OPINION OF ADVOCATE GENERAL
Mischo
delivered on 15 May 2001 [1]

1. The purpose of Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector [2] ('the basic regulation') is to attain certain objectives pursued by the common agricultural policy, in particular to guarantee producers a fair standard of living and to guarantee supplies to consumers at reasonable prices by means of a system of price and disposal guarantees varying in accordance with the production quotas allocated to undertakings in the various Member States.

2. For each marketing year starting on 1 July one year and ending on the following 30 June, each Member State is allocated an A sugar quota, linked to the absorption capacity of the Community market, and a B sugar quota for it to divide among the various undertakings established in its territory, each receiving both an A and a B quota.

3. If an undertaking produces a quantity of sugar in excess of the A and B quotas allocated to it, that sugar will be classified as C sugar. In accordance with Article 24(1) of the basic regulation:

'... For the purposes of this Regulation:

(a) "A sugar"... mean[s] any quantity of sugar ... the production of which is attributable to a specific marketing year and which is produced by the undertaking concerned within its A quota;

(b) "B sugar"... mean[s] any quantity of sugar ... the production of which is attributable to a specific marketing year and which is produced by the undertaking concerned outside its A quota but within the sum of its A and B quotas;

(c) "C sugar" ... mean[s] any quantity of sugar the production of which is attributable to a specific marketing year and which is produced either by the undertaking concerned outside the sum of its A and B quotas or by an undertaking which has no quota'.

1 — Original language: French.
2 — OJ 1981 L 177, p. 4.

4. The conditions under which sugar may be disposed of vary according to its classification. The basic regulation provides several support mechanisms for A and B sugar, the guarantees for sugar produced as part of A quota being greater than those for B sugar.

5. A and B sugar must be bought by intervention bodies at guaranteed prices, and the fact that there are refunds giving them access to the world market makes them easier to export. In return, producers are required to bear the cost of those measures by means of a complex system of levies, since the common organisation has to be self-financing.

6. C sugar is treated quite differently. Not only does it not benefit from the intervention mechanisms, but also it cannot be sold on the Community market. An undertaking which has produced C sugar in a given marketing year has the choice of either exporting it, without being eligible for any refund, to non-member countries or of carrying it forward to its A quota for the following marketing year.

7. If, notwithstanding, it does dispose of C sugar on the Community market, that sugar will be treated as though it were sugar imported from a non-member country, with the result in particular that a sum equal to that of the import levy must be paid.

8. These essential differences in the various categories of sugar correspond to differences of the same kind in the sugarbeet used in their production.

9. Sugar producers are required to pay a minimum price for the beet they use for producing A and B sugar, higher for the one than the other. There is no such requirement in the case of beet processed into C sugar.

10. That is how, by dealing with a processed product, the common organisation of the markets in the sugar sector provides guarantees for growers.

11. In the United Kingdom British Sugar plc alone possesses the entire A and B quotas allocated to that Member State.

12. During the second half of 1992 British Sugar became aware, having regard to the beet crop which was going to be delivered to it, that it would produce a volume of sugar far in excess of its A and B quotas, and would accordingly be in possession of a very considerable quantity of C sugar which must, unless carried forward to the following marketing year, be exported to non-member countries.

13. It therefore perfectly lawfully took action, through its commercial agents, to find outlets for its excess quantities of sugar.

14. On 16 October 1992 and again on 26 November 1992 British Sugar applied for export licences for a total of 20 000 tonnes of C sugar. Those licences were essential if the proposed exports were to be made since, although C sugar is not eligible for export refunds, its export is conditional upon obtaining an export licence pursuant to Article 13(1) of the basic regulation, which enables the administrative authorities responsible for the management of the common organisation of the market to follow developments in the sugar trade between the Community and non-member countries.

15. This was not the first time that British Sugar had exported C sugar, since it had happened before that its total production exceeded the quantity equivalent to its A and B quotas. However, it had always exported its C sugar after it had actually produced a quantity in excess of its quotas.

16. Nevertheless, during the fourth quarter of 1992, British Sugar made contact with the Intervention Board for Agricultural Produce ('IBAP'), the competent intervention agency for the purposes of the basic regulation, and with the Ministry of Agriculture, Fisheries and Food ('MAFF'), which in turn consulted the Commission, in order to discover, according to British Sugar, whether it might export C sugar before it had actually produced a quantity of sugar in excess of the sum of its A and B quotas.

17. What exactly was the information imparted to it has not been clearly established, British Sugar maintaining that it had been given every assurance of the legality of the transaction, and the administrative authorities contacted denying, for their part, that they had given any such assurances and claiming merely to have advised on the possibility of concluding contracts of sale for the export of C sugar before that sugar had actually been produced, which is plainly not the same thing.

18. The fact remains that British Sugar obtained the licences for which it had applied whereas, under Article 4 of Commission Regulation (EEC) No 2630/81 of 19 September 1981 on special detailed rules for the application of the system of import and export licences in the sugar sector, [3] '[a]n export licence for C sugar ... may be issued only after the manufacturer in question has provided the competent body with proof that the quantity for which the licence is requested, or an equivalent quantity, has actually been produced in excess of the A and B quotas of the undertaking concerned, account being taken ... of any quantities carried forward to the marketing year in question'.

3 — OJ 1981 L 258, p. 16.

19. Making use of those licences, British Sugar had, by 7 January 1993, the date on which the quantities of sugar actually produced in its factories reached the tonnage equivalent to the sum of its A and B quotas, in fact exported 16 650.465 tonnes of sugar.

