Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Finanzgericht, Berlin, by order of that court of 12 January 1971, hereby rules:

The provisions of Article 2 of Regulation No 865/68 of the Council of 28 June 1968 on the common organization of the market in products processed from fruit and vegetables, in conjunction with Additional Note No 2 to Chapter 20 of the Common Customs Tariff, to which reference is made in Article 9 of the said regulation, must be interpreted as meaning that only products processed by the actual addition of sugar are subject to the levy, but that if the sugar content of a product coming under tariff heading 20.06 B I (e) exceeds 9% by weight, it is for the importer to prove that the product contains only natural sugar.

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 17 June 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 27 MAY 1971[1]

Mr President,
Members of the Court,

Although the problem created by this case is very complicated its origin is simple.
The Community sugar market is an organized market and, as you know, there is a levy on the import of sugar from third countries into the Community.
The fruit and vegetable market is likewise an organized market, but it is one of the few markets of this type in respect of which there are no levies or refunds, imports being subject only to

1 — Translated from the French.

customs duties laid down by the Common Customs Tariff.

To combine these two organizations of the markets was both necessary and difficult.

That the sugar content of fresh fruit should be subjected to the levy never contemplated; however, there was apprehension lest, in default of any special provisions, the import of products processed from fruit should create a considerable breach in the protection and equalization system which was set up by the Community rules concerning sugar.

In fact all fruit products contain sugar, either simply natural fruit sugar or else sugar due in part to addition during the processing of the fruit.

Given the considerable volume of imports of this type of product into the Community, if no action had been taken, large quantities of sugar added to fruit (40 000 metric tons a year according to some estimates) would have been able to escape the Community levy on imports of sugar.

To deal with this situation the Council adopted several successive regulations: Regulation No 220/67 of 30 June 1967, Regulation No 789/67 of 31 October 1967 and then Regulation No 865/68 of 28 June 1968.

It is the application of Regulation No 865/68 which lies at the root of the proceedings, concerning which a German finance court has referred to this Court the question of interpretations which you now have to consider.

In September 1969 the Bagusat partnership submitted to a Berlin customs office considerable quantities of cherries in spirit from Yugoslavia.

These cherries are known in German as 'Weichselkirschen', which was translated into French in the pleadings as 'griottes' (morello cherries).

In fact, on inquiry, it appears that this is a variety of a species of cherry known as 'Santa Lucia' which grows on the shores of the Adriatic and which is called in Italian 'amarasca' and in French 'marasques' from which presumably comes the name of the liqueur known as maraschino.

At first the German customs authorities took the view that whilst these cherries were liable to customs duty and to various related taxes, they could not give rise to the imposition of the levy on sugar.

However, when an analysis revealed that the sugar content of the goods exceeded the 9% stipulated by Additional Note No 2 to Chapter 20 of the Common Customs Tariff, annexed to Regulation No 950/68 of the Council of 28 June 1968, the customs authorities changed their mind and took the view that the levy could be imposed.

The importer protested, maintaining that there had been no addition of sugar, and announced his readiness to bring evidence that this was so.

The German customs authorities, however, remained firm, maintaining that, once the sugar content was in excess of 9%, the levy was payable even if there had been no actual addition of sugar, which they did not contest.

In pursuance of Article 177 of the Treaty, the competent German finance court hearing this case has referred to this Court the following questions:

(a) May Article 2 of Regulation 865/68 in conjunction with Article 9 of that regulation and with the provisions of the Common Customs Tariff (Additional Note 2 to Chapter 20, tariff heading 20.06 B I (e)) be interpreted as meaning that when the sugar content established by refractometry exceeds 9% by weight it is necessary to consider that there is 'added sugar', or must it be considered that in accordance with Regulation No 865/68 the goods (in this case, morello cherries in spirit) can be subject to the levy only if sugar has in fact been added to them?

