OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 20 JUNE 1978 [1]

Mr President,
Members of the Court,

The cases which concern us today are about a product known as "isoglucose" which we have already encountered in Case 101/76 *(Koninklijke Scholten-Honig N.V.* v *Council and Commission of the European Communities,* judgment of 5 May 1977 [1977] ECR 797).

Isoglucose is a new sweetener in liquid form which originated in the United States at the beginning of the seventies, 100 kilograms of which are approximately equivalent to 71 kilograms of white sugar. It is manufactured from starch which has been obtained from maize or wheat or potatoes. In the Community the relevant raw material is principally maize and to a lesser extent other cereals and the recorded processing figures vary between 70 % and 85 % in the case of maize and 15 % to 30 % in the case of other cereals. However from the autumn 1977 onwards — as we were assured — only maize was used as the raw material 50 % of which had to be imported because Community production falls short of requirements. Isoglucose is used in the industrial production of foodstuffs where it can replace liquid sugar.

In the Community isoglucose is manufactured on the one hand by the Netherlands company Koninklijke Scholten-Honig which, after obtaining a licence in 1972 and building an experimental plant, commenced production in September 1973 and increased it in September 1975 after enlarging its factory. However in the meantime the Scholten group, as we heard during the oral procedure, has become insolvent as from 7 March 1978 and a split-up of the group is apparently under way. Isoglucose is also manufactured by the Belgian company G. R. Amylum N.V., the applicant in one of the actions for damages (Case 116/77) with which I have to deal in my opinion which follows this one. This company also commenced production early on, in February 1972, and likewise enlarged its plant. In addition Royal Scholten-Honig (Holdings) Limited, a subsidiary of Koninklijke Scholten-Honig N.V., decided in 1973 to build a plant for manufacturing isoglucose with an annual capacity of 85 000 tonnes and commenced building at Tilbury in October 1974. Lastly the English company Tunnel Refineries has in recent years invested a considerable amount of capital in the manufacture of isoglucose in connexion with an existing starch factory. Part of the capacity thus created has apparently been in use since January 1976.

In the case of the manufacture of isoglucose two groups of Community provisions are material and their validity has to be examined in the present proceedings. One deals with the granting of production refunds in connexion with the manufacture of starch products, the other with taking isoglucose out of the organization of the market in sugar and laying down special common provisions for this product, in particular the imposition of a production levy on its manufacture.

On this point — it was in part the issue in Case 101/76 — the following detailed information is necessary:

Article 11 of Regulation (EEC) No 2727/75 of the Council of 29 October 1975 (Official Journal 1975, L 281, p. 1) on the common organization of the

1 — Translated from the German

market in cereals provides that a production refund may be granted:

"(a) for maize and common wheat used in the Community for the manufacture of starch;

(b) for potato starch;

(c) for maize groats and meal used in the Community for the manufacture of glucose by direct hydrolosis."

Article 11 (3) provides that the Council, acting by a qualified majority on a proposal from the Commission, shall adopt rules for the application of this article and fix the amount of the production refund. The Council did so by means of Regulation (EEC) No 2742/75 of 29 October 1975 (Official Journal 1975, L 281, p. 57) on production refunds in the cereals and rice sectors which was amended by Council Regulation (EEC) No 1862/76 of 27 July 1976 (Official Journal 1976, L 206, p. 3) which entered into force on 1 August 1976. The latter regulation provided for an increase of production levies for the 1976/77 marketing year because the threshold price for maize had been increased. However in the case of starch products intended for the manufacture of isoglucose — and this is one of the issues in the present cases — the rates of the refund for the 1975/76 marketing year were maintained and refunds were no longer granted with effect from 1 August 1977. This was done in such a way that the refund paid by the competent authorities of the Member States to all starch manufacturers was recovered to the extent to which isoglucose was extracted from the starch. Commission Regulation (EEC) No 2158/76 of 31 August 1976 (Official Journal 1976, L 241, p. 21) lays down the rules for the application of Regulation (EEC) No 2742/75. By virtue of Article 4 of Regulation (EEC) No 2158/76 those rules entered into force on 3 September 1976 and were to be applied as from 1 August 1976.

In connexion with the special organization of the market in isoglucose some of the principles of the organization of the market in sugar which originally included isoglucose must first of all be recalled, since isoglucose has to be assigned to tariff headings 17.02 D and 17.05 D which are specifically mentioned in Article 1 of Regulation No 3330/74 of 19 December 1974, L 359, p.1).

The organization of the market in sugar contains rules relating to quotas which apply until the end of June 1980. As provided for in these rules each Member State has a basic quota which has to be allotted to the producers. A sales and price guarantee applies up to the amount of the basic quota (A sugar): national intervention agencies buy the sugar at the intervention price, which is usually above the world price. There is also a maximum quota (B sugar) which has to be fixed every year and is expressed as a percentage of the basic quota. There is also a price guarantee for it — in the 1976/77 and 1977/78 marketing years the maximum quota amounted to 135 % and it was reduced to 127.5 % for the 1978/79 marketing year. However producers are required to make a contribution to the costs of intervention and export — A and B sugar can be exported with a refund — and the total losses incurred by bringing on to the market sugar which exceeds consumption are divided by the quantities of B sugar produced. However the total contribution may not amount to more than 30 % of the intervention price which represents a ceiling for the 1977/78 marketing year of 9.85 units of account per 100 kilograms of white sugar. Sugar produced which exceeds the maximum quota (C sugar) may in principle — except when there is a shortage in the Community as there was in 1974 and 1975 — only be sold on the world market at world prices.

Isoglucose was taken out of the organization of the market in sugar because special provisions were laid down for it by Council Regulation (EEC) 1110/77 of 17 May 1977 (Official Journal 1977, L 134, p.1). Common provisions for isoglucose, which amounted virtually to a mini-market organization, were laid down in Council Regulation (EEC) No 1111/77 of 17 May 1977 (Official Journal 1977, L 134, p.4) which was adopted on the same day. It contains provisions on trade with third countries, import levies and export refunds. But its most important provisions, which have special relevance in the present cases, introduced a production levy for isoglucose. In principle the amount of this levy is the same as that applicable to B sugar. However for the 1977/78 marketing year commencing on 1 July 1977 it is limited to five units of account per 100 kilograms of dry matter; and this amount shall only apply if the production levy for B sugar exceeds five units of account for every 100 kilograms of white sugar for the same period. The Council has in the meantime extended this limitation to five units of account until the expiry of the rules relating to quotas, that is until 1980. Implementing rules for applying the production levy were laid down in Commission Regulation (EEC) No 1468/77 of 30 June 1977 (Official Journal 1977, L 162, p. 7). Under this regulation the same method of calculation applies to isoglucose as to sugar beet.

These provisions have caused several actions to be brought in the national courts.

Before the High Court of Justice in England the plaintiff in the main action in Case 103/77 asked for a declaration that the United Kingdom Government is not empowered to implement Regulations Nos 1862/76, 1110/76 and 1111/77, because they are invalid; the plaintiffs in the main action in Case 145/77 asked for a declaration that Regulation 1111/77 is invalid and consequently cannot be implemented by the national Intervention Board. Several reasons based on Community law were put forward in support which must be considered later in detail. The plaintiffs relied in particular on an infringement of the prohibition of discrimination in Article 40 and violation of the objectives of Article 39 of the EEC Treaty and also of the principle of proportionality.

In the Netherlands case the defendant in the main action served on the plaintiff, the Koninklijke Scholten-Honig N.V., in December 1976 a statement of account of the production refunds for processing maize into starch during the period from 1 August to 31 October 1976. Since this statement worked out in accordance with Regulation No 1862/76 and No 2158/76 showed a debit for the said period in respect of the processing of starch into isoglucose, the plaintiff in the action which it brought before the College van Beroep voor het Bedrijfsleven asked for reimbursement of the production refunds which had been deducted. It takes the view that the provisions of Community law upon which the statement of account is founded are invalid because of failure to give a statement of reasons and infringement of the prohibition of discrimination. It also submits that there has been misuse of powers and a breach of the principle of legal certainty.

Having regard to the arguments submitted, which each of the defendants in the main actions opposes, the courts before which the matters had been brought stayed the proceedings and by orders of 29 July, 12 October and 8 November 1977 referred the following questions to the Court of Justice pursuant to Article 177 of the EEC Treaty for a preliminary ruling:

I. Case 103/77:

"1. Is Council Regulation (EEC) No 1862/76 in so far as it purports to insert Article 5a in Council Regu-

lation (EEC) No 2742/75 a valid regulation?

2. Is Council Regulation (EEC) No 1111/77 a valid regulation?

3. Is Regulation (EEC) No 1110/77 a valid regulation?"

II. Case 125/77:

"1. Must it be held that the reasons on which Article 2 of Council Regulation (EEC) No 1862/76 is based are not stated in accordance with the requirements of Article 190 of the Treaty and if so does it follow that Article 2 — Article 5a of Council Regulation (EEC) No 2742/75 — is not binding?

2. Is the said Article 2 incompatible with the principle of non-discrimination which is fundamental to the Treaty and which is set out, in particular, in Article 40 of the Treaty and is Article 2 not binding for that reason?

