produce cannot be quantified, stored or marketed without further treatment, and whether or not that product, in the same state, may qualify for reimbursement of storage costs.

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Delivered in open court in Luxembourg on 15 May 1984.

For the Registrar
H. A. Rühl
Principal Administrator

Y. Galmot
President of the Third Chamber

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 29 MARCH 1984 [1]

Mr President,
Members of the Court,

1. This reference for a preliminary ruling concerns the system for offsetting storage costs for sugar. The Court will have to decide whether the manufacturers of certain substances which appear temporarily during the sugar manufacturing process are required to pay the levy in respect of storage costs.

Zuckerfabrik Franken GmbH, whose registered office is in Ochsenfurt (Federal Republic of Germany), is a manufacturer of invert sugar. That product, which is generally used for non-alcoholic beverages to be sold in bottles, is produced from crystalline sugar, which is also known as "basic-category crystalline mass" and is obtained by separating the mother syrup from the crystalline magma. The basic-category crystalline mass is continuously dissolved, by the addition of water, into syrup and the (clarified) syrup is processed into invert sugar either immediately or after a certain period. In the latter case, it is stored in an appropriate container.

On 16 December 1979 the Hauptzollamt Würzburg claimed payment of approximately DM 1 200 000 from Zuckerfabrik Franken GmbH by way of levy for the storage of clarified syrup for the period from September to December 1978. The levy was calculated on the basis of production which in those four months

1 — Translated from the Italian.

had been in excess of 276 000 tonnes. By further measures of 15 November and 7 December 1979, the Hauptzollamt fixed the amount of the levies in respect of the storage of the basic-category crystalline mass at DM 22 000 and DM 500 000 for September 1979 and October 1979 respectively. Zuckerfabrik Franken GmbH lodged an objection against those demands for payment but since they were upheld by the Hauptzollamt it subsequently brought an action before the Finanzgericht München in which it contended that the levy in respect of storage costs may be imposed only on sugar which is produced and that only finished products which are marketable may be regarded as falling within that category. By order of 13 May 1983 the Finanzgericht München stayed the proceedings and referred to the Court under Article 177 of the EEC Treaty the following questions for a preliminary ruling:

"1. Is the second paragraph of Article 12 (1) of Regulation (EEC) No 1998/78 valid, having regard to the enabling power contained in the third sentence of Article 8 (3) of Regulation (EEC) No 3330/74 on which it is based and to the first subparagraph of Article 6 (4) of Regulation (EEC) No 1358/77 in so far as it provides, under (d), that disposal is to mean the processing of the sugar by the manufacturer into products other than those falling within heading No 17.01 of the Common Customs Tariff?

2. If the first question is answered in the affirmative, how is the phrase 'syrups produced prior to the crystallizing stage and marketed in their natural state' within the meaning of the third subparagraph, under (a), of Article 8 (1) of Regulation (EEC) No 3330/74, to be interpreted with regard to Article 8 (2) of Regulation (EEC) No 1998/78?

Does it include sugars which, during the manufacturing process, have been dissolved by the addition of water as a first stage towards the production of invert sugar?

3. If the second question is answered in the negative, how are the phrases 'sugar produced' within the meaning of the first indent, under (a), of the third subparagraph of Article 8 (1) of Regulation (EEC) No 3330/74, as amended by Article 1 of Regulation (EEC) No 1396/78 and 'white ... sugar ... produced and marketed' contained in Article 6 (4) of Regulation (EEC) No 1358/77 to be interpreted?

(a) Do they include a transitional product which appears only temporarily during a continuing manufacturing process?

(b) If part (a) of the third question is answered in the affirmative is it also an important factor whether such a transitional product can be quantified directly and is capable of being stored and marketed without further treatment?

(c) If part (b) of the third question is answered in the negative is it a precondition of the charging of the levy in respect of storage costs pursuant to the third subparagraph of Article 8 (1) of Regulation (EEC) No 3330/74, that the storage costs must be capable of reimbursement in respect of the same product in the same state?"

2. I propose to begin by considering the provisions relevant to the case pending before the court making the reference. As I have already said, they are provisions of Community law relating to the levy in respect of storage costs for sugar.