20. Since all customs formalities had been complied with and since British Sugar was able to provide evidence that the quantities corresponding to the licences issued to it had left Community territory, the securities which it had been required to lodge in order to obtain the licences were released by IBAP.

21. As a result, British Sugar considered that it had in fact exported 16 650.465 tonnes of C sugar in compliance with the Community rules and it took those exports into account when planning its commercial operations so that, at the end of the marketing year, the quantities disposed of on the Community market remained within the bounds of its A and B quota total.

22. Subsequently, however, following a sequence of events the timing of which need not be set out in detail just now, IBAP considered that British Sugar's exports were irregular inasmuch as, before 7 January 1993, British Sugar could not export C sugar.

23. From IBAP's point of view, on a correct construction of Article 24 of the basic regulation, an undertaking may not seek to dispose of C sugar until its sugar production has exceeded the total of its A and B quotas. The licences issued to British Sugar during the last quarter of 1992 could not be used before 7 January 1993 in order to export sugar classified as C sugar.

24. In consequence, still according to IBAP, the sugar which British Sugar had exported before that date was in fact quota sugar. The sugar exported, supposedly as C sugar, must be reclassified as quota sugar.

25. Export refunds which, *ex hypothesi*, British Sugar had not claimed since it had purportedly exported C sugar, could have been granted in respect of that sugar and monetary compensatory amounts ought to have been paid.

26. As a result of IBAP's reclassification itself, part of the sugar sold by British Sugar on the Community market, very precisely

amounting to 16 650.465 tonnes, must be considered to be C sugar.

27. If the quantity of sugar incorrectly presented as C sugar is added to the quantity equivalent to the sum of the A and B quotas, it must necessarily be found that sugar was produced in excess of quota.

28. Since British Sugar did not put the quantity equivalent to that excess to one of the uses authorised by the Community legislation — namely, being carried forward to the following marketing year or exported out of the Community — that quantity must, according to IBAP, be deemed to be C sugar disposed of on the Community market.

29. Such a disposal must give rise to application of Article 3(1) 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 accordance with which:

'In respect of the quantities which, within the meaning of Article 1(1) have been disposed of on the internal market, the Member State concerned is to impose:

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

— ECU 1.25.'

30. Following that line of reasoning, in 1997 IBAP demanded that British Sugar should pay the sum of GBP 6 641 608.10. British Sugar denies that it owes that charge.

31. In its view, there is nothing in the basic regulation which precluded it from exporting C sugar before it had produced suffi-

4 — OJ 1981 L 262, p. 14.

cient sugar to fill its A and B quotas since, at the end of the marketing year, it would be in a position to establish that it had in fact produced the necessary quantity for that purpose and had disposed of that quantity as A and B sugar, which it did in fact do.

32. It has argued that it is not possible for IBAP to reclassify as A and B sugar sugar exported as C sugar with all the requisite documents and, at the same time, to classify as C sugar sugar disposed of as A and B sugar, and then to impose a penalty on British Sugar.

33. It has also maintained that, if such reclassification were possible, it must itself be authorised to make a retrospective application for the export refunds which it would have been able to claim if the sugar which it exported as C sugar had been described as quota sugar, despite the fact that neither Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products [5] nor, moreover, any other provision of Community legislation, authorises national authorities to accept a retrospective declaration for those refunds.

34. According to British Sugar's calculations, the amount of the refunds which it could have claimed is approximately GBP 6 million, a sum which ought to be set against the sum demanded from it by IBAP for having disposed of C sugar on the Community market.

35. Since IBAP refused to reconsider its decision to recover the sum of GBP 6 641 608.10, British Sugar brought the matter before the High Court of Justice, Queen's Bench Division (Crown Office).

36. The latter, considering that resolution of the dispute depended on the answer to questions of the interpretation and validity of certain provisions of Community law, referred to the Court of Justice for a preliminary ruling a whole series of questions which I need not at the beginning set out in detail, in so far as many of them are raised only in response to the answer which the Court gives to another question, but which in essence deal with four points.

37. The national court wishes to know

— whether an undertaking may purport to have C sugar available for export in the course of a marketing year when it has not yet produced a volume of sugar in excess of the sum of its A and B quotas;

5 — OJ 1987 L 351, p. 1.

— whether, in the circumstances of the case, the intervention agency is in breach of one or more of the general principles of Community law by seeking to impose a charge on British Sugar pursuant to Article 3 of Regulation No 2670/81 and, supposing that such a charge could be levied, whether the amount must be calculated applying that provision to the letter or must, on the contrary, be adjusted in light of the facts of the case;

— whether the decision to demand payment of a charge pursuant to Article 3(1) was taken out of time;

— whether British Sugar may claim export refunds in respect of sugar reclassified by IBAP as quota sugar although it did not make the application before exporting, when at the time of export it regarded the sugar as C sugar.

'(1) Under the EC Sugar Regime and in particular under Article 24.1.c of Council Regulation (EEC) No 1785/81 of 30 June 1981, may an undertaking awarded a quota by a national authority attribute sugar as C sugar when that sugar is produced during a marketing year before the undertaking has actually completed production of a volume of sugar that is equivalent to the sum of its A and B quotas?'

39. Article 4 of Regulation No 2630/81, set out above, might be thought to give the most explicit of answers to that question, since it makes the issue of an export licence for C sugar subject to the condition that 'an equivalent quantity ... has actually been produced in excess of the A and B quotas of the undertaking concerned'.

40. But that is a mere implementing regulation adopted by the Commission and, as such, it cannot amend the basic regulation adopted by the Council on which it is based.