3. Does Regulation (EEC) No 1862/76 contain an amendment to the system of granting refunds to the starch industry, which amendment, either of itself or because of the fact that it was suddenly introduced into the aforementioned system which has been applicable since 1967, is incompatible with the principle of legal certainty fundamental to the Treaty and if so is that regulation not binding in whole or in part, namely in so far as it makes provision for the said amendment?

4. Have the Council and the Commission, by adopting Regulation (EEC) No 1862/76 and Regulation (EEC) No 2158/76 respectively, misused their powers in that, in adopting those regulations, they pursued objectives other than those inherent in Regulation (EEC) No 2727/75, particularly because by those regulations they introduced the aforementioned change in the system of production refunds with the aim of helping the sugar industry which aim was not and is not proper to Regulation (EEC) No 2727/75 on the common organization of the market in cereals?

5. Must Article 4 of Commission Regulation (EEC) No 2158/76 be interpreted as meaning that, taking account of the provisions of Regulation (EEC) No 1862/76, those refunds in respect of the manufacture of glucose with a high fructose content which were granted in the period from 1 August to 3 September 1976, on which latter date the regulation entered into force, may be recovered on the basis of the provisions of the said regulation and those of Regulation (EEC) No 1862/76, and if so, must it follow that Regulation (EEC) No 2158/76 is not binding in whole or in part, namely in so far as it makes provision for the recovery of refunds as mentioned above?"

III. Case 145/77:

The question asked was whether Regulation (EEC) No 1111/77 of 17 May 1977 is invalid on any and if so which of the grounds referred to in the plaintiff's points of claim.

Before I consider these questions permit me also to mention that those undertakings and the Belgian company G. R. Amylum N. V. have commenced proceedings for damages against the Council and the Commission. In these proceedings — the cases in question are Cases 116, 124, 143 and 153/77 — the same rules are at issue, namely those concerned with the lapse of the production refund for isoglucose and the introduction of a production levy on isoglucose. I therefore think it would be right for me to consider also the arguments put forward in those proceedings which are relevant to the

question of the validity of the regulations to be dealt with in the cases now before us in the proceedings for a preliminary ruling; I am dealing with these cases in my present opinion.

I — I must preface my argumentation with a brief observation on a question of admissibility raised by the Council in Case 145/77. The Council doubts whether this reference for a preliminary ruling is admissible, because the court making the reference has simply reiterated the plaintiff's complaints, that is to say, it has not made any selection from them having regard to the arguments put forward by the parties, and also has not stated clearly which facts in this case may be assumed to have been established.

Even if in fact the impression might thus be given that these proceedings closely resemble proceedings under Article 173 of the EEC Treaty, which because of the regulatory nature of the acts of the Community which have to be reviewed could not have been instituted by the individuals affected, I do not in the final analysis see any convincing objection. It must certainly be regarded as desirable that a request for a preliminary ruling should deal thoroughly with the circumstances of the case and the position reached in the dispute and if possible give the reasons why the questions are referred to the Court. But there is no express provision for this anywhere and the present case is not the first in which the form of the order making the reference falls short of the ideal. In such circumstances we simply have to proceed on the basis that the problems raised by the plaintiff appear to be convincing to the national court and that it has subsequently made the questions raised its own. The absence of any analysis of the parties' submissions should not therefore give us cause for declaring the reference for a preliminary ruling in Case 145/77 — and perhaps the reference framed in the same way in Case 103/77 — to be inadmissible.

II — As far as the content of the questions referred to the Court is concerned I would like first of all to deal with the lapse of the production refund relating to the manufacture of isoglucose.

In this connexion consideration must first of all be given to Regulation No 1862/76 which was adopted for the purpose of amending Regulation No 2742/75, whereby the production refund for products intended for the manufacture of isoglucose was left for the 1976/77 marketing year at the previous year's level, and was not therefore increased as it was in the case of other products, and which provided that as from the 1977/78 marketing year a refund would no longer be granted. Furthermore Commission Regulation No 2158/76 also contains rules implementing Regulation No 2742/75 and lays down the detailed rules for the recovery by Member States of contributions to the refund in so far as the manufacture of isoglucose is concerned. The orders making the references ask whether these two regulations are valid and also for an interpretation of Regulation No 2158/76.

1. As far first of all as validity concerned there is thus in essence only one matter to consider since — on the whole — in the case of Regulation No 2158/76 no specific reasons have been advanced for its invalidity. In the plaintiffs' view Regulation No 2158/76 would have no meaning if Article 2 of Regulation No 1862/76 was proved to be invalid. When examining the validity of Regulation No 1862/76 there are formal and material aspects to be considered.

(a) The formal validity of the regulation is called in question on the grounds that the statement of the reasons upon which it is based is inadequate, that it makes no reference to the opinion of the European Parliament

which is required under Article 43 (2) of the EEC Treaty and that isoglucose manufacturers were not properly consulted before its adoption. The following are my detailed observations on this argument:

(aa) The plaintiff in the main action, which led to the reference in Case 125/77, takes the view that the statement of reasons cannot be said to be adequate even on the basis of the requirements of the judgment of 13 March 1968 in Case 5/67 *W. Beus GmbH & Co.* v *Hauptzollamt München* [1968] ECR 83, according to which in the case of a regulation more cannot be expected than an indication of the general situation and of the general objectives which it seeks to attain. It cannot also be said in the present case that the objectives are to be inferred from the rules relating to the refund, contained in Regulation No 2742/75, since Regulation No 1862/75 does not refer to the said regulation but is intended to amend it. Furthermore it is important to note that the refund policy has since 1967 applied indiscriminately to all starch manufacturers and that it can be inferred neither from the recitals in the preamble to Regulation No 2727/75 — reference is made in this preamble to the particular situation of the starch market — nor from Article 11 thereof that a distinction can be made according to the end products. Having regard to this situation the reasons for the abrupt change in the refund policy, which occurred when Regulation No 1862/76 was adopted, ought to have been given and full particulars should have been supplied to explain why isoglucose had been made an exception and why in this connexion even the complete abolition of the production levy was deemed to be right.

In answer to this the Council and the Commission call attention to the fact — *inter alia* by referring to the opinion in Case 78/74 *Deuka, Deutsche Kraftfutter GmbH B. J. Stolp* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1975] ECR 421, at p. 435 — that in the case of legislative measures the requirements for carrying out the duty to give a statement of reasons are less stringent if part of an entire system is under consideration. On this point it is important to bear in mind that Regulation No 1862/76 is one of a series of regulations. However the objectives of that regulation, in so far as they can be inferred from basic Regulation No 2727/75 and Regulation No 2742/75, make it immediately clear why there is no question of a production refund for the manufacture of isoglucose. Furthermore it must not be forgotten — and this refers to the argument that the Community has abruptly altered its consistent refund policy — that isoglucose is a new product, which only appeared on the market in appreciable quantities in 1976, and that since 1974 there have been indications of efforts to abolish the refunds or at least to reduce them considerably.

With reference to this argument it must first of all be conceded that the recitals in the preamble to Regulation No 1862/76 are not in fact drawn up in great detail; they actually contain the following:

"whereas however, given the objectives of the production refund system, such an increase should not be retained in the case of products used in the manufacture of glucose having a high fructose content."

However on the one hand I am of the opinion that what was said in connexion with the decision not to increase the refund must naturally apply to its lapse, that the reasons in the preamble therefore form a logical entity. On the other hand I take the view that the reference to the objectives of the rules relating to the refund is sufficient if one follows the arguments in the Advocate General's opinion in Case 78/74 and

the relevant case-law to date (judgment of 13 March 1968 in Case 5/67 *W. Beus GmbH & Co.* v *Hauptzollamt München* [1968] ECR 83; judgment of 20 June 1973 in Case 80/72 *N.V. Koninklijke Lassiefabrieken* v *Hoofdproduktschap voor Akkerbouwprodukten*, [1973] ECR 635; judgment of 18 March 1975 in Case 78/74 *Deuka, Deutsche Kraftfutter GmbH B. J. Stolp* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1975] ECR 421 and judgment of 23 February 1978 in Case 92/77 *An Bord Bainne Co-operative Limited* v *The Minister for Agriculture*, not yet published). In this connexion both the basic Regulation No 2727/75 and Regulation No 2747/75 have a role and it must be regarded as immaterial that the objectives of the rules relating to refunds are mainly indicated in Regulation No 2747/75, which had to be amended by Regulation No 1862/76, the one relevant in these proceedings. The preamble to Regulation No 2727/75 refers to the special market situation for starch, which might make the production refund appear to be appropriate. It can no doubt be inferred from this that refunds for the manufacture of isoglucose have not been included in the objectives of the rules, since isoglucose, even if it is obtained from starch, being a sweetener in the proper sense of that word, does not form, part of the starch market. The preamble to Regulation No 2742/75 is even clearer. It states that there is a special situation on the market in starches and that the starch industry must ensure that its prices are competitive with those of substitute products. In this connexion special reference is made to competition between maize starch, rice starch, potato starch and substitute *chemical* products. However if the creation of the capacity to compete with the products of the chemical industry, especially the petrochemical industry, which can buy raw materials cheaply on the world market, can be found to be the principal justification for the rules relating to refunds, it must accordingly follow that refunds for isoglucose, which is not exposed, or not yet exposed, to a large extent to such competition, were not included in the system established by the rules.