(b) On the assumption that a sugar content in excess of 9% by weight must be regarded as 'added sugar' within the meaning of Regulation No 865/

68, and that it is irrelevant whether sugar has in fact been added, is this rule compatible with the objectives of Regulation No 865/68?

(c) If the answer to the second question is in the negative, does it follow from the incompatibility thus established that there has been an infringement of Community law such as to make it impossible to impose the levy, or must that levy nevertheless be imposed despite the fact that such was not the intention of the Community legislature?

In my opinion the problem placed before the Court by the first of these questions has two aspects:

The first is to determine, to repeat traditional terminology, the 'chargeable event', the 'Steuertatbestand' for the levy introduced by Regulation No 865/68.

Is it the presence of sugar in excess of a certain percentage?

Is it, on the other hand, merely the *actual* addition of sugar during the processing of the product?

The second aspect of the problem concerns the procedure and the burden of proving that sugar has or has not been added to the processed product.

I

Regarding the first of the abovementioned aspects of the problem which this Court must solve, three arguments are placed before the Court:

The first is that of the importer, which claims that the levy can be imposed only if there has been an *actual* addition of sugar to the product.

The second is that pleaded by the German customs authorities before their national court; it consists mainly in the assertion that although there may be some doubt concerning the interpretation of Regulation No 865/68, this doubt is removed by the second paragraph of Additional Note No 2 to Chapter 20 of the Common Customs Tariff which provides expressly that 'The products classified under heading No 20.06 shall be considered as "containing added sugar" when the "sugar content" thereof exceeds . . . . 9%'.

The third argument is that submitted to the Court by the Commission which regards Additional Note No 2 to Chapter 20 as only a quite secondary consideration but which considers that according to Regulation 865/68 itself, processed products must be subject to the levy even *if in fact no sugar has been added to them,* once their sugar content exceeds a certain percentage.

For my part I am of the opinion that the levy is applicable only when an *actual* addition of sugar has taken place during the processing of the imported product.

This interpretation appears to me in fact to follow, as I shall try to demonstrate, from:

— the actual wording of Regulation No 865/68,

— the objective pursued by the authors of this regulation,

— finally, the principles which the regulation itself lays down with regard to its application.

1. The wording of Regulation No 865/68.

It seems certain that the authors of the regulation intended to submit to the levy only products processed with the addition of sugar.

The preamble to this regulation sets out the reasons why 'provisions must therefore be adopted to ensure that a levy is charged on the *sugar component incorporated* in processed products'.

Article 2 (1) which establishes the levy reads as follows: 'In addition to the customs duty referred to in Article 9 (1), an import levy calculated as described in the paragraphs which follow shall be charged on the *various added sugars* contained in the products listed in Annex 1'.

There is perfect agreement on this point between the German, French, Dutch and Italian versions.

In all the other provisions of this regulation concerning this levy, to which I shall return shortly, as indeed in those concerning refunds which are established parallel to the levy, the same concept of 'added sugar' is found.

Finally, the drafting is almost identical in Regulation No 2275/70 which amended Regulation No 865/68.

The care taken by the Community authorities to specify this point on every occasion is significant in itself.

2. It is even more significant if not only the text but the purposes pursued by the regulation are considered.

What were they in fact? To fill a lacuna the Community organization of the market in sugar and to prevent sugar from being introduced into the Community which, imported in its pure state would have been subject to the levy, but which, mixed with fruit, would have escaped it.

It is therefore apparent that as is the case of fresh fruit, it was not intended to subject to the levy the natural sugar in prepared fruit but only the sugar added to the fruit during the processing operations.

I believe that to interpret the Community regulation otherwise would attribute to it a meaning different from that intended by its authors.

The desire of the latter was to protect the Community sugar market, but not to protect the Community market in products processed from fruit as a whole.

It is necessary also to note that the authors of the regulation, probably fearing a misunderstanding on this point, formally expressed their intention, which is the third reason which in my view militates in favour of the interpretation which I commend to the Court.

