storage costs shall be granted for sugar which is in transit at the beginning of the month, must not be regarded as merely interpreting the above-mentioned Article 3 (1) to the effect that sugar in transit between approved warehouses fulfils, in principle, the requirement that the product be stored in a warehouse.

2. Discrimination consists in treating differently situations which are identical, or treating in the same way situations which are different.

3. The fact that reimbursement is granted in respect of storage costs for sugar which, at the beginning of the month, is in transit between two approved warehouses situated in the same Member State but is not granted in respect of sugar which is in transit between two approved warehouses situated in different Member States does not amount to discrimination prohibited by Community law. The difference of treatment is based on requirements of supervision which may be justified objectively.

In Case 8/82

REFERENCE to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht [Administrative Court] Frankfurt am Main for a preliminary ruling in the action pending before that court between

KOMMANDITGESELLSCHAFT IN DER FIRMA HANS-OTTO WAGNER GMBH AGRARHANDEL, Bad Homburg,

and

BUNDESANSTALT FÜR LANDWIRTSCHAFTLICHE MARKTORDNUNG [Federal Office for the Organization of Agricultural Markets], Frankfurt am Main,

on the interpretation of Article 3 of Council Regulation (EEC) No 1358/77 of 20 June 1977 laying down general rules for offsetting storage costs for sugar and repealing Regulation (EEC) No 750/68 (Official Journal L 156, p. 4) and of Article 40 (3) of the Treaty on the validity of Article 11 of Commission Regulation (EEC) No 1998/78 of 18 August 1978 laying down detailed rules for the offsetting of storage costs for sugar (Official Journal L 231, p. 5),

THE COURT (First Chamber)

composed of: A. O'Keeffe, President of Chamber, G. Bosco and T. Koopmans, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and written procedure

Article 8 of Regulation (EEC) No 3330/74 of the Council of 19 December 1974 on the common organization of the market in sugar (Official Journal L 359, p. 1) provides for a scheme to reimburse storage costs for sugar produced from raw material of Community origin. The flat-rate reimbursement, which is paid by the Member States, is financed from levies on producers and importers. The offsetting of costs enables a constant price level to be maintained throughout the marketing year and avoids excessive recourse to intervention agencies after the marketing year has ended.

The Council, acting pursuant to Article 8 (2) (a) of Regulation No 3330/74, fixed the general rules for the offsetting of storage costs for sugar in Regulation No 1358/77. Article 2 of that regulation provides that only traders approved as specialized undertakings by the Member State concerned and fulfilling a number of conditions to be specified are entitled to reimbursement. Only stored sugar owned by the undertaking concerned affords a right to reimbursement.

Article 3 of Regulation No 1358/77 provides that:

"(1) Reimbursement shall be made in respect of:

Undenatured white and raw sugar and certain syrups produced within the maximum quota,

All imported preferential sugar, and undenatured white sugar produced therefrom,

stored in a warehouse approved by the Member State in whose territory the warehouse is situated.

Approval shall be granted subject to conditions to be specified.

(2) In special circumstances special provisions may be adopted in accordance with the procedure laid down in Article 36 of Regulation (EEC) No 3330/74 to deal with sugar in transit at the beginning of the period referred to in Article 4 (2)."

Article 4 states that:

"(1) Calculation of the reimbursement shall be based on monthly returns of quantities in store:

(2) The quantity to be taken into account for any one month shall be equal to the arithmetic mean of the quantities held in store at the beginning and at the end of the month in question.

(3) . . ."

The Commission's implementing provisions, which are decisive as regards the case before the national court, are contained in Regulation No 1998/78. Article 11 thereof provides that:

"(1) Reimbursement of storage costs shall be granted in respect of raw or white sugar which at 00.00 hours on the first day of a month is within a Member State in transit from an approved warehouse, other than transit as referred to in Article 10, and which, on arrival, is stored in another approved warehouse in the same Member State.

(2) For purpose of calculating the quantity of sugar qualifying for the reimbursement of storage costs, as referred to in Article 4 (2) of Regulation (EEC) No 1358/77, the sugar referred to in paragraph 1 shall be considered as still stored in the departure warehouse at 24.00 hours on the last day of a month, and as already stored in the arrival warehouse at 00.00 hours on the first day of the following month."