In these circumstances the exclusion of isoglucose from the rules relating to refunds did not in fact call for any special justification and the validity of Regulation No 1862/76 can therefore scarcely be called in question with reference to the requirements of Article 190 of the EEC Treaty.

(bb) Furthermore one of the plaintiffs notes the absence in Regulation No 1862/76 of any reference to an opinion of the European Parliament to be given in accordance with Article 43 (2) of the EEC Treaty. It considers that such an opinion is necessary because the said regulation is not to be regarded as a rule for the application of Article 11 of Regulation No 2727/75 within the meaning of that Article. In fact it has exceeded the limits of the authorization granted in that article, since Article 11 mentions production refunds for specific products quite generally, and does not provide that the Council may adopt different rules according to the use for which the starch was intended.

It is however scarcely possible to accept this line of thought either. In the first place within the framework of *optional* rules relating to the levy, as in Regulation No 2727/75, it seems quite obvious that the Council must be able within the context of the implementing rules which it has to adopt to differentiate between end products. This cannot — if a too narrow definition of the concept of "implementing rules" is to be avoided and in this connexion I refer *inter alia* to the judgment of 30 October 1975 in Case 23/75 *Rey Soda* v *Cassa Conguaglio Zucchero* [1975] ECR 1279 — be regarded as a fundamental

change of policy in the field of refunds on which the other Community institutions had to be consulted. Furthermore reference can be made to what has already been stated about the meaning and purpose of the rules relating to refunds. Thus it emerges from the recitals in the preamble to Regulation No 2727/75 that the rules relating to refunds have been laid down with due regard to the special situation which is a feature of the starch market. That seems to justify completely the exclusion from the rules of products further processed, which are not included in this market. Such a formulation of the rules relating to the refund in other words accords with their objectives and for that reason must fall within the category of what are to be regarded as rules for the application of Article 11 of Regulation No 2727/75.

Since no provision has been made for consulting Parliament on the implementing rules within the meaning of Article 11 of Regulation No 2727/75 and of Article 9 of Regulation No 1418/76 — these provisions laid the foundation for the adoption of Regulations No 2742/75 and No 1862/76 — the fact that Parliament's opinion was not obtained does not conduce to the invalidity of Regulation No 1862/75.

(cc) Finally the same applies the argument that the Community institutions wrongly failed to consult the glucose manufacturers before adopting the regulations which are criticized.

On this particular point it suffices to point out that the Treaty does not provide for such consultation and that there is no corresponding legal principle — at all events when legislative measures are being taken. Furthermore contact was definitely maintained with the interested parties. It was stated during the proceedings, without being challenged, that since June 1976 there has been an exchange of views with the starch manufacturers and mention was made of a visit by officials to an isoglucose factory. This thereby ensured that some effect at least was given to the interests of the parties concerned before the new rules relating to the refund were settled.

(b) In addition the validity of Regulation No 1862/76 is also challenged upon grounds relating to substantive law. In this connexion there are three grounds to consider:

— Infringement of the prohibition of discrimination,

— Disregard of the principle of legal certainty, by reason of the absence of any transitional rules,

— Misuse of powers.

(aa) The isoglucose manufacturers feel that compared with starch manufacturers, who continue to benefit from the production refund, they have been discriminated against, and in this connexion they also have in mind the effects of the new rules relating to the refund on by-products such as feeding stuffs and corn oil. They take the view that it is not permissible to draw a distinction according to whether there is competition with chemical substitute products. They make the further submission that the rules provide for discrimination within the group of products which are exposed to the competition of non-chemical products and refer in this connexion to the fact that a production refund continues to be granted for the manufacture of glucose.

I should like for the moment to leave open the question whether the objection can be raised against these arguments that the producers of isoglucose and starch are the same undertakings and that there cannot therefore be said to be discrimination against different *producers*, because our considerations must at least be based on economic units. I will examine this problem in another connexion, that is to say, the

question whether attention must not more appropriately be focused on the *products* and the relations between them in the field of competition.

For the purpose of evaluating the complaint of discrimination it is now sufficient to refer primarily to the principal objective, which has already been mentioned, of the rules relating to the refund as expressed for the first time in Regulation No 1955/75. According to that regulation *starch* manufacturers should be enabled to meet the competition of chemical substitute products. *Isoglucose* manufacturers are not in such a situation, the competition of chemical products (cyclamates) only being for them very much of secondary importance. It may therefore be said that the exclusion of isoglucose from the rules relating to the refund appears to be justified having regard to the meaning and purpose of the rules, and furthermore it has not been shown that the terms of its exclusion have been too narrowly drawn.

Furthermore there cannot also be said to be any discrimination against starch manufacturers because isoglucose and starch are not products which compete with each other. In this connexion naturally the main products are taken and not for instance the by-products which are also obtained in the manufacturing process and consequently benefit indirectly from the rules relating to the levy.

Moreover as far as concerns the reference to the fact that rules relating to the refund continue to apply in their unamended form to glucose manufacturers, it is also important to bear in mind in this connexion that isoglucose and glucose are not normally in competition with each other. In any case it seems to me to be convincing that owing to the considerable difference in the sweetening properties each product must be assumed to have its separate field of application and that consequently the interchangeability which is a prerequisite of the prohibition of discrimination is absent.

Finally in this connexion the Community institutions have also pointed out — this consideration also is relevant in the context of the principle of equality of treatment — that it would have to be said that there was discrimination against *sugar* manufacturers if isoglucose manufacturers were to continue to benefit from the production refund.

Consequently the rules relating to the refund also cannot therefore be regarded as invalid because they have provided for different treatment of isoglucose products.

(bb) The applicants, in reliance on the principle of legal certainty, also complain that when the production refund for isoglucose production was abolished the existing capacities, in which capital had been invested before the adoption of Regulation No 2727/75, were not taken into account and that neither transitional rules nor compensatory measures were adopted. There were grounds for doing so, namely that there had been production refunds since 1967, that there had been no announcement that the refund in respect of the manufacture of products competing with non-chemical products might be discontinued and also that no indication could have been inferred from Regulation No 2727/75 of any change in the refund policy.

However the Community institutions answer this with good reason by pointing out that a certain form of transitional rules was adopted in that the refund for the 1976/77 marketing year contined at the old rate. Having regard to current agreements and commitments to deliver which had been entered into this could in fact appear to be sufficient. There were scarcely any grounds for measures of adjustment or compensatory measures going beyond this.

Indeed if attention is focussed on the refund rules which originaly applied — according to Article 11 of Regulation No 120/67 they were not optional — it is of primary importance that according to the recitals in the preamble to the regulation they were adopted because of the special situation on the market in cereal and potato starches and of the need to keep prices for those products competitive with prices for substitute products. When these rules were introduced no-one even thought of products such as isoglucose which do not belong to the starch market and also did not arrive on the market in appreciable quantities until 1976. On the other hand the Community institutions have correctly pointed out that undertakings which manufacture a product that competes with sugar and were familiar with the market in sugar and starch products had from the very beginning to be prudent when making capital investments. They could not in fact assume that a set of rules laid down mainly for other purposes would remain unamended in a sector which might create difficulties for the sugar market and there was even less justification for this assumption as the refund policy had any way undergone substantial change in recent years. A communication of the Commission in the Bulletin of the European Communities (Supplement 17/73, p. 14) had in fact already mentioned the necessary amendments and adjustments.

If on the other hand attention is focussed on a later period when considerable quantities of isoglucose arrived on the market, it is then important to note that the rules relating to the refund, as can be clearly inferred from Regulation No 665/75, were only optional at that time. Moreover it was quite clear that for this period the refund was intended — this emerges from the recitals in the preambles to Regulation No 1955/75 and Regulation No 2742/75 — to make starch products competitive with synthetic substitute products. As I have already mentioned this prerequisite did not apply to isoglucose. No one could therefore rely on the optinal rules relating to refunds being maintained in force just for a product of that kind.

From the standpoint also of legal certainty the existence of a defect which might make Regulation No 1862/76 appear to be invalid can therefore hardly be established.

(cc) The complaint of misuse of powers which still has also to be dealt with in this connexion is founded on the argument that Regulation No 1862/76 was adopted within the framework of the organization of the markets in cereals and that this means that the regulation could only pursue objectives which were connected with that market organization. But in fact — as can be inferred from Regulation No 1111/77 — it was support measures for the sugar industry that were involved. Considerations which apply to competition between isoglucose and sugar must be regarded as having no relevance to rules laid down for the implentation of the common organization of the market in cereals. Measures benefiting sugar producers could only have been properly adopted within the framework of the common organization of the market in sugar.