The basic provision is Article 8 of Regulation No 3330/74 of the Council of 19 December 1974 on the common organi-

zation of the market in sugar, as amended by Council Regulation No 1396/78 of 20 June 1978. Article 8 (1) provides that the storage costs in respect of the certain sugars manufactured from beet or cane harvested in the Community, namely white sugar, raw sugar, syrups obtained prior to the crystallizing stage, and syrups obtained by dissolving crystallized sugar, are to be reimbursed to manufacturers at a flat rate by the Member States. The Member States are to finance such reimbursement by imposing a levy on each manufacturer by unit of weight of sugar produced or by unit of weight of syrups of the kind which I referred to earlier, provided they were produced prior to the crystallizing stage and marketed in their natural state.

According to Article 8 (3) of that regulation, the Council is to adopt the general rules for the implementation of that article and the Commission is to adopt the detailed rules for its implementation and to fix annually the amount of the levy. The general implementing rules were laid down by Regulation No 1358/77 of 20 June 1977 which regulates the system for offsetting storage costs. Of particular importance in this connection is Article 6 (4) of that regulation which provides that "the Member State shall collect the levy from each manufacturer in respect of the white and raw sugar and of the syrups, referred to under (a) of the third subparagraph of Article 8 (1) of Regulation No 3330/74, produced and marketed within his maximum quota".

The details of that system are set out in Commission Regulation No 1998/78 of 18 August 1978. Article 8 (2) of that regulation provides that the phrase "'syrups obtained prior to the crystallizing stage', means those syrups which fall within subheading 17.02 D II of the Common Customs Tariff and are subsequently processed into solid sugar under customs control, or under ... control providing equivalent safeguards, and which are stored in special containers separated from the sugar manufacturing plant" (I would recall that the subheading in question includes "other" sugars and syrups, that is to say different from those indicated in the preceding subheadings). Article 12 (1) provides that "the levy shall be incurred in respect of products as referred to in (a) of the third subparagraph of Article 8 (1) of Regulation ... No 3330/74 at the moment of disposal" and goes on to state that, for the purpose of calculating the amount of the levy, "disposal" is to mean "processing by the manufacturer of the sugar and syrups into products other" than those — beet sugar and cane sugar, in solid form — falling within heading No 17.01 of the Common Customs Tariff.

3. The first question concerns Article 12 which I have just mentioned. That provision, I would recall, lays down the rule that the levy in respect of white sugar and in respect of syrups obtained prior to the crystallizing stage or by dissolving crystallized sugar is incurred "at the moment of disposal". Moreover, according to Article 12 (1) (d), the processing of those products into substances other than solid sugars is to be regarded as *equivalent to disposal.* The national court (see pages 9 and 10 of the order making the reference) doubts whether there is any justification for treating a transitional product arising in the course of the manufacturing process as equivalent to a finished product which is marketed in the light of Article 8 of Regulation No 3330/74 (which is the basic regulation) or of the implementing regulation, No 1358/77. In other words, Article 12 (1) (d) may be invalid on the ground that the Commission exceeded

the limits of the legislative powers conferred upon it by the Council.

That doubt is groundless. In my view, the Council conferred sufficient powers on the Commission to enable it legitimately to treat a transitional product as the operative factor giving rise to the levy and the processing of the sugar or syrups into other products as equivalent to disposal.

Let us consider why this is so. Article 8 of the basic regulation makes the collection of the levy conditional on disposal only in the case of syrups, including those obtained by dissolving solid sugar. In the case of white or raw sugar (see Article 8 (1) (a)) *there is no such link.* It fallows in my view that "disposal" is not a strict pre-condition for the obligation to pay the levy. Its scope is flexible. Nor is it possible to counter that argument by having recourse to Article 6 of Regulation No 1358/77 wich does indeed relate the levy to disposal without providing for any exceptions but is in itself an implementing provision and is therefore incapable of binding the Commission. Therefore, in laying down the detailed rules for the implementation of Article 8, the Commission in order to comply with the requirements imposed under the system of levies, quite reasonably had recourse to a fiction, inasmuch as it treated as equivalent to disposal an entirely different process such as the processing of the sugar and syrups into products other than solid sugars.

Moreover, the requirements to which I have referred are mandatory. As the Hauptzollamt submits in its written observations, it is necessary to treat certain operations as equivalent to disposal in order to ensure that the levy is collected in all cases. If it were otherwise, that would not be possible. That is true in the case of solid sugar dissolved in water and processed by the manufacturer into a product falling outside heading No 17.01, that is to say outside the scope of the phrase "beet sugar and cane sugar, in solid form". The same applies to the other operations which are treated as equivalent to disposal. They are not referred to in the question but it is useful to recall them. I have in mind in particular Article 12 (1) (f) which provides that "denaturing of sugar" is to be regarded as disposal. Here, too, any processing would preclude the collection of the levy in respect of the storage of the product, which is sugar. Once again that risk has been averted by treating an operation which is not a disposal as equivalent thereto.

