In Joined Cases 103/77 and 145/77

REFERENCES to the Court under Article 177 of the EEC Treaty by the High Court of Justice, Queen's Bench Division, Commercial Court, for a preliminary ruling in the actions pending before that court, in Case 103/77, between

ROYAL SCHOLTEN-HONIG (HOLDINGS) LIMITED

and

INTERVENTION BOARD FOR AGRICULTURAL PRODUCE,

and in Case 145/77 between

TUNNEL REFINERIES LIMITED

and

INTERVENTION BOARD FOR AGRICULTURAL PRODUCE

on the validity of Council Regulation (EEC) No 1862/76 of 27 July 1976 (Official Journal 1976, L 206, p. 3) amending Regulation (EEC) No 2742/75 on production refunds in the cereals and rice sectors, of Council Regulation (EEC) No 1111/77 of 17 May 1977 laying down common provisions for isoglucose (Official Journal 1977, L 134, p. 4) and of Council Regulation (EEC) No 1110/77 of 17 May 1977 (Official Journal 1977, L 134, p. 1) amending Regulation (EEC) No 3330/74 on the common organization of the market in sugar,

THE COURT,

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), A. M. Donner, P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

I — Facts and procedure

The facts, the procedure and the written observations submitted in pursuance of Article 20 of the Protocol in the Statute of the Court of Justice of the EEC may be summarized as follows:

1. The product at issue

Glucose having a high fructose content ("isoglucose") is a new natural sweetener made from starch of any origin but most frequently obtained from maize. This product, which appeared on the market in the Community countries in 1976, has sweetening properties comparable to those of sugar. However, in the present state of technical knowledge, isoglucose cannot be crystallized. It follows that its markets at the present time are limited to the food industries using sugar in liquid form: refreshing drinks, jams, biscuits, ice-creams etc. In these respects it competes with liquid sugar.

The plaintiffs in the main actions in these cases are starch manufacturers who have made heavy investments to allow them to produce isoglucose.

2. Community legislation

A. The production refund

Council Regulation (EEC) No 2727/75 of 29 October 1975 on the common organization of the market in cereals (Official Journal 1975, L 281, p. 1) stated, in the preamble, that "in view of the special market situation for cereal starch, potato starch and glucose produced by the 'direct hydrolysis' process it may prove necessary to provide for a production refund of such a nature that the basic products used by this industry can be made available to it at a lower price than that resulting from the application of the system of levies and common prices", and provided in Article 11 that:

"1. A production refund may be granted:

(a) for maize and common wheat used in the Community for the manufacture of starch;

(b) for potato starch;

(c) for maize groats and meal used in the Community for the manufacture of glucose by direct hydrolysis;

2. . .

3. The Council, acting by a qualified majority on a proposal from the Commission, shall adopt rules for the application of this article and fix the amount of the production refund."

In application of that provision, the Council, by means of Regulation (EEC) No 2742/75 of 29 October 1975 (Official Journal 1975, L 281, p. 57), adopted implementing rules and fixed the various amounts of the production refunds.

By Regulation (EEC) No 1862/76 of 27 July 1976 (Official Journal 1976, L 206, p. 3) the Council amended Regulation No 2742/75, it being stated in the recital in the preamble to that regulation that: ". . . in view of the situation which will exist as from the beginning of the 1976/1977 marketing year, particularly as a result of the application for that marketing year of common prices for cereals and rice, it is necessary to increase the production refunds; . . . however, given the objectives of the production refund system, such an increase should not be retained in the case of products used in the manufacture of glucose having a high fructose content; . . . the best method of

implementing a measure of this type is to provide for recovery from the manufacturers concerned of the amount of the increase in production refunds according to the product used."

Under Article 1 the refunds are increased.

However, under Article 2 of that regulation a new article, Article 5 a, is added to Regulation (EEC) No 2742/75, reducing the production refund for only one product processed from starch, glucose having a high fructose content. In fact the amount of the refund for starch processed into that product is maintained at the level of that of the previous marketing year and is totally abolished as from the 1977/1978 marketing year.

Under Article 5 a (3) the Member States must recover from manufacturers of glucose having a high fructose content the difference between the amount of the production refund for starch processed into glucose having a high fructose content and the amount for starch used for any other purpose.

By Regulation (EEC) No 2158/76 of 31 August 1976 (Official Journal 1976, L 241, p. 21) laying down rules for the application of Regulation (EEC) No 2742/75, the Commission adopted implementing provisions.

B. The production levy

Furthermore, the Council decided to lay down common measures applicable to isoglucose. Those measures were adopted by Regulation (EEC) No 1111/77, laying down common provisions for isoglucose (Official Journal 1977, L 134, p. 4).

The recitals in the preamble to that regulation contain amongst other things the following passages:

"... isoglucose is a direct substitute for liquid sugar obtained from sugar-beet or cane" (second recital);

"... being a substitute product in direct competition with liquid sugar, which, like all beet or cane sugar, is subject to stringent production constraints, isoglucose therefore enjoys an economic advantage and since the Community has a sugar surplus, it is necessary to export corresponding quantities of sugar to third countries; ... there should, therefore, be provision for a suitable production levy on isoglucose to contribute to export costs" (seventh recital).

The system for production levies for isoglucose is laid down by Articles 8 and 9 of the regulation and applies to periods corresponding to the sugar marketing years 1977/1978 and 1978/1979.

By Article 9 the amount of the production levy is, per 100 kg of dry matter, equal to the amount of the production levy for sugar provided for in Article 27 of Regulation (EEC) No 3330/74, the basic sugar regulation, for the same period to which the latter amount applies.

For the period from 1 July 1977 to 30 June 1978 however, the amount of the production levy may not exceed five units of account per 100 kg of dry matter. The latter amount is to apply when the amount of the production levy provided for in Article 27 of Regulation (EEC) No 3330/74 exceeds 5 units of account per kg 100 kg of white sugar for the same period.

Article 9 (3) provides that detailed rules for the application of the provisions concerning the production levy are to be adopted in accordance with the Management Committee procedure.

These detailed rules formed the subject of Commission Regulation (EEC) No 1468/77 of 30 June 1977 laying down rules for applying the production levy on isoglucose in respect of the period 1 July 1977 to 30 June 1978 (Official Journal 1977, L 162, p. 7).

Council Regulation (EEC) No 1110/77 of 17 May 1977 (Official Journal 1977, L 134) provides *inter alia* for the exclusion of isoglucose from the field of application of Regulation (EEC) No 3330/74.

3. The main actions

A. Case 103/77

Royal Scholten-Honig (Holdings) Ltd., a company incorporated under English law and a subsidiary of the Netherlands company Koninklijke Scholten-Honig N.V., commenced proceedings in the High Court of Justice, Queen's Bench Division, Commercial Court, against the Intervention Board for Agricultural Produce (the British intervention agency), for a declaration that Regulation (EEC) No 1862/76 (in so far as it supplemented Regulation (EEC) No 2742/75 by inserting Article 5 a therein), Regulation (EEC) No 1111/77 and Regulation (EEC) No 1110/77 are void and of no effect and that the United Kingdom Government is not entitled to implement the said regulations.

By order of 29 July 1977 the national court stayed the proceedings and asked the Court of Justice, in pursuance of Article 177 of the EEC Treaty, for a preliminary ruling on the following questions:

"1. Is Council Regulation (EEC) No 1862/76 in so far as it purports to insert Article 5 a in Council Regulation (EEC) No 2742/75 a valid regulation?

2. Is Council Regulation (EEC) No 1111/77 a valid regulation?

3. Is Regulation (EEC) No 1110/77 a valid regulation?"

The order for reference was registered at the Court on 8 August 1977.

B. Case 145/77

On 7 October 1977 Tunnel Refineries Ltd., a company incorporated under English law, commenced proceedings in the High Court of Justice, Queen's Bench Division, Commercial Court, against the Intervention Board for Agricultural Produce. In its statement of claim it claimed a declaration that Council Regulation (EEC) No 1111/77 is void and of no effect and that the defendants are not entitled to implement the same.

By order of 8 November 1977 the national court stayed the proceedings and asked the Court of Justice in pursuance of Article 177 of the EEC Treaty for a preliminary ruling on the question whether Regulation (EEC) No 1111/77 is "invalid on any and if so which" of the grounds referred to in the plaintiff's points of claim which are set out below in the summary of the plaintiff's observations.

The order for reference was registered at the Court on 24 November 1977.

By order of 14 December 1977 the Court decided to join the present cases for the purposes of procedure and judgment.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure, the Council and the Commission having first been invited to answer certain questions (set out under III below).

II — Summary of the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

1. In Case 103/77

Observations of Royal Scholten-Honig Ltd.

By way of introduction Royal Scholten-Honig Ltd., *the plaintiff in the main action*, explains that Council Regulations Nos 1862/76, 1111/77 and 1110/77 have been made with the object of penalizing production of

isoglucose so as to prevent it from competing with liquid sugar. The likely effect of the penalties, if validly imposed, would be to put a stop to the production of isoglucose in the EEC and thus (a) to deny the EEC the benefits of a major technological advance; (b) to render enormous investments made in recent years almost worthless, without any compensation to the investors; and (c) to disregard completely the interests of consumers within the EEC.

However, the plaintiff takes the view that Council Regulations (EEC) Nos 1111/77 and 1110/77 and also Council Regulation (EEC) No 1862/76, in so far as it purports to insert Article 5 a in Council Regulation (EEC) No 2742/75, are invalid.

Facts

The plaintiff explains that isoglucose is made from starch, which itself can be produced from maize, wheat, potatoes or other products. In the main so far, however, production has been from starch made from maize. The plaintiff gives a brief summary of the principal stages in that process, emphasizing its revolutionary technical nature.

As regards the characteristics and uses of isoglucose, the product is almost as sweet, according to the plaintiff, as sucrose — cane or beet sugar. Since it must be supplied and used in liquid form it is only in competition with liquid sugar, which represents no more than 7% of the total EEC sugar market. For a number of reasons isoglucose is not used as a total substitute for liquid sugar in any given application. It is used mixed with liquid sugar.

The plaintiff lists certain characteristics of isoglucose which has for the user a number of positive advantages over liquid sugar in the fields in which it does compete with sugar, that is, for soft drinks, fruit and vegetable conserves, jams and preserves, bakery products and confectionery.

The plaintiff points out, as regards its interest in isoglucose, that it is a subsidiary of Koninklijke Scholten-Honig N.V., a company incorporated under Netherlands law, which, in late 1972, bought from an American company industrial property rights in respect of an enzyme process for manufacturing isoglucose.

With those rights and the know-how resulting from its own researches and under the then prevailing applicable Common Market regulations, the Netherlands company decided that investment in plant to manufacture isoglucose was justified. So far as the plaintiff was concerned a decision was taken in 1973 to construct at Tilbury in the United Kingdom a major plant to produce starch and to produce therefrom 85 000 tonnes per annum of isoglucose. By May 1977 (that is, the date of the adoption of Council Regulations (EEC) Nos 1111/77 and 1110/77) a total of Fl. 53 000 000 had been spent on the plant.

The effect of the above-mentioned regulations, if they are declared to be valid, will be, according to the plaintiff, either that the latter will have to produce isoglucose at a substantial loss or that the sums spent on construction of the isoglucose plant will have to be written off.

The regulations in question have already compelled the plaintiff to suspend construction of the Tilbury plant, causing it substantial losses.

Relevant market organizations and the context in which the regulations referred to in the questions must be viewed

A. Cereals

Referring to the history of production refunds in relation to the starch industry as set out in the "Report on Starch Products in the Community and the Starch Production Refund" prepared by the Commission, the plaintiff explains that it appears from that account (a)

that the decision to invest in the plant at Tilbury was taken against the background of a system of production refunds granted to Community starch producers since 1962; and (b) that at no stage in the history of production refunds for starch had any distinction been drawn between production refunds for starch when used for one purpose as opposed to any other, until Regulation (EEC) No 1862/76 was introduced. The effect of that regulation was to place producers of starch in so far as they intend to produce starch for the production of isoglucose, in an adverse position as compared with persons producing starch for other purposes.

B. Sugar

The plaintiff gives a summary of the quota system laid down by Council Regulation No 3330/74.