3. In fact, the penultimate article of the regulation, Article 18, contains a provision, the usefulness of which is not apparent at first sight. It reads in fact: 'This regulation shall be so applied that appropriate account is taken, at the same time, of the objectives set out in Articles 39 and 110 of the Treaty.'

What is the purpose of such a provision? Why remind everybody of that duty of which we are all aware, to apply the provisions of the Treaty?

The reason appears to be that the authors of the regulation feared that it might be applied too widely.

The reason why they have drawn attention to two articles, 39 and 110 of the Treaty, is because whilst Article 39 enumerates the objectives of the Common Agricultural Policy, Article 110 formally states: 'By establishing a customs union between themselves Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers'.

By providing expressly that in the application of Regulation No 865/68, regard must be had to these two articles *concurrently*, the authors of the regulation in my view clearly tried to say: 'Take care! The objective of this regulation is only to protect the Community market in sugar; let nobody use it to protect the Community market in products processed from fruit when these processed products from third countries do not contain sugar'.

The same fear has furthermore been expressed repeatedly by the Parliament and particularly by its Committee on Economic Affairs. In its report of 30 April 1969, Doc. No 23, that Committee expresses the fear that the provisions of Regulation No 865/68 'may ensure too great protection for Community production' and underlined the dangers which such a situation would present, particularly for the developing countries for which 'the manufacture of preserved fruit and vegetables is one of the leading activities to be considered with regard to the industrialization of these countries'.

It is quite obvious that to give to Regulation No 865/68 an interpretation such as would lead to subjecting to the levy fruit processed without any actual addition of sugar would lead precisely to the

result which the authors of the Regulation wished to avoid and which gave rise to the fears of the Parliament.

The strength of these various considerations which have already appeared decisive to certain German financial courts[1] has not escaped the Commission and perhaps explains why neither the Council nor the German Government has considered that it should express an opinion in this case.

Nevertheless the Commission asks you to adopt the opposite interpretation to that which I have suggested and on this subject puts forward various arguments, all of which are certainly important, but of which none, let it be said at once, appears to me to be decisive.

1. The Commission's first argument is an argument based on the general scheme of the various provisions included in Regulation No 865/68.

It consists in the assertion that in order to interpret the provisions of Article 2 (1) of Regulation No 865/68, they must be read in conjunction with paragraphs (3) and (4) of the same article.

The Commission concedes that the statement of reasons on which Regulation No 865/68 is based and Article 2 (1) and several other provisions of the regulation only prescribe the levy for cases of added sugar. But according to the Commission that is not the statement of a binding rule, but rather the declaration of an objective which does not preclude the treatment of products the total sugar content of which, whatever its origin, exceeds certain percentages as products containing added sugar.

This argument had already been outlined by the Commission in a reply to Question No 258/70 from Mr Vredeling (OJ C 133, of 5.11.1970, p. 21). Giving the reasons for new provisions concerning imports of fruit juices, the Commission stated in fact that the new provisions had proved necessary to 'avoid imports of juice with a strong concentration of natural sugar, but containing no added sugar, from being subject to a levy which *should* be imposed only on imports of juice containing added sugar'.

The use of the conditional 'should' shows the basis of the Commission's reasoning. The exemption from the levy for products processed without the addition of sugar is a desirable objective but it is not, according to the Commission, a legal requirement.

In order to find a legal basis for that argument, the Commission in its observations, as I have told you, relies upon Article 2 (3) and (4) of the regulation.

