OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 16 May 2006 [1]

I — Introductory comments

1. The present preliminary ruling procedure [2] concerns the validity of Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector [3] and of Commission Regulation (EEC) No 2670/81 of 14 September 1981 laying down detailed implementing rules in respect of sugar production in excess of the quota. [4] In particular, it concerns the question whether the absence of the possibility of the repayment or remission of charges on C sugar is compatible with the principle of equity.

II — Legislative background

2. Rules of market organisation legislation and customs legislation are relevant in the present proceedings.

A — *Organisation of the markets in sugar*

3. The market organisation legislation applicable in the present case comprises a Council regulation and the Commission implementing regulation associated therewith.

1. Regulation No 1785/81

4. Regulation No 1785/81, now repealed, governed the production, importation and exportation of sugar. The system of production quotas was a means of guaranteeing producers Community prices and an outlet for their production.

5. Article 24 of Regulation No 1785/81 specified for each marketing year basic quantities of A and B sugar, which each Member State allocates to the producers established in its territory. The quantity exceeding the quota allocated is deemed to be C sugar.

1 — Original language: German.

2 — See the parallel appeal procedure in Case C-68/05 P *Koninklijke Coöperatie Cosun* v *Commission*, pending before the Court.

3 — OJ 1981 L 177, p. 4.

4 — OJ 1981 L 262, p. 14.

6. C sugar is eligible for neither price support nor export refunds. Pursuant to Article 26(1), C sugar which is not carried forward to the following marketing year may not be disposed of in the Community and must be exported.

7. Implementing rules were to be adopted in accordance with the procedure laid down in Article 41.

2. Regulation No 2670/81

8. The detailed implementing arrangements for C sugar were defined by Regulation No 2670/81.

9. Article 1 contains provisions on export from the Community. Paragraph 1 thereof, in the version applicable here, [5] reads:

'The export referred to in Article 26(1) of Regulation (EEC) No 1785/81 shall be considered to have taken place if:

(a) the C sugar or the C isoglucose is exported from the Member State on whose territory it was produced;

(b) the export declaration in question is accepted by the Member State referred to under (a) before 1 January following the end of the marketing year during which the C sugar or the C isoglucose was produced;

(c) the C sugar or the C isoglucose or a corresponding quantity within the meaning of Article 2(3) left the customs territory of the Community at the latest within 60 days from 1 January referred to under (b);

(d) the product has been exported without refund or levy as white sugar or raw sugar, non denatured, or as syrups, obtained prior to the crystallising stage, falling within CN codes 1702 60 90 and 1702 90 90, or as isoglucose in its natural state, from the Member State referred to under (a).

Except in the case of force majeure, if all of the conditions provided for in the first subparagraph are not complied with, the quantity of C sugar or C isoglucose in question shall be considered to have been disposed of on the internal market.

5 — Commission Regulation (EEC) No 3892/88 of 14 December 1988 amending Regulation (EEC) No 2670/81 laying down detailed implementing rules in respect of sugar production in excess of the quota (OJ 1988 L 346, p. 29).

In the case of force majeure, the competent agency of the Member State on whose territory the C sugar or the C isoglucose has been produced shall adopt the measures which are necessary by virtue of the circumstances invoked by the interested party.'

10. Article 2 governs the procedures for proving compliance with the conditions referred to in Article 1(1).

11. Article 3 specifies the charges to be imposed as a sanction where quantities have been disposed of on the internal market. The relevant parts thereof, in the version applicable here,[6] read as follows:

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

(a) for C sugar, per 100 kilograms:

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

— 1 [euro];

...

2. The Member State concerned shall, before 1 May following 1 January referred to in Article 1(1)(b), notify those manufacturers who are required to pay the charge referred to in paragraph 1 of the total amount to be paid.