The first question

38. The first question asked by the national court indubitably calls for an answer. It is worded as follows:

41. If, with regard to the availability of C sugar, it introduced a condition which is inadmissible in the light of the basic

regulation, and in particular of Article 24(1)(c) thereof, it would, which the national court has most aptly perceived, as shown by the question it asks in the event of receiving an affirmative answer to the first question, have to be considered void.

42. In other words, a Commission implementing regulation cannot be relied upon as a means of interpreting the basic regulation, since the Commission's interpretation of a Council regulation, even though very rarely incorrect, is not to be regarded as authoritative.

43. The same observation holds good for Article 2 of Commission Regulation (EEC) No 65/82 of 13 January 1982 laying down detailed rules for carrying forward sugar production to the following marketing year, [6] referred to by the United Kingdom Government in order to show that IBAP's interpretation of Article 24(1)(c) was correct.

44. That point having been clarified, what interpretation is to be given to Article 24(1)(c) of the basic regulation?

45. Let me first of all point out that that provision does not expressly sequence the production of the various categories of sugar. The only unit of time to which it refers is the marketing year. Having regard to the fact that, as British Sugar has observed, sugar is a homogeneous commodity and that nothing therefore physically distinguishes the A, B and C categories at the end of the marketing year, an undertaking's production is divided between those three categories by means of a series of arithmetical operations. If an undertaking has produced a quantity less than its A quota, then it has produced only A sugar; if it has produced quantities greater than its A quota, that means that it has also produced B sugar, and if it has produced a quantity in excess of the sum of its A and B quotas, then it has produced C sugar. The quantity of C sugar produced is therefore obtained by subtracting the sum of its A and B quotas from its total production.

46. In other words, whether or not C sugar exists depends on whether or not there is production in excess of the sum of the A and B quotas.

47. That excess is itself a physical fact. It is one thing to foresee that, having regard to the quantities of beet harvested and currently being delivered to the undertaking, the balance-sheet drawn up at the end of the marketing year will reveal that C sugar has been produced. It is another thing already to have produced a quantity equivalent to the A and B quotas and still to have

6 — OJ 1982 L 9, p. 14.

raw material available to continue production, and thereby to produce sugar which, because it can no longer be classified as A or B sugar, must necessarily be classified as C sugar.

48. Taking into consideration the significant consequences attaching, under the system of the common organisation of the markets in the sugar sector, to an undertaking's classification of the sugar it has produced, in particular with regard to the levies payable by producers in order to ensure that the common organisation is self-financing and to guarantee the conditions under which sugar is exported, it seems to me impossible to allow a producer to rely on the estimates he makes as to the total quantity of sugar that he expects to produce by the end of the marketing year in order to classify at his own convenience, that is to say, more or less arbitrarily, as A, B or C sugar some of the sugar which he has actually produced at a given point in time.

49. Admittedly, it cannot be argued that it would have been impossible to afford producers that latitude. The Council could perfectly well have drafted the regulation otherwise than as it did, and provided that, in so far as he judges himself to be in a position actually to produce a quantity of sugar in excess of the sum of his A and B quotas, a producer is entitled at any time during the marketing year to place some of his sugar under the legal rules applicable to C sugar.

50. However, if it had so intended to let undertakings shoulder their own responsibilities, it would of necessity have taken care to define the consequences to which an error of assessment resulting in production in fact lower than predicted would have exposed the undertaking in question.

51. It is unimaginable that, in the light of the separate regimes applying to the different categories of sugar, the Council would have been able to permit undertakings to place their production, in bad faith but scot-free, under the regime which offered them the greatest advantages at a given time. To allow such conduct would have made it impossible for the various and highly complex mechanisms, the disposition of which constitutes the common organisation of the market, to function.

52. Those considerations seem to me to be sufficient to support the conclusion that Article 24(1)(c) of the basic regulation by implication lays down a chronological sequencing of production and, therefore, of the availability of the various categories of sugar produced by a given undertaking.

53. Confirmation of the existence of such chronological sequencing could be found, if need be, in the recitals in the preamble to Council Regulation (EEC) No 192/82 of 26 January 1982 amending Regulation

(EEC) No 1785/81 on the common organisation of the markets in the sugar sector,[7] to which the French Government has drawn the Court's attention.

54. There the Council has stated that the obligatory storage period for B and C sugar carried forward should no longer be fixed at the date of 1 February, so that producers who, on account of the region in which they are established, begin their production earlier may make use of the possibility of carrying sugar forward 'as soon as their production exceeds their A quotas'.

55. Many further points have been made by the United Kingdom and French Governments in support of the argument that there can be no question of an undertaking placing part of its production under the C sugar regime before it has produced a quantity of sugar equivalent to the sum of its A and B quotas.

56. I shall not set them out here, for two reasons.

57. First, they vary considerably in the degree to which they are relevant. For example, it seems to me unconvincing to claim that, if C sugar could be exported before production equivalent to the A and B quotas had been achieved, supplies to the Community market could be seriously jeopardised, with all the attendant risks in respect of the objectives attributed to the common agricultural policy, when it is not disputed that, once produced, A sugar may be exported and even be eligible for export refunds, which British Sugar has had every opportunity to point out.

58. It is, admittedly, true that an export levy may, if necessary, be imposed on quota sugar, specifically in order to guarantee supplies for the Community market, but a similar measure could also be adopted with regard to C sugar.