The eleventh recital in the preamble to Regulation No 1998/78 reads as follows:

". . . Article 3 (2) of Regulation (EEC) No 1358/77 provides that, in special circumstances, special provisions may be adopted to deal with sugar in transit at the beginning of a month; whereas such special circumstances prevail in respect of raw sugar produced in the French overseas departments, in that practically none of the production is consumed on the spot; whereas the long distance between those departments and Europe means that transport takes several weeks; whereas, therefore, it is unavoidable that such sugar, as a general rule, should be in transit on the first day of a calendar month; whereas reimbursement should accordingly be limited to less than one month; whereas in the case of sugar transported from one approved warehouse to another within the same Member State, a system should be provided for which is analogous *mutatis mutandis* to that applied to cane sugar from the French overseas departments."

The German version of the last clause of that recital expresses a link of cause and effect (". . . ist daher . . .") whereas the French text contains only the words ". . . il convient . . ." and not ". . . il convient donc . . .".

It may be noted that Regulation No 2671/81 of 14 September 1981 (Official

Journal L 262, p. 17) replaced paragraph 1 of Article 11 cited above with the following provision:

"In respect of raw or white sugar which at 00.00 hours on the first day of a month is in transit from an approved warehouse, other than transit as referred to in Article 10, and which on arrival is stored in another approved warehouse, reimbursement of storage costs shall be granted in so far as the storage levy has not already been incurred."

The plaintiff in the main action [hereinafter referred to as "Wagner"] is an undertaking which is approved as a specialized sugar trader within the meaning of Articles 1 and 2 of Regulation No 1998/78. In 1979 it applied each month to the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets, hereinafter referred to as "the Federal Office"] for the reimbursement to offset its storage costs. In some cases Wagner's applications related to quantities of sugar which on the last day of the relevant month were in transit from an approved warehouse in France to an approved warehouse in the Federal Republic of Germany. The Federal Office refused Wagner's applications on the ground that under Article 11 of Regulation No 1998/78 only sugar transported from one approved warehouse to another approved warehouse in the same Member State may be counted towards stocks at the beginning and end of the month and be taken into account for the calculation of the reimbursement.

In an action brought against those decisions of the Federal Office the Verwaltungsgericht Frankfurt am Main decided by order dated 8 October 1981 to stay the proceedings and to refer the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

"1. Does sugar which is in transit from a warehouse approved under the first sentence of Article 3 (1) of Council Regulation (EEC) No 1358/77 of 20 June 1977 laying down general rules for offsetting storage costs for sugar and repealing Regulation (EEC) No 750/68 (Official Journal L 156, 25. 6. 1977, p. 4) to another approved warehouse constitute sugar which is 'stored in a warehouse' within the meaning of that provision even if the two warehouses are situated in different Member States?

If it does not,

2. Does the general prohibition of arbitrariness or the prohibition of discrimination contained in the second subparagraph of Article 40 (3) of the EEC Treaty require similar treatment to be granted to the trader discriminated against, at any rate for as long as such treatment is granted unlawfully to the favoured trader?

If it does,

3. Is the special provision of Article 11 (1) of Commission Regulation (EEC) No 1998/78 of 18 August 1978 laying down detailed rules for the offsetting of storage costs for sugar (Official Journal L 231, 23. 8. 1978, p. 5) covered by the power conferred in Article 3 (2) of Council Regulation (EEC) No 1358/77?

If it is not,

4. Does the resultant unlawful preference of sugar transported between approved warehouses in the same Member State over sugar transported between approved warehouses in different Member States constitute discrimination

within the meaning of the second subparagraph of Article 40 (3) of the EEC Treaty, or does it at any rate offend against the general prohibition of arbitrariness which rests on common legal principles?"

The Verwaltungsgericht Frankfurt am Main takes the view that transport between two approved warehouses must be assimilated to storage in one place in an approved warehouse. It considers that the transport of a commodity does not alter the fact that it remains withdrawn from the market and so the purpose of the subsidy is not defeated. It does not therefore matter whether the warehouses are situated in the same Member State or in different Member States. Article 3 of Regulation No 1358/77 contains no restriction in this regard nor does any such restriction result from the concept of "storage".

In an opinion requested by the Verwaltungsgericht the Commission took the view that it was proper to allow sugar to be transported between approved warehouses in the same Member State during the period of storage but not between approved warehouses in different Member States. Even if that view were correct the Verwaltungsgericht considers that the rule in Article 11 of Regulation No 1998/78 is still unlawful because there is no legal authority for its enactment. The only authority would appear to be Article 3 (2) of Council Regulation No 1358/77 authorizing the Commission in derogation from paragraph 1 of that article to adopt "in special circumstances" special provisions to deal with sugar in transit. Moreover, to reason that sugar transported between approved warehouses within one Member State should "therefore" [daher] be subject to a system analogous to that applicable to sugar in transit by sea from the French overseas departments is not acceptable.