It maintains that Council Regulations Nos 1111/77 and 1110/77 attempt to impose on *all* isoglucose a penalty equal to the amount of the levy imposed under Article 27 of Regulation No 3330/74 on B Quota sugar, without providing isoglucose with the aid or benefits of the quota system.

Regulation No 1862/76

The plaintiff puts forward the following submissions and arguments in support of its view that Regulation No 1862/76 is invalid:

1. Article 190 of the EEC Treaty

The regulation infringes Article 190 of the EEC Treaty inasmuch as it fails to state the reasons on which it is based. In fact, apart from referring to Council Regulations (EEC) Nos 2727/75 and 2742/75 the preamble to Regulation No 1862/76 simply states as a reason for not granting the increase in the production refund for the marketing year 1976/1977 for products used in the manufacture of starch intended for the manufacture of isoglucose: "given the objectives of the production refund system". This phrase is not sufficient as a reason for not granting the increase. No reasons at all are given for discontinuing the refund for isoglucose altogether with effect from 1977/1978.

2. Article 11 (3) of Regulation No 2727/75)

The plaintiff emphasizes the subordinate nature of Regulation No 1862/76, which was adopted pursuant to the authority conferred on the Council by Article 11 (3) of Council Regulation (EEC) No 2727/75, the latter regulation having been adopted directly pursuant to Article 43 (2) of the Treaty after consultation with the assembly. The plaintiff claims that, having regard to the terms of the authorization received by the Council under Article 11 (1) the Council has no authority to differentiate between products for the manufacture of which any of the items referred to in subparagraphs (a), (b) or (c) of that paragraph might be used. In any event and even on the supposition that in certain circumstances the Council might adopt rules making such a distinction, the Council has been guilty of a misuse of powers if in adopting Regulation No 1862/76 it took into account considerations extraneous to the purposes of the common organization of the markets in cereals. The competition between isoglucose and liquid sugar would be and was, in the view of the plaintiff, an extraneous consideration in the context of the power given to the Council by Article 11 (3) of Regulation No 2727/75.

3. Article 40 (3) of the Treaty

Regulation No 1862/76 infringes Article 40 (3) of the Treaty, which obliges the common organization to "exclude any discrimination between producers or consumers within the Community". The essence of the regulation is that it discriminates between producers of starch inasmuch as

producers of starch for the manufacture of isoglucose are placed in a different position from that of producers of starch for other purposes.

Regulations Nos 1111/77 and 1110/77

In the submission of the plaintiff, the above-mentioned regulations are invalid on the grounds set out below.

By way of preliminary observation the plaintiff points out that Regulation No 1111/77 is based on the idea that the protection of Community producers of isoglucose and the safeguarding of their interests require the setting up of common measures. To this end it purports to set up a common organization for isoglucose with a system of licences for exports and imports (Article 2), levies on imports (Article 3), export refunds (Article 4), power to prohibit inward processing arrangements in respect of isoglucose (Article 5) and power to take measures in trade with third countries in relation to threats of serious disturbances in the Community market in isoglucose (Article 7). Those provisions are, however, wholly unreal. Community producers of isoglucose are not and never have been in need of protection from producers outside the Community and there is not and never has been any need to stabilize the internal Community market in isoglucose.

The only effective or real provision is that contained in Article 9 which imposes a production levy on isoglucose.

Grounds of invalidity relied on by the plaintiff

1. *The common provisions for isoglucose constitute an unlawful discrimination against isoglucose, contrary to Article 40 (3) of the Treaty*

The plaintiff takes the view that the production levy on isoglucose laid down by Regulation No 1111/77 is just as much an unlawful discrimination against isoglucose as if the levy had been written directly into the basic sugar regulation, No 3330/74. Producers of isoglucose are plainly in competition with producers of liquid sugar and the only part of Regulation No 1111/77 which has any reality, namely the production levy on isoglucose, plainly discriminates against producers of isoglucose in favour of producers of liquid sugar. The former would pay a levy on all their production, being granted neither a levy-free A Quota nor the benefit of an intervention system such as are granted to the latter.

2. *The common provisions for isoglucose do not seek to attain and will not attain the objectives of Article 39 of the Treaty*

The plaintiff accepts that the objectives set out in Article 39 cannot always be attained simultaneously and that the Council must have the power to reconcile the various interests involved. The plaintiff takes the view however that when the inclusion of a measure in a common organization established under Article 40 results, contrary to the objective of increasing agricultural productivity set out in Article 39 (1) (a), in the stifling of technical progress there would have to be overwhelming evidence that another of the objectives was being sought and that that objective could only be achieved by the measure proposed.

According to the plaintiff that is not the position in the present case. Indeed the imposition of the levy may be said to achieve objectives contrary to those set out in Article 39 (1) (c), (d) and (e) inasmuch as the production of isoglucose, if it takes place, will add stability and ensure availability of supplies at reasonable prices since it will provide some insurance against a dramatic shortage in Community or world sugar production. As regards the other objectives of the common agri-

cultural policy, the plaintiff observes that the regulation itself makes no mention in the preamble of any suggestion that its object is to improve or safeguard the standards of living of the agricultural community.

3. The common provisions for isoglucose violate the principle of proportionality

According to the plaintiff, the first genuine objective stated in Regulation No 1111/77 is that expressed by the preamble in the seventh recital. As regards the content of that recital, it is important to note the following points:

(i) The "stringent production constraints" imposed on beet or cane sugar are restraints imposed by Community regulations. The regulations can therefore be modified if they impose too great a restraint in the face of a competitive product.

(ii) It is only in circumstances in which A or B Quota sugar is exported that any export costs arise on the export of sugar since it is only in such circumstances that an export refund is payable. There can be no justification for making isoglucose contribute to export costs of A or B Quota sugar where that sugar has been exported because isoglucose is technically better. The consumer is then suffering for the benefit of sugar producers. Similarly the mere existence of the restraints imposed by the Community itself on sugar producers cannot justify the imposition on isoglucose of a levy which will have the effect of depriving the consumer of a product which is technically more efficient in certain fields than liquid sugar.

(iii) If there is an excess production of sugar in the Community attributable to the fact that isoglucose has taken part of the sugar market, it is wrong for isoglucose to be charged with the entire export costs of that excess.

(iv) In any event the effect of the tax will be to stop production of isoglucose and there will be no contribution to export costs.

(v) Finally the stated object of a contribution to export costs could only be achieved if the production levy did constitute own resources within the meaning of Article 2 of the Council Decision of 21 April 1970 (Official Journal, English Special Edition 1970 (I), p. 224).

On the basis of an analysis of the wording of that article the plaintiff claims that the production levy will however *not* constitute own resources within the meaning of Article 2 and that the Council is not empowered to treat it as "analogous to" other levies which are own resources in this sense.

In the plaintiff's submission there is accordingly a clear lack of proportionality (a) when the stated objects would appear to be ones which will not be achieved; (b) where for the purpose of protecting from competition a small sector of one market, EEC manufacture of a technically advanced product is brought to a stop and EEC consumers are deprived of a product which in the relevant field has advantages over sugar; (c) where for the same purpose the entire financial burden is placed not on the Community as a whole but on the producers of a single product and what is more on the very producers who have made or are in the process of making enormous capital investment so as to provide the technically advanced product within the EEC; and (d) where the effect will be to cause the loss of the investment without compensation to the investors.

4. The common provisions for isoglucose are not, except for Article 9 which imposes the production levy, effective provisions and the Council has misused its powers

Whether the common provisions for isoglucose are a device for imposing tax on that product or whether they were made on a totally wrong premise, they are, in either event, in the plaintiff's submission, invalid as involving a misuse by the Commission and/or the Council of the powers conferred by Article 40 (2) and (3) of the Treaty. Those provisions primarily authorize the establishment of a common organization and only secondarily and by implication the imposition of levies in connexion with such organization. They do not authorize the imposition of levies where there is no common organization as, in the plaintiff's submission, is in reality the case in respect of isoglucose.

5. *The common provisions for isoglucose violate superior rules of law by failing to include:*

(i) provisions to exclude existing and committed production capacity; and/or

(ii) a detailed transitional regime to prevent damage to existing and committed production capacity; and/or

(iii) provisions for compensation.

The plaintiff points out that if Regulations Nos 1111/77 and 1110/77 are declared valid the effect will be that the plaintiff will have to write off the capital investment in plant manufactured or in the process of being manufactured for the production of isoglucose or else produce isoglucose at a loss.

In the plaintiff's submission the failure to adopt any provisions to exclude existing and committed production capacity or a detailed regime to prevent damage to existing and committed production capacity or at least provision for compensation violates the aforementioned superior rules of law and consequently renders Regulations Nos 1111/77 and 1110/77 illegal and void.

6. *The common provisions for isoglucose are invalid because of a non-compliance with Article 190 of the Treaty*

The preamble to Regulation No 1111/77 contains the reference: "Having regard to the opinion of the European Parliament". The opinion in question was published in Official Journal C 93 of 18 April 1977.

In the plaintiff's submission, when the European Parliament in paragraph 26 of its opinion expressed the view that the *same discipline* should be imposed on isoglucose as that imposed by the common organization of the market for sugar the Parliament meant precisely that and not that the production levy alone should be imposed without the commensurate benefits.

The plaintiff submits that some reasoning indicating why the objectives of the Treaty cannot be achieved by imposing *the same* discipline should be an essential procedural requirement under Article 190 of the Treaty and that Regulation No 1111/77 is invalid for non-compliance with that article.

7. *Isoglucose is not an "agricultural product"*

The plaintiff recalls that "agricultural products" are defined by Article 38 of the Treaty as "the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products".

However, isoglucose is not a product of first-stage processing. It is accordingly not an agricultural product and the Council has no power pursuant to the Treaty to make regulations treating it as such.

Conclusions

For the reasons set out above the plaintiff claims that the Court should declare that:

(i) Regulation (EEC) No 1862/76, in so far as it purports to insert

Article 5a in Council Regulation (EEC) No 2742/75, is invalid;

(ii) Regulations (EEC) Nos 1111/77 and 1110/77 are invalid.

Observations submitted by the Council

Preliminary remarks

The Council, whilst bearing in mind the recent arrival of isoglucose on the Community market, considers that it would be useful to supply some statistics relating to the product.

According to the Council, for the end of 1976 an annual production capacity of 150 000 tonnes (in white sugar equivalent) was cited; for the end of 1977, 400 000 tonnes. The total actual production for 1976 was 70 000 tonnes, 85% of which was maize-based an 15% wheat-based. The 70 000 tonnes represent something less than 1% of the total annual sugar consumption in the whole Community but the percentage might rise swiftly and reach 3 or 4% in late 1977 and early 1978.

The above figures are regarded by some persons — notably by the beet growers — as incomplete or even inaccurate.

However, information on prices is particularly hard to establish.

As regards the respective production costs, that of isoglucose is spoken of as being 10 to 15% below that of sugar taking into consideration the restrictions imposed on the latter. Some persons take the view that the price advantage is even greater especially as isoglucose is technically more malleable for certain uses. Isoglucose is also supposed to give rise to special expense since it is difficult to conserve (10% of the cost?). Apart from the very vague nature of these figures it seems likely that increased production will reduce the cost of isoglucose, perhaps considerably.

Uncertainty is also marked over marketing prices: whilst figures for sugar are well known, those for isoglucose are far less so. Is there in fact a true market for isoglucose? How is its price determined? With regard to the latter the Council refers to a theory of "utility value" or "replacement value" according to which the sale price of a product which is not widely available is determined by reference to the price of the product on the wider market for which it is a substitute. In other words since isoglucose production is about one hundredth of the size of sugar production and since the former is a substitute for the latter the sale price of isoglucose on the Community market should tend towards that of sugar on the same market irrespective of the cost of producing isoglucose.

The Council next gives a brief summary of the legislation which it has adopted relating to isoglucose.

With regard in particular to Regulation No 1111/77 the Council claims that it creates a veritable "mini-organization" of the market for isoglucose which, however, is not entirely independent but rather complementary to the organization for sugar for which "isoglucose is a direct substitute". The Council finally emphasizes that the system of production levies is of a temporary nature and that there are transitional arrangements for them.

The Council next considers the submissions put forward by the plaintiff in its points of claim before the High Court and makes the following points in particular.