59. Furthermore, even if those considerations are correct, they do not appear to me to be conclusive, or in any event they appear less persuasive than the information which we can deduce from a close reading of Article 24(1)(c) of the basic regulation. They are predicated on there being consistency between the various mechanisms of the common organisation, and therefore involve lengthy arguments which I am unwilling to tackle, inasmuch as they would only serve to support an approach which I believe I have sufficiently demonstrated to be compelling.

60. The conclusion I have reached as regards the first question allows me to pass

7 — OJ 1982 L 21, p. 1.

straight to consideration of the third and fourth questions, which are closely connected to the first, the second question arising only in the event of the answer to the first being one which I have specifically rejected.

The third and fourth questions

61. Those two questions are set out as follows:

'(3) If the answer to Question 1 or Question 2 is "No", in the circumstances of this case, is the national authority in maintaining that the sugar exported as C sugar was A or B quota sugar and/or in then seeking to impose a charge pursuant to Article 3 of Commission Regulation (EEC) No 2670/81 of 14 September 1981 for the failure to dispose of C sugar outside the EC, in breach of one or more of the following general principles of Community law:

(a) the principle of [the protection of] legitimate expectations;

(b) the principle of legal certainty:

(c) the principle of non-discrimination;

(d) the principle of proportionality;

(e) the principle of the proper use of powers;

with the effect that the demand for the charge in the present case is void and unenforceable?

(4) Further or alternatively, if the answer to Question 1 is "No":

(a) Does the national authority have a discretion to vary the amount of the charge to be imposed pursuant to Article 3 of Commission Regulation (EEC) No 2670/81?

(b) If the answer to Question 4(a) is "yes", what factors may the national authority take into account in exercising such a dis-

cretion in the light, in particular, of the circumstances of this case?

(c) If the answer to Question 4(a) is "no", is Article 3(1) of Regulation 2670/81 void to the extent that it requires a national authority to levy a charge even when the amount of sugar disposed of on the internal market does not, in practice, exceed the sum of the relevant manufacturer's A and B quotas?'

62. Let me first consider, as the national court requests the Court, whether the mere fact of seeking to impose a charge on British Sugar, regardless of its exact amount, pursuant to Article 3 of Regulation No 2670/81, amounts to breach of one of the general principles listed in the order for reference, in light of the circumstances of the case.

63. Those circumstances have been described above, and I shall not go back over them, save to state that the exports made by British Sugar before 7 January 1993 could in no way be regarded as exports of C sugar, whatever the documents relating thereto may have indicated, and to point out that, in correspondence sent by British Sugar to Mr Liikanen, a member of the Commission, on 30 May 1997, which is included among the documents in the case before the national court, the undertaking states that:

'To date, we have not met anyone in a position of responsibility who disagrees with the following key points:

The classification of this particular sugar was a mistake which should not have been made by a company of our size and experience'.

64. I therefore consider it to have been established that British Sugar acted in contravention of the Community rules and that it acknowledges that, on the most favourable construction, that contravention is the outcome of a mistake which it ought never to have made.

65. That finding seems to me more than sufficient to exclude any possibility that the imposition of a penalty as a result of those contraventions could amount to breach of the principle of protection of legitimate expectations.

66. If British Sugar ought to have been aware that it had not acted in compliance with the Community legislation, since in

order for it to have done so it would have been enough for it to have been aware of Article 4 of Regulation No 2630/81, the subjectmatter of which is precisely the previous production of A and B sugar, I am at a loss to see how it could at the same time have become convinced that the contravention would not entail any consequences.

67. Nor can I see how the imposition on it of a penalty, quite clearly provided for by the Community legislation, could be considered to be detrimental to legal certainty. It is quite out of the question to affirm as a rule that, where a supervisory authority responds retroactively to the discovery of an unlawful operation, any measure it adopts in order to make the person responsible for the unlawful conduct bear the consequences attached thereto by the legislation undermines legal certainty.

68. It is only in special circumstances that that principle may set limits to the authority's actions, and I shall consider below whether the present case reveals such circumstances.

69. The fact that IBAP reclassified the exports in dispute, which had the automatic effect of laying British Sugar open to penalties did, it is true, cause damage to that undertaking but there is, to my mind, no justification for the party committing the contravention to complain that in the end, that is to say, when its infringement of the rules has been discovered by the supervisory authorities, it has to bear a loss the cause of which is to be found nowhere but in its own actions.

70. As regards the principle of equal treatment, British Sugar's argument that that principle is infringed if the penalty imposed on it is identical to that which would be imposed on an undertaking which had actually, unlike British Sugar, disposed of more sugar on the Community market than its A and B quotas allowed for does not stand up to scrutiny.

71. In Case C-161/96 *Südzucker*, [8] the Court held, with regard to sugar exported by a Community producer to a non-member country, that the fact that the sugar was actually exported is not sufficient to enable the producer to escape the application of Article 3 of Regulation No 2670/81 if the export was not effected in compliance with the formalities to which Community legislation subjects the export of sugar which the undertaking regards as C sugar.

72. It is therefore to no avail for British Sugar to seek to rely on the fact that it did not dispose of more sugar on the Community market than its A and B quotas allowed for in order to appear to be the victim of discrimination.

8 — Case C-161/96 *Südzucker* [1998] ECR I-281.

73. In the light of *Südzucker*, it seem to me equally fruitless to plead the principle of proportionality.

74. If the Court held in that judgment that, with regard to the export of C sugar, compliance with the customs formalities must be regarded as a primary obligation breach of which fully justifies the application of the penalty provided for by Article 3 of Regulation No 2670/81, it is hard, as the Commission has observed, to see how application of that penalty could fall foul of the principle of proportionality in a case such as this where the undertaking purports to have exported sugar as C sugar when it was obviously no such thing.

