JUDGMENT OF THE COURT
30 JANUARY 1974 [1]

Hannoversche Zucker AG Rethen-Weetzen v Hauptzollamt Hannover (preliminary ruling requested by the Finanzgericht Hamburg)

'Sugar production levy'

Case 159/73

Summary

1. *Agriculture — Common organization of the markets — Rules — Nature — Lacuna — No power of Member States to remedy it — Application of Community law*

   (EEC Treaty, Article 40)

2. *Agriculture — Common organization of the markets — Sugar — Production year — Expiration — Excesses — Computation of the production levy — Reference period*

   (Regulation No 1009/67 of the Council, Article 27 (1); Regulation No 142/69 of the Commission, Article 3 (1))

1. The rules of the common organization of the market in sugar form a complete system in the sense that it does not leave the Member States the power to fill a lacuna by resorting to their national law. It is thus proper to seek a solution in the light of the aims and objectives of the common organization of the market, taking account of considerations of a practical and administrative nature.

2. Sugar excesses which come to light after the expiration of the marketing year in which they were produced must be treated for the purpose of production levy as arising in the marketing year in which they were ascertained, even if they have been produced before the coming into force of the common organization of the market in sugar.

In Case 159/73

Reference to the Court under Article 177 of the EEC Treaty by the Hamburg Finanzgericht for a preliminary ruling in the action pending before that court between

1 — Language of the Case: German.

HANNOVERSCHE ZUCKER AG RETHEN-WEETZEN,

and

HAUPTZOLLAMT HANNOVER,

on the interpretation of Regulation No 1009/67/EEC of the Council of 18 December 1967, on the common organization of the market in sugar (OJ L 308/67, p. 1) and of Regulation (EEC) No 142/69 of the Commission of 25 January 1969, laying down certain detailed rules for the application of the quota system for sugar (OJ L 20/69, p. 1),

THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sørensen (Rapporteur) (Presidents of Chambers), R. Monaco, J. Mertens de Wilmars, P. Pescatore, H. Kutscher, C. Ó Dálaigh and Lord Mackenzie Stuart, Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

A — The facts of the case, the subject matter of the reference and the views of the parties may be summarized as follows:

I — Facts and procedure

1. The common organization of the market in sugar was set up by Regulation No 1009/67 of 18 December 1967, which replaced Regulation No 44/67 of the Council of 21 February 1967 (OJ of 3 March 1967, p. 597) which had introduced certain measures for a common organization of the market in sugar for the 1967/68 marketing year.

Regulation No 1009/67 comprises *inter alia* the establishment of an interim system applicable until 1975, the main feature of which is a limitation on Community responsibility for products coming within the scope of the regulation.

Under this transitional system each Member State has a basic quantity fixed by Article 23 (1). Each undertaking producing sugar is allotted a basic quota under the terms of the same provisions. Apart from this basic quota, each undertaking has a maximum quota. The

quantity of sugar produced and sold during a particular marketing year (extending from 1 July to the following 30 June), which is outside the basic quota but within the maximum quota, shall benefit from all the intervention measures for the support of the market. However, this quantity is subject to a tax, called a production levy, which must not exceed a maximum fixed by the Council. Any quantity of sugar which exceeds the maximum quota of the undertaking does not benefit from any of the intervention measures. Moreover it may not be disposed of on the internal Community market.

Subject to certain conditions, undertakings may carry forward that part of their production which is outside the basic quota, up to a maximum corresponding to 10 % of the basic quota, to the following marketing year to be treated as part of that year's production.

The present organization of the market in sugar took effect as from 1 July 1968. Where there was an excess from the previous marketing year in a Member State, such excess was carried forward to the 1968/69 marketing year under Article 33 of Regulation No 1009/67 as well as Regulation No 1789/68 of 8 November 1968, fixing the amount of the quantities to be carried forward to the 1968/69 marketing year (OJ L 273, p. 11).

2. The plaintiff is an undertaking producing sugar. Two successive stocktakings were made on 5 October 1966 and 30 September 1970. On the second stocktaking, there was found an excess of 310 973 kg of white sugar in relation to the figures in the sugar tax register ('Zuckersteuerbuch'), which is required to be maintained under German law.