The Community institutions, in my view convincingly, countered these inferences with the assertion that the main reason for adopting Regulation No 1862/76 was that they recognized that subsidizing isoglucose was incompatible with the fundamental aims of the rules relating to the refund. Since such considerations concern the very essence of the rules relating to the refund they in fact fall within the scope of the common organization of the market in cereals. However in addition to this the view also seems to me to be tenable that when adopting agricultural measures —

and implementing rules laid down pursuant to Article 11 of Regulation No 2727/75, which in the final analysis has its origin in Article 43 of the Treaty, are such measures — it must be considered lawful to take into account the effect on sectors other than those directly considered, and in the present cases even the fact that the retention of the production refund in the case of isoglucose would have amounted to discrimination against sugar manufacturers. Finally the Community institutions could in justification of their assertion also refer to the case-law of the Court and in particular to the judgment of 21 December 1954 in Case 1/54 *Government of the French Republic* v *High Authority of the European Coal and Steel Community* (Rec. 1954-55, p. 7). In that case it was held in connexion with the concept "misuse of powers" that where a decision pursues more than one aim, even if an unjustified ground is included among the valid ones, this would not make it invalid for misuse of powers, provided that it does not abandon attainment of the main aim. It is my impression that this is at least the case in these proceedings.

(c) All things considered I can accordingly state that none of the arguments put forward during the proceedings warrants the conclusion that Regulation No 1862/70 and as a result Regulation No 2158/76 are invalid.

2. After that for the purpose of interpreting Regulation No 2158/76 — part of the examination of its validity must no doubt also be carried out from a particular angle — the following brief observations must be made at the end of this first section of my investigations:

Article 4 of the regulation expressly states that it shall enter into force on 3 September 1976, but shall apply from 1 August 1976. It follows quite clearly from this that pursuant to Regulation No 2158/76 production refunds for isoglucose, which were granted during the period from 1 August to 3 September 1976, are also to be recovered.

It is in any case clear that there are no legal misgivings due to this regulation having retroactive effect which militate against the administrative rules of Regulation No 2158/76 being applied in this way. In fact there is no genuine retroactivity which might have had the effect of imposing unexpected burdens upon the parties concerned. As the Commission has rightly observed this is quite simply due to the fact that the level of the refund and consequently the amount recoverable have already been laid down in Regulation No 1862/76 which entered into force on 1 August 1976 and that the direction to the Member States to the effect that the amounts of the refund, as far as they concern isoglucose and exceed the permissible limit, are to be recovered can also certainly be inferred from this regulation. This is conclusive in deciding the matter and as against this the question how the recovery is to be effected technically in law is of minor importance.

III — I come now to the second section of my examination which has to deal with the validity of Regulations Nos 1110/77 and 1111/77. These regulations took isoglucose out of the organization of the market in sugar and introduced a production levy on it. In this connexion it is important to note that the levy fixed in the first instance for a period of one year for isoglucose at a lower level than for B sugar — namely five units of account per 100 kg —, pursuant to a recently adopted decision of the Council, shall apply until the expiry of the rules relating to quotas of the organization of the market in sugar, that is until 1980.

1. In this connexion it is, I feel sure, appropriate first to assemble some economic facts which could not be considered at the outset and which are of importance in examining the arguments put forward by the plaintiffs in the main actions against the validity of the said regulations.

First of all as far as concerns the Community *sugar market*, following several years when sugar was scarce on it and also on the world market, its own production, to which are added imports at guaranteed prices from African, Caribbean and Pacific countries amounting to about 1.3 million tonnes in fulfilment of obligations under the Lomé Convention which remains in force until 1980, has been large in recent marketing years. The sugar market is confronted with stagnant or even falling sugar consumption which at about 9.3 million tonnes per year is in the region of the basic quota. Consequently the 1976/77 marketing year produced surpluses of 1.7 million tonnes in spite of small yields per hectare attributable to the drought. In the 1977/78 marketing year, with the production of white sugar reaching 11.086 million tonnes — not counting C sugar — and taking account of ACP sugar imported into the Community, a surplus of 2.6 to 2.7 million tonnes is to be expected. In such circumstances and in view of the fall in world prices considerable sums of money are needed to finance exports: thus in the 1977/78 marketing year the cost was first calculated at 240 to 250 units of account per tonne and recently at 220 units of account per tonne. The effect of the surplus is also that market prices are approximately the same as the intervention prices or only slightly above them.

As far as isoglucose is concerned the production capacities, expressed in white sugar equivalents, at the end of 1976 have been estimated by one plaintiff at 70 000 tonnes, by the Community institutions and the starch manufacturers at 150 000 tonnes and at the end of 1977 by the plaintiffs at 160 000 tonnes and 380 000 tonnes respectively, by the Community institutions at 400 000 tonnes. The Community institutions also expect a further increase of about 700 000 or even 1 000 000 tonnes by 1980, in answer to which the plaintiffs express the opinion that the expansion of production capacities is already slowing down because of the lapse of the production levy. In fact from the middle of 1976 to the middle of 1977 75 000 to 88 000 tonnes of isoglucose were produced — calculated on the basis of the dry matter — which corresponds to about 2 to 3 % of the entire production of starch. One plaintiff gave as its actual sales 112 000 tonnes for 1977 and 154 000 tonnes for 1978.

Isoglucose arrives on the market in liquid form. This can be seen as a disadvantage because it has to be kept at a particular temperature and is more difficult and expensive to transport than sugar. The advantages enjoyed by isoglucose were stated to be *inter alia* that it is rich in natural fructose and colourless, that it has a neutral taste which brings out the flavour of fruits and has a high degree of solubility and that when it is stored it is not exposed to the risk of infection from microbes.

The price of isoglucose is clearly dependent upon the price of sugar but appears to be a few per cent below the price of liquid sugar; figures of 5 to 7 % or even 10 to 13 % have been mentioned. In this connexion the disadvantages which have been mentioned and the fact that isoglucose is a new product are relevant. Furthermore in this context attention was drawn to the somewhat lower sweetening properties, which are however disputed, and to the fact that two materials have to be stored simultaneously by the manufacturers, the specific reasons being that isoglucose is regularly mixed with sugar

and that *inter alia* the sweetening properties are greater if there is a mixture than would be arithmetically expected. It is not disputed that isoglucose can only replace sugar in the industrial field which accounts for about half of consumption. To what extent isoglucose is expected to oust sugar from this field remained of course a controversial issue. The isoglucose manufacturers adhere to the view that at the present time there is a market for liquid sugar of 700 000 tonnes and that, since the products have to be mixed, about half of it can be taken up by isoglucose. Their view is that, last but by no means least, for reasons of taste isoglucose is only expected to be used in the drinks industry and also generally in larger concerns and they believe — also because the use is restricted in part by administrative provisions — that isoglucose in the longer term will only replace about 7 % of sugar consumption. The Community institutions on the other hand submit that the liquid sugar market is not the only criterion since part of the sugar bought by the industry is solid sugar which it liquifies itself. They point out that the use of liquid sugar is on the increase — in the United Kingdom it already accounts for 16 % of consumption — and that it is certainly not essential, especially in the drinks industry, to mix isoglucose with liquid sugar. They therefore expect that in the long term isoglucose will have a share of up to 30 % of the sugar market. This estimate has been confirmed in a measure by a paper produced during the proceedings and indicating that more than 2 million tonnes of sugar will be replaced in Western Europe by isoglucose are similar — against which must be set another study giving a figure in the order of one million tonnes and a forecast by a sugar manufacturer of an isoglucose market of 1.5 million tonnes.

Finally mention must also be made in this connexion of the fact that according to the statements of the Community institutions isoglucose is manufactured in the Community by five or six modern undertakings of the most convenient size and in the best possible locations. On the other hand sugar manufacturing in the 1976/77 marketing year was spread over 100 undertakings with more than 200 factories. Most of them are near areas where sugar beet is cultivated, some are old and small and their competitive capacity — depending on the region and the harvest — varies considerably.

2. If I next turn to the examination of the regulations mentioned just now — Regulation No 1110/77 which took isoglucose out of the organization of the market in sugar has no significance in this connexion on its own — the first question which might be raised is whether the production levy on isoglucose affects the manufacturers concerned at all. There are grounds for doubting whether it does in view of the assertion of some of the plaintiffs that the lapse of the production levy itself is making the manufacture of isoglucose unprofitable and forcing them to stop production. If this were the case, if isoglucose therefore were no longer being manufactured because of the lapse of the production refund, the rules relating to the levies would in fact not apply and consequently the questions relating thereto would be irrelevant.

Nevertheless it seems to me that for various reasons there is no justification for breaking off the examination at this point on that ground.

One such reason is that is has not so far been clearly established that the consequence indicated — cessation of production — is bound to flow solely from the lapse of the refund. The plaintiff Amylum has not adduced any evidence to this effect and the plaintiff Tunnel Refineries only mentions a

decline in profits due to the lapse of the production refund. Finally no circumstances exist which threaten an immediate cessation of production; if the worst came to the worst this would only be something to be feared in the future, should long term market conditions without a refund not allow isoglucose to be manufactured profitably. If however it cannot thus at the present time be said for certain that the rules relating to the levies are not a matter of importance to isoglucose manufacturers then the examination of the questions of validity referred to us cannot be abandoned.

3. When examining the reasons put forward to establish the invalidity of Regulations No 1110/77 and No 1111/77 I will first of all consider once again the formal complaints.