75. Last, as regards the principle of the proper use of powers, I must confess I do not perceive in what way the application by an administrative authority of a penalty provided for by Community legislation could amount to a misuse of powers, when all the conditions governing the application of that penalty are satisfied.

76. British Sugar has not denied that, from the time it was established that the exports in issue involved quota sugar, examination of the attribution of the sugar produced by British Sugar during the 1991/92 marketing year reveals a quantity of C sugar which was neither carried forward nor exported, and British Sugar cannot rely on any circumstances entirely outside its control.

77. Given that the answer to the third question must, in my opinion, be 'No', it is now necessary to consider the fourth, which takes us from the very principle of the penalty to its application in the actual circumstances of the case.

78. Let me say immediately that nothing in the wording of Article 3 of Regulation No 2670/81 gives grounds for interpreting that provision as conferring any discretion whatsoever on national authorities to vary the amount of the penalty, which, if we were to follow the scheme of the question as formulated by the national court, would have to lead us to question its validity.

79. That is not, however, the approach I shall take. It seems to me that the fact that the wording of Article 3 does not expressly provide for the possibility of variation does not mean that the latter is wholly excluded.

80. Like any other provision of secondary Community legislation, Article 3 must be interpreted, and therefore applied, in compliance with the rules of law which rank higher than it, which obviously include general legal principles.

81. Having regard to the facts of the case, it seems to me that we must contemplate taking into consideration the principle of proportionality.

82. I have just, it is true, stated that in my opinion it is not contrary to that principle for a charge to be levied pursuant to Article 3 of Regulation No 2670/81 on an undertaking which cannot claim to have exported C sugar, even though it did actually export sugar which it did not regard as falling within its A and B quotas. However, at that stage of the argument, I was dealing with the principle of the penalty.

83. If I now turn to the specific question of quantum, I am hard put to it to disregard the highly singular circumstances in which British Sugar's irregular transactions took place.

84. If those operations had been performed in the course of intentionally fraudulent manœuvres, it goes without saying that there could be no question of contemplating variation of the penalty.

85. It seems to me that any such variation must also be ruled out if it was the undertaking's unacceptable mistake, that is to say its negligence, which alone appeared to be the source of the irregularity since in that case the undertaking would have only itself to blame.

86. However, the situation under consideration would seem to be somewhat different. Plainly the undertaking is not the only party involved. From the facts set out by the national court, it appears that IBAP played a part in making it possible for quota sugar to be exported, ostensibly as exports of C sugar. I do not possess information which might enable me to understand why the intervention agency issued export licences when the applications did not contain the proof required by Article 4 of Regulation No 2630/81, or why that same body subsequently released the securities, that is to say, considered that the transactions were in order, even though it had in the meantime learned that it was only on 7 January 1993 that British Sugar had produced enough sugar to fill its A and B quotas.

87. Perhaps it too acted negligently and, in that case, its negligence does not to my mind amount to a reason to vary the penalty imposed on British Sugar, since it is only an addition to the latter's negligence, which Article 3 of Regulation No 2670/81 requires, in my view quite rightly, to be penalised by the imposition of the charge the method of calculating which it lays down.

88. However, perhaps too IBAP's conduct does not lend itself to being classified as mere negligence but must be regarded as actually wrongful. If such were to be the case, it seems to me that there would be scope for the application of the principle of proportionality, not to relieve British Sugar of all payment, but to vary the amount it has to pay.

89. That assessment of IBAP's conduct falls, to my mind, to the national court, which is best placed to undertake it. If, however, after painstaking examination of IBAP's conduct in its relations with British Sugar, the national court should reach the conclusion that IBAP might be found to have been definitively at fault, then Community law would not merely authorise it to vary the penalty but would require it to do so. In my view the common organisation of the markets in the sugar sector represents, even if the expression may shock, a form of planned economy, and where public authorities administer, account must be taken of the faults they may commit.

90. But those different considerations will perhaps be revealed retrospectively to be subsidiary. All will depend on the answer to be given to the fifth question.

The fifth question

91. The fifth question asked of the Court is worded as follows:

'Is the national authority, in the circumstances of this case, prevented from levying a charge pursuant to Article 3(1) of Commission Regulation 2670/81 where it has not notified the undertaking of such a charge in accordance with the time-limit contained in Article 3(2) of Regulation 2670/81 before 1 May of the relevant year and/or is the undertaking relieved of any obligations to pay such a charge in the above circumstances?'

92. Let us recall that, with regard to the charge to be paid by manufacturers deemed to have disposed of C sugar on the Community market pursuant to Article 3(1), Article 3(2) of Regulation No 2670/81 provides that:

'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.'

93. It is not in dispute between the parties in the main proceedings that it was by letter addressed to it on 19 May 1997 that British Sugar was sent an invoice by IBAP for the sum of GBP 6 641 608.10, an amount calculated on the basis of a quantity of C sugar neither carried forward nor exported of 16 650.465 tonnes.

94. It has also been established that it was at a meeting held on 29 September 1994 that IBAP informed British Sugar that it would find it necessary to apply the provisions of Article 3 of Regulation No 2670/81 to British Sugar.

95. British Sugar acknowledges that IBAP informed it at the beginning of November 1996 that the amount to be claimed from it exceeded GBP 6 million.

96. As regards the answer to be given to the fifth question, British Sugar submits that the competent national body must observe the time-limit fixed by Article 3(2) of Regulation No 2670/81, unless it is possible to plead exceptional circumstances.