The defendant decided to claim payment of an additional production levy corresponding to the additional amount. The problem arose whether — and if so how — this quantity should be apportioned over the years which could come into consideration. The defendant decided at first to apportion the excess over the four previous marketing years according to the production reported for each of these years. However, it was ultimately decided that the excess should be attributed to the 1970/71 sugar marketing year, during which it had been discovered.

3. The plaintiff appealed against this decision and two earlier decisions to the Hamburg Finanzgericht. By order of 24 July 1973 the latter decided to stay the proceedings under Article 177 of the EEC Treaty and refer the following questions to the Court of Justice for a preliminary ruling:

'1. When applying Article 27 (1) of Regulation No 1009/67 of the Council of the EEC dated 18 December 1967 (OJ 1967, No 308, p. 1) and Article 3 (1) of Regulation No 142/69 of the Commission of the EEC dated 25 January 1969 (OJ L 20, p. 1) must surpluses be taken into account which came to light during physical stocktaking after the coming into force of the regulations relating to production levies, but which arose before 1 July 1968?

2. If question 1. is answered in the affirmative:

Were surpluses arising before 1 July 1968 liable to production levy in the 1968/69 sugar marketing year, or in the year in which the stocktaking occurred?'

In the order for a preliminary ruling the Finanzgericht makes the following observations in particular regarding the questions put:

On the one hand it would be in accordance with the evident object of the regulation in question, namely, the discouragement of overproduction within the Community in the most practicable way, to consider as part of the basic quota that quantity of sugar which is on hand during a particular

sugar marketing year, and it therefore appears reasonable to require payment of the production levy also for surpluses actually produced before 1 July 1968.

On the other hand the carrying-over of production from one marketing year to the next is subject to certain Community rules which are perhaps of an exclusive nature, that is, they may not permit additional quantities from a previous year to be included for consideration in the current sugar marketing year. Quantities to be carried forward from the 1967/68 marketing year to the 1968/69 marketing year were fixed by Regulation No 1789/68 of 8 November 1968. If the surpluses produced during the 1966/67 and 1967/68 sugar marketing years were included for consideration, the resultant increase in the quantity carried forward would contravene Regulation No 1789/68. The Finanzgericht also refers to Article 33 (2) of Regulation No 1009/67, according to which the quantities to be carried forward from the 1967/68 marketing year 'shall be treated' as production within the basic quota for the 1968/69 marketing year. In the view of the Finanzgericht this prompts the conclusion that in principle only sugar produced during the current sugar marketing year, having regard only to those quantities validly carried forward under Articles 32 and 33 of Regulation No 1009/67, is to be regarded as the quantity of sugar produced within the meaning of Article 27 (1) of Regulation No 1009/67 or the quantity of sugar actually manufactured within the meaning of Article 3 (1) of Regulation No 142/69.

The Finanzgericht summarizes the arguments of the plaintiff in the main action as follows:

'The surplus in question is almost certainly partially attributable to production prior to 30 June 1968, which was governed exclusively by EEC Regulation No 1789/68. In the absence of any legal principle to that effect, this production could not subsequently be again taken into account for the collection of the production levy. The legal view adopted by the defendant is not in accordance with paragraph 3 (1) of EEC Regulation No 142/69, which states that the calculation of the production levy is dependent solely upon the amount of sugar actually produced by the factory. Surpluses produced before the introduction of the production levy could not, therefore, be attributed to the sugar marketing year 1970/71. The same position emerges from the wording of Article 2 of EEC Regulation No 142/69 and from paragraphs 3 and 4 of the (German) Regulation on the collection of a production levy for sugar, dated 13 May 1969. These provisions indicate that the production levy is assessed solely on sugar produced during the current or preceding sugar marketing year.'

4. The order of the Finanzgericht was registered at the Court on 16 August 1973.

The Government of the Federal Republic of Germany, represented by Dr Martin Seidel, and the Commission of the European Communities, represented by its legal adviser, Dr Peter Gilsdorf, submitted their written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

The *Government of the Federal Republic of Germany* refers first of all to the main aspects of the common organization of the market in sugar. It refers to the fact

that the contribution of producers, as far as stocks existing on 1 July 1968 is concerned, is governed by Article 33 of Regulation No. 1009/67 to the extent that quantities of sugar produced during the 1967/68 marketing year which exceed a particular amount are to be treated as sugar production of the 1968/69 marketing year. Since Article 33 of Regulation No 1009/67 refers to the transitional system laid down for the 1967/68 marketing year, the measure likewise covers production arising from previous marketing years. The quantity to be carried forward for the 1968/69 marketing year has been fixed as regards the Federal Republic of Germany by Regulation No 1789/68 as 157 001 metric tons.