The order making the reference for a preliminary ruling was registered at the Court on 8 January 1982.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged on 5 April 1982 by Wagner, represented by Dr Klaus Landry of Fritz Modest and Partners, Rechtsanwälte, Hamburg; on 26 March 1982 by the Federal Office, represented by Erdmann Schaller, acting as Agent, and on 11 March 1982 by the Commission of the European Communities, represented by Meinhard Hilf, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry and, pursuant to Article 95 (1) and (2) of the Rules of Procedure, to assign the case to the First Chamber, no Member State or institution having requested that the case be decided in plenary session.

II — Written observations lodged with the Court

1. Observations submitted by Wagner

Wagner takes the view that Article 11 (1) of Regulation No 1998/78 shows that sugar in transit between approved warehouses in principle constitutes sugar "stored in a warehouse". The primary

purpose of that provision is the interpretation of Article 3 (1) of Regulation No 1358/77. It is not based on Article 3 (2) of Regulation No 1358/77, which is the basis for Article 10 of Regulation No 1998/78 (which relates to cane sugar originating in the French overseas departments which is in sea transit), and applies to cases in which sugar is transported *to* approved warehouses and not to cases in which it is transported *between* them.

Wagner observes that Article 1 (4) of Regulation No 2671/81 assimilates sugar transported between two approved warehouses to sugar actually in storage, whether the warehouses are situated in different Member States or in the same Member State. The contested provision of Regulation No 1998/78 should be construed accordingly. To construe it otherwise would offend against the general prohibition of arbitrariness and the prohibition of discrimination because there are not justifiable grounds for treating the two cases under consideration differently.

Consequently Wagner's answers to the other questions are submitted only in the alternative.

The point raised by the second question is whether, assuming that the benefit previously granted in 1979 to traders whose sugar was in transit between two approved warehouses in the same Member State was illegal and that those traders were therefore unlawfully preferred, that benefit may be withdrawn retroactively. If the breach of the principle of equal treatment cannot be cured retroactively by claiming back the wrongly-granted benefit the only course remaining is to grant the benefit retroactively to the traders discriminated against. If the Court considers that it cannot accept Wagner's argument yet finds that traders transporting across a frontier are being discriminated against that finding would simply cause the question of how that breach of principle is to be cured and the question of eliminating that discrimination to re-emerge in an action for damages against the Commission.

As regards the third question and quite apart from the answer given to the first question Wagner does not understand why, as is stated in the eleventh recital in the preamble to Regulation No 1998/78, a system analogous to that for sugar produced in the French overseas departments should "therefore" be needed for sugar transported between approved warehouses situated in the same Member State. If the special circumstances allowing special provisions within the meaning of Article 3 (2) of Regulation No 1358/77 to be adopted for the French overseas departments may be considered to be the greater distance and the longer duration of transport the obvious solution would have been to apply the rules adopted for those departments to sugar transported between approved warehouses situated in different Member States. It is therefore wholly inappropriate to deduce from the system applicable to the French overseas departments that only the cost of storing sugar in transit otherwise than across an internal frontier of the Community must be reimbursed.

As to the fourth question, Wagner believes that the difference between the two types of transport under consideration, in so far as in one case a frontier within the Community is crossed, is immaterial because the sugar is withdrawn from the market in the same way in both cases. It argues that it is incompatible with the aims and purposes of a common market to give preference to transport within one Member State as against transport from one Member State to another. It

observes that in the case of intra-Community transport there are even opportunities for carrying out additional checks, namely during customs clearance at the frontier (waybills and T 2 forms). Thus the provision at issue for no valid reason discriminates against trade between Member States and against undertakings involved in that trade compared to businesses and sugar manufacturers who carry on business in one Member State only, although both categories compete with each other on the Community sugar market and their situation as regards costs is the same.