97. In its view, such circumstances might arise from organised fraud by the undertaking concerned, concealing the disposal of C sugar on the Community market, or where it is impossible for the national intervention body to calculate the amount payable, for lack of available information essential to that calculation.

98. British Sugar argues that in this case, however, IBAP cannot claim that the circumstances are exceptional, so that the late presentation of the invoice relieved it of the obligation to pay the charge levied on it.

99. In addition, British Sugar is at a loss to see how it is possible to interpret Article 3 of Regulation No 2670/81 as meaning that the national invention body has no discretion in determining the amount of the charge to be paid by the undertaking which has disposed of C sugar on the Community market, but that that same body is not required to observe the deadline set by that same provision.

100. That is not the view of the United Kingdom Government. It argues that the competent authorities did not become aware of British Sugar's disposal of C sugar on the Community market until January 1994, as a result of the publication of the

report on the scrutiny visits paid to British Sugar between 26 October and 2 December 1993.

101. Since that report led the customs authorities to open an investigation in order to ascertain whether any fraud had been committed by the undertaking in relation to the monetary compensatory amounts for which exports of A sugar made before 1 January 1993 would have been liable, IBAP had to wait for the result of that investigation before taking any action whatsoever in respect of the application of Article 3 of Regulation No 2670/81.

102. Nevertheless, on 29 September 1994 IBAP informed British Sugar of its intentions, explaining that before it took any decision it would seek the advice of the Commission.

103. However, at the same time discussions were taking place between British Sugar and the customs authorities concerning the irregularities found by the latter, discussions which went on until May 1995, when proceedings were compounded with regard to the amount of the penalties to be paid by British Sugar because of its contraventions of customs regulations.

104. For its part, the Commission, informed by IBAP in March 1995 of the irregularities disclosed by the investigation of British Sugar carried out in the third quarter of 1993, had made its own investigations, using its anti-fraud unit (Unité coordination de la lutte anti-fraude, 'UCLAF') and did not consider itself sufficiently well-informed to be able to take up a position until July 1996.

105. Once it was established in principle that Article 3 of Regulation No 2670/81 had to be applied to British Sugar, several more months of discussions were needed in order to determine the exact amount for which it was liable, so that the invoice could not in fact have been sent to it before May 1997.

106. The Commission submits that the time-limit laid down by Article 3(2) of Regulation No 2670/81 cannot be regarded as being absolute, since to do so would make it impossible, once the period had expired, to recover charges in respect of irregular, and in some cases fraudulent, operations contrary to the spirit of Article 209a of the EC Treaty (now, after amendment, Article 280 EC), which requires the Community and the Member States to counter 'fraud and any other illegal activities affecting the financial interests of the Community'.

107. The provision in question must in essence be understood as requiring the Member States to act within the period prescribed in so far as they are aware of the

irregularity concerned. A similar approach, in respect of Community customs legislation, was followed in Case C-370/96 *Covita*.[9]

108. The Commission accordingly suggests that the answer to the fifth question should be that 'Article 3(2) of Regulation No 2670/81 does not preclude the authorities of a Member State from imposing a charge after the dates mentioned in that provision, where the irregularity concerned did not come to light in good time.'

109. To my mind, that answer could just as well have been proposed by British Sugar, subject to the reservation that that undertaking, with a view to ensuring that the national court should receive an answer of immediate usefulness in resolving the dispute before it, would have added that in the circumstances of the case there can be no justification for failure to comply with the time-limit. I would note that the national court is not asking the Court to rule on whether it was permissible in principle for the decision to be adopted after the time-limit had passed but on whether it was permissible in the actual circumstances to send the invoice on 19 May 1997, when the time-limit, as set by the terms of the provision in question, expired on 30 April 1994.

110. I need not therefore deal with the question whether the time-limit laid down by Article 3(2) of Regulation No 2670/81 is an absolute time-limit, which even British Sugar does not claim.

111. I shall merely observe that if the Court's case-law has classified certain time-limits fixed by regulations concerning the common organisation of markets, and in particular by the basic regulation relating to the common organisation of the markets in the sugar sector, as not being absolute,[10] that classification has always been the result of very close scrutiny of the reason for the period in issue and of the consequences for the traders in the sector concerned, favourable or otherwise, which might result from failure to comply with the time-limit.

112. In the case of the prescribed period in issue, I am inclined to consider that it was not fixed without regard being had to concerns for legal certainty.

113. In any event a time-limit must, of its very nature, be respected and even if in the light of a number of considerations, such as those put forward by the Commission, I cannot quite bring myself to call it absolute, it seems to me that there can be no question of systematically giving authorisation every time it is exceeded.

9 — Case C-370/96 *Covita* [1998] ECR I-7711.

10 — See, for example, Case C-289/97 *Eridania* [2000] ECR I-5409, paragraphs 20 to 34.

114. Let me say straight away that I consider British Sugar to have adopted an utterly reasonable view of the time-limit fixed by Article 3(2) of Regulation No 2670/81.

115. It seems to me imperative to prevent a mere failure to comply with a time-limit from enabling a trader who carried on plainly fraudulent practices in full knowledge of all the facts to escape any penalty.

116. Fraud is, by definition, deception and well-organised deception will very probably never be discovered or, if it is, only discovered very late in the day.

117. It must still be possible to penalise fraud discovered within a reasonable period, having regard to the artfulness involved, even if the period prescribed to that end by the rules has expired, so long as many years have not elapsed between the fraud and its discovery. Let it be borne in mind that in criminal law there are generally time-limits on the prosecution of even the most heinous crimes.