I — The validity of Regulation No 1862/76

1. Discrimination, within the meaning of Article 40 (3) of the Treaty, between Community producers

According to the Council there does not appear to be any possible competition between starch products receiving the production refund and isoglucose. Furthermore it may be doubted whether there is discrimination within the meaning of Article 40 at a prior stage in

the production of isoglucose. In any case, in the view of the Council, that would be not the isoglucose manufacturers who were discriminated against but their suppliers.

2. Inadequacy of statement of reasons

The Council considers that it has made clear in the third clause of the sole recital in the preamble to the regulation that the retention of the refund for isoglucose was uncalled for in view of the objectives of the refund as set out in the preamble to Regulation No 2742/75. That is a *statement of reasons by reference* which would not seem to be excluded by Article 190 of the Treaty and which would be in accordance with the requirements laid down by the Court in its judgment of 13 March 1968 (Case 5/67, *Beus*, [1968] ECR 83 at p. 95).

II — Validity of Regulations Nos 1110/77 and 1111/77

1. Infringement of Article 38 (1) of the Treaty — isoglucose is not an "agricultural product"

The Council recalls that the two types of isoglucose to which Regulation No 1111/77 refers are products inserted in Annex II to the Treaty as a result of Regulation 7a of 18 December 1959 (Official Journal, English Special Edition 1959-1962, p. 68).

The Council refers to the judgment of the Court in Case 185/73 *Hauptzollamt Bielefeld* v *König* ([1974] ECR 607) and points out that isoglucose comes within the definition of "products of first-stage processing" under Article 38 (1) as that expression refers to a direct economic interdependence between the natural product and the product resulting from the productive process irrespective of the number of operations.

2. Discrimination between producers contrary to Article 40 (3) of the Treaty — violation of the rule of proportionality

The Council deals *inter alia* with the plaintiff's argument that the imposition of the B sugar levy on isoglucose is discriminatory because it makes isoglucose subject to some of the charges on sugar but not to the corresponding advantages and that moreover it is not proportional to what is necessary and imposes charges which are too heavy.

The Council wonders whether what the isoglucose producers want is to benefit on their production in the same way as do sugar manufacturers from a guaranteed remuneration.

In this respect the Council mentions that sugar manufacturers have a maximum quota made up of two tranches, namely the Quota A tranche which is guaranteed the full intervention price and the Quota B tranche which is approximately equal to one third of Quota A (35%) and is guaranteed only the intervention price reduced by the amount of the levy. In other words, sugar producers are guaranteed the intervention price reduced by a *quarter* of the levy (exactly $\frac{135 - 100}{135} = 26\%$).

On the other hand isoglucose producers pay on all their production the full levy (although reduced by half for 1977/1978). It is in this difference of treatment that the discrimination is alleged to lie.

It remains to be determined whether absolute equality of the systems is necessary. The plaintiff has not begun to answer any of the three questions which arise in this respect:

1. Is the competition of use between the two products sufficient to ground absolute equality of systems between them?
2. Is it possible now to determine in a permanent way the connexion between the systems when the production of isoglucose is likely to increase by 500% in the near future,

which will put the problem in a new setting?

3. Would equality of systems ensure the same remuneration?

It might on the contrary be claimed that since the production of isoglucose is complementary to existing sugar production it is perfectly logical that it should be subject to the constraints of that part of sugar production (B sugar) which is additional to the part judged necessary to cover the normal needs of the Community which, because of this, benefits from all Community guarantees (A sugar) (cf. the seventh recital in the preamble to Regulation No 1111/77).

Article 39 of the Treaty states that one of the objectives of the common agricultural policy is to "stabilize markets". It therefore seems to be perfectly in conformity with the objectives of the common agricultural policy to consider isoglucose as additional sugar production and to make it bear a financial contribution adequate to cover the export costs of the excess Community sugar.

Furthermore, the Council wonders whether the isoglucose arrangements are really so unfavourable to isoglucose and points out that it benefits indirectly from the advantages of the organization of the sugar market in particular with regard to prices.

With regard to the plaintiff's submission that the Council has not brought about the equilibrium which the European Parliament considered desirable between sugar and isoglucose in its resolution of 23 March 1977 (Official Journal C 93 of 18 April 1977, p. 14), the Council points out that the Parliament desired (paragraph 26 of its resolution) the extension to isoglucose of the discipline imposed by the common organization of the market in sugar; it did not however say that that equilibrium must be achieved by applying the system of the sugar quotas to isoglucose.

In conclusion, as regards the alleged imbalance between the markets for sugar and isoglucose which is said to have brought about discrimination to the disadvantage of isoglucose or even imposed upon it stricter constraints which were out of proportion to what was necessary, the Council does not consider that this has been proved.

3. Prejudice to legal certainty by sudden reversal of policy without notice (paragraph 19 of the points of claim) and absence to transitional arrangements

According to the Council, Regulations Nos 1111/77 and 1110/77 were sufficiently well known in advance not to cause the plaintiff losses in the completion of contracts in progress.

With regard to the complaint of a sudden reversal of policy since the plaintiff claims to have invested Fl. 53 000 000 at Tilbury the question arises according to the Council whether there is a right to continuation of the same rules (or more exactly of the absence of rules). In fact the Community has never undertaken either to continue the starch production refund system with respect to isoglucose, or to refrain from organization of the market in isoglucose. In this connexion the Court of Justice has nowhere stated in its case-law on acquired rights and transitional measures that there is an acquired right to have a set of regulations maintained (cf. in particular Case 1/73, *Westzucker* [1973] ECR 723).

4. Failure to comply with the duty to consult the European Parliament at the time of the adoption of Regulations Nos 1111/77 and 1110/77

The Council simply states that the opinions of the European Parliament are not binding on the Council.

5. Infringement of essential procedural requirements

The Council points out that it has fulfilled all its formal duties of consultation: in the case of the Regulations Nos 1110/77 and 1111/77 it consulted the European Parliament and the Economic and Social Committee; in the case of Regulation No 1862/76, a second-generation regulation, the provisions which are its legal basis do not specify that there must be consultation.

The Council concludes its observations by expressing the view that none of the arguments advanced by the plaintiff establishes the invalidity of Regulations Nos 1862/76, 1110/77 or 1111/77.

Observations submitted by the Commission

I — Application of Community legislation

1. Isoglucose

As regards details of the properties and applications of isoglucose the *Commission* refers to an article published in the journal "Food Technology" of November 1975, entitled "Isomerized Corn Syrups in Food Products" (Annex I to its observations). According to the Commission the only substantial differences between isoglucose and sugar are that, in the present state of technology, isoglucose cannot by crystallized and requires to be kept during storage and transport at a temperature of between 28 and 30 °C.

The Commission states that according to information available to it in 1976, at a time when the effects of the arrival of isoglucose on the Community sugar market were first being examined, production capacity for isoglucose within the Community would be of the order of 145 000 tonnes at the end of 1976 and might attain 375 000 tonnes in 1978 with further increases in capacity projected during the years 1977 to 1982. (See the reply to Written Question No 330/76 put by Mr Martens — Official Journal C 305 of 27 December 1976, p. 5). It was further estimated that actual production of isoglucose during the period from mid-1976 to mid-1977 would be of the order of 75 000 to 85 000 tonnes (dry matter), which would represent between 2 and 3% of the total starch production of the Community. For the year 1976/1977 such a production would involve the consumption of 135 000 tonnes of maize out of a total Community maize crop of 15 000 000 tonnes and the consumption of 30 000 tonnes of wheat out of a total Community wheat crop of 35 000 000 tonnes.

Manufacturers of isoglucose, who make glucose as well, have introduced it on to the market as a liquid sugar with which it is in direct competition. The Community production of liquid sugar is at present roughly 700 000 tonnes (see the answer to Written Question No 803/76 by Mr Martens — Official Journal) C 84 of 4 April 1977, p. 12), which represented in 1976/1977 8% of the total Community sugar consumption. However, it should be remembered that there is a tendency for the consumption of liquid sugar to increase whilst that of sugar is coming down. Ten years ago liquid sugar produced in the Community represented only 3% of the total Community sugar market. Thus it is estimated that the potential market in the long term for isoglucose might amount to as much as 30% of the total Community sugar market.

2. Production refunds

The Commission refers to its "Report on Starch Products in the Community and the Starch Production Refund" (COM (77) 363 final of 27 July 1977 — Annex II to the Commission's observations), which gives a general view of the system of production refunds in the starch industry and sets out the Commission's proposals to the Council

regarding its future policy towards that sector. The objectives of the system are set out in particular in the first recital in the preamble to Regulation (EEC) No 2742/75 of the Council:

"...on account of the special situation on the market in starches and, in particular, the need for the starch industry to ensure that its prices are competitive with those of substitute products, Regulations (EEC) Nos 2727/75 and 359/67/EEC provided for the granting of a production refund, in order that the starch industry might obtain the basic products it requires at a lower price than that which would result from the application of the rules of the common organization of the markets in the products in question."

3. Regulation No 1862/76

The Commission gives a brief summary of the origin of the regulation and in particular of Article 2.

The reasons on which that article is based, as given in the recital to the regulation, indicate that "given the objectives of the production refund system" the increase decided generally by the Council (14 units of account per tonne for maize) should not be retained for products used in the manufacture of isoglucose. The Commission's view, which was accepted by the Council, was that these objectives did not include the subsidization of a product, not envisaged in 1962 when the Community production refund system was first introduced, which was in direct competition with another agricultural product, sugar, which was subject to a common organization of the market.

4. The common organization of the market in sugar

The Commission first sets out the principal characteristics of the quota system and the production levy system in the context of the organization as a whole.

It next deals in particular with the situation on the Community market at the present time, starting in 1976 and considered likely to continue for the foreseeable future, which is one of marked surplus despite the quota system. The total consumption of sugar, which in 1973/1974 was of the order of 10·5 million tonnes, has subsequently dropped during 1976/1977 to 9·09 million tonnes, lower than the basic quota fixed by Regulation No 3330/74 at 9 136 million tonnes. In addition, the Community assumed under the Lomé Convention in 1976 continuing obligations to import 1·4 million tonnes of sugar at guaranteed prices. The effect was that during 1976/1977 the Community had a surplus of 1·7 million tonnes, even during a marketing season when the sugar yield per hectare was low on account of the drought. The Commission estimates that during 1977/1978 the Community might have a total production of 10·7 million tonnes of sugar which, assuming preferential import obligations of 1·4 million tonnes and expected consumption of 9·4 million tonnes, would give rise to a total exportable surplus of 2·6 million tonnes. To enable these exports to take place at a time of mounting world sugar production and falling prices, Community funds will be obliged to pay out, in the Commission's view, refunds of the order of 240 units of account per tonne.

5. Regulation No 1110/77

It followed from the decision, recorded in Regulation No 1111/77, to classify isoglucose in subheading 17.02 D (other sugars and syrups) of the Common Customs Tariff and to lay down common provisions for isoglucose, that that product was not to be included within the common organization for sugar. In this respect Article 1 of Regulation No 1110/77 made the necessary amendment to Article 1 of Regulation No 3330/74, the basic sugar regulation.

6. Regulation No 1111/77

The Commission proceeds to discuss the origin and content of the above-mentioned regulation.

In order to deal with the problems presented by the appearance on the market of a new product in direct competition with liquid sugar, the Commission organized on 4 October 1976 a meeting at which all parties were able to express their points of view (cf. Document VI/2482/76 — Annex III to the Commission's observations). That document shows that sugar interests requested the application to isoglucose of the sugar system whilst the manufacturers and industrial users of starch preferred that there should be no change in the existing arrangements.

On 13 February 1977 the Commission finally transmitted to the Council, as part of the annual price proposals, its proposal regarding isoglucose. That proposal involved essentially the establishment of a completely new and separate system for isoglucose, having as its most notable feature the establishment of a production levy on isoglucose at the same level as the levy on B Quota sugar. According to the Commission that levy was justified on the following grounds:

(1) Isoglucose benefited from the guaranteed price for sugar which as a result of the application of the quota system was above the equilibrium price level which would otherwise be established. The Commission estimated that this advantage for isoglucose amounted to 15% of the Community sugar price.

(2) The direct consequence of substituting isoglucose for liquid sugar would be that more sugar would be exported and that this would represent an additional burden for Community funds by way of export refunds. On the basis of current world prices these were between 150 and 180 units of account per tonne, involving a total of 12 million units of account at the volume of isoglucose production at that time and 60 million units of account by the end of 1977 on the assumption that world sugar prices remained constant. (These prices have since fallen considerably and refunds are at present being paid at the rate of 240 units of account per tonne).