2. *Observations submitted by the Federal Office*

The Federal Office points out that the aim and purpose of a reimbursement to offset storage costs for sugar is to achieve a steady disposal of sugar throughout the marketing year. The offsetting of storage costs also helps to finance the quantities of sugar stored with manufacturers, specialized traders and other persons entitled which have not yet been disposed of. The offsetting of storage costs thus enables a constant price level to be maintained throughout the sugar marketing year and avoids huge quantities of sugar being offered to the intervention agencies (see the recitals in the preamble to Regulation No 3330/74). The system of reimbursement should therefore be applied as restrictively as possible. In the view of the Federal Office it follows from the inter-relation between the offsetting of storage costs and the levy that storage costs must never be offset when the levy becomes payable owing to the marketing of sugar (see the tenth recital in the preamble to Regulation No 1358/77 and Article 1 (4) of Regulation No 2671/81). Article 12 of Regulation No 1998/78 specifies precisely the cases in which the levy is payable. One of those cases is the exit of sugar from the factory in which it was produced, except in so far as the sugar enters an approved warehouse of the manufacturer thereof situated in the same Member State. Since, according to Wagner's documents, the sugar was bought by Wagner in France from the undertaking C. Lanvin of Dijon and transported to Germany, the sugar in question has been sold and not just transferred within the meaning of the second sentence of Article 12 (1) (b) of Regulation No 1998/78. In a case of that kind in which stored sugar is sold to another undertaking the factual condition of storage is not satisfied, and the sugar is certainly not "stored in a warehouse" within the meaning of Article 3 (1) of Regulation No 1358/77. From 1 July 1970 intervention agencies have been under the obligation to buy in sugar offered to them by manufacturers and so the reimbursement of storage costs is intended to obviate, in whole or in part, the need for intervention buying (see the twelfth recital in the preamble to Regulation No 750/68 of the Council of 18 June 1968 laying down general rules for offsetting storage costs for sugar (Official Journal, English Special Edition 1968 (I), p. 131)).

The Federal Office contends that transport within the same Member State for which a reimbursement may be paid and international transport for which no reimbursement may be paid owing to the final marketing destination in the event of sale must be treated differently. According to the sixth recital in the preamble to Regulation No 1358/77 and the fifth, twelfth and thirteenth recitals in the preamble to Regulation No 1998/78, Member States must have some

appropriate measure of control. In cases involving international transport Member States can no longer fulfil the obligation to carry out controls or can do so only in more difficult conditions. The controls must relate to the conditions for entitlement to the reimbursement offsetting storage costs, which depends on different factors. For example, the reimbursement depends *inter alia* on whether the commodity was produced in another Member State by an undertaking having a basic quota and was stored there or put in an approved warehouse and on whether the person applying for reimbursement has in fact acquired ownership in the commodity, perhaps abroad. Therefore it makes little difference that international transport may be controlled during clearance through customs, even if by means of waybills and T 2 documents. In the matter of the offsetting of storage costs there are no special, smoothly operating channels of communication between the intervention agencies of Member States which might be of use in this matter. Moreover, since the controls effected when storage costs are reimbursed are carried out on the spot by inspection of the applicant's warehouses and his accounting documents, they are restricted to the Member State in question and it is not therefore possible to carry out checks in other Member States. Furthermore, the Federal Office cannot discern any unlawful grant of a market advantage constituting discrimination within the meaning of the second subparagraph of Article 40 (3) of the EEC Treaty or a breach of the prohibition of arbitrary measures adversely affecting other traders. For, as it has previously remarked, storage costs are not reimbursable if the aim of the subsidy is no longer attainable owing to the sale of the sugar. The Court has held in numerous judgments, most recently in Case 77/81 *Zuckerfabrik Franken* [1982] ECR 681, that compliance with the aim of a subsidy is a condition of entitlement to the grant of a market advantage. According to a unanimous judgment of the Bundesverwaltungsgericht [Federal Administrative Court], where the legal situation does not call for the treatment sought there is no breach of the principle of equality if, contrary to the objective legal situation, that treatment has been accorded in other, factually similar, cases; there is no right to equal treatment contrary to the law which Wagner may invoke.

Rules analogous to those provided for in the case of sugar from the French overseas departments have been laid down in Article 11 of Regulation No 1998/78 for sugar manufacturers who, within their Member State, transfer sugar from their factory to a foreign warehouse or between two foreign warehouses. That operation, which is especially necessary during the processing period (marketing year), is not considered to be a disposal within the meaning of Article 12 (1) of Regulation No 1998/78 and therefore does not result in the storage-cost levy being charged. To extend the authority contained in Article 3 (2) of Regulation No 1358/77 beyond the existing exceptions would no longer accord with the true aim of the offsetting of storage costs and could not be justified either from the point of view of the additional expense, which leads to an increase in the consumer price, or from the point of view of reasonable administrative costs.