118. It also seems to me to be imperative, quite apart from cases of fraud orchestrated by the trader, for it to be permissible for the intervention body not to act within the period in question where it proves in the circumstances to be too short.

119. I am thinking in particular of cases in which the information required in order to calculate the amount payable is not available to that body or is made known to it just before the deadline of 1 May.

120. The intervention body may also, having regard to the documents produced, find it necessary to seek explanation or clarification from the trader. It will have to check and cross-check which, *ex hypothesi*, in most cases is not the work of a moment.

121. Nor is it inconceivable that the trader himself should have acted outside the periods prescribed, but that it should still be necessary in the light of the circumstances in which his operations took place to consider whether it might not be necessary to acknowledge that the conditions defining *force majeure* have been satisfied.

122. In all those cases, which are certainly not exhaustive, the fact that the intervention body delays the decision and its notification is in fact in the interest, properly understood, of the traders and to my mind there can be no question of treating a late decision as invalid, provided that the delay in its adoption remains within the bounds of the reasonable. If

the approach I propose is followed, what conclusion will be reached in this instance?

123. Let me state straight away that British Sugar does not appear to have designed a system intended to mislead the supervisory authorities.

124. It has not presented falsified documents to those authorities, it has not organised secret nocturnal transportation, it has not made unauthorised exports, it has not made clandestine deliveries to customers on the Community market, it has not hidden part of its production away in storage safe from prying eyes. It has, if I may so express it, taking account of the answer which I believe ought to be given to the first question, infringed the Community legislation in broad daylight.

125. I am even tempted to say that it was to the full knowledge of IBAP that British Sugar exported sugar which was not C sugar. I would point out that IBAP is always duly informed of British Sugar's production figures, that it received an application for the issue of export licences for C sugar which did not contain proof of the production of the required amount of quota sugar, that it was told that the required production of quota sugar was achieved on 7 January 1993, that it received in return documents attesting to both the date and the actual fact of exportation on the basis of the licences it had issued and that it authorised the release of the securities which British Sugar had had to lodge.

126. In fact, at least to start with, IBAP endorsed British Sugar's irregular operations, when it could have hindered them, if only by refusing to issue the licences applied for.

127. It would seem, however extraordinary this may appear, that at the moment when British Sugar declared that it had filled its quotas, no one in IBAP realised that the earlier issue of licences for the export of C sugar was anomalous.

128. In a word, if British Sugar has at the very least displayed carelessness in believing itself authorised to export C sugar before 7 January 1993, IBAP has displayed just as much carelessness in the performance of its supervisory duties.

129. Let us, however, suppose for the moment that IBAP was unable to discover the existence of irregular operations in the export of C sugar by British Sugar until the end of 1993, that is to say, when the report of the scrutiny visits during the last quarter of 1993 was drawn up.

130. IBAP then had four months to draw the appropriate conclusions from those irregularities and cannot now take refuge behind the fact that it could not carry out the calculations to determine the amount for which British Sugar was to be declared liable.

131. It had available to it all the documents necessary to establish very precisely how much A sugar had been exported as C sugar, and thus how much sugar which was actually C sugar had been disposed of on the Community market, or was still stored, by British Sugar.

132. Furthermore, the fact that the customs authorities opened an investigation into the circumstances surrounding British Sugar's exports at the end of 1992/beginning of 1993 ought to have induced IBAP to ascertain whether those operations were lawful having regard to the rules which it was responsible for enforcing and to take action if it found irregularities.

133. IBAP declares, however, that it was not in a position, even after it had been informed of the existence of irregularities, to take a decision before May 1997. I do not believe that to be the case.

134. I fail to see how the fact that a customs investigation was being conducted, in order to find out whether any offences to which a penal sanction might apply had been committed, prevented IBAP from drawing the appropriate administrative conclusions from irregularities the existence of which was beyond dispute.

135. Given that it was perfectly well aware of all the operations carried out by British Sugar throughout the marketing year, it was in a position to establish for itself the quantity of C sugar neither carried forward nor exported which must be used to calculate the charge payable by the trader under Article 3 of Regulation No 2670/81.

136. Lastly, and above all, IBAP had full and unlimited jurisdiction to apply that provision. It was not, it is true, debarred from seeking the Commission's opinion, but in law that opinion was not only not required but was not even binding on it.

137. Let it be borne in mind that the implementation of regulations relating to the common organisation of markets is, save where expressly provided otherwise, a matter for the national authorities alone.

138. By putting off the adoption of its decision until such time as the Commission had very clearly shown it what steps to take, IBAP in reality failed to have regard to its own jurisdiction.

139. That is why I am in no way inclined to consider acceptable a delay of three years caused by that disregard.

140. The United Kingdom Government argues, however, that if the decision was adopted so belatedly, that was essentially because British Sugar asked IBAP to negotiate with the Commission and reach an agreement with it as to a moderate penalty.

141. British Sugar is not therefore, in that Government's view, entitled to plead the lateness of a decision which was delayed in its own interests. I do not for a single moment doubt that IBAP attempted to play the role of honest broker between British Sugar and the Commission, and not without success, since it seems that at one time the Commission was of the opinion that an even greater penalty should be imposed on British Sugar.

142. But there was in point of fact nothing to prevent IBAP, during the period prescribed, from applying Article 3 as it interpreted that provision in the exercise of its own responsibility. It could perfectly well have imposed immediately on British Sugar, as a provisional measure, the penalty fixed by that provision, while approaching the Commission to ascertain whether the latter was prepared to accept that to fix a lesser amount could constitute an unexceptionable application of the Community legislation.