These paragraphs concern the procedures for determining 'the added sugar content'. They lay down two methods, one which the Commission describes as the 'fixed method' which requires no examination of the product, and the other which the Commission calls the 'individualized method' which requires testing the product with a refractometer. I think it useless to describe them to you in detail, which would necessarily take a long time since these methods are quite complicated. It is sufficient for me, I think, since it is the essential point of the Commission's argument, to inform you that the determination of the amount of the levy in these two cases results from the application of what the Commission calls a *'legal fiction'* or an *'irrebuttable presumption'*. The total sugar content is ascertained, then a fixed figure appearing in a table annexed to the regulation is deducted from this total sugar content; this figure is regarded as representing the natural sugar content and the levy is then calculated in accordance with the results of that subtraction. For this reason, the Commission maintains, the provisions of Article 2 (1) must be interpreted in conjunction with the provisions of paragraphs (3) and (4) of the same article. If the Community authorities after establishing a levy on added

1 — Finanzgericht Hamburg, 17 October 1969: concentrated orange juice without added sugar or spirit.
Finanzgericht Baden-Württemberg, 11 February 1970: concentrated Brazilian orange juice.
Finanzgericht Bremen, 21 January 1970: Spanish apricots without added spirit, but with added sugar.

sugar have provided that this addition of sugar could be calculated by way of legal fictions or by irrebuttable presumptions, these same fictions or presumptions must be used to determine whether or not a product is subject to the levy.

As the Court will have found on reading the Commission's written observations, that argument is brilliantly developed and most ingenious.

It has not convinced me, however, because in my opinion it arises from confusing for dialectic purposes two fiscal concepts which I consider must, on the contrary, always be distinguished carefully:

— The chargeable event, the 'Steuertatbestand',

— the detailed rules concerning the basis of assessment, the 'Bemessungsgrundlage', of that charge.

In the present case it is certain that paragraphs (3) and (4) of Article 2 of the Regulation refer solely to the detailed rules concerning the *basis of assessment to the levy*. In fact they prescribe according to their very wording the detailed rules in accordance with which 'the added sugar content' of the product is determined.

Paragraph (1) concerns the *chargeable event* and this chargeable event, as I have said, is the addition of sugar and solely the addition of sugar.

The inter-relation of the various paragraphs of Article 2 appears to me capable of being summarized shortly in the following manner:

If there is added sugar (paragraph (1)), the added sugar content from which the levy is calculated is determined as described in paragraphs (3) and (4).

The technical explanations which we were given the other day during the oral proceedings have reinforced my conviction upon this point, because it appeared to me in fact to follow from them that, although there is a difference of opinion as to the possibility of detecting easily the presence of added sugar in a product manufactured from fruit, there is agreement on the point that it is practically impossible to ascertain the quantity of added sugar.

Thus it is perfectly understandable that the Council was able to introduce a levy which is applicable only to products which have actually had sugar added to them and to provide at the same time that the added sugar content is calculated by methods partly depending on 'legal fictions' or on 'irrebuttable presumptions'.

2. It is the Commission's second argument which caused me the most hesitation just now.

It is based on the fact that when the Community authorities wished to exempt products containing a strong concentration of natural sugar from the levy, they adopted special regulations for that purpose.

At first sight this appears to be a very weighty argument, because from the existence of the regulations relied upon (to my knowledge there are four of them, of which three relate to fruit juice) one might well infer *a contrario* that Regulation No 865/68 ought to be interpreted as meaning that, as a general regulation, when products have a sugar content in excess of a certain percentage, they are subject to the levy, since it appeared necessary to adopt special regulations to exempt some of them therefrom.

But an examination of the actual wording of these regulations in my view removes the value of this argument largely if not totally.

In fact what do these regulations achieve, whether they be Regulation No 1604/68, Regulations Nos 455/69, 1906/70 or 2613/70?

They amend Annex A to Regulation No 865/68, that is to say, the table to which Article 2 (3) and (4) of the regulation refer, which as I have just endeavoured to show you, concern merely the detailed rules relating to the basis of the assessment to levy not the chargeable event giving rise thereto.

Their effect is thus to diminish or even reduce to nothing the amount of the levy

when it is applicable, but not to modify the conditions of its applicability.

Furthermore, they could not, I believe, legally have such an effect because as these regulations are Council regulations, they are regulations adopted without the opinion of the Parliament, and are thus implementing regulations applying basic Regulation No 865/68 and therefore cannot legally extend or restrict the field of application of the levy introduced by Article 2 (1) of that basic regulation.