(a) Thus one of the plaintiffs drew attention to the opinion of the European Parliament (Official Journal 1977, C 93, p. 14) which shows that Parliament thought it advisable to extend to isoglucose the treatment applicable to sugar. In the view of this plaintiff the Community legislature is obliged according to Article 190 of the EEC Treaty to give a statement of the reasons why it has not acted upon the opinion. There is no such statement of reasons in the present cases.

In my view we cannot accept this argument. The predominant reason for this is not so much the fact that the Council has not completely disregarded the opinion of the European Parliament; the decisive factor on the contrary is that, although the duty to consult is laid down by Article 43 of the Treaty, it certainly does not follow that the opinion given must be considered or that if it is disregarded specific reasons for this must be stated. This point was settled early on by the case-law of the Court in similar circumstances in the context of the Treaty establishing the European Coal and Steel Community (cf. Case 4/54 *Associazione Industrie Siderurgiche Associate (I.S.A.)* v *High Authority of the European Coal and Steel Community* (Rec. 1954-55, p. 177)). The same must naturally apply in the field covered by the EEC Treaty.

(b) In connexion also with the introduction of a production levy there is a further complaint that the isoglucose manufacturers were not consulted beforehand.

On this and also the corresponding complaint concerning Regulation No 1862/76 it must be noted that no such obligation exists under the Treaty. Furthermore we know that, on the one hand, there were contacts between the Community institutions and the branch of industry affected — there was a meeting in the autumn of 1976, the minutes of which have been produced, and according to the Council's statements there was extensive correspondence from June 1976 to May 1977 between the Community institutions and the undertakings concerned and also a visit by officials of the Commission to an isoglucose factory. On the other hand it is important to bear in mind in this connexion that the Economic and Social Committee which has the specific function of taking due account in the legislative process of the interests of the business circles involved was in any case consulted. (Official Journal 1977, C 77, p. 18).

Regulations Nos 1110/77 and 1111/77 cannot therefore be said to be vitiated by any formal and procedural defects.

4. The examination of the substantive arguments submitted concerning the validity of the two said regulations is more difficult and covers a wider area.

(a) In this connexion I turn first of all to the question whether the Council could adopt Regulation No 1111/77, which is expressly based on Articles 42

and 43 of the Treaty and refers to the objectives of Articles 39, as a measure relating to agricultural policy or whether it can be said against this that isoglucose is not an agricultural product within the meaning of the Treaty.

In this connexion one of the plaintiffs relies on the opinion of the European Parliament which has already been mentioned and which describes isoglucose as an industrial product. It also refers to the definition of agricultural products in Article 38 of the Treaty which only includes products of first-stage processing. Isoglucose which is produced by second-stage processing does not fall within this definition and Annex II to the Treaty provides no help either, for a wide interpretation of this Annex cannot turn agricultural products into industrial products.

When considering this question it is in my view important to bear in mind that isoglucose falls within tariff headings 17.02 and 17.05 of the Common Customs Tariff. No problems arise on this account in the case of the first tariff heading because from the very beginning it was set out in Annex II.

As far as concerns tariff heading 17.05 it is true that it was not inserted in the list in Annex II until the adoption of Regulation No 7a of the Council of 18 December 1959 (Official Journal, English Special Edition 1959-1962, p. 68). However in my view Article 38 is to be interpreted in such a way that paragraph (3) thereof as well as Annex II to the Treaty are invariably considered in the version from time to time in force. Furthermore it has been established by the case-law of the Court (judgment of 29 May 1974 in Case 185/73 *Hauptzollamt Bielefeld* v *Offene Handelsgesellschaft in Firma H. C. König* [1974] ECR 607) that the number of operations is not the criterion for determining the concept "first-stage processing" and that the ratio between the cost of the basic product and the processed product is a material factor. However since in the case of isoglucose, as we have heard, the costs of the raw materials account for 50 % of the entire costs there can indeed be scarcely any doubt that within the meaning of the Treaty isoglucose is an agricultural product of first-stage processing and that the Community institutions are accordingly empowered to lay down rules in the context of Title II on Agriculture of the Treaty.

It must be noted in connexion with the view put forward by one plaintiff, namely that in the case of processed products the procedure prescribed by Article 235 of the Treaty ought to have been adopted, that the Community institutions could safely have recourse to Article 43 of the Treaty. In any case the Council's contention that it must be possible to introduce a charge under Article 43 if there is already a charge of this kind on competing products seems to me to be tenable in this connexion.

(b) It was then also submitted that the revenue from the production levy on isoglucose could not be treated as "own resources" within the meaning of Council Council Decision of 21 April 1970 (Official Journal, English Special Edition 1970 (I), p. 224), since neither the requisite conditions of subparagraphs (a) or (b) nor of the last paragraph of Article 2 are fulfilled. It follows that the contribution cannot be used for financing sugar exports; the objective which it sought to attain cannot therefore be achieved and for that reason alone levying it must be regarded as unlawful.

This argument also seems to me to be unconvincing. It must, I admit, be conceded that in the present cases Article 2 (b) of the said Council decision, which only applies to customs duties, and the last paragraph of that article, which makes compliance with the procedure prescribed by Article 201 of the Treaty a prerequisite, do not

apply. However I do not consider that one need have any qualms about invoking Article 2 (a) with reference to the levy on isoglucose. In this article appears the very wide-ranging expression "within the framework of the organization of the markets in sugar" according to which I imagine even a very close actual connexion with this organization of the market should suffice. In this context one point of interest is that isoglucose was included originally in the organization of the market in sugar and taken out of it because a special set of rules was adopted for it. Furthermore the levy on isoglucose, as can be inferred from the recitals in the preamble to Regulation No 1111/77, is specifically designed to finance exports of surpluses which come onto the sugar market. Accordingly the levy on isoglucose should be treated as "own resources" within the meaning of the Council decision, and it is therefore plain that its use for the said purpose certainly does not come up against any legal obstacles arising out of the financial system.

(c) In the third place the argument that the rules relating to the levies on isoglucose are incompatible with the objectives of Article 39 of the Treaty must be examined.

The plaintiffs' main submission in support of this argument is that because the levy leads to the production of isoglucose being stopped, technical progress within the meaning of Article 39 (a) of the Treaty is impeded, and by no means the least of the consequences of this is that the effect both on the work force in isoglucose factories and on that part of the agricultural Community which produces the necessary raw materials for the manufacture of isoglucose has not been taken into consideration. The measure also runs counter to the objective in Article 39 (d) of the Treaty since isoglucose can help to assure the availability of supplies when sugar is scarce by stabilizing the market. Furthermore the isoglucose regulation, which in fact increases prices, has disregarded the objective of ensuring that supplies reach consumers at reasonable prices (Article 39 (e)). However it has not been shown in each case that disregarding these objectives in order to pursue another — the Community institutions as we know refer primarily to the stabilization of the market — is *essential.*

It is in my view advisable at the beginning of the examination of this complaint to recall that the decided cases of the Court have repeatedly stressed that all the objectives of Article 39 cannot be pursued at the same time and with equal effect and it is therefore permissible to give one or other of them priority (cf. for example judgment of 13 March 1968 in Case 5/67 *W. Beus GmbH & Co.* v *Hauptzollamt München* [1968] ECR 83; judgment of 24 October 1973 in Case 5/73 *Balkan-Import-Export GmbH* v *Hauptzollamt Berlin-Packof* [1973] ECR 1091; judgment of 2 July 1974 in Case 153/73 *Holtz & Willemsen GmbH* v *Council and Commission of the European Communities* [1974] ECR 675). The Community institutions have a wide discretion in this matter. They exercise it according to the economic circumstances. On the other hand the case-law of the Court nowhere indicates that giving preference to one objective requires evidence that in the interest of that objective it is *essential* to disregard other objectives.

As far then as the individual objectives referred to by the plaintiffs are concerned the following are my observations on the alleged disregard of them.

With reference to Article 39 (a) it is certainly of importance that it uses the expressions "agricultural productivity" and "rational development of agricultural productivity" and "rational

development of agricultural production". This provision can scarcely be invoked if the effects of a rule on new methods in the processing industry are at issue.

To this must be added that it has not so far been established that the rules relating to the levies for the time being in force make it impossible to manufacture isoglucose. In support of this the figures produced so far, on which the Community institutions have registered some doubts and have not as yet gone into in sufficient depth, are probably inadequate. There is the further point that the plaintiff in Case 125/77 only says that because of the levy isoglucose has to a great extent been eliminated from the market and that the plaintiff Tunnel Refineries nevertheless began to produce isoglucose in 1978 even if the scale of production was smaller than originally planned.

The plaintiffs' reference in this connexion to the situation of the workers in isoglucose factories is undoubtedly inadmissible. In my view such considerations have no place in the context of Article 39 (a). If they were appropriate reference could on the other hand also be made to the situation of the workers in the sugar industry which is plainly much more labour intensive and represents a threat to isoglucose.