The Federal Office believes that its arguments as set out above lead to the conclusion that the fact that the cost of

storing sugar transported between approved warehouses in the same Member State may be reimbursed, whereas such costs for sugar transported between approved warehouses in different Member States may not, does not fulfil the factual conditions for discrimination within the meaning of the second subparagraph of Article 40 (3) of the EEC Treaty or offend against the general prohibition of arbitrary measures.

3. Observations submitted by the Commission

The Commission first places the case in the context of the relevant regulations. It had to draw up rules governing the reimbursement of storage costs in a way that would reduce the risk of intervention. At the same time it had to make sure that in attaining that aim the rules were kept as restrictive as possible in order to keep the costs of the scheme, financed by the persons subject to the levy and not involving a Community subsidy, as low as possible. When undertaking that task assigned to it by the Council the Commission also had to bear in mind the practicability of the regulations, particularly possible methods of control, in order to keep the administrative costs of the national authorities in reasonable proportion to the aim pursued. The basic regulation, No 3330/74, accordingly provides for only a flat-rate reimbursement of storage costs. This accounts for the provisions restricting reimbursement to manufacturers and larger trading businesses and the Commission's decision not to apply the reimbursement scheme to negligible quantities of sugar transported from one Member State to another.

According to the Commission Article 3 of Regulation No 1358/77 makes a basic distinction between sugar stored in an approved warehouse at the beginning and end of a month (paragraph 1) and sugar still in transit at the end of a month (paragraph 2). That distinction is based on the system of flat-rate reimbursement whereby under Article 4 the average quantity of sugar in a warehouse at the beginning and end of the month is taken into account. If a quantity of sugar is removed from the warehouse before the end of the month half a month's reimbursement is due. The arrival of a quantity of sugar at the warehouse before the end of the month also leads to half a month's reimbursement. However, sugar still in transit at the end of a month does not count towards stocks existing at the beginning or end of the relevant month and therefore necessitates special rules for calculating the reimbursement due. The Council authorized the Commission if need be to adopt "special provisions" for those exceptional cases as well. The context in which the rules appear shows that sugar in transit at the end of one month and the beginning of the next is not considered to be "in a warehouse" within the meaning of Article 3 (1) of the Council regulation and does not therefore fulfil the conditions mentioned in the first question referred to the Court.

The Commission has heard of very few cases in which sugar has been transported from one Member State to another and in which a reimbursement of storage costs has been claimed. Hitherto it has been approached only by the Federal Office and only in connection with claims made by Wagner. The amounts claimed by Wagner from the Federal Office between February and December 1979 come to only DM 4 240.92 representing 4 120 tonnes of sugar transported from one Member State to another. A comparison of that figure with the total amount of storage costs reimbursed, which in 1979 was

DM 160 713 000 in the Federal Republic of Germany, underlines the comparative insignificance of the transport operations with which these proceedings are concerned (0.0026%). Furthermore, the risk of intervention to be avoided comes mainly from manufacturers: admittedly traders also have the right to offer sugar for intervention, but if they buy quantities at a price higher than the intervention price the risk of intervention is practically non-existent because they expect to be able to sell at a higher price.

Sugar in transit from one Member State to another at the transition from one month to the next would involve disproportionate administrative costs. The warehouse of departure and that of arrival are under the responsibility of different administrations. Because of the infrequency of cases of this kind no machinery for cooperation has been established. In order to perform correctly its duty of control the authority having responsibility for the sugar's arrival and for paying the reimbursement on stock deemed to exist at the beginning of the month must check whether the trader has become the owner of the goods, ascertain the time at which he became the owner should he also claim the end-of-month reimbursement relating to the warehouse of departure and check whether the sugar was stored in an approved warehouse in the country of departure. Transport documents provide no information on those matters. On the other hand they may show that the sugar was still in transit at the end of the month. Admittedly the authorities responsible for administering the sugar market may obtain the necessary information and documents from the competent foreign authorities, which will enable them to ensure that a full check is carried out. But the Commission believes that on the whole this would lead to administrative costs which would be totally out of proportion to the comparatively insignificant operations actually carried out. It is important to bear in mind also that as a rule where the reimbursement of the storage costs may amount to a considerable sum it is possible to avoid sugar being in transit at the transition from one month to the next.