The Commission's third group of submissions is based upon the alleged physical impossibility in which the customs authorities would find themselves of applying the Community rules if they could not have recourse, in order to determine the presence or absence of added sugars, to this 'legal fiction' consisting in a sugar content in excess of certain percentages fixed in advance.

But this last argument is linked in fact to a second aspect of the first question which has been submitted to you by the German finance court and which I mentioned to you earlier: the system of proof of the addition or absence of added sugar.

II

This second aspect of the first of the questions which are submitted to you by the German court leads me to consider the relationships between Regulation No 865/68 and Additional Note No 2 to the Explanatory Notes to Chapter 20 of the Common Customs Tariff.

Note No 2 in its 1968 edition reads as follows:

'The products classified under heading No 20.06 shall be considered as 'containing added sugar' when the 'sugar content' thereof exceeds by weight the percentages given hereunder, according to the kind of fruit concerned:

— pineapples and grapes 13%
— other fruits, including mixtures of fruit ..... 9%'

The Berlin Customs Office, by a legally questionable argument but one which nevertheless had logic and simplicity on its side, had considered that this provision at the same time as fixing the applicable customs duty determined the products subjected to the levy.

The Commission has seen the dangers in this reasoning and has expressly set it aside.

In fact, it says, although they were adopted on the same day, the regulation relating to the Common Customs Tariff and Regulation No 865/68 have different fields of application.

Certainly Article 9 of Regulation No 865/68 does refer to the general rules and the special rules of interpretation of the Common Customs Tariff, but it refers to them only for the tariff classification of the products to which the regulation relates.

The Commission considers also that the common external tariff was not able to create a 'legal fiction' in respect of the determination of the products subject to the levy, but Regulation No 865/68 itself did so.

The Commission pursues its argument by claiming that if, in accordance with what I was suggesting to you just now, you do not accept the creation of this legal fiction by Regulation No 865/68, the whole system created by Additional Note No 2 would collapse. The customs authorities would then have to determine in each case whether each product contains added sugar or not, which for both practical and scientific reasons they would be unable to do.

I hope that the Commission will not bear a grudge against me if I say that its argument reminds me of the proverb: 'Give a dog a bad name and hang it'.

The Commission is so eager to have the Court interpret Regulation No 865/68 as enabling even products containing no added sugar to be subjected to the levy that it in my view exaggerates the consequences of a contrary interpretation.

If it is accepted that Regulation No 865/68 only enables products processed with the actual addition of sugar to be

subjected to the levy, Additional Note No 2, to which Article 9 refers, not only does not become void, as the Commission maintains, but on the contrary it enables Regulation No 865/68 to be applied in a way which is both legally acceptable and takes account of the practical requirements of the customs authorities.

In fact, unlike the Commission, I feel that Additional Note No 2 does not create a 'legal fiction' as the Commission says, that is to say, in other words an 'irrebuttable legal presumption' but a *mere presumption.*

If the product contains less than 9% sugar, it is presumed to contain only natural sugar and it would then be for the customs authority, if it had doubts on this point, to prove the addition of sugar. This last hypothesis is purely theoretical as regards products which come under heading 20.06, because the levy, although payable, would in such a case be nil and the customs authority would have no interest in proving the addition of sugar.

As I see it, three reasons appear to militate in favour of this method of interpretation of the Additional Note.

(1) 'Irrebuttable' presumptions are still the exception in all our legal systems.

Even the presumption 'Is pater est, quem nuptiae demonstrant' does not preclude a denial of paternity and it is not possible to see why a 'denial of sugar' should be prohibited.

When there is a presumption I believe that it is necessary always, except where there is an express indication by the legislature, to regard a presumption *juris tantum* as a mere presumption.

(2) The wording of Additional Note No 2 does not prevent it from being a presumption of this type.