Such total amount shall be paid by the manufacturers in question before 20 May of the same year

3. However, where the competent agency has, pursuant to the second subparagraph of Article 2(3), extended the time-limit for furnishing the proof, the dates referred to

6 — Commission Regulation (EEC) No 3559/91 of 6 December 1991 amending Regulation (EEC) No 2670/81 laying down detailed implementing rules in respect of sugar production in excess of the quota (OJ 1991 L 336, p. 26).

in paragraph 2 shall be replaced by the dates determined by the competent agency on the basis of the extension allowed.

4. In the case of quantities of C sugar or C isoglucose which prior to export were destroyed or damaged without possibility of recovery, in circumstances recognised by the competent agency of the Member State concerned as a case of force majeure, the relevant amount referred to in paragraph 1 shall not be levied.'

B — *Customs legislation*

12. In the area of customs legislation, reference must be made to a Council regulation and the Commission implementing regulation associated therewith, both of which have meanwhile been repealed.

1. Regulation No 1430/79

13. Article 13(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties,[7] in the version applicable here,[8] reads as follows:

'Import duties may be repaid or remitted in special situations other than those referred to in Sections A to D, which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

The situations in which the first subparagraph may be applied, and the detailed procedural arrangements to be followed for this purpose, shall be determined in accordance with the procedure laid down in Article 25. Repayment or remission may be made subject to special conditions.'

14. Pursuant to Article 1(2)(a), import duties comprise:

'customs duties and charges having equivalent effect, as well as agricultural levies and other import charges laid down within the framework of the common agricultural policy or in that of specific arrangements

7 — OJ 1979 L 175, p. 1.

8 — Council Regulation (EEC) No 3069/86 of 7 October 1986 amending Regulation (EEC) No 1430/79 on the repayment or remission of import or export duties (OJ 1986 L 286, p. 1).

applicable, pursuant to Article 235 of the Treaty, to certain goods resulting from the processing of agricultural products'.

15. Article 14 stipulates inter alia that Article 13 applies mutatis mutandis to the repayment or remission of export duties.

16. Pursuant to Article 1(2)(b), export duties comprise:

'agricultural levies and other export charges laid down within the framework of the common agricultural policy, or in that of specific arrangements applicable, pursuant to Article 235 of the Treaty, to certain goods resulting from the processing of agricultural products'.

2. Regulation No 3799/86

17. The detailed implementing arrangements were set out in Commission Regulation (EEC) No 3799/86 of 12 December 1986 laying down provisions for the implementation of Articles 4a, 6a, 11a and 13 of Council Regulation (EEC) No 1430/79 on the repayment or remission of import or export duties. [9] Article 4 thereof specifies the special situations resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. This applies without prejudice to other situations to be considered case by case by a decision of the Commission as part of the procedure laid down in Articles 6 to 10.

III — Facts of the case, main proceedings and questions referred

18. Koninklijke Coöperatie Cosun UA ('Cosun'), which operates an undertaking producing sugar, produced more sugar in the 1992/93 marketing year than the A and B quotas allocated to it. A subsidiary of Cosun sold on consignments of sugar to other undertakings for export to Croatia, Slovenia and Morocco.

19. In 1994, Cosun was called upon to pay a charge. On 19 June 1995 a decision was taken by the Hoofdproduktschap Akkerbouw ('HPA').

9 — OJ 1986 L 352, p. 19.

20. In August 2001, the Kingdom of the Netherlands applied to the Commission for the remission of the charge imposed. On 2 May 2002 the Commission declared that application to be inadmissible.

21. Cosun lodged an appeal with the Court of First Instance against that decision. In its judgment of 7 December 2004 in Case T-240/02, the Court of First Instance dismissed the appeal as unfounded.

22. In addition, on 18 July 1995 Cosun brought an action before the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry; 'CBB') against the Minister van Landbouw, Natuur en Voedselkwaliteit because of the decision taken by the HPA. The CBB stayed the proceedings pending the judgment in *De Haan*.[10]

23. In particular, the CBB rejected Cosun's submission that this was a case of force majeure. It referred to the absence of unusual and unforeseeable circumstances, given that a contractual partner's failure to fulfil obligations was a known commercial risk.