Last but by no means least the submissions put forward in this connexion on the effects on the agricultural community of impeding the production of isoglucose also seem to me to carry little conviction. It is true that it is technically possible to manufacture isoglucose not only from maize but also from potatoes and other cereals. But the possibility of so using the two last-mentioned products in the Community as the Council with reference to processing costs has convincingly shown by means of figures, is ruled out. With regard to maize which alone is used the decisive factor however is that in spite of considerable expansion the production of maize in the Community presents no problems at all since it does not yet meet Community demand by a long way. In addition Community maize is clearly less suitable for the manufacture of starch and isoglucose than it is for use as fodder. Consequently only less than 100 000 tonnes of the Community maize used for the manufacture of starch — about 1 000 000 tonnes per year — are supplied for the manufacture of isoglucose and imported maize is mainly used for this.

The plaintiffs' reference to Article 39 (d) — the assurance of the availability of supplies — cannot in my opinion stand because, as has been explained to us, the rules relating to quotas of the organization of the market in sugar have provided for a sufficiently large safety margin. Furthermore for some years there has been a surplus in the Community — which amounted to 2.7 million tonnes for the marketing year 1977/78 — and this situation is expected to continue both in the Common Market and on the world market for the foreseeable future.

Finally the plaintiffs' reference to Article 39 (e) — supplies reaching consumers at reasonable prices — would not seem to hold good. In this respect isoglucose can indeed achieve nothing for the foreseeable future because in the main it follows the sugar price. The point to bear in mind about the sugar price is that owing to the existing intervention system and the present surplus its movements are in any case close to the lower Community price limit, namely the intervention price. It does not drop below that price if an additional sweetener appears on the market.

Conversely the submissions of the Community institutions on the pursuit of the objectives of Article 39 in

connexion with the production levy on isoglucose seem to me to be convincing.

According to these submissions its main purpose is to stabilize the sugar market, that is to say, to counteract any increase of the surpluses. In this connexion it must be borne in mind that there are already surpluses on the sugar market and that in view of the obligations under the ACP-EEC Convention of Lomé and also the rules relating to quotas which remain in force until 1980 and have established rights in a definite way, there are scarcely any other possible ways of reducing the surpluses.

In addition to the main purpose must be mentioned the concern to ensure sugar beet growers, for whom the applicable organization of the market in sugar has created certain rights, "a fair standard of living" within the meaning of Article 39 (b). The possibility is not to be ruled out that in fact a further expansion of isoglucose and the attendant increase in the price of sugar exports will cause sugar beet growing to decrease, at any rate as far as so-called B sugar is concerned, to which indeed a lower minimum sugar beet price applies. A changeover by these agricultural communities to products of which there is not also now a surplus might however not be practicable in the medium term, quite apart from the fact that the cultivation of maize — this must be the primary consideration — is not possible everywhere for climatic reasons and that for technical reasons (rotation of crops) growing sugar beet cannot be completely abandoned.

If all these maters are considered it can in fact hardly be said that the rules relating to the levies imposed upon isoglucose prevent the attainment of the objectives of Article 39, even if considerations such as the fact that it is in the interest of consumers for the budget not to have to bear too great a burden are disregarded.

(d) The question whether the rules adopted discriminate against manufacturers of isoglucose, which is the unanimous view of the applicants, now has to be considered.

Their view is that since isoglucose competes with sugar it should not be subjected to a higher charge than sugar. That is however the position since the whole of the production of isoglucose is charged whereas in the case of sugar a levy for financing exports is only imposed on B sugar. If this charge is expressed in terms of the entire production of sugar, and at the same time it is assumed that the B quota is not usually exhausted, and if account is taken of the lower sugar beet price in so far as B sugar is concerned, that is to say, of the fact that part of this charge is passed on to the farmers, then in the case of sugar an average charge of one unit of account or less per 100 kg is arrived at whilst isoglucose has to bear a charge five times or more greater than this.

The Community institutions in answer to this refer to the fact that, since isoglucose is put on a market where there is a surplus, it is only logical to treat it in the same way as surplus sugar and therefore to charge it in the same way as B sugar. They also take the view that the only object of the production levy on isoglucose is to offset the competitive advantage which isoglucose derives from the organization of the market in sugar and its rules for quotas to which isoglucose is not subject. The price of sugar from which isoglucose also benefits would in fact be some 15 % lower were it not for the rules relating to quotas. The Community institutions also take the view that it is not the charges on the *products* but the consequential effects on *manufacturers* which have tot be compared. Here it must be borne in mind that sugar manufacturers only produce *one* product and are entirely dependent upon *one* basic product. On the other hand starch

manufacturers, who also produce isoglucose, have a wide range of products and can have recourse to a large number of basic materials. Since they are all large undertakings which are capital rather than labour intensive and since the proportion of isoglucose in the production of starch is only some 3 % they are definitely in a position to pay the production levy on isoglucose at the prescribed rate. Finally isoglucose derives benefits from the common provisions applicable to it under Council Regulation (EEC) No 1111/77 and is frequently subject to a lower domestic taxation than sugar. For the purposes of considering whether there has been any unequal treatment compared with sugar objective reasons can be found and in this connexion the objectives of Article 39 must be especially borne in mind.

It is obviously difficult to settle this difference of opinion because two systems have to be compared which have been developed on quite different lines. One only has to think of the applicable restrictions on sugar production, the rules relating to quotas, and the obligation to keep stocks as well as the guarantee to purchase sugar which do not exist in the case of isoglucose.

On the other hand the difficulties would certainly not be removed by laying down identical rules for isoglucose, especially by introducing rules for quotas corresponding to those of the organization of the market in sugar. The Community institutions had good reason to show that in this connexion the fixing and allocation of any quotas would create serious problems, as at the relevant time production capacities were being built up and on the other hand representative production figures were virtually non-existent. If the rules relating to quotas were to be practical they might have necessitated cuts in the sugar quotas; the arguments against making such cuts might have been that in this connexion rules have been laid down until 1980, that in a certain sense therefore acquired rights had to be considered. It is therefore quite understandable that this problem was kept back for consideration in connexion with the future definitive rules which are to apply from 1980 onwards. On the other hand because of the growing influence of isoglucose on the sugar market it was imperative at least to adopt provisional rules. When this was done only certain rules relating to levies were possible, if cutting the B sugar quotas for the 1978/79 marketing year is disregarded, which obviously could not be effected for the preceding marketing year, because at the relevant time the sowing of sugar beet had already taken place and certain promises had been given that the old quotas would be maintained.

If I now consider the rules relating to levies on isoglucose from the standpoint of discrimination some relatively simple observations may first of all be made on this aspect of the matter.

In my opinion the reference to the mini-market organization for isoglucose with its import and export system and the observation made in connexion therewith that isoglucose derives certain benefits from these rules which stabilize the market are therefore irrelevant. In fact it may well be that they have at present and will for some time to come have no actual effects. Isoglucose is in fact only manufactured on a large scale in the USA and Japan; imports from these countries are hardly feasible however owing to the distance and the existing transport problems raised by isoglucose. In other words there is consequently at the moment no world market against the fluctuations of which the manufacturer of isoglucose in the Community would have to be protected and this is borne out by the figures produced by the Commission, during the oral procedure, for imports and exports of isoglucose since January 1978.

In my view the reference to the fact that different domestic rules relating to levies apply to sugar and isoglucose is also not decisive. This is not the case in all Member States — for instance not in the United Kingdom. Furthermore it is not for the Community institutions to consider such divergences as it were in passing when they establish a market organization.

Furthermore it certainly cannot be accepted as "logical" to treat isoglucose as surplus B sugar simply because its appearance on the market helps to increase the sugar surpluses. This argument in fact amounts to saying the Community sugar market has so to speak already been allocated and that comparable new products in principle have no place on that market but are for export. There is no doubt that the rules relating to quotas cannot have this effect. Even if these rules are accepted on account of the stabilizing effect they have on the market — there is important criticism of this as well — they cannot possibly however have the effect of making new developments in this sector practically impossible or unduly difficult. According to the basic system of the Treaty, which is liberal, access to the market must on the contrary be guaranteed on the same terms even if in certain circumstances this involves additional sacrifices for the general public.

Furthermore I consider it to be inadmissible when making the necessary comparison to focus on the position of the *manufacturers* and to conclude from it that large starch factories which also manufacture isoglucose could within the framework of their overall programme which allows a certain flexibility cope with production levies more easily than labour intensive sugar manufacturers many of which are only small. In this respect the picture outlined by the Community institutions requires some correction because in factories where isoglucose is manufactured it represents a greater proportion of the production programme (17 or 25 %) than it does of the manufacture of starch as a whole. However the fact that in undertakings having several production lines care is taken to ensure that in principle each individual product is in the long run manufactured at a profit is even more important. Therefore in my view one can only focus on individual products, which compete with each other, and merely compare the charges imposed on them and their capacity to bear such charges. Moreover this appears to me to be in line with the case-law of the Court (judgment of 19 October 1977 in Joined Cases 117/76 and 16/77, *(Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co.* v *Hauptzollamt Hamburg-St. Annen* [1977] 1753) and only in this way can an unintended direct charge on starch production, which in any case is under considerable pressure from chemical competitors, be avoided in the present case.

On the other hand the reference to alleged discrimination against isoglucose compared with glucose, which is also a sweetener produced by starch manufacturers, to which the rules relating to the levies do not apply must be regarded as irrelevant. As to this I recall the point which has already been made in connexion with the examination of the rules relating to refunds that because of the considerable difference in the sweetening property there was no competition.