If the Court were to declare the provision at issue incompatible with the principle of equal treatment its decision would not directly alter the legal situation. The authorities in the Member States would not have the power or the duty in future to grant the reimbursements provided for in Article 11 (1) of Regulation No 1998/78 to the traders who at present have no entitlement. As the Court held in its judgment of 19 October 1977 in Joined Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753, in such a case the Commission is under the obligation to put an end to the incompatibility by means of appropriate measures. That might be done in various ways. For example, by adopting a regulation having retroactive effect the Commission might also grant reimbursements to the traders who hitherto have had no claim provided that it could establish that the resultant increase in the number of persons entitled to reimbursement would be compatible with the scheme. It might also introduce individual measures compensating persons discriminated against or adopt other measures. In the final analysis the means of legal

protection available to Wagner would depend on the measures adopted by the Commission. At all events, as long as the Commission has not taken any action the plaintiff will have no rights, on the basis of the principle of equal treatment alone, to the reimbursement of storage costs. Only by pursuing claims based on non-contractual liability might Wagner acquire legal protection.

III — Oral procedure

The plaintiff in the main proceedings, represented by Klaus Landry, the Federal Office, represented by Eberhard Grobosch and the Commission, represented by Meinhard Hilf, presented oral argument at the sitting on 16 September 1982.

The Advocate General delivered his opinion at the sitting on 14 October 1982.

Decision

1 By order of 8 October 1981, which was received at the Court on 8 January 1982, the Verwaltungsgericht [Administrative Court] Frankfurt am Main referred to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty four questions relating to the interpretation and validity of Council Regulation (EEC) No 1358/77 of 20 June 1977 laying down general rules for offsetting storage costs for sugar (. . .) (Official Journal 1977, L 156, p. 4) and Commission Regulation (EEC) No 1998/78 of 18 August 1978 laying down detailed rules for the offsetting of storage costs for sugar (Official Journal 1978, L 231, p. 5), having regard to the prohibition of discrimination contained in the second sentence of Article 40 (3) of the EEC Treaty.

2 The questions arose in the course of proceedings between Hans-Otto Wagner GmbH Agrarhandel and the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets, hereinafter referred to as "the Federal Office"], the German intervention agency.

3 Article 8 of Regulation (EEC) No 3330/74 of the Council of 19 December 1974 on the common organization of the market in sugar (Official Journal 1974, L 359, p. 1) provides for the flat-rate reimbursement by the Member States of storage costs for certain types of sugar manufactured from beet or cane harvested in the Community. Regulation No 1358/77, which replaced Regulation (EEC) No 750/68 of the Council of 18 June 1968 (Official Journal, English Special Edition 1968 (I), p. 131), provides in Article 3 (1) that reimbursement is to be made in respect of sugar stored in a warehouse

approved by the Member State in whose territory the warehouse is situated. Article 3 (2) provides that in special circumstances special provisions may be adopted in accordance with the procedure laid down in Article 36 of Regulation No 3330/74 (known as the Management Committee procedure) to deal with sugar in transit at the beginning of the period referred to in Article 4 (2).

4 Article 4 (1) provides that the calculation of the reimbursement is to be based on monthly returns of quantities in store. Article 4 (2) provides that the quantity to be taken into account is to be equal to the arithmetic mean of the quantities held in store at the beginning and at the end of the month in question.

5 Article 10 of Regulation No 1998/78 provides as follows:

"(1) Reimbursement of storage costs shall be granted for cane sugar originating in the French overseas departments which is in sea transit at 00.00 hours on the first day of the month and which, on arrival, is stored in an approved warehouse.

. . .

(2) Reimbursement for the sugar referred to in paragraph 1 shall, however, be limited to a period equal to three quarters of one month."

6 Article 11 of the same regulation provides as follows:

"(1) Reimbursement of storage costs shall be granted in respect of raw or white sugar which at 00.00 hours on the first day of a month is within a Member State in transit from an approved warehouse, other than transit as referred to in Article 10, and which, on arrival, is stored in another approved warehouse in the same Member State.

(2) For purposes of calculating the quantity of sugar qualifying for the reimbursement of storage costs, as referred to in Article 4 (2) of Regulation (EEC) No 1358/77, the sugar referred to in paragraph 1 shall be considered as still stored in the departure warehouse at 24.00 hours on the last day of a month and as already stored in the arrival warehouse at 00.00 hours on the first day of the following month."

7 The plaintiff in the main action applied for reimbursement of his storage costs in respect of quantities of sugar purchased from a French undertaking which were in transit from an approved warehouse in France to an approved warehouse in the Federal Republic of Germany on the last day of the month in question. The relevant German authority, the Federal Office, rejected the application on the ground that under Article 11 of Regulation No 1998/78 only sugar transported between approved warehouses in the same Member State could be considered.