24. In response to Cosun's legal opinion that a special situation existed justifying remission pursuant to Article 13 of Regulation No 1430/79 and that the Commission was wrong to declare its application inadmissible, the CBB submitted that it did not consider it necessary to consider the validity of the Commission decision.

25. A question which arose for the CBB, however, was whether, if the possibility of remission did not apply to charges on C sugar, the fact that the organisation of the markets in the sugar sector lacked a legal basis for the remission of those charges resulted in the invalidity of Regulation No 1785/81 and Regulation No 2670/81. The invalidity of that legislation might result in the charges being based on such rules. In order to clarify the validity of the regulations and the consequences should they be invalid, the CBB referred the following questions to the Court of Justice for a preliminary ruling by order of 9 June 2004:

'(1) If the possibility of remission under Article 13 of Regulation (EEC) No 1430/79, now replaced by Article 239 of [Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing] the Community Customs Code [(OJ 1992 L 302, p. 1)], is not applicable

10 — Case C-61/98 [1999] ECR I-5003.

to [charges] on C sugar, as in the present action, are Regulation (EEC) No 1785/81 ... and ... Regulation (EEC) No 2670/81 ... wholly or partly invalid in view of the absence of the possibility of repaying or remitting [charges] on C sugar on equitable grounds?

(2) If so, does the legal liability to the [the charge] on C sugar no longer apply, or may the competent authority of the Member State concerned and/or the Commission decide not to impose the [charge] on quantities of C sugar in accordance with Article 3 of Regulation (EEC) No 2670/81 if the party liable for the [charge] cannot be accused of any deception or negligence which may have contributed to the fact that the export of those quantities intended by him has not taken place and that in the interests of an investigation by the national authorities into infringements and irregularities that party has not been informed of the investigation referred to?'

IV — The questions referred

26. *Cosun*, the *Council* and the *Commission* begin by pointing out that the questions referred are to be answered only if the assumption on which they are based, namely that the possibility of remission for which Article 13 of Regulation No 1430/79 provides does not apply to C sugar, is correct.

27. In addition, *Cosun* and the Minister van Landbouw, Natuur en Voedselkwaliteit submit that Article 13 of Regulation No 1430/79 is applicable to charges on C sugar.

28. The *Commission*, on the other hand, takes the view that, as the general equity clause in Article 13 of Regulation No 1430/79 is not a general principle of Community law, but applies only in connection with Community customs legislation, the assumption on which the questions referred are based is correct.

A — *The first question referred*

29. By the first question, the referring court wishes to establish whether Regulation No 1785/81 and Regulation No 2670/81 are invalid. As the criterion for assessing validity, the referring court cites only 'grounds of equity'. No other criteria are mentioned. As

regards compatibility with the principle of proportionality, the referring court explicitly states in its order for reference that that principle has not been breached. The question as to compatibility with the principle of proportionality is therefore deliberately not raised.

30. From this it follows that the subject of the present preliminary ruling procedure is limited accordingly and is therefore confined to an examination in the light of the general legal principle of equity.

1. Arguments of the parties

31. Where Regulation No 1785/81 is concerned, *Cosun* contends that it does not lay down a formal requirement regarding the date on which charges on C sugar become due, but in Articles 26 and 41 entrusts the Commission with the adoption of provisions in this sphere. Consequently, the regulation could not be in any way invalid.

32. As regards Regulation No 2670/81, *Cosun* assumes above all that it must be interpreted and applied in accordance with the general principles of law. From this it follows that Article 3 of that regulation must be interpreted as meaning that it provided for the competent national authorities to grant a remission on grounds of equity in certain circumstances, as in the main proceedings, for example. Regulation No 2670/81 is therefore valid. In the alternative, if the Court does not accept the interpretation of Article 3 of Regulation No 2670/81 proposed by *Cosun*, the latter submits that the regulation is invalid in so far as it breaches the principles of equality, equal rights, equity and legal certainty.