When considering the question what are the criteria in accordance with which a *somewhat better* balanced set of rules — in view of the complexity of the relationship more cannot be required — can be found for isoglucose and sugar, one might first consider treating the levy on isoglucose as simply compensation for a 15 % price advantage which isoglucose derives from the organization of the market in sugar. This appraisal stems from the history of the establishment of the

organization of the market in sugar. At that time there were various domestic rules with officially fixed prices and production quotas: their principal feature was that owing to the differing price patterns in the Member States there was no uniform price level. On this basis an approximate market equilibrium could also have been established for the common organization of the market in sugar and other products solely by means of a price system. However, if this had been done prices would have had to be at approximately their low level in France with the result that beet growing in regions at a disadvantage would no longer have been possible. In order to rule out this possibility a higher price level — at approximately the Italian and German prices — was chosen. However, in view of the existing production capacities, which allow 14 million tonnes of sugar to be produced, such a price-level made restrictions on production necessary, if inordinate surpluses were not to arise. The Community institutions argue that, had it not been for these rules relating to quotas, the Community price level would have been lower, namely by about 15 %. Since isoglucose benefits from the rules on prices applicable to sugar without being subjected to any restrictions on its production it can be said that the rules relating to quotas give isoglucose a competitive advantage of about 15 % of the intervention price which corresponds to approximately five units of account. Nevertheless I doubt whether these reasons given for the amount of the levy on isoglucose are correct. There can certainly be no doubt that there is a link between the sugar price level and the rules relating to quotas. The price advantages however also apply to the sugar manufacturers and in their case — and this is important — the rules relating to quotas have very different effects; favourably located modern factories can readily produce the full B quota and indeed even C sugar, since there is in fact therefore no restriction of their production. Therefore I do not see how the disadvantage at which sugar manufacturers are placed by the rules relating to quotas can be quantified at 15 % of the intervention price, as the Commission has assumed, and why accordingly in the case of isoglucose there was said to be a similar competitive advantage, which could as it were be creamed off. For this reason I prefer to centre the examination on a comparison of the charges applicable, on the one hand, to isoglucose and, on the other hand, to sugar.

In doing so there certainly seems to me to be no justification for proceeding as the applicants have suggested, that is to say, ascertaining the average charge of the entire sugar industry by means of which — allowing for the lower price of sugar beet in the case of B and C sugar — with the B quotas being completely used up one then arrives at a charge of about one unit of account per 100 kg, and what is more, if account is taken of the fact that in the years 1971 to 1976 production of B sugar only amounted to between 11 and 19 % of the production of A sugar, that is taking as a basis the actual average production of B sugar, a charge of only one half of a unit of account is arrived at. In my view this method of calculation fails to appreciate two essential aspects. In the first place the history of the establishment of the organization of the market in sugar reveals that A quota sugar is intended in principle to support producers in unfavourable regions and that B quota sugar is designed to encourage production where it is more competitive and where if need be C sugar could also be produced. From this angle the idea suggests itself of forming a group of sugar producers for whom first and foremost B quota sugar is meant. On the other hand it is of importance that isoglucose manufacturers have large modern factories which have much

lower labour costs than sugar factories. It is therefore natural to compare them with corresponding modern sugar manufacturers who are favourably located and also work efficiently. They are unquestionably manufacturers who also produce C sugar in large quantities and for whom therefore the production restrictions of the rules relating to quotas are in practice of as little importance as they are for isoglucose manufacturers.

The Commission also took this as a starting point when it gave us the example of a modern sugar factory which produces a great deal of C sugar — in the year 1976/77 87 % of the A quota. In the case of this undertaking it calculated on the basis of the production figures of the 1976/77 marketing year an average charge on sugar of 11 units of account, by applying the actual production figures for the year 1976/77 which became known later, a charge of 8.71 units of account and for the year 1977/78 a charge of 13.80 units of account per 100 kg. However in my view such an example can scarcely be satisfactory, especially as we were told during the hearing that in the factory in question a very large amount of C sugar was produced, that a large increase of its quota and of its production was effected, but that it ran at a loss in the 1976/77 marketing year. On the contrary I consider that it is necessary to place the examination on a broader basis and include all similar undertakings in the investigation. In this connexion it is appropriate to confine the investigation to the 1977/78 marketing year, not only because a production levy was imposed upon isoglucose for the first time in this marketing year, but also because the drought in the preceding 1976/77 marketing year only permitted a relatively small production of C sugar. The Commission has told us on being asked to do so what kind of a picture emerges. According to that picture it has to be assumed that sugar manufacturers bear a charge which is between 3.81 and 13.52 units of account per 100 kg. However I also consider — and on this point I agree with the applicants — that it is proper as far as concerns this calculation to bear in mind that other purchase prices apply to sugar beet intended for the production of B and C sugar, namely in the case of B sugar a minimum price reduced by 30 % and in the case of C sugar — as there is no minimum Community price for it — a market price which in 1976 apparently only amounted to something more than half of the minimum price for sugar beet. There were thereby included in the comparison, not as might be expected elements of the production costs which would have been improper but factors relating to the market organization which in the common organization of the market are fixed and are calculated to shift a specific portion of the charge on to sugar beet farmers, in the case of B sugar — as the sugar industry itself admits — about 60 %. If one proceeds in this way and if appropriate corrections are made to the figures produced by the Commission — the applicant Amylum has worked them out by way of example — then one arrives at charges which are valued at five units of account for six undertakings, at rather less for four undertakings and at even more than five units of account for four undertakings. However, on that basis and especially if it is borne in mind — and the Commission considers it is appropriate to do so — that frequently more than the minimum price, sometimes even the A price, was paid for B sugar beet, it can be said that the average charge on such sugar manufacturers on the whole corresponds to the charge which isoglucose manufacturers also have to bear. We should in the main stick to this method since the quantification of other factors (the advantages accruing to the isoglucose

manufacturer from lower marginal costs and the existence of by-products — guaranteed purchase of sugar and the sugar manufacturers' obligation to keep stocks) is unsatisfactory.

In the final analysis this means that the production levy fixed for isoglucose, which from now until the end of 1980 is to be five units of account per 100 kg does not in fact discriminate against isoglucose manufacturers, and accordingly it is unnecessary to go further into the question whether placing isoglucose at a disadvantage might not even be justified on the ground that we are only concerned with transitional rules applicable for a few years, that the sugar manufacturers might be said to have well established rights, that there might be a certain Community preference for sugar extracted from sugar beet produced in the Community as against isoglucose which is manufactured principally from imported products.

(e) Since the complaint of discrimination, which is probably to be regarded as the principal complaint is thus unfounded, the question whether objection could be taken to the rules which have been adopted because they are in breach of the principle of proportionality must furthermore be considered. As is generally known, according to this principle which has been repeatedly applied and explained in the case-law of the Court, an official measure must not have any greater effect on private interests than is necessary for the attainment of its objective and it must be established that it can only with difficulty be replaced by less stringent measures.

The applicants take the view that this requirement is not satisfied for various reasons by the rules relating to the levies which have been adopted, the purpose of which according to the statements of the Community institutions is to fix a contribution to the financing of exports of surpluses and thereby slow down the growth of isoglucose. They take the view that an appropriate contribution to the financing of exports of surpluses — quite apart from the fact that the surpluses were to be disposed of in another way, namely by reducing the quotas — ought to have been determined by the market share of isoglucose, which at the present time is about 3 % of sugar consumption. They also take the view that, having regard to the objective of slowing down the growth of isoglucose, the production levy must be regarded as excessive, because the Community institutions have obviously proceeded on the basis of misconceptions as to the volume of exports to be anticipated, as to isoglucose's possible market share and also as to its production costs, if the latter were not quite wrongly wholly left out of account. Furthermore the fact has to be faced that the production levy does not slow down the growth of isoglucose but makes discontinuance of its production unavoidable.

On this issue the following brief observations have in my view to be made.

In so far as the applicants mention exaggerated fears concerning sugar exports — they themselves give a figure of about 500 000 tonnes for the current marketing year — it must be borne in mind that they have not succeeded in questioning the figure of 2.7 million tonnes give by the Community institutions. It is apparent that the applicants have simply carried forward the production figures of A and B sugar of the 1976/77 marketing year to the following marketing year and deducted from them the presumed consumption. However, when they did this — apart from the fact that it is necessary to proceed on the basis of higher production values — they overlooked in particular the quantities in respect of which there are obligations to import under the ACP-EEC Convention of

Lomé. If the values of the Community institutions are taken as a basis and if the charge accruing therefrom to the budget is considered it is hardly possible to talk of isoglucose manufacturers being required to make an excessive contribution. In fact they only bear less than 3 % of all export costs: in relation to the rate of the refund per tonne (220 units of account) their share (50 units of account) amounts to less than one quarter. If on the other hand only 3 % of the total costs which sugar and isoglucose producers bear were imposed upon the applicants in accordance with their market share, which they consider to be the appropriate method, then the other objective which has been mentioned, the slowing down of the growth of isoglucose, would hardly be attained.