4. I now turn to the second question in which the Court is requested to interpret the phrase "syrups produced prior to the crystallizing stage and marketed in their natural state" (third subparagraph, under (a), of Article 8 (1) of the basic regulation). The court making the reference wishes in particular to ascertain whether that phrase includes sugars which, during the manufacturing process, have been dissolved by the addition of water as a first stage towards the production of invert sugar. The answer, on which the Commission and the parties to the main proceedings are agreed, can only be in the negative.

The question is based on Article 8 (2) of Commission Regulation No 1998/78. That article provides that the phrase "'syrups obtained prior to the crystallizing stage' means those syrups which fall within subheading 17.02 D II of the Common Customs Tariff and are subsequently processed into solid sugar ... and .. stored in special containers separated from the sugar manufacturing

plant." If that formula were used for the interpretation of the provision of the basic regulation which forms the subject-matter of this question, the phrase "syrups obtained prior to the crystallizing stage" should be regarded as also including the products obtained by dissolving the basic-category crystalline mass. There is no doubt that such products fall within the subheading to which that provision of secondary legislation refers.

As I said earlier, however, that conclusion must be rejected. It is not permissible to interpret a superior rule of law in the light of the provisions adopted pursuant to it. Moreover, if that criterion is applied, it must be acknowledged that the phrase "syrups produced prior to the crystallizing stage and marketed in their natural state" can in no way include sugars which, during the manufacturing process, have been dissolved by the addition of water as a first stage towards the production of invert sugar. The reason for this is both simple and inescapable: those syrups are produced *not prior* to the crystallizing stage but *after* that stage.

5. The third question presupposes that the second question is answered in the negative. I am therefore obliged to consider it. It concerns the interpretation of the phrases "sugar produced" (first indent, under (a), of the third subparagraph of Article 8(1) of the basic regulation, as amended by Regulation No 1396/78) and "white ... sugar ... produced and marketed" (Article 6 (4) of the implementing regulation, No 1358/77). The national court further subdivides the third question into three parts. In the first part it wishes to ascertain whether those phrases include a transitional product — such as white sugar — which appears temporarily during a continuing manufacturing process.

I am inclined to answer that question in the affirmative in the light of the wording of the basic provision. To begin with, that provision makes no mention of disposal and makes the obligation to pay the levy conditional purely and simply on the production of sugar. Secondly, the phrase "sugar produced" which is used in that provision is sufficiently wide to encompass a transitional product such as white sugar which appears during a manufacturing process. It must be borne in mind, however, as the Hauptzollamt observes that, for liability of the levy to arise, the sugar must be a *genuine* product *in its own right*, that is to say a product capable of independent use and not merely an ingredient used in the manufacture of a different finished product. There is no doubt that white sugar possesses both of those properties and the only way to establish whether the former or the latter is meant is to refer to the headings of the Common Customs Tariff.

Not only is that interpretation of Article 8 inescapable. It also satisfies the need (see part 3 *supra*) to ensure that the levy is capable of being collected also in respect of products which further processing excludes from the range of those in respect of which there is an obligation to pay the levy. Nor does it seem to me that Article 6 of the implementing regulation leads to a different conclusion. The two provisions are reconcilable, as the Commission states. It is true that Article 6 provides for disposal as a condition but — and this is the point — only so as to establish the time at which the manufacturer is required to pay the levy. In that connection, I would recall that the

Commission regulation in question treats certain processing operations as equivalent to disposal, thereby refining the mechanism introduced by Article 6.

6. The second part of the third question is linked to the first part. The national court asks whether the fact that a transitional product can be quantified, stored and marketed is an important factor for the purpose of establishing whether it falls within the scope of the phrase "sugar produced". In my view, neither the possibility of quantifying it nor that of storing it is an important factor. The first possibility is unnecessary for the calculation of the levy, which is fixed by reference to the quantity of the finished product. The second possibility is only ostensibly more important. The presence, if any, of crystallized juice may diminish the suitability of the product for storage but, as the Commission observes, it does not affect the properties of the sugar *qua* white sugar, as defined in the first indent of Article 1 (2) of Regulation No 3330/74 (beet sugar and cane sugar, in solid form "containing in the dry state, 99.5% ... of sucrose determined by the polarimetric method").