33. The *Minister van Landbouw, Natuur en Voedselkwaliteit* and the *Netherlands Government* maintain that C sugar marketed in the Community is in the same position as sugar imported from third countries and that these two categories of sugar should therefore be treated in the same way. Consequently, it is a breach of the principle of equality for an importer of sugar from third countries who is in a special situation with respect to the application of Article 13 of Regulation No 1430/79 to be able to obtain remission of levies under that provision, whereas this option is not open to a producer of C sugar in the same special situation.

34. The Netherlands Government submits that, according to settled case-law, [11] omissions in legislation can be remedied in individual cases by the application by analogy of Community law where this is necessary for compliance with a general principle of Community law. That case-law

11 — See, for example Case 165/84 *Krohn* [1985] ECR 3997, paragraph 13 et seq.

is applicable in the present instance, from which it follows that Article 13 of Regulation No 1430/79 must be applied by analogy to the charges on C sugar.

35. If the Court does not accept such application by analogy, the Minister van Landbouw, Natuur en Voedselkwaliteit and the Netherlands Government maintain that the absence of the possibility of a remission of charges on C sugar in individual cases and on grounds of equity must result in the partial invalidity of Regulations No 1785/81 and No 2670/81 since that absence breaches the principle of equality.

36. The *Council* argues primarily that the fact that the WTO provisions concerning sugar do not include a general equity clause similar to that contained in the customs legislation and in Article 13 of Regulation No 1430/79 does not breach the principle of equal treatment. The customs legislation and the provisions on sugar concern two completely different areas, and the exceptions for which they provided, or did not provide, concern completely different obligations in completely different legal contexts.

37. It also follows from the Court's case-law [12] that the Community legislature is not obliged to provide for the possibility of remission on grounds of equity and that it may use its own discretion in deciding whether or not to provide for such a possibility in a certain sphere. As the common organisation of the markets in the sugar sector is largely financed from contributions made by economic operators, the possibility of the remission of charges on C sugar would have serious consequences, since it would be an incentive to produce more and more sugar in excess of the quota. The Community legislature's decision not to provide for a procedure for the remission of charges similar to that which exists for customs duties also seems reasonable.

38. In the alternative, the Council submits that, if the absence of the possibility of remission on grounds of equity breaches the principle of equal treatment, invalidity is confined to Regulation No 2670/81, on the basis that the Council has instructed the Commission to adopt rules on charges on C sugar.

39. The *Commission* argues that neither the Court of Justice nor the Court of First Instance has acknowledged a general legal principle which would permit reliance on a breach of the principle of equity if the applicable arrangement does not explicitly provide for the possibility of remitting charges on C sugar on grounds of equity. Regulations No 1785/81 and No 2670/81

12 — Case 118/76 *Balkan-Import-Export* [1977] ECR 1177.

could not be invalid simply because they do not explicitly provide for the possibility of such remission.

40. It adds that, even if it should decide to examine the substance of an alleged breach of the principle of equity in each and every case, it would conclude that in the present case the levy to be paid by Cosun did not breach the principle of equity.

41. On the one hand, the Court has already ruled that charges on C sugar imposed for failure to comply with customs formalities do not breach the principle of proportionality since those formalities are essential if undesired effects on the common organisation of the sugar market are to be avoided. [13] The same considerations apply when the question is whether the principle of equity has been breached by the imposition of a charge.

42. On the other hand, it follows from the judgment in *Peter* [14] that the possible application of the principle of equity in the area of the common agricultural policy must not in any circumstances make it impossible in practice to implement the Community system concerned, for example by jeopardising the quota system designed to limit production. If, however, it is possible for a producer to be granted a remission on grounds of equity in a case such as the present one, the Commission contends that the quota arrangements specified in the common organisation of the sugar market would be jeopardised.