I am unable in addition to accept that the production levy could in fact have been avoided or reduced by an amendment of the rules relating to quotas applicable to sugar. Such an amendment is ruled out with reference to A quotas because in their case until the rules which are at present in force expire, that is until 1980, there is the question of the legal situations which have arisen. In the case of B quota sugar a specific reduction was decided upon for the 1978/79 marketing year. However, in my view there are significant considerations relating to agricultural policy, which I examined just now when I dealt with the objectives of Article 39, which militate against a reduction by an amount which would considerably reduce the export levy or even effectively abolish it.

Furthermore with regard to the applicants' argument that when the Community institutions fixed the levy they proceeded on the basis of misconceptions as to the production costs of isoglucose and its potential to oust specific quantities of sugar from the market within a short time, it may indeed turn out — and this refers to the last mentioned point — that the forecasts of the Community institutions, which I mentioned just now when I dealt with the economic data, were pitched too high. On this point reference can indeed be made to the fact that the lapse of the production refund has a slowing down effect and that in some Member States legal rules restrict the use of isoglucose. Furthermore it is of interest to note that on the American market, an area in which isoglucose has already been produced for a long time, where the production of sugar is inadequate but a large amount of maize is produced and where perhaps reasons of taste and business patterns enable isoglucose to be used extensively, the production of isoglucose for the 1976/77 marketing year is said to have amounted to only about 1.2 million tonnes. However, according to the contentions of the Community institutions the level of the production levy has not been fixed on the basis of isoglucose's potential share of the market. Likewise the production costs of isoglucose did not serve as a guide-line for determining the levy. On the contrary the main idea for this was to charge isoglucose and sugar in the same way.

Finally in connexion with the principle of proportionality — and with this observation I conclude my remarks on this complaint — there can be no question of proceeding on the assumption that the levy was fixed in such a way that it renders the manufacture of isoglucose impossible. On the contrary it is my impression that the figures which have so far come to light are insufficient to support such an assumption. Likewise a charge which modern sugar factories seem to be able to bear can also be borne in the same way by the less labour intensive manufacturers of isoglucose. However, in principle this viewpoint can least of all have any decisive significance when all other considerations point to the charge

being fair. If the position were as the applicants consider it to be then it would only be evident that the manufacture of this new product, in which it was decided to invest when the economic situation was entirely different, just cannot be carried on economically under existing circumstances and in such a way as to maintain the conditions of competition which apply to sugar.

(f) The applicants also submit that the Community institutions have wrongly failed to provide for any transitional rules and derogations for existing capacities and the argument put forward in the proceedings relating to the liability of public authorities for damages that the applicants have been frustrated in their legitimate expectations is connected with this.

The applicants point out that isoglucose has for some time benefited from production refunds, that is to say, from certain measures to promote it. The Community institutions were aware of the efforts to develop isoglucose in the Community and also knew about the consequent decisions to invest in it. Nevertheless they did not at any time draw the attention of the applicants to the fact that in view of a threat to the sugar market caused by isoglucose production measures might be adopted.

As far as the first part of this argument is concerned it suffices to refer to the fact that it has already become clear in this case that the production refund was not intended for isoglucose and that the latter was not included among the objectives of the relevant rules. The fact that isoglucose manufacturers benefited for a time from the rules relating to the refund does not establish any legitimate expectation of further encouragement and preferential treatment.

For the rest there can only be said to be a breach of the principle of the legitimate expectation that a given legal position would continue if, having regard to all the relevant circumstances and especially to the conduct of the Community institutions, there were grounds for being absolutely certain that a specific legal situation would not be altered. But that is out of the question in these cases as far as the production levy is concerned. The Community institutions were right to stress that the applicants operate in a field which is technically very closely connected with the sugar market and that they knew all about this market and the rules governing it, especially those relating to the problem of the surplus. They therefore had to take into account the fact that, in such an economic situation, far-reaching stabilization measures would be adopted and that the system of financing exports would also be extended to substitute products as soon as they arrived on the market in considerable quantities, and that by no means the least reason for this was that an amendment of the rules relating to quotas and the import regulations for the ACP sugar was not to be expected before 1980.

For that reason and especially because the preparatory work in connexion with the measures has been carried out in such good time that existing contracts were scarcely affected by them there was no occasion to adopt special transitional measures which might have frustrated the effect of the rules. If however isoglucose manufacturers nevertheless got into unexpected difficulties that was their own fault, because when they made their decisions to invest they did so on the basis of specific forecasts of the economic trend — a continuing sugar deficit and rising prices — which now turn out to be wrong.

(g) The other argument which has now still to be dealt with — it also originates in the proceedings relating to the liability of public authorities — namely that the rules to which

exception is taken contravene the right to carry on a business freely, which can be numbered among the principles which the Community institutions also have to observe, is in a certain way connected with the principle of proportionality which has already been dealt with. On this point the applicants once again submit that the production levy renders the manufacture of isoglucose impossible, in fact even at the level of five units of account per 100 kg which was originally limited to one year and now applies until 1980. The capital invested in isoglucose has therefore been lost; the Community institutions should in each case have provided for compensation for this "expropriation".

On this I can first of all only repeat that it has not been proved that this economic consequence is inevitable even if the calculations produced by the Community institutions have not so far been acknowledged to be conclusive. It also appears to be in principle unlikely — and the conduct of the applicant, Tunnel Refineries, supports this view — that transitional rules could give rise to such a drastic step as the closing down of a factory.

For the rest the effect of the apprehended discontinuance of isoglucose production, if the worst comes to the worst, is the disappearance of one branch of the starch manufacturing industry so that the existence of the undertaking concerned as such is not endangered. But such a state of affairs can scarcely be said to be an interference in the business amounting to expropriation.

By no means the least of the arguments of the Community institutions in this connexion is their reminder that according to the case-law of the Court (judgment of 14 May 1974 in Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung* v *Commission of the European Communities* [1974] ECR 491) rights such as those which are asserted in these cases can be restricted in the public interest. On this point it must be borne in mind in these proceedings that the applicants operate in a field in which considerations of agricultural policy are very important and for that reason freedom of manoeuvre is in any case very restricted.

I therefore assume that the legality of the rules upon which judgment has to be passed cannot be seriously called in question by relying on the right to carry on a business freely.

(h) It only remains for me to consider the complaint of a misuse of powers which the applicants make on the ground that a set of rules relating to levies such as those involved in these cases may only be adopted under Article 40 of the EEC Treaty in connexion with an organization of the market. But there is no real organization of the market for isoglucose, because the advantages to accrue to isoglucose under Council Regulation (EEC) No 1111/77 have not as yet been realized. Furthermore the rules relating to levies pursue illegal objectives such as neutralization of the competition offered by isoglucose and slowing down its growth, protection of the sugar industry which is running less economically and lightening the burden of the Community budget.

On this point I have already acknowledged in another connexion that the advantages which isoglucose was expected to derive from the organization of the market are not at the moment of any real significance. However that naturally does not mean that the organization of the market in isoglucose is mere show. The course which further development is expected to take is entirely in foreign trade although perhaps not so much with overseas countries as with European countries bordering on the Community. I simply recall that the large French share of isoglucose production has to be exported because of the prohibition of

its use which applies in France. Furthermore, even if the rules relating to the levies are perhaps seldom applicable in practice, the rules relating to the refund, which indeed also apply to isoglucose in processed products, have to be borne in mind. I do not therefore consider that the introduction of a production levy on isoglucose is inadmissible because there is no real organization of the market in isoglucose. Quite apart from that, the imposition of production levies on substitute products under Article 43 of the EEC Treaty can in any case be regarded as lawful, if a corresponding levy within the framework of an organization of a market — in these cases the organization of the market in sugar — is imposed on agricultural processed products.

As for the rest nothing has come to light to show that the real aim of the rules is only the neutralization of the competition offered by isoglucose and the protection of the sugar industry. As we have been shown the rules aim — in order to avoid discrimination against sugar — at nothing else but the extension of the rules on contributions applicable to this product to substitute products which have considerable importance on the market. If however in this connexion the aim of *slowing down* the growth of isoglucose in the interest of stabilizing the market has played a part — the Community institutions refer specifically to this in answers to Parliamentary questions — this would be just as lawful as the other subsdiary concern, namely to protect the Community budget from burdens which are too heavy.

I therefore find that there is no basis for the complaint that there has been a misuse of powers.

(i) All things considered it therefore emerges that there are no grounds for legitimate doubts as to the validity of the rules governing the levies on isoglucose and that there is consequently no reason to assume that Council Regulation (EEC) No 1110/77 and Council Regulation (EEC) No 1111/77 are invalid and that the provisions adopted by the Commission for their implementation, in respect of which specific arguments have not been submitted during the proceedings, are also invalid.

I therefore submit that the questions referred for a preliminary ruling be answered as follows:

1. During the proceedings no reasons have become apparent which might justify the assumption that Council Regulation (EEC) No 1862/76 in so far as it has added an Article 5 (a) to Regulation (EEC) No 2742/75 of the Council and Council Regulations (EEC) No 1110/77 and (EEC) No 1111/77 are invalid.

2. Article 4 of Commission Regulation (EEC) No 2158/76 is to be interpreted as meaning that it also applies to the recovery of refunds, which have been granted in respect of the production during the period from 1 August to 3 September 1976 of glucose having a high fructose content.