The 1968 wording says: 'The products . . . shall be *considered* as "containing added sugar" when the "sugar content" thereof exceeds . . .' *et seq.*

The amended 1969 wording includes the same phrase.

(3) Finally the third reason is that such a method of interpretation avoids giving a ruling on the issue contested during the written and oral proceedings by the Commission's Agent and the representative of the Bagusat partnership, concerning the possibility of determining the presence of added sugars scientifically.

According to the information which I have been able to cull from various works of reference, and to the extent to which I have understood them correctly, it appears that both parties are partially right.

It appears in fact that *to determine the quantity* of added sugar in a product containing natural sugar is, as I have already said, if not impossible at least *very difficult.*

It appears on the other hand that specialized laboratories may in any case be able to *detect* added sugars in a product.

However that may be, if the Court accepts the interpretation which I suggest with reference to the method of proof, the question loses much of its importance.

If the sugar content of a product which comes under heading 20.06 exceeds 9%, it will be for the importer to bring evidence that this sugar is natural sugar, and so the laboratories of the customs authorities will not need to carry out the necessary research.

To sum up I therefore propose to the Court that it should answer the first of the German finance court's questions by ruling that: 'The provisions of Article 2 of Regulation No 865/68 subject to the levy only the products enumerated in Article 1 of the said regulation which have been processed by the actual addition of sugar' and that, 'by application of the Rules of Interpretation of the Common Customs Tariff (Additional Note No 2 to Chapter 20, heading 20.06 B), to which Article 9 of Regulation No 865/68 refers, when the sugar content of these products exceeds 9%, it is for the importer to prove that they contain only natural sugar'.

III

In conclusion let me say a word concerning the second and third questions referred by the German finance court.

Let us take note first of all that if this Court accepts the interpretation which I have just proposed, these questions become pointless and the Court has no need to reply to them.

If on the contrary you accept the interpretation proposed to you by the Commission, the validity of Regulation No 865/68 thus understood would appear to me very doubtful for at least two reasons:

(1) The lack or inadequacy of the statement of reasons upon which it is based would then, in my opinion, be beyond question.

Since the object of the regulation is to impose the levy on the sugar *added* to products, its authors, if they had the intention of having it applied in certain cases to products containing no added sugar, ought at least to have given their reasons.

(2) But there is probably a more serious flaw.

In my opinion, to subject to the levy products processed from fruit containing no added sugar, which the Commission very fairly accepts would follow from the interpretation which it proposes, would in my view far exceed the desired object which was merely to prevent 'clandestine' imports as it were of sugar into the Community by means of processing fruit with the addition of sugar.

The Commission, it is true, maintains that the charge thus imposed on importers would to a certain extent be compensated for by the fact that with the interpretation which it suggests to you, processed products containing added but having a total sugar content which is below certain percentages would escape the levy (this is the case for example in respect of pineapples).

But it is not at all certain that the charges and the advantages would affect the same importers.

I think on the contrary that a measure which makes products containing only natural sugar liable to a levy would be contrary to the principle of proportionality which, the Court has held, 'is an integral part of the general principles of law the observance of which the Court of Justice ensures'.

It could only be otherwise, in my view, if an expert's report ordered by the Court showed that contrary to my belief the addition of sugar is not only difficult but *impossible* to establish scientifically.

I hope that the Court will consider, as I do, that it is not necessary for it to consider these questions or to order that measure of inquiry, and I conclude that you should hold that:

(1) the provisions of Article 2 of Regulation No 865/68 submit to the levy only the products enumerated in Article 1 of the said regulation which have been processed by the actual addition of sugar. By application of the Rules of Interpretation of the Common Customs Tariff (Additional Note No 2 to Chapter 20, heading 20.06 B), to which Article 9 of Regulation No 865/68 refers, when the sugar content of these products exceeds 9%, it is for the importer to prove that they contain only natural sugar;

(2) the answer to the first question raised deprives the other two alternative questions of any purpose.