2. Analysis

43. It seems appropriate to begin with a few clarifications. In the matter of interest here, for example, a distinction must be made between various aspects associated with equity.

44. In principle, the following legal phenomena need to be distinguished. On the one hand, with respect to the principle of equity, a distinction needs to be made between a national principle and a principle of Community law. At the level of the Member States, the question is whether the application of a national legal principle of equity is admissible under Community law.

45. At the level of Community law, on the other hand, a distinction must be made between explicit rules on equity, as in market organisation arrangements, and a general legal principle of equity.

13 — Case C-161/96 *Südzucker Mannheim* [1998] ECR I-281, paragraph 42 et seq., and Case C-329/01 *British Sugar* [2004] ECR I-1899, paragraphs 46 and 48.

14 — Case C-290/91 [1993] ECR I-2981.

46. In the present proceedings, some of the parties have referred to an obligation under Community law to apply by analogy Article 13 of Regulation No 1430/79 on grounds of equity. Strictly speaking, the question is whether an explicit rule on equity is applicable. That is the subject of the parallel proceedings in Case C-68/05 P, but not of the present proceedings.

47. In the present proceedings, the sole aim is to determine whether rules of secondary Community law comply with the general legal principle of equity. What must first be considered, of course, is whether Community law recognises such a principle at all.

48. As regards the criterion to be applied in the examination, the present proceedings are, as has already been pointed out, confined to the general legal principle of equity and do not concern such other principles as those of equality and proportionality.

49. This means that much of the Court's case-law cited by the parties needs to be considered in greater depth in the following only if something can be gleaned from it for the legal question of interest here. The case-law which concerns other aspects thus recedes into the background. This is especially true of the judgment in *Peter*, which concerns the admissibility of the application of a *national* rule on equity. In that judgment, the Court ruled that in certain circumstances Community law does not preclude the application of a national rule which empowers the national authorities in certain cases to waive charges on grounds of personal equity. [15]

50. What must first be considered in the following, then, is whether a general legal principle of equity applies in Community law.

51. An initial reference must be made to the Court's case-law, which rules that there is no legal basis in Community law for remitting charges on equitable grounds. [16]

52. In its judgment in *Hoche*, the Court explained that case-law inasmuch as it recalled that it had denied the existence of a general principle of objective unfairness under Community law. [17] In that judgment, the Court also decided that the application of a certain provision of a regulation cannot be suspended in an individual case for reasons of fairness. [18]

15 — *Peter* (cited in footnote 14), paragraphs 11 and 17.

16 — *Balkan-Import-Export* (cited in footnote 12), paragraphs 8 and 10, and Case 299/84 *Neumann* [1985] ECR 3663, paragraph 24.

17 — Case C-174/89 [1990] ECR I-2681, paragraph 31.

18 — *Hoche* (cited in footnote 17), paragraph 36.

53. However, further clarifications can also be derived from that case-law. The Court opposed the recognition of a general principle of equity, for example, because it might prevent provisions of Community law from having full effect in the Member States and would be prejudicial to the fundamental principle that Community law must be applied uniformly throughout the Community. [19]

54. In the judgments in *Neumann* and *Hoche*, the Court also stated that there is no general legal principle that a Community provision that is in force may not be applied by a national authority if it causes the person concerned hardship which the Community legislature would clearly have sought to avoid if it had envisaged that eventuality when enacting that provision. [20]

55. What must not be overlooked, of course, is that references to the contrary can also be derived from the Court's case-law. In *First City Trading and Others*, for example, the Court held that 'none of the general principles of Community law, and in particular the principles of force majeure, the protection of legitimate expectations, proportionality and *equity*, required exporters, in the circumstances described by the national court, to be authorised to retain all or part of any export refunds paid in advance'. [21]

56. From this more recent judgment, it might be inferred that the Court now recognises a general legal principle of equity. Another passage in the same judgment makes the situation clear, however, in that the Court states that 'the *principle of equity* cannot be regarded as allowing any *derogation* from the application of provisions of Community law, save as provided for by the legislation or where the legislation is itself declared invalid'. [22]

57. The above examination of the Court's past case-law has thus shown that it has not recognised a general legal principle of equity.

