2. A duty falling within a general system of internal taxation applying to domestic products as well as to imported products according to the same criteria can constitute a charge having an effect equivalent to a customs duty on imports only if it has the sole purpose of financing activities for the specific advantage of the taxed domestic product, if the taxed product and the domestic product benefiting from it are the same, and if the charges imposed on the domestic product are made good in full.

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 28 March 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 13 MARCH 1979 [1]

Mr President,
Members of the Court,

I — This reference for a preliminary ruling originates in the following facts:

On 19 June 1978 the undertaking Nuova Commissionaria Zuccheri di Walter Beneventi, Reggio Emilia, ordered from the undertaking I.C.A.P. Distribution, San Maurizio (Reggio Emilia), 430 quintals of French granulated sugar in paper bags of 50 kg net, at the current price fixed by the Comitato Interministeriale dei Prezzi [Interdepartmental Committee on Prices, hereinafter referred to as "the Price Committee"]. Approximately 300 quintals were to be delivered before 1 July and the remainder in the course of August owing to shortage of available warehousing space on the buyer's premises. The sugar was to be of standard quality (second category) for which Community legislation lays down the target price and the intervention price.

After despatching 250 quintals of this sugar to Beneventi on 28 June, then 60

1 — Translated from the French.

quintals on 3 July, I.C.A.P. informed him on 22 August 1978 that it would deliver the remaining 120 quintals within the next few days. However, it notified the buyer that owing to the entry into force on 5 July 1978 of Price Committee "Provvedimento" [Order] No 15/1978 of 4 July 1978, the price of the sugar would be increased by Lit. 19.50 per kg following the increase in the ordinary "sovrapprezzo" [surcharge] to which there must be added as "sfioramento" ["skimming-off" levy] a special charge of Lit. 21 per kg in respect of sugar still held in stock by the seller on 5 July 1978. Following the buyer's request to postpone delivery of the remainder of the order until August, I.C.A.P. stated that it would itself have to pay the sum of Lit. 252 000 (2 100 120) in respect of the sugar stored in its warehouses on 5 July on behalf of the buyer.

Consequently it told the buyer that it would include on its invoice this surcharge in relation to the old price, which itself had been increased by Lit. 19.50 per kg.

Having received the invoice relating to the remaining 120 quintals on 24 August 1978, Beneventi informed its seller on 29 August 1978 that it had no objection to the increase of Lit. 19.50 per kg for the ordinary "sovrapprezzo" resulting from the new Price Committee price, but was not in agreement with the increase of Lit. 21 per kg as "sfioramento", an increase which the "European Community" had several times held to be unlawful.

On 5 September 1978 I.C.A.P. repeated its request for payment of the surcharge of Lit. 252 000.

On 12 September 1978 it brought an action against Beneventi before the Pretore of Reggio Emilia for payment of the said sum.

In reply, Beneventi disputed the validity of the claim for the surcharge resulting from the application of Order No 15/1978 to the remainder of the order still stored in the supplier's warehouses after 5 July 1978.

As in the dispute which gave rise to the *Cucchi* v *Avez* case (judgment of 25 May 1977 [1977] ECR 988), the Federazione Nazionale Comercianti Alimentari — Sindacato Nazionale Zucchero [National Food Trade Federation — National Sugar Association] (Federgrossisti) — intervened in support of Beneventi's conclusions. By an order of 14 September 1978, the Pretore of Reggio Emilia allowed the intervention of Federgrossisti and decided to stay the proceedings and refer the case to this Court under Article 177 of the EEC Treaty for a preliminary ruling on certain questions directly calling in question the legality of the Italian provision in the light of Regulation No 3330/74 of the Council of 19 December 1974 on the common organization of the market in sugar and the second subparagraph of Article 40 (3) and Article 12 of the EEC Treaty. It is therefore more in the nature of a "disguised" action for failure of a Member State to fulfil its obligations.

II — This is not the first time that the Court has had to deal with the compatibility of Community legislation with the system of the Price Committee's "special surcharge". Therefore I shall refrain from describing its aims and objectives.

By its judgment of 30 October 1975 in the *Rey Soda* case [1975] ECR 1280, the Court of Justice declared invalid Article 6 of Regulation No 834/74 of the Commission of 5 April 1974 laying down requisite provisions to prevent the sugar market being disturbed as a result of the price increase in this sector for the 1974/75 sugar marketing year. The

Court held (in paragraph 29 of the decision, [1975] ECR at p. 1303) that the Commission "was validly enabled ... to adopt ... a provision providing for the imposition of a pecuniary charge on holders of stocks of sugar in a Member State as a result of an alteration in the common prices and in these prices expressed in national currencies at the change-over to a new sugar year", but it had to determine the essential basic rules *itself;* those rules had to comprise a statement of the parties liable and the bases of calculation of the tax as well as a definition of the concept of "excessive stocking" in respect of each class of business, having regard to the size of the undertakings.

