatible with the provisions issued under the organization of the market in sugar.

3. Moreover, and here I come to a further question from the national court, the price rules are also to be considered in the light of the prohibition contained in Article 30 of the EEC Treaty to which Article 35 of Regulation No 1009/67 refers, that is, the prohibition on measures having an effect equivalent to quantitative restrictions on imports.

Assuming that national price rules at whatever stage are in principle lawful, nonetheless in any event they must not be an obstacle to the free movement of goods. This is referred to by certain passages in the judgment in *Galli* where it is said in connexion with the fixing of prices at the retail and consumption stages that other provisions of the Treaty may not be infringed. In my view the Commission has convincingly shown by reference to its Directive No 70/50 of 22 December 1969 'on the abolition of measures which have an effect equivalent to quantitative restrictions on imports' (OJ English Special Edition 1970 (1), p. 17) that such effects may appear with maximum price rules. Measures having equivalent effect within the meaning of the said provisions include the fixing of different maximum prices for domestic and imported products. This may also be the case where there are rules applying equally to domestic and imported products which lead to the obstruction of imports because the price is fixed at a level which makes the sale of imported goods more difficult, for example because no regard is had to the different profit margins, production costs and the costs necessarily associated with imports.

These observations should suffice in the context of a reference for a preliminary ruling. Whether consequences arise from this in the cases dealt with in the main actions is for the court making the reference to determine on the basis of price comparisons which may be different for the different periods.

4. In view of what has been said it is no longer difficult to deal with the further question whether the maximum price rules represent a national measure which the Italian Government continued to be entitled to adopt in the context of its own conjunctural policy.

In this respect it is important that the Italian maximum price rules for sugar constituted no hasty measure; these rules had existed already before the establishment of the common organization of the market and continued without interruption. It is thus a permanent

system which is not to be ascribed to the difficulties occasioned by inflation and economic trends. As one of the advocates of the parties in the main action observed, we are concerned with a completely 'closed' system which exists alongside the Community system and erects what is undoubtedly a national barrier against it.

If it is assumed, however, that this system was part of the national Italian conjunctural policy, it is nevertheless apparent that it was not only an unnecessary repetition of the measures decided upon at a Community level but that it also encroached directly upon the Community sphere.

Support for this is to be found in the judgments of 13 June 1972 in Joined Cases 9-11/71 *Compagnie d'approvisionnement* [1972] ECR 408 and 24 October 1973 in Case 43/72 *Merkur* [1973] ECR 1073 where it was said that 'by enabling the Council, without obliging it, to "adopt ... measures appropriate to the situation", Article 103 conferred on that body wide powers of appraisal, to be exercised as a matter of "common concern", and not in the private interest of a particular group of participants in the market'.

Furthermore, in three judgments which were likewise delivered on 24 October 1973, Case 5/73 *Balkan* [1973] ECR 1108-1110, Case 9/73, *Schlüter* [1973] ECR 1152/1153, and Case 10/73, *Rewe Zentrale* [1973] ECR 1189-1191, it was stated:

'On the other hand, Article 103 refers to Member States' conjunctural policies, which they must regard as a matter of common concern. Consequently it does not relate to those areas already subject to common rules, as in the organization of agricultural markets. The real object envisaged by Article 103 is the coordination of Member State's conjunctural policies, and, according to the terms of paragraph 2 of that Article, the adoption of common policies appropriate to the situation ...

Although by Article 103 (1) Member States are bound to regard their conjunctural policies as a matter of common concern, the wording does not preclude Community institutions from having power to lay down themselves without prejudice to other procedures set out in the Treaty, conjunctural measures or matters within the spheres of their competence. On the contrary Article 103 (2), by declaring that the Council may, "acting unanimously ... decide upon the measures appropriate to the situation", confers on that body — subject to the condition referred to above — the powers necessary to adopt in principle, any conjunctural measures which may appear to be needed in order to safeguard the objectives of the Treaty.'

Later the judgment of 23 January 1975 in Case 31/74, *Galli* [1975] ECR p. 63 repeats that

'a Member State cannot base the justification for its unilateral intervention in the movement of prices in the sector in question on the provisions of Article 103 of the Treaty relating to conjunctural policy.

Article 103 which refers to Member States' conjunctural policies, does not relate to those areas already subject to common rules such as the organization of the agricultural markets'.

It goes on to say:

'The only way compatible with Community law of enabling Member States to attain, in a sector covered by a common organization of the market, the objectives sought by national legislation and intended to combat a rise in price, is for those States to take, at the Community level, the necessary action to the purpose of prompting the competent Community authority to institute or authorize measures which are consistent

with the requirements of the single market set up by Regulations Nos 120/67 and 136/66.'

In the sphere of its conjunctural policy, if consumer protection requires it, the Council can therefore adopt common measures in the field of price formation which apply to the whole area of the Community and are not an obstacle to intra-Community trade. If such measures on the other hand are taken by the Member States individually and without previous agreement, there is the danger that essential Community interests may be adversely effected.

The result of these judgments therefore is to reject the idea that the Member States remain free for the purpose of their policies in combating inflation or the difficulties in supply with regard to certain products to intervene with unilateral measures in the price system of the Community. Such action would be lawful only if the Community itself did not adopt specific measures. We have seen, however, that the Community authorities have adopted such specific measures in the context of the common organization of the market in sugar and the rules adopted in pursuance thereof.

5. Finally I have still an observation to make on the question relating to the direct applicability of the Community rules relevant in these proceedings or in other words on the possibility of individuals relying on them in opposition to national provisions.

This requires no lengthy comment. In my mind there is no doubt that the Commission is right in proposing that the question raised be answered in the affirmative. In support of this view it is sufficient to refer to the fact that the relevant provisions of the organizations of the market are contained in regulations of the Community which must be applied directly in the Member States. On the other hand, as regard Article 30 of the EEC Treaty, which may also be relevant, it has likewise also been declared in the case-law that it produces direct effects in the sense proposed by the Commission.

6. In view of the foregoing I propose that the questions referred for a preliminary ruling should be answered as follows:

(a) Where a common organization of the market with common rules in prices exists, as is the case with Regulation No 1009/67 on the common organization of the market in sugar, the Member States may no longer intervene, with national measures adopted unilaterally, in the Community machinery for price formation applying at the production and wholesale stages.

National measures in the field of retail and consumer prices may jeopardize the aims or functioning of the common organization of the market in question. In this respect it is important whether the national maximum consumer prices result in a price level at the production and wholesale stages below the Community intervention, target and threshold prices and whether the national measures in question result in frustrating particular Community actions to subsidize imported products in the Member State in question.

(b) Member States may not fix maximum consumer prices for agricultural products, which are the subject of a common organization of the market, in so far as they set different levels for domestic and imported products or in so far as they are likely, although applying formally without distinction to domestic products and products imported from Member States, to make the sale of imported products more difficult than domestic products.

(c) In so far as national measures, in accordance with conclusions set out under (a) and (b), are incompatible with the Community provisions on the organization of the market in sugar or with the provisions on the abolition of measures which have an effect equivalent to quantitative restrictions on imports, individuals may, in reliance on the direct effect of the said Community provisions, require before national courts that the said national measures not be applied.