58. In the absence of the recognition of a general legal principle of equity by the Court, it would be possible to deduce the validity of such a legal principle from the legal systems of the Member States.

59. Even a rough analysis of the national legal systems reveals that a legal principle of equity does not apply in all Member States.

19 — *Neumann* (cited in footnote 16), paragraph 25.

20 — *Neumann* (cited in footnote 16), paragraph 33, and *Hoche* (cited in footnote 17), paragraph 31.

21 — Case C-263/97 [1998] ECR I-5537, paragraph 68; my italics.

22 — *First City Trading and Others* (cited in footnote 21), paragraph 48; my italics.

Although recognition in all Member States is not imperative, it would at least be necessary in the areas of law of decisive importance for the current proceedings, which must be regarded as part of public economic law. It is not enough for certain national rules explicitly to provide for the remission or repayment of charges on grounds of equity, since from that it cannot be inferred that a corresponding principle applies in the Member State concerned.

60. The analysis of the case-law has shown that a general legal principle of equity does not apply in Community law. As, then, an appropriate examination criterion does not exist, the examination of the compatibility of the regulations forming the subject of the proceedings cannot, logically, take place.

61. The answer to the first question referred must therefore be that Regulation No 1785/81 and Regulation No 2670/81 are neither wholly nor partly invalid in view of the absence of the possibility of repaying or remitting levies on C sugar on equitable grounds if the possibility of remission under Article 13 of Regulation No 1430/79 — now replaced by Article 239 of the Community Customs Code — does not apply to charges on C sugar, as contested in the current proceedings.

B — *The second question referred*

1. Arguments of the parties

62. *Cosun* submits that, if the Court's answer to the first question is that Regulation No 2670/81, and especially Article 3 thereof, is invalid because it does not provide for the possibility of remitting charges on grounds of equity, the CBB must find that there is no legal basis enabling the HPA to demand payment of the amounts at issue. In the alternative, the Court of Justice should rule that the Commission should include in Regulation No 2670/81 with retroactive effect by analogy with the provisions of Article 233 EC the possibility in a case such as this of remission being granted on grounds of equity.

63. The *Minister van Landbouw, Natuur en Voedselkwaliteit* argues that the competent Dutch authorities and/or the Commission might exclude from the charges only those quantities of sugar which Cosun had entrusted to its contractual partners for export after the Dutch authorities had learnt of the investigation.

64. The *Netherlands Government* adopts the position that, assuming the Court declared Regulations No 1785/81 and No 2670/81 to be partly invalid, a charge might not be

imposed only on those quantities of sugar on which no charge would have been imposed if the party liable to pay the charge had been notified immediately of the launching of an international investigation into possibly fraudulent transactions.

65. The *Council* and the *Commission* have not commented on the second question.

2. Analysis

66. The second question is referred only in case the answer to the first question is that Regulation No 1785/81 and Regulation No 2670/81 are wholly or partly invalid.

67. As the investigation undertaken in the context of the first question has shown that the two regulations are not invalid owing to a breach of the principle of equity, an answer to the second question is superfluous.

V — Conclusion

68. In view of the foregoing, it is proposed that the Court should answer the questions referred for a preliminary ruling as follows:

Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector and Commission Regulation (EEC) No 2670/81 of 14 September 1981 laying down detailed implementing rules in respect of sugar production in excess of the quota are neither wholly nor partly invalid in view of the absence of the possibility of repaying or remitting levies on C sugar on equitable grounds if the possibility of remission under Article 13 of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties — now replaced by Article 239 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code — does not apply to charges on C sugar, as contested in the current proceedings.