Following that judgment, by Regulation No 2680/77 of 5 December 1977 the Commission expressly acknowledged the illegality of the authorization which it had given Italy and the right of traders who had paid the charge introduced by the Price Committee to have it reimbursed. It defined what was to be understood by "holder of sugar" and by exempt "working stocks", and it laid down the limits of the amount of the charge which Italy was authorized to levy. That country was required to adopt the measures necessary to apply the regulation, in particular to reimburse sums "collected in excess", and to inform the Commission in writing without delay of the measures adopted. The regulation had retroactive effect as from 10 April 1974.

The measure now at issue in the main action is intended, as regards sugar held in stock by wholesalers, importers and retailers on 5 July 1978, to "skim off" part of the profit margin resulting from the difference between the maximum selling prices applicable in Italy for those classes of persons at the change-over from the 1977/1978 marketing year to the 1978/1979 marketing year.

III — (1) It follows from Article 33 of Regulation No 3330/74 that in order to prevent the market in sugar being disturbed as a result of an alteration in price levels at the change-over from one marketing year to the next — whether that alteration is due to an adjustment of the price in units of account or of the rate of the green currency — the functioning of the common organization of the market and in particular the formation of producer prices must in principle be governed by the general Community provisions as laid down in general rules amended annually with the result that any specific interference with this function is strictly limited to the cases expressly provided for. The Court so held in its judgment in the *Cucchi* case (paragraph 31 of the decision), and it added (in paragraph 34 of the decision) that "this provision is as much concerned with the consequences of an alteration in rates of exchange as with those of an alteration in intervention prices and ..., under the common agricultural policy, both are matters within the Community's exclusive powers".

Moreover, according, to the judgments of 26 February 1976 in Case 65/75 *Tasca* [1976] ECR 291 at p. 309 and in Joined Cases 88 to 90/75 *SADAM* [1976] ECR 323 at p. 340, "a maximum price, in any event in so far as it applies to imported products," constitutes a measure having an effect equivalent to a quantitative restriction prohibited by Article 30 "when it is fixed at such a low level that, having regard to the general situation of imported products compared to that of domestic products, dealers wishing to import the product in question into the Member State concerned can do so only at a loss".

It will be for the national court to decide whether the Italian Order No 15/1978 affects the formation of prices for sugar marketed in Italy, having regard both to the *direct* relationship between that measure's adoption and the Community adjustment of the price of sugar resulting from Council Regulation No 1399/78 of 20 June 1978 fixing the prices applicable to sugar for the 1978/1979 marketing year, and to the 7.2 % devaluation in the representative green rate of the Italian lira decided as from the 1978/1979 marketing year by Council Regulation No 976/78 of 12 May 1978. It will also be for the national court to decide whether the charge of Lit. 21 which the Price Committee empowered the Cassa Conguaglio Zucchero [Sugar Equalization Fund] to levy results from the increase decided at Community level and constitutes a sum which only Community legislation could order to be confiscated or specially appropriated.

(2) A measure of the kind mentioned involves a breach of the principle of non-discrimination laid down in the second subparagraph of Article 40 (3) of the Treaty to the extent to which it constitutes a special charge differentiated according to the capacity of the trader on whom it is imposed. Granulated sugar imported from Member States held in stock by Italian producers on 5 July 1978 was exempted from the charge — and the *Suiker Unie* and other cases have shown that Italian refiners import not inconsiderable quantities of it — whereas the same sugar of Community origin held in stock at the same date by Italian wholesalers, importers and retailers was subject to it. It deprives the latter of an advantage which is conferred on other traders by a directly applicable Community provision.

In so far as the levying of it depends on the capacity of those on whom it is imposed, a charge of this kind constitutes a charge having equivalent effect the levying of which is prohibited by Article 21 (2) of Regulation No 3330/74.

(3) Finally, it may be wondered whether the ultimate aim and effect of a measure of this kind are not to cause the adaptation aid authorized by Article 38 (2a) of Regulation No 3330/74 (as amended by Article 2 of Council Regulation No 1396/78 of 20 June 1978) to the benefit of Italian beet-growers and refiners to be financed in part by a charge levied on imports of sugar, that is to say in the end by the foreign suppliers whom it is precisely a question of supplanting. Such a consequence would be contrary to Article 41 of Regulation No 3330/74 and to the Court's judgments of 19 June 1973 *(Capolongo* [1973] ECR 611) and of 18 June 1975 *(IGAV* [1975] ECR 699). However, such a finding ought to be made by the Commission acting on the basis of Article 93 or 169 of the Treaty rather than by the national court, which cannot be asked to carry out laborious inquiries involving sometimes uncertain comparisons.

My opinion is that the Court should rule that the system of sugar prices adopted within the frame-work of the common organization of the market in sugar and of the subsequent provisions adopted by the Community authorities precludes a Member State from being able to intervene unilaterally in order to fix the consumer selling price of that product within its territory in reliance upon the need to protect its economy against speculative practices and to guarantee supplies to consumers.