The adjusted basic quota attributed to the Federal Republic of Germany for the 1967/68 marketing year has been destributed between the various sugar factories and the quantity to be carried forward and to be treated as within the 1968/69 marketing year was equivalent for each factory to the difference between the production and the basic quota in 1967/68.

To explain how it was possible that discrepancies in the information originally given to the Commission were subsequently discovered, the Government refers to the German system of registration of production for the purpose of levying the tax on sugar. In Germany, for the purpose of assessment of the sugar tax each sugar factory is required to maintain a sugar tax register. Each factory, itself, enters in the register its production and the goods which leave the factory. Verification of the figures entered in the register is made by an official stocktaking. Since the official stocktakings can only be accurately done when the sugar silos are empty, they take place at quite substantial intervals of time.

As regards the questions put by the Finanzgericht the Government states that the Community rules were based on the principle that the quantity of sugar actually produced determined the calculation of the production levy. This was why it was necessary as a rule to take into account also further quantities of sugar the existence of which was subsequently revealed and which until then had not been recorded.

Article 1 of Regulation No 142/69 does not allow a different result. It proceeds from the basis of ascertaining the total production of a sugar factory (expressed in white sugar) and then gives an exhaustive list (paragraph 2) of the quantities of sugar which must be deducted from this production. This list does not mention quantities of sugar produced during a previous marketing year which have not been taken into account in the calculation of the production levy.

As a result it appears from this article that additional quantities subsequently recorded are to be taken into account, for the calculation of the production levy, in the year during which their existence has been discovered. At the time of the revision of the provisions for implementing the quota system in the sugar sector this method has been expressly defined (Article 2 (3) of Regulation No 700/73, OJ L 67, p. 12). Further, additional quantities found after Regulation No 700/73 came into force could not be liable to an additional production levy at no matter what time these additional quantities were actuelly produced, but this was not the case as regards additional quantities whose existence was disclosed before 15 March 1973.

This conclusion does not conflict with Article 3 of Regulation No 142/69. Article 3 (1) of Regulation No 142/69 simply sets out the system applicable to the exceptions provided for by paragraphs 2 to 4 of this provision.

The Government then makes the point that the sole object of Regulation No 1789/68 is to provide the necessary numerical basis for the calculation of the

production levy. There is no doubt that if the information given at the time by the Federal Republic of Germany had included the additional quantities subsequently found, the quantity to be carried forward would have been fixed at a higher amount. For these reasons it is not possible to proceed on the basis that the fixing of the quantity to be carried forward by Regulation No 1789/68 is conclusive.

The *Commission* first of all considers Articles 1 to 3 of Regulation No 142/69 and concludes that the question of how the additional quantities are to be treated has not been settled by this Regulation. It states that Regulation No 700/73, in force since 15 March 1973, contains a formal provision on this point and that this Regulation has been substituted for Regulation No 142/69 the substance of which it has re-adopted. Under Article 2 (3) of Regulation No 700/73 differences found after 'final production figures are established' shall be taken into account in the marketing year during which they have been ascertained.

The Commission considers that it should be the same when Regulation No 142/69 was still in force as regards additional quantities which have subsequently been found. This manner of viewing the problem, which the Commission has continually supported, for example in the Management Committee for Sugar where the delegations have approved it, is dictated by several reasons:

— White sugar is a homogeneous product which as such does not enable its date of manufacture to be ascertained. As a result, unless other factors exceptionally enable a conclusion to be drawn that the product has been manufactured at a particular date, it is technically impossible to establish whether a particular quantity of white sugar has been manufactured during a particular marketing year.

— Subsequently to allot additional quantities to the marketing year of their actual manufacture would involve moreover very great administrative difficulties. The total sugar production of the Community during a particular marketing year is one of the factors in the calculation of the amounts of the production levy for this marketing year. If the final production figures for an undertaking were subsequently amended, it would necessarily entail the total production of the Community and the calculation of the production levy being likewise amended.