(3) The Commission therefore took the view that no further encouragement should be given by way of investment aids for the construction of isoglucose facilities and that isoglucose manufacturers should be required to contribute by way of a production levy, as were the sugar manufacturers, to the costs of making the additional exports of sugar which would inevitably be displaced by the new product on to the world market.

At its meeting on 25 and 26 April the Council decided that the production levy system should be adopted as proposed but that during the first year of application the levy should be limited to 5 units of account per 100 kg — Article 9 of Regulation No 1111/77. On the assumption that the production levy payable by sugar manufacturers on B Quota sugar would be at its maximum during the year 1977/1978, that is, 9·85 units of account per 100 kg, that is to say, 30% of the intervention price of 32·83 units of account per 100 kg, that levy is about half the amount payable by sugar manufacturers on their B Quota sugar. It corresponded to the price advantage which isoglucose was considered to have as a result of its alignment with the guaranteed price for sugar on the Community market (14·4% of the guaranteed price). It also represents, according to the Commission, a contribution to Community funds of just over

one third of the estimated cost of exporting the sugar displaced by isoglucose on to the world market — 50 units of account per tonne as opposed to estimated refunds of between 150 and 180 units of account per tonne.

Finally the Commission states that, following numerous complaints from the starch industry about the effect of the levy on future production of isoglucose, an inquiry is being made into the comparative costs of making isoglucose and of making liquid and invert sugar.

II — Answers to the questions submitted

1. Regulation No 1862/76

(a) Failure to state reasons

The Commission points out in particular that Regulation No 1862/76 indicates in the recitals in the preamble that an increase in the refund should not be retained for isoglucose "given the objectives of the production refund system". For an undertaking in the position of the plaintiff the circumstances in which Regulation No 1862/76 was adopted and the intentions on which it was based should have been self-evident. The Court also, in the Commission's contention, should be able, with the same knowledge of the economic background, to judge the consistency of the refund on starch intended for isoglucose with the objectives of the production refund system.

(b) Failure to refer to opinions required by Article 43 (2) of the Treaty

The legal basis for Regulation No 1862/76 is Article 11 (3) of Regulation No 2727/75 and Article 9 (2) of Regulation No 418/76 (Official Journal L 166 of 25 June 1976, p. 1). Neither of those articles provides for consultation with the Parliament or with the Economic and Social Committee.

(c) Discrimination

According to the Commission, producers of isoglucose who are allegedly discriminated against by comparison with the producers of other starch-based products are in fact the same undertakings. Even if a given undertaking produced isoglucose only and no other starch-derived product, there is no real competition between isoglucose and other glucose syrups since they have different characteristics and different applications.

2. Regulations Nos 1110/77 and 1111/77

The Commission discusses Regulation No 1111/77 only and in particular the production levy since, in the Commission's view, the validity of Regulation No 1110/77 stands or falls with that of Regulation No 1111/77.

(a) The argument that isoglucose is not an "agricultural product"

On the basis of the same reasons as those put forward by the Council, the Commission submits that the above-mentioned argument is devoid of substance.

(b) Submission that the opinion of the Parliament has been disregarded

The Commission points out that when the Council adopts regulations based on Article 43 of the Treaty it is bound to consult the European Parliament. On the other hand the Council is not obliged, legally, to accept the views of the Parliament and the fact that it has not done so could not in any event be considered as a misuse of powers.

(c) Discrimination contrary to Article 40 (3) of the Treaty

The Commisson refers to the abundant case-law of the Court on the definition and application of the above-mentioned principle and points out that it has recently been subjected to an exhaustive

analysis by Mr Advocate General Capotorti (opinion delivered on 22 September 1977 in Joined Cases 64 and 113/76 *inter alia* [1977] ECR 1773), which distinguishes three essential aspects of discrimination:

(i) Discrimination exists when comparable situations are treated differently.

(ii) Interventions by the Community authorities which bring about an imbalance in the competitive capacity of undertakings are discriminatory.

(iii) Differences of treatment based on objective criteria are permissible.

(1) Comparable situations

The Commission submits that the producers concerned in the present case are producers of starch (not isoglucose) and producers of sugar, whose situation is in no way comparable.

The starch industry, which is an industry with a multiplicity of products and outlets and which uses a number of different basic materials, is in a better position to adapt itself to changing circumstances than are sugar manufacturers. Furthermore, the manufacture of starch is a capital-intensive process, whereas that of sugar is relatively labour- intensive.

(2) Competitive capacity

Subject to any figures which the plaintiff may produce, the Commission's present view is that a charge on a product which at the moment represents less than 3% of the total output of the starch industry can only have the most marginal effect on the general profitability of the industry.

(3) Objective criteria

According to the Commission it is logical and objectively justifiable for isoglucose, being an addition to the existing Community production of sugar and benefiting from the price guarantee given by the authorities to that production, to pay the marginal charge which is paid for all sugar in excess of basic production.

(d) Failure to exclude existing capacity, to provide for a transitional system or for provisions for compensation

(1) Legal certainty

In view of the market on which they were selling starch manufacturers had every reason, according to the Commission, to expect isoglucose to be covered in certain repects by the system applicable to sugar. In fact, transitional measures have been applied to isoglucose inasmuch as for the first year of application of the new common provisions the production levy is subject to a ceiling roughly equal to one half of the levy applied to B Quota sugar. Moreover the Commission wonders on what basis "existing and committed production capacity" could be excluded from the application of the new levy and points out that a decision to exclude "committed capacity" from the application of the new levy would itself be discriminatory. Manufacturers in such a favoured position would have a considerable advantage over any new arrival in the field.

(2) Means not proportional to the objectives pursued

The Commission points out that it is not a question in the present case of one unrelated sector being asked to bear the costs of another sector indifficulty. The levy on isoglucose is imposed precisely because it effectively forms part of the sugar market and because it contributes directly to the difficulties of that market. The Commission's argument is therefore divided into a restatement of the aim which it is intended to achieve, an appraisal of the burden imposed and an examination of other possible solutions.

The aim to be achieved

The aim of the levy imposed on isoglucose is to require the manufacturers of the product to pay their share of the costs of disposing of current surpluses of sugar on the Community market to which they are directly contributing and thereby to restrain the expansion of isoglucose which would otherwise aggravate the situation.

Burden imposed on isoglucose

For an assessment of the validity of Regulation No 1111/77 what has to be considered is not so much the actual effects of the regulation as the question whether the levy was fixed at a level completely disproportionate to the objective of restraining rather than stopping the production of isoglucose.

The actual amount of the production levy imposed on isoglucose during 1977/1978 (15% of the intervention price for sugar) is equal to the hypothetical difference estimated by the Commission of approximately 15% between the equilibrium price level of sugar with and without the imposition of production quotas. In other words, if there had been no quota system, sugar prices would have to be about 15% lower for there to be the same quantity of sugar produced in the Community. The Commission therefore takes the view that this is a reasonable level at which to introduce levies on isoglucose for a trial period — having regard to the general difficulty at the start of the system of fixing the levy at exactly the right level to achieve the desired result.

In the Commission's view a decision to take no action might have brought about catastrophic results. Indeed, if the production of isoglucose increased to its potential maximum of 30% of the whole Community sugar market this would mean wholesale abandonment of the cultivation of sugar beet with damaging agronomic consequences and widespread unemployment amongst sugar factory workers and would probably lead to the breaking of international promises made to the developing countries under the Lomé agreement.

The Commission refers to other possible solutions which it rejects on technical or legal grounds.

III — Conclusions

The Commission suggests that the Court should give the following answer to the questions submitted by the High Court of Justice:

"Examination of the questions raised has not revealed any factor capable of affecting the validity of Regulation No 1862/76 of the Council of 27 July 1976 or of Regulations Nos 1110/77 and 1111/77 of the Council of 17 May 1977".

Case 145/77

Observations submitted by Tunnel Refineries Ltd.

Tunnel Refineries Ltd., the plaintiff in the main action, recalls that it is also the applicant in Case 124/77, in which it claims damages against the Council and the Commission under Article 178 and the second paragraph of Article 215 of the EEC Treaty. To avoid needless repetition it limits its observations substantially to such of the submissions as relate more particularly to the present proceedings and have not already been put forward in Case 124/77, but it states that, so far as material in the present case, its application and reply in Case 124/77 are to be regarded as included in their entirety in the present observations.

According to the plaintiff Regulation No 1111/77 is invalid for each of the seven grounds indicated in the order referring the matter to the Court of Justice.

1. The regulation breaches the principle of proportionality inasmuch as it imposes a wholly unfair burden on manufacturers of isoglucose in the interests of manufacturers of sugar

The production levy is imposed on the whole of the production of isoglucose whilst there is no corresponding burden on sugar producers except in the form of the B Quota levy system which itself embodies a serious discrimination against manufacturers of isoglucose. The nature and extent of that discrimination have been set out by the plaintiff in its application and reply in Case 124/77.

After stating that isoglucose cannot for technical reasons be exported to any significant extent, the plaintiff claims that any export costs should have been borne either by the sugar producers or by Community funds.

Even on the supposition that it was legitimate to require manufacturers of isoglucose to contribute to those export costs the contribution was manifestly excessive and disproportionate since any such contribution should have been proportionate to its share of the total sugar market, that is, limited to approximately 3% of the total burden (reply in Case 124/77, paragraph 36).

2. The regulation contains no provisions and no provisions have been adopted in implementation of the regulation, to protect the legitimate expectations of the plaintiff who made the investment decision in reliance upon a Community policy which had been consistently followed over a period of years

The relevant facts are set out in the application in Case 124/77 (paragraphs 1 to 7 and 11).

The plaintiff submits that at no time from its first decision of principle to manufacture isoglucose, in October 1974, could it reasonably have been expected to foresee the imposition of a tax on isoglucose which would make its production uneconomic.

It contests the Council's argument (defence in Case 143/77) that the above-mentioned decision was based primarily on a false assessment of the evolution of the sugar market. It regrets in particular the Council's claim that the degree of Community self-sufficiency in sugar has considerably increased since the 1960s whereas consumption has remained stagnant or fallen slightly since the 1970s *[sic]*. In fact, the Council's assertion is not supported by its own figures which show that there has not been any considerable or consistent increase.

It is thus clear that what was unforeseeable at the period when the investment decisions were made (between 1974 and 1976) was the imposition of the tax but for which the production of isoglucose would still be economic and that it is the Community institutions, not the evolution of the sugar market, which are responsible for the reversal of the plaintiff's legitimate expectations.

3. The regulation infringes the Treaty inasmuch as its provisions either fail to meet or are contrary to the objectives of the common agricultural policy as set out in Article 39 of the Treaty and each of them

Regulation No 1111/77 fails to meet, or is contrary to, every one of those objectives:

(a) In so far as isoglucose can be regarded as an "agricultural product" the regulation plainly *reduces* agricultural productivity, *hinders* technical progress and *prevents* the rational development of agricultural production and the optimum utilization of the factors of production, in particular labour.

(b) The regulation fails to ensure a fair standard of living for workers concerned in the production of

isoglucose. If the regulation is designed to ensure a fair standard of living for sugar-beet growers and sugar producers it is a gross misuse of powers.

(c) The regulation patently fails to stabilize the market in *isoglucose;* moreover such "stabilization" is unnecessary or even impossible in the case of that product. To the extent to which the objective sought was to stabilize the market in *sugar* it was a misuse of powers.

(d) The regulation does not serve the objective of ensuring the availability of supplies of *isoglucose* since it is designed in all respects to limit its production. Similarly, according to the plaintiff, the regulation cannot have been intended to ensure the availability of *sugar* of which there was, is, and is expected to continue to be, a substantial surplus in the Community.

(e) Nor can it be contended that the regulation serves the objective of ensuring that supplies reach consumers at reasonable prices. On the contrary the regulation was plainly designed to increase the price of isoglucose and to prevent the development of a product which would in certain sectors of the market be a competitive substitute for sugar.