8 The dispute was brought before the Verwaltungsgericht Frankfurt am Main. That court, considering that by virtue of the wording of Regulation No 1358/77, reimbursement could be made only in respect of sugar withdrawn from the market in circumstances similar to storage by the State, referred the following questions to the Court for a preliminary ruling:

"1. Does sugar which is in transit from a warehouse approved under the first sentence of Article 3 (1) of Council Regulation (EEC) No 1358/77 of 20 June 1977 laying down general rules for offsetting storage costs for sugar and repealing Regulation (EEC) No 750/68 (Official Journal L 156, 25. 6. 1977, p. 4) to another approved warehouse constitute sugar which is 'stored in a warehouse' within the meaning of that provision even if the two warehouses are situated in different Member States?

If it does not,

2. Does the general prohibition of arbitrariness or the prohibition of discrimination contained in the second subparagraph of Article 40 (3) of the EEC Treaty require similar treatment to be granted to the trader discriminated against, at any rate for as long as such treatment is granted unlawfully to the favoured trader?

If it does,

3. Is the special provision of Article 11 (1) of Commission Regulation (EEC) No 1998/78 of 18 August 1978 laying down detailed rules for the offsetting of storage costs for sugar (Official Journal L 231, 23. 8. 1978, p. 5) covered by the power conferred in Article 3 (2) of Council Regulation (EEC) No 1358/77?

If it is not,

4. Does the resultant unlawful preference of sugar transported between approved warehouses in the same Member State over sugar transported between approved warehouses in different Member States constitute discrimination within the meaning of the second subparagraph of Article 40 (3) of the EEC Treaty, or does it at any rate offend against the general prohibition of arbitrariness which rests on common legal principles?"

9 The first question asks whether sugar which is in transit from one approved warehouse to another fulfils the requirement that it be stored in a warehouse within the meaning of Article 3 (1) of Regulation No 1358/77. The plaintiff in the main action maintains that Article 11 (1) of Commission Regulation No 1998/78 is not based on Article 3 (2) of Council Regulation No 1358/77. The latter provision is the basis for Article 10 of Regulation No 1998/78, which relates to sugar originating in the French overseas departments, and cannot therefore be the basis of Article 11 (1). It is consequently of the opinion that the latter provision simply gives an interpretation of Article 3 (1) of Regulation No 1358/77 to the effect that sugar in transit between approved warehouses meets, in principle, the requirement that the product be stored in a warehouse.

10 It is true that the eleventh recital in the preamble to Regulation No 1998/78 states that Article 3 (2) of Regulation No 1358/77 provides that, in special circumstances, special provisions may be adopted to deal with sugar in transit at the beginning of a month; that such special circumstances prevail in respect of raw sugar produced in the French overseas departments, inasmuch as practically none of the production is consumed on the spot; that the long distance between those departments and Europe means that transport takes several weeks; that, therefore, as a general rule, it is unavoidable that such sugar should be in transit on the first day of a calendar month and that in the case of sugar transported from one approved warehouse to another within the same Member State, a system should be provided which is analogous *mutatis mutandis* to that applied to cane sugar from the French overseas departments. That recital may give the impression that the Commission regarded Regulation No 1358/77 as granting it the power to make special provisions only in relation to sugar produced in the French

overseas departments, and that it considered that it must exercise that power by analogy in the case of sugar in transit between two approved warehouses.

11 An examination of the earlier regulations shows, however, that that is not the case. Regulation (EEC) No 750/68 of the Council of 18 June 1968 (Official Journal, English Special Edition 1968 (I), p. 131), laid down general rules for offsetting storage costs for sugar. Article 3 (1) thereof provides that reimbursement is to be made in respect of quantities of sugar stored in a warehouse approved by the Member State on whose territory the warehouse is situated. The second paragraph of that provision provides that in special circumstances special provisions may be adopted to deal with sugar in transit at the beginning of a month.

12 The latter provision has general application, like the similar provision contained in Regulation No 1358/77, and does not in any way restrict the nature of the circumstances which are to be regarded as special. The Commission relied upon that provision in Regulation (EEC) No 442/70 of 9 March 1970 laying down detailed rules for the application of the system of offsetting storage costs for sugar (Official Journal, English Special Edition 1970 (I), p. 140), when it adopted in Article 5 provisions similar to those of Article 10 of Regulation No 1998/78.