143. Such a step would have been perfectly justified and would have protected at one and the same time the interests of IBAP, British Sugar and the Community.

144. Instead, IBAP chose a wait-and-see policy and put back adopting the decision imposing a penalty on British Sugar beyond what was reasonable, taking little account of the requirements of legal certainty.

145. For those reasons I propose that the Court should reply to the national court that, in the light of the circumstances of the case before it, the undertaking is relieved of any obligation to pay the charge demanded of it.

146. Although the answer I propose to the fifth question seems to me to be capable on its own of providing the national court with the outcome of the dispute which it has to resolve, I shall deal briefly with the sixth question.

The sixth question

147. The sixth question is worded as follows:

'In the circumstances of this case, is the national authority obliged to pay the export refunds which the undertaking would have applied for at the time of export and would have been payable if the sugar described as C Sugar and exported under C Sugar Licences had been designated as A and B quota sugar, on the grounds that:

(a) the national authority can retrospectively accept an export declaration under Article 3 of Commission Regulation No 3665/87 and the circumstances of the present case constitute a reason of force majeure entitling it to extend the period for the furnishing of proof under Article 4 of Commission Regulation 3665/87?

And/or on the grounds that:

(b) a refusal to pay such export refunds would constitute a breach of the principles of the protection of legitimate expectations and/or legal certainty and/or proportionality and/or proper use of powers?'

148. To my mind, there can be no question, even in the circumstances of this case, of envisaging that it could be possible for the national authority to accept, retrospectively, an export declaration presented with a view to obtaining export refunds.

149. Export refunds form an essential constituent in the regulation of the sugar market of which the Commission makes permanent use in the light of the developments it notes on that market. The refunds are fixed in relation to world market prices and to the export opportunities open to traders. The grant of a given amount of refund at a given time is the result of the Commission's reconciliation of various requirements.

150. Authorising a trader to apply, several years after the end of a marketing year, for refunds provided for at a particular moment during that marketing year would be tantamount, if I may make this comparison, to allowing a gambler in a casino to place his stake on the roulette wheel after the ball has already stopped on a number.

151. There is nothing to support the argument that, if the quantities for which British Sugar now seeks refunds had in fact been recorded at the time of actual export

as having to be exported with a refund, the level of refund would have been what it was, since the past cannot be relived.

152. I do not wish even to contemplate here the headache of calculating the production levies which would retrospectively prove necessary in order to finance those refunds. The 1992/93 marketing year has been definitively closed and it is inconceivable that its balance-sheet should be redrawn in order to save British Sugar having to bear losses which, need I point it out, are simply the consequence of its own negligence, and cannot be attributed to any event amounting to *force majeure*.

153. As regards calling on the general principles of law referred to by the national court in order to challenge the legality of the refusal to pay refunds to British Sugar, it is beyond doubt that neither the circumstances of the present case nor the operating rules of the common organisation of the markets in the sugar sector allow of it.

154. After consideration of the questions referred to the Court by the national court, it is certainly worthwhile to summarise the various findings made.

155. First of all, it is to my mind clear that a sugar manufacturer may not purport to dispose of C sugar so long as it has not yet produced more than the sum of its A and B quotas. British Sugar has therefore not complied with the Community legislation. This must, I believe, be pointed out in any event to the national court.

156. Next, however, given the conclusion I have reached in respect of the fifth question, that British Sugar must be relieved of all payment because of the significant delay in the adoption of IBAP's decision to penalise it, it seems to me, if the Court follows me on this point, that there is no need to answer the third, fourth and sixth questions, which I have considered with a view to comprehensiveness.

157. If, none the less, it appears to the Court that those questions ought to be answered, then I believe that the answer to the third must be that British Sugar has indeed incurred a penalty, to the fourth that the amount of that penalty might be less than that which would be imposed by application of the calculation method laid down by Article 3 of Regulation No 2670/81, if the national court were to find that IBAP was clearly at fault and, to the sixth, that there is no way in which the retrospective grant of export refunds may even be contemplated.

Conclusion

158. In consequence, I propose that the Court should answer the first and fifth questions referred to it by the High Court of Justice as follows:

— under the Community sugar regime and in particular under Article 24(1)(c) of Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector, an undertaking awarded a quota by a national authority may not attribute sugar as C sugar when that sugar is produced during a marketing year before the undertaking has actually completed production of a volume of sugar equivalent to the sum of its A and B quotas;

— in the circumstances of this case, the national authority is prevented from levying a charge pursuant to Article 3(1) 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, since it has not acted within a period of time compatible with the requirements of Community law;

and, if an answer must be given to the third, fourth and sixth questions, that:

— where a national authority claims that sugar exported as C sugar was A or B sugar and/or where it seeks to impose a charge pursuant to Article 3 of Regulation No 2670/81 for failure to dispose of C sugar outside the

Community, it is not in breach of the principle of protection of legitimate expectations or of the principle of equal treatment or of the principle of proportionality or the principle of the proper use of powers;

— in circumstances such as those of this case, a finding by the national court that the national intervention body was clearly at fault requires downward variation of the amount of the penalty imposed pursuant to Article 3(1) of Regulation No 2670/81;

— even in circumstances such as those of this case, the national authority is in no way bound to grant refunds for quota sugar which has been exported without prior presentation of the export declaration upon which the Community legislation makes the grant of those refunds conditional.