4. The regulation infringes the Treaty inasmuch as it embodies a gross form of discrimination contrary to Article 40 (3) of the Treaty

It is established that Article 40 (3) prohibits discrimination, not only between producers of the same product, but also between producers of different products: cf. for example case 2/77, *Hoffmann's Stärkefabriken AG* v *Hauptzollamt Bielefeld* [1977] ECR 1375 the "*Quellmehl*" and "*Gritz*" cases, (Joined Cases 64 and 113/76, Joined Cases 117/76 and 16/77 — Judgment of 19 October 1977 [1977] ECR 1753 — and Joined Cases 124/76 and 20/77 — Judgment of 19 October 1977 [1977] ECR 1795).

In reliance on the line of argument pursued by Mr Advocate General Capotorti in his opinion on the above-mentioned series of joined cases ([1977] ECR at pp. 1778 and 1782 and 1783) the plaintiff points out that in the present case the discrimination resulting from the production levy on isoglucose consists principally in that:

(a) whilst purporting to give similar treatment to isoglucose and sugar by relating the tax to the levy payable on B Quota sugar, the regulation in fact discriminates blatantly against isoglucose producers in making no allowance for the equivalent of an A Quota under which very substantial quantities of sugar can be sold at guaranteed prices;

(b) whilst purporting to give similar treatment to isoglucose and sugar, the regulation in fact gives isoglucose none of the advantages of the sugar system, in particular guaranteed quotas and guaranteed prices;

(c) the regulation effectively eliminates the production of isoglucose as a competitor with sugar in the interests of sugar producers.

5. The levy is excessive and disproportionate as demonstrated by the fact that its effect is to render the production of isoglucose uneconomic in relation to sugar in a market in which they would otherwise be able to compete and so to remove a competitor from the market

The plaintiff submits that the regulation is invalid on the above ground for the reasons set out in the application and reply in Case 124/77.

6. The Commission and Council have misused their powers inasmuch as they have sought by means of the levy to

offset the real or supposed competitive advantage of isoglucose

Even on the supposition that the Council had the power to act on the basis of Article 43 of the Treaty the Commission and the Council have misused their powers in establishing a common organization of the market in isoglucose, the only true purpose of which is to offset the real or supposed competitive advantage of isoglucose by imposing a levy on its production.

In the plaintiff's view the levy cannot be justified by the objective, referred to in the preamble to the regulation, of contributing to the costs of exporting surplus sugar. In any event the true object of the regulation was not that set out in its preamble but instead to protect the standard of living of beet growers and to protect the sugar producers as well as to restrain the expansion of isoglucose.

7. The regulation is based on a wholly inadequate and/or false estimate of the costs of production of isoglucose and/or on a wholly erroneous assessment of the role of isoglucose and of the potential market for the product

The plaintiff submits that the regulation is invalid on the above ground for the reasons set out in the application and reply in Case 124/77.

Conclusion

In conclusion the plaintiff submits that the question referred to the Court should be answered to the effect that Council Regulation (EEC) No 1111/77 of 17 May 1977 is invalid on every one of the above-mentioned grounds or alternatively that the court should state on which of the above-mentioned grounds the regulation is invalid.

Observations submitted by the Council

By way of *preliminary observations* the Council wonders whether the questions raised do not exceed what is acceptable in the context of legal co-operation between a court in a Member State and the Court of Justice, as set out in Article 177 of the Treaty. In fact the national court has simply reiterated in its question all the pleas advanced by the plaintiff, all of which directly and exclusively concern questions of the validity or interpretation of Community law. It is, however, primarily incumbent on the national court to apply and even to interpret Community law and only if a question of Community law arises which it is unable to resolve should the question be referred to the Court of Justice.

Otherwise, and this is true of the present case, the request for a preliminary ruling is tantamount to, and is even in part identical (in its aims if not in its outcome) with, for example, an action for annulment under Article 173, which does not give individuals the right to institute proceedings against legislative acts.

The Council leaves it to the Court to judge whether the request for a preliminary ruling can still be reconciled with the essentials of Article 177, namely, the strictly limited role of the parties to the proceedings and the active role to be taken by the national court.

The Council next proceeds to examine the complaints made in connexion with the validity of Regulation No 1111/77, which it regroups and treats under the following headings:

1. Breach of the principle of equality and non-discrimination

Relying on the judgment of the Court in Joined Cases 124/76 and 20/77 of 19 October 1977, *Moulins et Huileries de Pont-à-Mousson* v *Office National Interprofessionnel des Céréales* ([1977] ECR 1795), the Council points out that for an allegation of discrimination to be justified, a measure of Community law must treat comparable situations in

different ways without this being justified by objective circumstances.

In the present case, the Council considers that it has achieved a balance between sugar and isoglucose, that the burden which it has imposed on the latter is in no way discriminatory as compared with those imposed on sugar; it adds that, even if exceptionally it were considered that the isoglucose arrangements, by introducing a levy on isoglucose, impose a heavier burden on that product than on sugar, the Community would have been entitled to do so not only because any other arrangements would have vitiated the sugar arrangements which are the basis of rights acquired legitimately by individuals until 1980, but also because, since beet sugar is a totally Community product whereas isoglucose is a product manufactured from raw materials for which the Community is largely dependent on foreign suppliers, the Community was entitled to differentiate between sugar and isoglucose in favour of the product obtained in the Community on the basis of the principle of Community preference, which in this case constitutes an objective factor.

2. Violation of the objectives of Article 39

The Council claims that in its measures relating to agricultural policy the Community must respect the various objectives set out in Article 39 of the Treaty whilst being able to make distinctions between them, that is to say to favour one rather than another. As regards Regulation No 1111/77, for objective reasons it favoured the principle set out in Article 39 (1) (c), namely, stabilization of the markets.

According to the Council the objective of Regulation No 1111/77 was primarily to stabilize the sugar market by stripping isoglucose of the economic advantage which it gained from the absence of any restraints as compared with sugar whilst automatically profiting from the "alignment" of the guaranteed price for sugar by means of intervention and thus to re-establish the conditions of competition between the two products.

3. Breach of the principle of proportionality

The Council claims that the comparison made by the isoglucose manufacturers to demonstrate the disproportionate nature of the levy imposed on production of that product as compared with the levy borne by the sugar refineries, namely the fact that the latter paid on only part of the production (Quota B) is based on false premises since it fails to take account of all the arrangements for sugar. The Council refers to the arguments on this point set forth in its defence in Case 124/77.

According to the Council a comparison must be made of like with like, that is to say, the levy on surplus sugar (B sugar) and that on isoglucose, since from an economic point of view isoglucose is also surplus sugar. For the first year the levy on isoglucose is approximately 50 % of the levy on B sugar and it is equal to that levy for the second year. Consequently the levy on isoglucose cannot be termed disproportionate or wholly unfair.

4. Frustration of legitimate expectation

The Council points out that the "full" levy will fall due only during the 1978/79 marketing year and that for the 1977/78 marketing year only 50 % of full levy is due. Legitimate expectations which — subject to the dictates of the public interest — require that current deliveries be made under transitional arrangements have thus been honoured.

5. Misue of powers

The Council claims that it is incorrect that the levy in dispute was fixed on the

basis of the cost price or of the potential market for isoglucose. This is clear from the seventh recital in the preamble to Regulation No 1111/77 which gives, as justification for the levy, the twofold ground of the economic advantage which isoglucose enjoys in the absence of any constraints on that product as compared with sugar and the increase in sugar surpluses brought about by isoglucose.

As regards the second part of the allegation of misuse of powers, namely that the Community's aim in Regulation No 1111/77 was to favour the sugar industry unduly, the Council recalls that the prime object of that regulation was to stabilize a Community market which would otherwise have been endangered by virtue of increased surpluses.

6. Manifest error in assessing the cost price of, and the potential market for, isoglucose

The Council recalls the twofold justification, already indicated under paragraph 5 above, for introducing the levy and claims that the levy has therefore in no wise been founded on a false or erroneous estimate of the cost price of isoglucose or of its potential market.

In conclusion, the Council suggests that the Court should reply to the High Court of Justice, Queen's Bench Division, Commercial Court, to the effect that examination of the question raised has revealed no argument against the validity of Council Regulation No 1111/77.

Observations submitted by the Commission

As regards the properties of and potential market for isoglucose, the organization of the sugar market and the origin and content of Regulation No 1111/77, the Commission repeats the summary contained in its observations submitted in Case 103/77.

Turning next to the grounds alleged by the plaintiff in favour of a declaration that the regulation is not valid, the Commission repeats the line of argument put forward in its observations in Case 103/77 with regard to the *breach of the principle of proportionality* and of the *principle of non-discrimination*. As regards the other grounds put forward by the plaintiff the Commission makes the following points in particular:

1. Protection of legitimate expectation

For the definition of this principle the Commission refers to the opinion of Mr Advocate General Trabucchi in Joined Cases 95 to 98/74, 15 and 100/75 (*Coopérative Agricole des Céréales* v *Commission and Council* [1975] ECR 1615):

"... protection of an individual interest in the maintenance of an advantageous system which the legislature proceeds to alter or revoke is only exceptionally recognized, basically on grounds of natural justice. For a legitimate expectation to be recognized as having this effect it is therefore essential that, in any case, the party wishing to avail itself of it should have been able to continue working in the reasonable belief that the system on the basis of which it has transacted its business will not be subject to alteration before fulfilment of the factual conditions necessary for acquisition and actual determination of its right ..."

The Commission points out that isoglucose is a new product, introduced to the Community market during 1976. There was no pre-existing advantageous system for isoglucose, the benefits of which were unexpectedly removed from its manufacturers. Moreover, given the market into which they were selling, starch manufacturers who added isoglucose to their range of products would have every reason to expect isoglucose to be covered in certain

respects by the system applicable to sugar.

2. Objectives of the common agricultural policy

The Commission points out at once that the measure in question does not aim to meet all those objectives. The principal objective of the production levy on isoglucose is to stabilize the sugar market by limiting the price of and market guarantees for that product. However, the Commission claims that the measure is in fact not incompatible with the other objectives of the common agricultural policy.

3. Misuse of powers

The Commission observes that the powers exercised by the Council in applying a production levy to isoglucose rest directly on Article 43 (2) of the Treaty. That article provides that the Council shall make regulations for working out and implementing the common agricultural policy. There can be no room for doubt that the levy, whether applied to the manufacture of isoglucose or to that of sugar, when viewed in the light of its objectives and of the economic situation in which it was brought into being, is to be regarded as such a measure.

4. Erroneous premises

Turning to the plaintiff's argument that Regulation No 1111/77 is based on erroneous premises regarding the production costs of isoglucose and the extent to which it may be substituted for sugar, the Commission points out that, even if that argument were true, it would not in itself be sufficient to render the regulation invalid (or to justify an application for damages). The Commission states that it would no doubt be deplorable if the Council, on the proposal of the Commission, had been misinformed as to the facts on which its legislation was based. However, unless such erroneous information had the effect of causing the legislation to breach some rule of law such as the principle of non-discrimination or of proportionality, the plaintiff would have no remedy at law.

This is, it is alleged, a sufficient answer in itself to the plaintiff's claim under this heading. Nevertheless the assumptions and arguments put forward in support of that claim, unfounded though it may be in law, should not be allowed to go unchallenged — in particular because they have a bearing upon the substantive issues which the Court is called upon to decide.

(i) The costs of production of isoglucose

In the Commission's view the question of the cost price of isoglucose is not central to the issues which had to be taken into account by the Community legislature.

At the time when it made its proposals the Commission did not have available figures on the cost price of isoglucose. The Commission still does not have such figures although an independent report on a sample of plants producing isoglucose and sugar is being prepared. In fact, in making its proposal to the Council for the application of the full sugar production levy to isoglucose, the Commission did not accept that such figures would be necessary or useful.

In the first place their accuracy would be open to doubt in view of the marginal position of isoglucose in relation to other starch products and the restricted sources from which such figures would have to come.

In the second place the Commission based its attitude on a different principle. Isoglucose was a new product on the Community market, resulting from a new technology. It was clear to the Commission that this new product could not and should not be prevented from finding a place in the sugar market, whatever difficulties its arrival might bring to the management of that

market. However, what was not tolerable for the Commission was that that new product should be allowed to expand with the full protection of the price guarantee for sugar, but without the corresponding restraints of production quotas and levies.

(ii) Possibility of substituting isoglucose for sugar

As regards the alleged inaccuracy of the information available to the Community authorities regarding the possibility of substituting isoglucose for sugar and the future production possibilities of isoglucose, the Commission refers to the explanation which it has already given concerning the nature of isoglucose and its potential market.