On the other hand, the requirement of marketability is an important factor. The Commission denies this on the ground that Article 12 (1) of Regulation No 1998/78 provides for various forms of notional disposal. It is correct to refer to Article 12 but not to rely upon it as a premise for the argument that marketability is not an important factor. On the contrary, the purpose of the reference to Article 12 is to define more clearly the scope of the requirement in question, in other words that reference demonstrates that the product must be marketable either technically or in the notional forms referred to in Article 12. The Hauptzollamt also denies that that marketability is an important factor on the ground that it does not affect the classification of the product under the Common Customs Tariff. However I am not swayed by that argument. As a rule the inclusion of a product in the Common Customs Tariff implies precisely that it is suitable for marketing.

7. In the final part of the third question, the national court again refers to the possibility of storage. It wishes to ascertain whether a product in respect of which the levy has been collected to pay for the storage costs (Article 8 (1) of the basic regulation) qualifies for the reimbursement of such costs where its characteristics — high temperature, moisture content — have in practice prevented it from being stored.

The answer to that question must be in the affirmative. The fact that the basic-category crystalline mass is not suitable for storage does not preclude it from qualifying for reimbursement. The financial neutrality of the system for offsetting storage costs militates in favour of that solution. Its neutrality stems from the fact that the reimbursement of those costs is granted only in the case of the products subject to the levy (even where the levy is collected following actual or notional disposal). The neutrality of the system is significantly borne out by the third recital in the preamble to Regulation No 1358/77 in which it is stated that: "... this ... reimbursement is financed by levies; ... the principle to be observed when the amounts of these levies are being fixed should be" that the total reimbursements made should equal total levies charged.

Moreover, it is sufficiently clear from Article 8 (1) of the basic regulation that the levies charged should equal the reimbursements granted and, as the

Agent for the Commission emphasized at the hearing, there is a perfect correspondence between the products which give rise to the payment of the levies and those which entail the reimbursement of storage costs. It should be added that such reimbursement is paid on a flat-rate basis, that is to say by a method which easily ensures that revenue equals expenditure.

8. In the light of all those considerations, I suggest that the Court should answer the questions submitted by the Finanzgericht München by order of 13 May 1983 in the case between Zuckerfabrik Franken GmbH and the Hauptzollamt Würtzburg in the following manner:

1. *First question:* the second subparagraph of Article 12 (1) of Commission Regulation No 1998/78 of 18 August 1978 is valid, in so far as it provides, under (d), that disposal is to mean the processing by the manufacturer of the sugar into products other than those falling within heading No 17.01 of the Common Customs Tariff.

2. *Second question:* the phrases "syrups produced prior to the crystallizing stage and marketed in their natural state" within the meaning of the third subparagraph, under (a), of Article 8 (1) of Regulaiton No 3330/74 of the Council of 19 December 1974 (as amended by Council Regulation No 1396/78 of 20 June 1978) must be interpreted as not including sugars which, during the manufacturing process, have been dissolved by the addition of water as a first stage towards the production of invert sugar.

3. *Third question:* the phrases "sugar produced" within the meaning of the first indent, under (a), of the third subparagraph of Article 8(1) of regulation No 3330/74 of the Council (as amended by Council regulation No 1396/78) and "white ... sugar ... produced and marketed" within the meaning of Article 6 (4) of Council Regulation No 1358/77 of 20 June 1977 must be interpreted in the following manner:

   (a) They include also a transitional product which appears only temporarily during a continuing manufacturing process, provided that it is a product capable of independent use. White sugar which appears during the process of manufacturing invert sugar falls within the scope of those phrases;

   (b) Marketability is an important factor for the purpose of establishing whether a product falls within the scope of those phrases and it includes also the various forms of notional disposal referred to in

Article 12 of Commission Regulation No 1998/78. However the fact that the product may be quantified and stored is not an important factor for that purpose.

(c) Where the levy in respect of storage costs is collected in respect of a given pursuant to the third subparagraph of Article 8 (1) of Regulaiton No 3330/74 (as amended by Regulation No 1396/78), that product qualifies for the reimbursement of those costs at a flat rate even if it has not been stored.