13 In the recitals to Regulation (EEC) No 1688/74 of the Commission of 28 June 1974 (Official Journal 1974, L 176, p. 5), the Commission stated that for sugar which was in transit from an approved warehouse in one of the Member States at 00.00 hours on the first day of a month and which on arrival was stored in an approved warehouse in the same Member State, a system should be provided which corresponded substantially to the provisions set out in Regulation No 442/70 in respect of cane sugar from the French overseas departments. Regulation No 1688/74 therefore inserts into Regulation No 442/70 a new article, Article 5a, which has essentially the same effect as Article 11 (1) of Regulation No 1998/78.

14 It would appear therefore that the Commission exercised the power referred to above for the two purposes described even before the Council expressly

authorized it to take special measures in just those terms in Regulation No 1358/77, and it may thus be concluded that that authorization should not be interpreted narrowly as suggested by the plaintiff in the main action, but should be interpreted in such a way as to bear out the effects of Articles 10 and 11 (1) of Regulation No 1998/78.

15 It follows that Article 11 (1) of that regulation has its legal foundation in Article 3 (2) of Regulation No 1358/77 and should not be interpreted, as is argued by the plaintiff in the main action, as constituting merely an interpretation of Article 3 (1) of the same regulation to the effect that sugar in transit between approved warehouses fulfils, in principle, the requirement that the product be stored in a warehouse.

16 Consequently, the reply to the first question should be in the negative and the reply to the third question should be in the affirmative.

17 The other two questions seek to discover whether Article 11 (1) of Regulation No 1998/78 is in breach of the prohibition of discrimination in Article 40 (3) of the Treaty or the general principle of non-discrimination in Community law, and, if it is, what are the legal consequences flowing from such a breach.

18 Article 40 (3) of the Treaty is concerned with the common organization of agricultural markets, including the regulation of storage, and provides in the second paragraph that the common organization must exclude any discrimination between producers or consumers within the Community. According to case-law of the Court discrimination is defined as treating differently situations which are identical, or treating in the same way situations which are different.

19 Even if it might appear to be contrary to the concept of a unified market that aid should be granted for sugar in transit between two approved warehouses in a single Member State while it is refused for sugar in transit between two approved warehouses situated in different Member States, that is not in fact

the case. The difference of treatment is based on requirements of supervision which may be justified objectively. Council Regulation No 1358/77 emphasizes the need for supervision and therefore provides that the reimbursement should normally be made by the Member State in whose territory the sugar is stored.

20 The Commission rightly states that the supervisory measures which would be necessary if reimbursement had to be made in the case of international transport would involve disproportionate administrative costs. The warehouse of despatch and the warehouse of arrival are subject to the jurisdiction of different administrative authorities. In the absence of any system of cooperation to effect the necessary supervision the relevant authority of the Member State which is the destination of the consignment must check that the dealer has acquired ownership of the goods, establish the moment when he acquired such ownership if he is also claiming reimbursement for the end of the month as far as the warehouse of departure is concerned, and check that the sugar was stored in an approved warehouse in the Member State from which the consignment was despatched.

21 It follows from the foregoing considerations that the situation with regard to sugar in transit at the beginning of a month between two approved warehouses in the same Member State is not the same as that where the warehouses are situated in different Member States. In the circumstances the difference between the two situations justifies a difference in treatment which does not amount to unlawful discrimination in Community law.

22 The reply to the second and fourth questions must therefore be that the fact that reimbursement is granted in respect of storage costs for sugar which, at the beginning of the month, is in transit between two approved warehouses situated in the same Member State but is not granted in respect of sugar which is in transit between two approved warehouses situated in different Member States does not amount to unlawful discrimination in Community law.

Costs

23 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these

proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Verwaltungsgericht Frankfurt am Main by order of 8 October 1981, hereby rules:

1. **Sugar which is in transit between one approved warehouse and another does not fulfil the requirement as to storage in a warehouse within the meaning of Article 3 (1) of Council Regulation No 1358/77 of 20 June 1977.**

2. **The special rule contained in Article 11 (1) of Commission Regulation No 1998/78 of 18 August 1978 is covered by the authority granted in Article 3 (2) of Regulation No 1358/77.**

3. **The fact that reimbursement is granted in respect of storage costs for sugar which, at the beginning of the month, is in transit between two approved warehouses situated in the same Member State but is not granted in respect of sugar which is in transit between two approved warehouses situated in different Member States does not amount to discrimination prohibited by Community law.**

O'Keeffe Bosco Koopmans

Delivered in open court in Luxembourg on 23 February 1983.

P. Heim
Registrar

A. O'Keeffe
President of the First Chamber