It bases its information on the article "Isomerized Corn Syrups in Food Products" (Annex I to its observations) and on the meeting held with all interested parties on 4 October 1976 (Annex III). It results from this information that isoglucose can replace liquid or invert sugar in the majority of applications of those products (consumption at present around 700 000 tonnes). More importantly, at the present time, the sugar-consuming industry buys sugar in crystal form and liquifies it at the stage of processing. The potential market for isoglucose is therefore not limited by the present consumption of liquid and invert sugar which is about 8 % of the market.

That is why it has been estimated that, given the right circumstances, the potential market for isoglucose might be as high as 30 % of total Community sugar consumption.

Conclusion

The Commission contends that the Court should reply in the following manner to the question submitted by the High Court of Justice:

"Examination of the question raised has not revealed any factor capable of affecting the validity of Regulation (EEC) No 1111/77 of the Council of 17 May 1977."

IV — Answers to the questions put by the Court

First question (to the Council and the Commission)

(a) The Council and the Commission are asked to produce the figures and calculations on which the rate of the production levy for isoglucose was initially proposed by the Commission and subsequently fixed by the Council.

(b) The Council and the Commission are asked to produce the information available to them at the material times as regards the capacity for isoglucose to be used as a substitute for sugar and the future production possibilities of isoglucose.

The Council's answer

In reply to this question the Council provides extracts from the three documents concerning isoglucose in the Commission's proposals of February 1977 (Commission proposals of 11 February 1977 on the fixing of prices for certain agricultural products and on other related measures, Vol. I; "Situation of the Agricultural Markets, 1976 Report, Part I", submitted to the Council by the Commission; proposal for a Council regulation (EEC) laying down common provisions for isoglucose.

In addition the Council submits to the Court a document dated 11 January 1977 produced by the Association Général des Producteurs de Maïs (General Association of Maize Producers): "Observations sur les Sirops de Glucose Riches en Fructose" (Observations on High Fructose Glucose Syrups). The Council contends that this document confirms that:

— At the end of 1977 the isoglucose production capacity amounted to 400 000 tonnes;

— Plans were being studied with a view to attaining a capacity of approximately 1 000 000 tonnes by 1980; and

— The possible substitutability (potential use) of isoglucose for sugar amounted to 2 000 000 tonnes.

The Commisison's answer

(a) The Commission states that its examination of the rate of the production levy for isoglucose provided in Regulation No 1111/77 was not based on specific calculations. The Commission approached the question in the following manner: isoglucose being a product which could be substituted for liquid sugar, it was appropriate to include it in the management of the sugar market. Given the existing forecasts of the situation of the sugar market in the Community and of the costs in the form of refunds following from exports, the Commission proposed that the production of isoglucose should be submitted to the same levy system as that existing for the production of sugar, which had the object of causing producers to share to a certain extent in the financial losses of the Community resulting from the putting of sugar on to the market.

The parallelism referred to in the Commission's proposal between the rate of the levy for isoglucose and that for sugar can be explained, then, by this decision to treat in an identical fashion two competing products which were substitutable in certain of their applications.

During the discussions in the Council the question arose whether this complete parallelism which might result, in particular, in a maximum rate of levy of 30 % of the intervention price of sugar should not be tempered during a certain transitional period. It was in this context that the Council finally accepted a maximum amount of 5 units of account for the levy on isoglucose, this amount representing the economic advantage gained by this product from a market price for sugar higher than it would be without the limitation on production deriving from the quota system.

The Commission intended that the one year transitional period should be extended in acordance with the Commission's proposals to the Council for 1978/79, providing during this period the same figure of 5 units of account for the isoglucose levy.

(b) In appendices to its answer the Commission submits the relevant information in its possession at the time of the preparation of Regulation No 1111/77 as regards the capacity for isoglucose to be used as a substitute for sugar and the future production possibilities of isoglucose.

Second question (to the Council and the Commission)

Did the Council and the Commission at any time, whilst the provisions now in dispute were being drafted, examine and take into consideration the biochemical and hygienic properties of isoglucose as compared with traditional sugars manufactured from beet and cane?

The Council's answer

The Council states that a comparative examination, such as this question refers to, was not made by the Council at the time of the discussions leading to the adoption of Regulation No 1111/77. The Council's Agent also wonders whether what was at stake here might have been not so much a problem of market organization, as a question of harmonization of legislation and possibly a matter of public health.

The Commission's answer

The Commission states that it did not take into consideration the bio-chemical and hygienic properties of isoglucose as compared with traditional sugars manufactured from beet and cane whilst the provisions now in dispute were being drafted. The Commission acted on the assumption, based on the information in its possession at the time, that isoglucose had, from the economic and commercial point of view, characteristics comparable to those of traditional liquid sugar. By way of illustration, the Commission submits in an annex data provided by the producers of isoglucose themselves which confirm this assumption.

Third question (to the Council)

Can the Council supply the Court with other examples taken from the agriculture sector of an obligation (pecuniary or otherwise) imposed on the producers or manufacturers of a product coming under one sector of the Common Agricultural Policy to assist producers or manufacturers of a product coming under another sector?

The Council's answer

The Council's Agent rejects the idea that Regulation No 1111/77 was designed to "assist" sugar producers by imposing a constraint on isoglucose producers. Moreover, he does not consider that the use of the expression "another sector" is an adequate way of distinguishing isoglucose from sugar. Both products are, in his view, as a pragmatic consequence of the substitution possibilities and of Regulation No 1110/77 (Article 4), part of one vast sector, that of sweetening agents.

The Council's Agent makes the point that the agricultural systems of the Member States may be integrated by levying taxes on traders in certain products in one or all Member States for the benefit of traders in other products.

In this connexion the third question put by the Court concerns an extremely complex problem relating to the arrangements to be applied to "similar and competitive products", to "substitute products" or, to use the words of the Court in Joined Cases 117/76 and 16/77 (eighth paragraph of the Decision) to products which "are in a comparable situation, in particular in the sense that (the one) can be substituted for (the other) in the specific use to which the latter product is traditionally put" and which must therefore be afforded equal treatment under the general principle of equality.

The Council's Agent states that it is possible to provide the Court with examples where the interdependence of a certain product with products covered by a sector of the agricultural policy has made it necessary for the Community authorities to adopt measures to maintain or re-establish a balance between products falling within this agricultural sector and similar products. Thus, the Community authorities imposed constraints on non-agricultural products, that is to say products not listed in Annex II but which in common parlance are considered to be of agricultural origin, constraints which were necessary for the smooth functioning of the common organization in question:

(i) Example: Regulation No 1696/71 of 26 July 1971 (Official Journal, English Special Edition 1971 (II), p. 634) on the common organization of the market in hops (see in particular the third recital in the preamble thereto). In fact, the smooth functioning of this market would have been jeopardized if "broadly speaking interchangeable" products with hops, namely the essence and vegetable extract of hops had not been subject to the common organization in question. In order to establish a balance between hops and these two products, the Community auth-

orities extended the common organization in question to these products and thus subjected their producers to the obligations flowing from this organization.

(ii) Another example: Regulation No 2783/75 of 29 October 1975 on the common system of trade for ovalbumin and lactalbumin (Official Journal L 282 of 1 November 1975) the first five recitals in the preamble to which show the absolute necessity of such links between products by reason of their competitive use, that is to say their substitutability.

Conversely it is also possible to mention another method tending towards the same goal, by which an advantage is granted to the agricultural product so that a balance may be re-established with a similar product. In order to guarantee a balance between agricultural products (starches, potato starch etc.) and substitute products from the industrial sector, the Council (Regulation No 1132/74) introduced a production refund for the former. The Court considered this to be a legitimate mechanism (end of paragraph 7 and paragraphs 9 and 12 of the Decision in Case 2/77 *Hoffmann's Stärkefabriken* v *Hauptzollamt Bielefeld).*

As a third point mention might be made of the example of the case where supply difficulties in an agricultural sector led the Community authorities to tax not only the export of the agricultural product, but also certain goods resulting from the processing of the product, provided that the agricultural product in short supply made up a certain percentage of those goods. Example: Council Regulation (EEC) No 3185/74 of 17 December 1974 introducing an export charge on certain goods covered by Regulation No 1059/69 (Official Journal L 340, p. 74) (sugar content — that is to say the product in short supply — a minimum of 35 %).

In conclusion, the Council's Agent reiterates that the "agricultural intervention system" is a coherent whole made up of guarantees offered to producers, but subject to constraints imposed on these selfsame producers. It would run entirely counter to the system and to the general Community interest to wish to benefit from the guarantees whilst refusing to accept the constraints. This, however, is the position adopted by the isoglucose producers who wish to benefit from the guarantees offered to the sugar producers, without having to suffer any of the constraints imposed upon them.

Request for additional information addressed to the Commission

1. In the observations submitted by the Commission in Case 103/77 there is a reference on page 27 (French version) to a report which is being prepared on the competitive capacity of isoglucose as compared with sugar. If this investigation has already been concluded the Court would be obliged if the report could be made available to it.

2. In the reply in Case 116/77 there is a reference on page 7 (French version) to an investigation by the Commission's Directorate General III into the costs of production of isoglucose. The Court would be glad to be informed of the results of this investigation.

3. In Case 124/77 there is a reference in the Commission's defence on page 27 (French version) to a report to be drawn up by experts on the production costs on isoglucose and sugar. If this report is yet in existence the Court would be glad to receive a copy.

4. The Commission is asked to provide detailed information with regard to the quantities of B and C sugar produced by the individual sugar producers during recent sugar

marketing years (for example from 1974).

The Commission's answers

Points 1 and 3

The comparative investigation into the production costs of isoglucose on the one hand and of sugar, liquid and invert sugar on the other, referred to on page 27 (French version) of the Commission's observations in Case 103/77 is the same as that referred to at page 27 (French version) op the Commission's defence in Case 124/77.

This investigation has been entrusted by the Commission to a specialist private firm, Klynveld, Turquands, DTG & Co. (KTD). The two industries in question have accepted this firm.

Originally the Commission intended, so that it should be representative of the Community as a whole, that this investigation should be carried out in three Member States (Germany, Belgium and the United Kingdom) where there was production of isoglucose, sugar and liquid sugar. However, the "isoglucose side" in Germany and the "sugar side" in the United Kingdom were not able to agree. The investigation, then, was limited to Belgium — at the Amylum company for isoglucose and at the Tirlemont refinery for sugar.

By agreement with the Commission and the two industries KTD planned to carry out the first part of its investigation at Amylum, the report on which was completed on 23 March 1978 and is in the form attached at Annex I, and to pursue the second part of its investigation at Tirlemont, which commenced on 10 April and should be completed during the month of May. It is further planned that the third part in which KTD gives its conclusions should be ready in mid-June. Thus at the present stage the Commisison is only in possession of partial information from this investigation. It will communicate the rest of the information to the Court as soon as it is available. The Commission thinks it important to mention to the Court that it has undertaken with regard to the sugar industry to treat in a confidential manner the information acquired during the course of the investigation (see Annex II).

Point 2

The investigation into the production costs of isoglucose referred to in the reply in Case 116/77 is an analysis of accounts carried out by the Directorate General for Industrial Affairs at Amylum (see Annex III). The Commission has not taken a position on the results of this investigation. As it emerges from the answers to the first and third requests, the Commission thought it appropriate to have a comparative investigation carried out.

Point 4

The Commission provides as Annex IV the information requested by the Court. The Commission mentions that this information has been acquired under the provisions of Regulation (EEC) No 1087/69 (Official Journal L 140 of 12 June 1969, p. 15). Article 7 of that regulation provides:

"Information communicated pursuant to the regulation is solely for the internal use of the Commission. Only those persons who, within the Commission, are responsible for the sugar market may have access to information relating to an individual factory or undertaking. Such information may not be disclosed to third parties."

Supplementary question put to the Commission

On page 26 of its defence in Case 117/77 the Commisison gave an example to show that the charge imposed on an undertaking manufac-

turing isoglucose is equivalent to the one imposed, by way of the production levy, on a modern sugar undertaking manufacturing A, B and C sugar.

The Commission is requested to repeat this calculation for the last two sugar-marketing years taking as a basis the average production of all the modern sugar undertakings which have exhausted their B Quota and produced appreciable quantities of C sugar and taking into account the fact that the price allowed for beet-growers in respect of B and C sugar is less than that paid to them in respect of A sugar.