— Subsequent amendment of the final production figures of an undertaking during a particular marketing year could, where appropriate, likewise affect the 'quantity to be carried forward' which is included in the production figures of the following marketing year.

— If a subsequent amendment were accepted, it would probably lead to very different results in the various Member States, for there are no uniform principles for assignment to a particular marketing year or for the criteria to be used to fix the date of manufacture.

Since the provisions of Regulation No 1009/67 were in force only as from 1 July 1968 and since, moreover, additional quantitites manufactured before this date had been found, the Commission considers the question whether the year when they were found is likewise decisive in this respect as to when they are to be taken into account.

To reply to this question the Commission gives a summary of the 'transitional system' in force before 1 July 1968 as regards production levies. In particular it considers Articles 7 and 8 of Regulation No 44/67 and Regulation No 1029/67 of the Commission of 21 December 1967 concerning adjustments

in the quantities of sugar production determined for the 1967/68 marketing year (OJ No 313 of 22. 12. 1967, p. 4) and the aforementioned Regulation No 1789/68.

It concludes that Regulation No 1789/68 was not intended to determine definitely and irrevocably the production for the 1967/68 marketing year, but to establish a size to serve as a basis for the calculation of the production levy for 1968/69.

If the existence of additional quantities had been found as from the year of their manufacture, the excess mentioned in this Regulation for Germany would have been larger; the additional quantities produced during the 1966/67 marketing year would have had an effect on the level of the adjustment of the quantity of production for 1967/68 and the additional quantities produced during the 1967/68 marketing year would have had a direct effect on the excess within the meaning of Article 33 (1) of Regulation No 1009/67. It follows that the finding of the existence of such additional quantities as from the year of manufacture would in any event have affected the production levy for the 1968/69 marketing year.

In the view of the Commission it thus follows from the transitional system that for the production levy it is likewise necessary to take into account additional quantities which have been produced between 1 July 1966 and 1 July 1968, but which have been ascertained only after the coming into force of the rules relating to production levy.

On the basis of the above considerations these quantities are likewise subject to the production levy in the year when they are ascertained providing the other conditions are fulfilled.

B — The oral hearing took place on 12 December 1973; the Government of the Federal Republic of Germany was represented by Dr Christof von Arnim and the Commission by Dr Peter Gilsdorf.

The *Government of the Federal Republic of Germany,* in reply to a question from the Court, explained more fully the practical difficulties in having official stocktakings at shorter intervals than those in the present case.

The *Commission,* likewise in reply to a question from the Court, observed that official stocktaking took place roughly in the same fashion in all the Member States. The Commission added that a sugar factory would as a general rule have to empty silos every three or four years to prevent the quantities of sugar always remaining at the bottom from deteriorating in quality, and on the whole verification took place in all Member States in accordance with this cycle.

C — The Advocate-General delivered his opinion at the hearing on 17 January 1974.

Grounds of judgment

1 By Order dated 24 July 1973, filed at the Court on 16 August 1973, the Hamburg Finanzgericht referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Regulations No 1009/67 of the Council of 18 December 1967 on the common organization of the market in sugar and No 142/69 of the Commission of 25 January 1969 laying down certain detailed rules for the application of the quota system for sugar.

2 The questions refer to the regulations relating to the production quotas laid down in respect of each sugar producer for each sugar marketing year by the national authorities within the framework of the quotas allotted by the Community provisions to each of the Member States.

This quota system provides for the imposition of a levy on quantities produced outside the basic quota but within the maximum quota, subject nevertheless to the liberty for the producer to carry forward that part of his production which is outside the basic quota up to a maximum corresponding to 10 % of the basic quota, to the following marketing year.

Before the common organization of the market in sugar came into force on 1 July 1968, the transitional system established by Regulation No 44/67 of the Council of 21 February 1967 on certain measures for the common organization of the market in sugar for the 1967/68 marketing year, while fixing production quotas, did not provide for the imposition of a production levy on excesses.