The Commission's answer

At page 26 of the Commission's defence in Case 116/77 the Commission put forward a calculation, carried out on the basis of the prices and levy for the 1977/78 marketing season but on the hypothesis of a production for the firm in question of the same order as that obtained during the 1976/77 sugar-marketing season since its actual production for 1977/78 was not yet known at the moment of the calculation (November 1977). In the light of the Court's question, the Commission now thinks it useful to submit for this firm the actual figures for the two most recent marketing seasons — see Annex I. These figures show that the position of the particular firm has not improved in spite of its increased quota.

Regarding the other firms for which the Court has asked the Commission to do the calculation again, the Commission thinks it necessary to emphasize that an analysis of their average production for the two most recent marketing seasons does not give a correct impression of their situation. In fact the production of C sugar in most Member States has been comparatively small, often non-existent, because of the drought which prevailed during the 1976/77 marketing season and which seriously affected yields. The average Community yield was 15 to 20 % lower than that for a normal harvest.

Finally the Commission indicates to the Court that it does not know the price paid by sugar-manufacturers to producers for beet intended for C sugar since this does not derive from Community rules but is a matter for agreement between the parties. As to the price actually paid for beet intended for B sugar the Commission knows that it is often higher than the minimum price fixed by the Community and that in certain cases the same price has been paid for all this beet as for beet intended for A sugar. For these reasons the Commission is only able to give the Court the information requested for each individual firm (15 in all) in the form of the calculation applied at page 26 of its defence in Case 116/77. These firms are distributed amongst four Member States.

V — Oral procedure

At the hearing on 24 May 1978 Royal Scholten-Honig (Holdings) Limited, represented by M. Waller of the London Bar, Tunnel Refineries Limited, represented by F. Jacobs, barrister, Middle Temple, London, the Intervention Board for Agricultural Produce, represented by its legal adviser G. R. John Robertson, barrister, Gray's Inn, the Council of the European Communities, represented by its Agent, Daniel Vignes, assisted by A. Brautigam and D. G. Lawrence, members of its Legal Department, and the Commission of the European Communities, represented by its Agents, J. H. J. Bourgeois and R. Wainwright, assisted by H. Bronkhorst and J. Delmoly, members of its Legal Department, presented oral argument.

The Advocate General presented his opinion at the hearing on 20 June 1978.

VI — Requests submitted after the closing of the oral procedure

By letter of 8 August 1978 Tunnel Refineries Limited, the plaintiff in the main action in Case 145/77 and the applicant in Case 124/77, *(Tunnel Refineries Ltd* v *Council and Commission)* requested, in the matter of Joined Cases 116, 124 and 143/77, that the Court should take into account certain information to which its attention had been drawn by letter of 7 August 1978 from the applicant in Case 116/77 *(Amylum* v *Council and Commission)* relating to the price for the marketing year 1977/1978 of sugar-beet corresponding to C sugar.

If the Court were to agree to the above-mentioned request it would be necessary for it to do the same in the context of Joined Cases 116, 124 and 143/77 as well as in the present cases.

By a letter of 25 September 1978 the Commission requested permission in pursuance of Articles 60 and/or 61 of the Rules of Procedure of the Court to make available to the Court the second and third parts of the comparative investigation into the costs of production of isoglucose on the one hand and of sugar, liquid sugar and invert sugar on the other hand carried out by the private firm Klynveld-Turquands DTG & Co. and asked that the Court should, if it thought fit, order the reopening of the oral procedure.

Having regard to the basis of the Court's judgment in this case it did not feel it necessary to accede to the above requests.

Decision

1 By orders dated 29 July and 8 November 1977 which reached the Court on 8 August and 24 November 1977 respectively the High Court of Justice, Queen's Bench Division, Commercial Court, requested the Court in pursuance of Article 177 of the EEC Treaty to give a preliminary ruling on the validity of certain provisions of Council Regulation (EEC) No 1862/76 of 27 July 1976 amending Regulation (EEC) No 2742/75 on production refunds in the cereals and rice sectors (Official Journal L 206, p. 3) and on the validity of Council Regulations (EEC) Nos 1111/77 of 17 May 1977 laying down common provisions for isoglucose (Official Journal L 134, p. 4) and 1110/77 of the same date amending Regulation (EEC) No 3330/74 on the common organization of the market in sugar (Official Journal L 134, p. 1)

2 The questions put by the national court arose in the context of actions undertaken against the Intervention Board for Agricultural Produce by the plaintiffs who maintain that the United Kingdom Government is not entitled to implement: (1) Regulation No 1862/76 to the extent to which it supplemented Regulation No 2742/75 by inserting a new Article 5a; and (2) Regulations Nos 1111/77 and 1110/77.

3 The file shows that the plaintiffs before the national court are starch producers who manufacture or are intending to manufacture isoglucose, a glucose syrup having a high fructose content, the sale of which on the Community market in appreciable quantities goes back only to 1976 and which is manufactured from starch obtained from various cereals but most frequently from maize, a substantial part of which is imported from non-member countries.

4 Although isoglucose has in many respects the same characteristics as cane or beet sugar it differs in certain respects from the two latter products especially inasmuch as, in the present state of technical knowledge, it cannot be crystallized and at present can only compete with sugar in industries using sugar in a liquid form.

5 For the purposes of the answer to be given to the questions raised by the national court it is appropriate to examine separately Regulation No 1862/76 on the one hand and Regulations Nos 1111/77 and 1110/77 on the other.

Regulation No 1862/76 (production refund)

6 In order to assess the validity of Regulation No 1862/76 it is appropriate to examine in the first place the legal situation as it existed prior to the entry into force of that regulation in the matter of the system of production refunds in the cereals sector.

7 According to the ninth recital in the preamble to Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (Official Journal 1975 L 281 p. 1): "in view of the special market situation for cereal starch, potato starch and glucose produced by the 'direct hydrolysis' process it may prove necessary to provide for a production refund of such a nature that the basic products used by this industry can be made available to it at a lower price than that resulting from the application of the system of levies and common prices."

8 Article 11 (1) of the regulation provides that a production refund "may be granted:

(a) for maize and common wheat used in the Community for the manufacture of starch;

(b) for potato starch;

(c) for maize groats and meal used in the Community for the manufacture of glucose by direct hydrolysis".

9 Under Article 11 (3) the Council, acting by a qualified majority on a proposal from the Commission, is to adopt rules for the application of the article and fix the amount of the production refund.

10 In pursuance of that provision the Council adopted Regulation No 2742/75 of 29 October 1975 on production refunds in the cereals and rice sectors (Official Journal L 281, p. 57) by which, on the basis in particular of "an assessment of the situation resulting form the level of common prices and from the competition between, on the one hand, maize starch, rice starch and potato starch and, on the other, the substitute chemical products" (second recital in the preamble to the regulation), it fixed the amounts of the production refund for those products.

11 By Regulation (EEC) No 1862/76, which entered into force on 1 August 1976, the Council amended Regulation No 2742/75 having regard to the fact that "in view of the situation which will exist as from the beginning of the 1976/77 marketing year, particularly as a result of the application for that marketing year of common prices for cereals and rice, it is necessary to increase the production refunds; ... however, given the objectives of the production refund system, such an increase should not be retained in the case of products used in the manufacture of glucose having a high fructose content; ... the best method of implementing a measure of this type is to provide for recovery from the manufacturers concerned of the amount of the increase in production refunds according to the product used".

12 Although, in pursuance of Article 1 of that regulation production refunds were increased, Article 2, which added a new Article 5a to Regulation No 2742/75, laid down special rules as regards the production refund for only one product processed from starch, glucose having a high fructose content.

13 According to that article the amount of the refund for starch processed into that product is maintained at the level of that of the previous marketing year and is abolished as from the 1977/78 marketing year.

14 Under the new Article 5a (3) the difference between the amount of the production refund for starch processed into glucose having a high fructose content and the amount for starch used for any other purpose is to be recovered by Member States from manufacturers.

15 Therefore, in the case of products used subsequently for the manufacture of glucose having a high fructose content, Article 2 of Regulation No 1862/76 by using the expedient of "recovery" in fact refused the increase in the production refund for the 1976/77 marketing year and abolished it as from the following marketing year.

16 Although in Case 103/77 the national court only asks in general terms whether Regulation No 1862/76 is valid in so far as it purports to insert Article 5a in Regulation No 2742/75, the plaintiff in its written observations puts forward three submissions regarding the validity of Regulation No 1862/76.

17 It is therefore appropriate to reply to the question which has been raised by a consideration of the validity of that regulation on the basis of the above-mentioned submissions.

18 First, according to the plaintiff, Regulation No 1862/76 does not provide a statement of the reasons on which Article 2 is based and accordingly infringes the provisions of Article 190 of the Treaty.

19 The reasons on which Article 2 of Regulation No 1862/76 is based, in so far as they emerge from the preamble to that regulation, are limited to the mere statement that, "given the objectives of the production refund system, such an increase should not be retained in the case of products used in the manufacture of glucose having a high fructose content".

20 However, the statement of reasons, laconic as it is, even omitting to mention the abolition of refunds for the manufacture of that product, must nevertheless be examined and assessed in the context of the whole of the rules of which Regulation No 1862/76 forms an integral part.

21 The statements quoted above from the preambles to Regulations Nos 2727/75 and 2742/75 show that the primary objective of production

refunds, as regards the market in starches, is to abolish the disadvantage to which the starch industry is subjected by reason of the application of common prices for the raw materials used by the industry and to enable it to maintain competitive prices in comparison with the prices of substitute chemical products.

22 When considered in the context of the system in which they took effect, the refusal to increase the refund and its subsequent elimination for starch intended for the manufacture of isoglucose, a product which is not or is hardly in competition with substitute chemical products, may be explained by the nature of the objectives of the system of production refunds to which reference is made in the preamble to Regulation No 1862/76.

23 That reference to the purposes of the refund system, which moreover are well known to the circles concerned, satisfies the requirement under Article 190 of the Treaty for a statement of reasons and thus the validity of Regulation No 1862/76 cannot be challenged on those grounds.

24 The plaintiff further claims that Regulation No 1862/76, by creating an exceptional situation for producers of starch intended for the production of isoglucose, is discriminating between them and manufacturers of starch intended for other purposes and that this is contrary to the principle of non-discrimination set out in the second subparagraph of Article 40 (3) of the Treaty.

25 The second subparagraph of Article 40 (3) of the Treaty provides that the common organization of agricultural markets "shall exclude any discrimination between producers or consumers within the Community".

26 The prohibition of discrimination laid down in the above-mentioned provision is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law.

27 That principle requires that similar situations shall not be treated differently unless the differentiation is objectively justified.

28 It must therefore be ascertained whether isoglucose is in a situation comparable to that of other products of the starch industry, in particular in the sense that they can be substituted for isoglucose in the specific use to which the latter product is normally put.

29 It is clear that there is no competition between starch and isoglucose or between isoglucose and the other products derived from starch except possibly glucose.

30 It emerges from the file that the considerable differences in the sweetening powers of isoglucose on the one hand and glucose on the other mean that the two products have different applications so that they cannot be in a comparable competitive situation with regard one to the other.

31 Furthermore as isoglucose is a product which is at least partially interchangeable with sugar, the maintenance of the production refund in favour of manufacturers of isoglucose might at a subsequent stage have constituted discrimination against manufacturers of sugar who, for their part, do not enjoy an equivalent advantage.

32 Hence Article 2 of Regulation No 1862/76 does not infringe the rule of non-discrimination between Community producers set out in the second subparagraph of Article 40 (3) of the Treaty.

33 Finally the plaintiff in Case 103/77 contests the validity of Regulation No 1862/76 by claiming that, to the extent to which the regulation lays down special rules abolishing the production refund for starch intended for the production of isoglucose, it exceeded the powers conferred on the Council in pursuance of Article 11 of Regulation No 2727/75.

34 Hence, as it could not be considered as a mere rule of application within the meaning of Article 11, Regulation No 1862/76 could only have been adopted after the completion of the procedure referred to in the third subparagraph of Article 43 (2) of the Treaty, including consultation with the Assembly.

35 It has already been established that the exclusion by Article 2 of Regulation No 1862/76 of starch intended for isoglucose production from the

production refunds system was in conformity with the objectives of that regulation.

36 The measure must therefore be regarded as having been adopted in conformity with the powers conferred on the Council by Article 11 of Regulation No 2727/75 and consequently as a rule adopted for the application of that article, for which consultation with the Assembly is not required by the Treaty.

37 It follows from the foregoing that consideration of the question raised by the national court has disclosed no factor of such a kind as to affect the validity of Regulation No 1862/76.

Regulations Nos 1110/77 and 1111/77 (production levy)

38 In order to assess the validity of Regulations Nos 1110/77 and 1111/77 it is appropriate to consider first certain aspects of the common organization of the market in sugar.

39 Title III of Regulation No 3330/74 provides quota arrangements for sugar producers for the sugar marketing years 1975/76 to 1979/80 inclusive on the following lines:

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

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

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

40 Under Article 27 (2) of the above-mentioned regulation the production levy is to be calculated per unit of weight by dividing total losses incurred in marketing the quantity produced in the Community outside the guaranteed quantity by the sum of the quantities produced outside the basic quota by Community undertakings.

41 Under Article 27 (3) the production levy is not to exceed a maximum amount which is not to be higher than 30 % of the intervention price.

42 Under Article 2 (2) of Council Regulation No 1112/77 of 17 May 1977 (Official Journal L 134, p. 9) the intervention price for white sugar is fixed at 32.83 units of account per 100 kg for the sugar marketing year 1977/78.

43 Under Article 5 of the same regulation Quota B is fixed for the same marketing year at 35 % of Quota A.

44 It follows that the production levy for the said marketing year is due at most on 35/135ths or slightly less than 26% of the total production of sugar within Quotas A and B.

45 Under Article 6 of Council Regulation No 1113/77 of 17 May 1977 (Official Journal L 134, p. 11) the maximum amount of the production levy is fixed for the above-mentioned marketing year at 9.85 units of account per 100 kg of white sugar.

46 By Regulation No 1111/77 the Council laid down common provisions for isoglucose involving in particular a common system of trade with non-member countries and a production levy system and instituting a procedure involving close co-operation between the Member States and the Commission in a management committee.

47 The seventh recital in the preamble to the regulation gives the following reasons for the establishment of a system of production levies:

"... being a substitute product in direct competition with liquid sugar which, like all beet or cane sugar, is subject to stringent production constraints, isoglucose therefore enjoys an economic advantage and since the Community has a sugar surplus it is necessary to export corresponding

quantities of sugar to third countries; ... there should therefore be provision for a suitable production levy on isoglucose to contribute to export costs."

48 According to the ninth recital the above-mentioned levy system is complementary to that established by Regulation No 3330/74, as last amended by Regulation No 1110/77 and the envisaged levy on the production of isoglucose is analogous to that provided for in Article 27 of Regulation No 3330/74 and consequently constitutes own resources of the Communities within the meaning of Article 2 of the Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (Official Journal, English Special Edition 1970 (I), p. 224).

49 The system of production levies is established by Articles 8 and 9 of the regulation and is applicable to the periods corresponding to the 1977/78 and 1978/79 sugar marketing years.

50 Article 9 (1) of the regulation provides that the Member States shall charge a production levy on manufacturers of isoglucose and paragraph (2) provides in the first subparagraph that the amount of the levy, per 100 kg of dry matter, shall be equal to the amount of the production levy provided for in Article 27 of Regulation (EEC) No 3330/74 for the same period to which the latter amount applies.

51 However, under the second subparagraph of Article 9 (2), for the period 1 July 1977 to 30 June 1978 the amount of the levy referred to in paragraph (1) is not to exceed the amount of 5 units of account per 100 kg of dry matter.

52 It is the latter amount which is to apply when the amount of the production levy referred to in Article 27 of Regulation No 3330/74 exceeds 5 units of account per 100 kg of white sugar for the same period.

53 In pursuance of Article 9 (3) the detailed rules for the application of the article are to be adopted in accordance with the so-called management committee procedure.

54 Article 1 of Council Regulation No 1110/77, in view of the fact that "the introduction of common measures for isoglucose ... necessitates the exclusion of this product from the scope of Council Regulation (EEC) No 3330/74", removed isoglucose from the common organization of the market in sugar.

55 According to the terms of the fourth recital in the preamble to the said regulation "the production levy on isoglucose provided for in Article 9 of Council Regulation (EEC) No 1111/77 ... is based essentially on the need for isoglucose producers to share the costs incurred by the sugar sector inasmuch as the substitution of isoglucose for sugar makes it inevitable, in view of the Community sugar surplus, for corresponding quantities of sugar to be exported to third countries; ... the revenue from the production levy on isoglucose should therefore be set against these marketing losses".

56 Under Article 4 of the regulation the total losses mentioned in Article 27 (2) of Regulation No 3330/74 are to be reduced *inter alia* by the amount of the production levy referred to in Article 9 of Regulation No 1111/77.

57 The national court has asked whether Regulations Nos 1111/77 and 1110/77 are invalid on one or more of the grounds pleaded before it by the plaintiffs.

58 It appears from the file that the most important grounds pleaded against the validity of the rules in question may be summarized as follows:

(a) They offend against the principle of proportionality by imposing on isoglucose manufactures an altogether unfair charge to the advantage of sugar manufacturers;

(b) They contain no provision, and were followed by no rules of application, for the protection of the legitimate expectations of the plaintiffs;

(c) They infringe the Treaty because their provisions do not seek to attain or are in contradiction with the objectives of the common agricultural policy set out in Article 39 of the Treaty both jointly and severally;

(d) They infringe the Treaty because they embody a manifest discrimination contrary to the second subparagraph of Article 40 (3) of the Treaty;

(e) The levy is excessive and disproportionate as is shown by the fact that its effect is to make the manufacture of isoglucose unprofitable as compared with sugar on a market on which such products might otherwise be competitive so that it is thus eliminating a competitor from the market;

(f) The Commission and the Council have misused their powers inasmuch as they have sought by means of the levy to compensate for the real or supposed advantage of isoglucose from the point of view of competition;

(g) The regulations are based on an altogether inappropriate and/or false estimate of the costs of production of isoglucose and/or on an altogether erroneous appreciation of the rôle of isoglucose and of its potential market.

59 The first question to be examined is whether Regulation No 1111/77, in establishing the production levy for isoglucose, infringed the prohibition on discrimination laid down in the second subparagraph of Article 40 (3) of the Treaty.

60 In this respect inquiry must be made whether isoglucose and sugar are in comparable situations.

61 The second recital in the preamble to Regulation No 1111/77 states that "isoglucose is a direct substitute for liquid sugar obtained from sugar-beet or cane" and the seventh recital states that isoglucose is "a substitute product in direct competition with liquid sugar".

62 As the Council has subsequently recognized in the third recital in the preamble to Regulation No 1298/78 of 6 June 1978 amending Regulation No 1111/77 (Official Journal L 160, p. 9), as the markets in sugar and isoglucose are closely linked and there are structural surpluses in the Community sugar sector, any Community decision on one of those products necessarily affects the other.

63 Nevertheless it must be pointed out that isoglucose manufacturers and sugar manufacturers are treated differently as regards the imposition of the production levy.

64 In fact, in contrast to the production levy provided for in Article 27 of Regulation No 3330/74, which only affects Quota B sugar, the levy applied by Article 9 of Regulation No 1111/77 is applied to the whole of isoglucose production.

65 Within the limits of Quotas A and B sugar manufacturers enjoy a guarantee of marketing at the intervention price and are entitled to the benefit of the export refund system whereas isoglucose manufacturers do not enjoy any similar advantages.

66 Even when account is taken of the fact that in pursuance of Article 9 (2) of Regulation No 1111/77 the amount of the production levy on isoglucose was limited for the period from 1 July 1977 to 30 June 1978 to the maximum rate of 5 units of account per 100 kg, a rate which was maintained in force for the marketing year 1978/79 by Regulation No 1298/78, the difference in treatment still exists as the isoglucose manufactures do not enjoy the marketing guarantees provided for manufactures of normal sugar.

67 However, it is still necessary to inquire whether that difference of treatment as regards the imposition of the production levy is objectively justified.

68 According to the Council and the Commission isoglucose, without being subjected to the production constraints imposed on sugar, benefits from the hypothetical difference, estimated at 15 %, between the intervention price fixed at a level which took account of the higher prices applied in the Member States before the setting up of the common organization of the market in sugar and the prices which, in the absence of the quota system, would have had to be fixed to regulate the production of sugar in the Community.

69 It has been claimed that hence, as the price of isoglucose tends to align itself on the intervention price for sugar, the intervention system confers on isoglucose a competitive advantage in relation to sugar of roughly 15 % of the intervention price for the latter, which corresponds more or less to 5 units of account, namely to the provisional amount of the production levy for isoglucose.

70 This argument cannot be accepted.

71 In fact, even if it were admitted for the sake of argument that the advantage enjoyed by isoglucose manufacturers as a result of the intervention system for sugar could be estimated at 15 % of the intervention price for sugar, such an advantage applies equally to certain sugar manufacturers, in particular those in possession of modern factories favourably situated.

72 The Commission and Council further claim that the production levy of 5 units of account imposed on isoglucose is essentially comparable to the charges borne by sugar.

73 By way of demonstration the Commission at the request of the Court produced a table showing a series of examples based on the production figures for modern sugar factories producing considerable quantities of C sugar.

74 According to the Commission these calculations show that sugar manufacturers bear charges varying from 3.81 units of account to 13.52 units of account per 100 kg.

75 The Commission has worked out the above-mentioned charges for each factory by a calculation based on the total production of A, B and C sugar for the sugar marketing year 1977/78; its has subsequently estimated the value of that production by attributing to A sugar the intervention price, to B sugar the intervention price less the levy involved and to C sugar an estimate of the world price.

76 By dividing the total value thus obtained by total production the Commission reaches an average price expressed in units of account per 100 kg.

77 On the basis of these calculations the average charge borne by each 100 kg of sugar produced is the difference between the said average price and the intervention price for the same quantity.

78 However, it is acknowledged that under the common organization of the market for sugar roughly 60 % of the average charge involved in the production levy is borne by sugar-beet growers for whom the minimum price of beet is substantially reduced for beet used for B and C sugar, that is to say, for sugar produced outside the basic quota.

79 By omitting to take this factor into consideration in its calculations, the Commission has considerably overestimated the charges borne by sugar manufacturers.

80 It is also important to note that it emerges from the Commission's calculations that each increase in the total production of sugar outside the basic quota has the effect of increasing the average charge to be borne by the manufacturer so that the latter is in a position to reduce the amount of the said charge by limiting his production whereas for the isoglucose manufacturer a limitation on production remains without any effect as regards the amount per unit of weight of the production levy brought into force by Regulation No 1111/77.

81 Moreover the Council and the Commission emphasize the practical difficulties which certain alternative solutions would have presented, in particular the establishment of a quota system for isoglucose, regard being had to the fact that the latter is a product newly arrived on the Community market and that its production is in the process of increasing rapidly.

82 However, inconveniences of the type alleged cannot justify the imposition of a charge which is manifestly unequal.

83 Accordingly the provisions of Regulation No 1111/77 establishing the production levy system for isoglucose offend against the general principle of equality of which the prohibition on discrimination set out in Article 40 (3) of the Treaty is a specific expression.

84 The answer must therefore be that Regulation No 1111/77 is invalid to the extent to which Articles 8 and 9 thereof impose a production levy on isoglucose of 5 units of account per 100 kg of dry matter for the period corresponding to the sugar marketing year 1977/78.

85 There is therefore no need to examine the other grounds put forward by the plaintiffs or to give a ruling on the validity of Regulation No 1110/77.

86 However, the above answer will leave the Council free to take any necessary measures compatible with Community law for ensuring the proper functioning of the market in sweeteners.

Costs

87 The costs incurred by the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

88 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of 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

in answer to the questions referred to it by the High Court of Justice, Queen's Bench Division, Commercial Court, by orders of 29 July and 8 November 1977, hereby rules:

1. **Consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Council Regulation No 1862/76 of 27 July 1976.**

2. **Council Regulation No 1111/77 of 17 May 1977 is invalid to the extent to which Articles 8 and 9 thereof impose a production levy on isoglucose of 5 units of account per 100 kg of dry matter for the period corresponding to the sugar marketing year 1977/78.**

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 25 October 1978.

A. Van Houtte — Registrar

H. Kutscher — President