Certain portions however of these excesses produced during the 1967/68 marketing year, as laid down by Regulation No 1789/68 of the Commission of 8 November 1968, have been carried forward to the following marketing year, which is governed by the common organization of the market.

3 The national court inquires basically whether an excess which comes to light on an official stocktaking after 1 July 1968, the date of the coming into force of Regulation No 1009/67, and which arose before this date, must be assigned, for the purpose of the calculation of the production levy, to the period before the common organization of the market in sugar came into force, or to the first sugar marketing year under the system of this organization (1968/69), or to the marketing year during which it was discovered.

The questions have been put in connexion with ligitation between a sugar producer and the German customs authorities relating to the levy on an excess of some 310 metric tons which came to light on an official stocktaking carried out on 30 September 1970, that is four years after the previous stocktaking and more than two years after the common organization of the market in sugar came into force.

4 The regulations in force at the time were silent in this respect.

The rules of the common organization of the market in sugar must be regarded as forming a complete system in the sense that it does not leave the Member States the power to fill such a lacuna by resorting to their national law.

It is thus proper to seek a solution in the light of the aims and objectives of the common organization of the market, taking account of considerations of a practical and administrative nature.

5 No general stocktaking was ordered either on the coming into force of the common organization of the market in sugar on 1 July 1968 or subsequently on the transition from one sugar marketing year to the next.

According to the explanations given to the Court, the technical conditions for stocking sugar are such that stocktaking can only take place at intervals of several years.

In practice it would be difficult to determine precisely the effective production year of an excess found in relation to the stocks calculated on the basis of the producer's accounting.

The assignment of an excess to a previous sugar marketing year would entail the necessity of amending the final production figures established for this marketing year not only for the particular undertaking but also for the Member State concerned and the whole of the Community.

Such an amendment, by reason of the consequences which would be entailed retroactively for the calculation of the production quotas and the levies to be imposed on the excess production, would involve, according to the unchallenged explanations of the Commission, administrative complications out of all proportion to the result sought.

6 In these circumstances the reply to the questions must be to the effect — formally adopted by Regulation No 700/73 of the Commission with effect from 15 March 1973 — that a difference which comes to light after the final

production figures have been established must be treated as arising during the marketing year in which it was ascertained.

Costs

7 The costs incurred by the Government of the Federal Republic of Germany and by the Commission of the European Communities, both of whom have submitted observations to the Court, are not recoverable, and since the proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the Government of the Federal Republic of Germany and the Commission;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to Regulations Nos 44/67 of the Council of 21 February 1967, 1009/67 of the Council of 18 December 1967, 1029/67 of the Commission of 21 December 1967, 1789/68 of the Commission of 8 November 1968, 142/69 of the Commission of 25 January 1969 and 700/73 of the Commission of 12 March 1973;
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 Hamburg Finanzgericht, by order of that court dated 24 July 1973, hereby rules:

Sugar excesses which come to light after the expiration of the marketing year in which they were produced must be treated for the purpose of the

production levy as arising in the marketing year in which they were ascertained, even if they have been produced before the coming into force of the common organization of the market in sugar.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 30 January 1974.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 17 JANUARY 1974 [1]

Mr President,
Members of the Court,

1. The questions of interpretation referred under Article 177 of the EEC Treaty by the Hamburg Finanzgericht are concerned with a possibility which was not expressly covered by Community legislation in force at the time with which the main action is concerned, nor is there any precise guideline clearly identifiable from the objectives of the system.

These objectives may be enough to exclude any one of the theoretically possible solutions but are in themselves insufficient to single out any one of them as the correct one.

A choice between them can be made with confidence only if, on the basis of these objectives, practical considerations are accorded primary importance. In short, the definition of the rule to be applied necessarily involves an element of law-making, which the courts are usually unwilling to adopt as the basis of their decision. But, as we shall see, this is one of those cases where a realistic appraisal is possible only if the practical requirements are taken into account.

The Commission, moreover, must have appreciated the seriousness of the omission, since in Regulation No 700 of 12 March 1973 (OJ L 67, p. 12), and therefore subsequent to the events on which the present reference for a preliminary ruling is based, it found it necessary to promulgate a rule on the same possibility in connection with which we are being called upon to interpret Regulation No 1009/67/EEC of the Council, which sets out the basic

1 — Translated from the Italian.