intervene. It is not possible to restrict the exercise of that right by any one of them without adversely affecting its institutional position as intended by the Treaty and in particular Article 4 (1).

The right to intervene which the institutions have is not subject to the condition that they have an interest in taking proceedings.

3. In the exercise of the power conferred on it by the first paragraph of Article 42 of the EEC Treaty to determine to what extent the rules on competition are to be applied in the agricultural sector, as in all implementation of the common agricultural policy the Council has a wide measure of discretion.

4. Different treatment of industries which is to be explained by objective differences between the situations of those industries cannot constitute discrimination within the meaning of Article 40 (3) of the EEC Treaty.

Nor is there discrimination within the meaning of that provision when in adopting measures of general interest the Council does not take account of the different situations between those industries due to their commercial choices and internal policy.

5. The consultation provided for in the third subparagraph of Article 43 (2) as in other similar provisions of the EEC Treaty, is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects, at Community level, the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly.

Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void. Observance of that requirement implies that the Parliament has expressed its opinion. It is impossible to take the view that the requirement is satisfied by the Council's simply asking for the opinion, if no opinion is afterwards given by the Parliament.

In Case 139/79

MAIZENA GMBH, whose registered office is at 218 Spaldingstraße, D-2000 Hamburg, represented by its Directors Karl-Heinz Schlieter and Klaus A. Schroeter, assisted by Hans G. Kemmler, Barbara Rapp-Jung and Alexander Boehlke, of the Frankfurt am Main Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34b Rue Philippe II,

applicant,

supported by

EUROPEAN PARLIAMENT, represented by its Director-General Francesco Pasetti Bombardella, assisted by Roland Bieber, Principal Administrator in its Legal Department, and Professor Arved Deringer, with an address for service in Luxembourg at the Secretariat General of the European Parliament,

intervener,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Daniel Vignes, Director in the Legal Department, assisted by Arthur Brautigam and Hans-Joachim Glaesner, acting as Joint Agents, Hans-Jürgen Rabe, of the Hamburg Bar, Professor Jean Boulouis, Honorary Dean at the Université de Droit, d'Economie et de Sciences Sociales, Paris, with an address for service in Luxembourg at the office of Douglas Fontein, Director in the Directorate for Legal Questions at the European Investment Bank, 100 Bd Konrad Adenauer, Kirchberg,

defendant,

supported by

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Peter Gilsdorf, acting as Agent, assisted by Jacques Delmoly, a member of the Legal Department, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

intervener,

APPLICATION for a declaration that certain provisions of Council Regulation No 1293/79 of 25 June 1979 (Official Journal L 162, p. 10, with corrigendum in Official Journal L 176, p. 37) amending Council Regulation No 1111/77 laying down common provisions for isoglucose are void,

THE COURT

composed of: H. Kutscher, President, P. Pescatore and T. Koopmans, (Presidents of Chambers), J. Mertens de Wilmars, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco, A. Touffait and O. Due, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

I — Facts and procedure

A — History of the adoption of Council Regulation No 1293/79

By judgment of 25 October 1978 on the reference for a preliminary ruling in Joined Cases 103/77 and 145/77 *Royal Scholten-Honig (Holdings) Ltd* v *Intervention Board for Agricultural Produce; Tunnel Refineries Ltd* v *Intervention Board for Agricultural Produce* [1978] ECR 2037 the Court of Justice held that Council Regulation No 1111/77 of 17 May 1977 laying down common provisions for isoglucose (Official Journal L 134, p. 4) was invalid to the extent to which Articles 8 and 9 thereof imposed a production levy on isoglucose of 5 units of account per 100 kilograms of dry matter for the period corresponding to the sugar marketing year 1977/78. The Court found that the system established by the above-mentioned articles offended against the general principle of equality (in those cases between sugar and isoglucose manufacturers). The Court added nevertheless that its judgment left the Council free to take any necessary measures compatible with Community law for ensuring the proper functioning of the market in sweeteners.

Following that judgment the Commission laid before the Council on 7 March 1979 a proposal for a regulation amending the provisions of Regulation No 1111/77 which had been held to be invalid. On 13 March 1979 the Council decided to consult the European Parliament on that proposal.

Following that decision the Council on 19 March 1979 consulted the Parliament pursuant to Article 43 of the EEC Treaty. In its letter seeking an opinion the Council wrote:

"This proposal takes account of the position after the judgment of the Court of 25 October 1978 in anticipation of new arrangements for sweeteners which

should enter into force on 1 July 1980. ... Since the regulation is intended to apply as from 1 July 1979, the Council would welcome it if the European Parliament could give an opinion on the proposal at its April session."

Pursuant to Articles 22 and 38 of the Rules of Procedure of the Parliament the President of the Parliament referred the matter to the Committee on Agriculture for consideration of the merits and to the Committee on Budgets for its opinion.

On 10 April 1979 the Committee on Budgets forwarded its opinion to the Committee on Agriculture which dispensed with the optional opinion of the Legal Affairs Committee and adopted the report of its Rapporteur Mr Tolman. In the motion for a resolution contained in that report the Committee on Agriculture approved the draft regulations subject to two amendments.

At the session of the Parliament on 10 May 1979 the Parliament considered the report by Mr Tolman and the draft resolution approved by the Committee on Agriculture. Both Mr Tolman and, on behalf of the Commission, Mr Gundelach intervened in the debate.

At the session on 11 May 1979 the draft resolution was put to the vote. On that occasion Mr Hughes, a Member of the Parliament, raised a question of procedure to which Mr Giolitti, a member of the Commission, answered that he had nothing to add to what Mr Gundelach had said the day before. On being put to the vote the motion for a resolution was rejected and pursuant to Article 22 of the Rules of Procedure of the Parliament was referred back to the Committee on Agriculture for reconsideration.

The May session was to be the last before the election of the Parliament by universal suffrage. The Parliament did not contemplate meeting again before 17 July 1979, the date provided for by the Act concerning the election of the representatives of the Assembly by direct universal suffrage in order to allow its members to take part in the electoral campaign for the purpose of the elections on 7 and 10 June 1979. At its meeting on 1 March 1979 the Bureau of the Parliament had decided not to provide for an additional session between the May Session and the sitting of the Parliament elected by direct universal suffrage but nevertheless added the following provisos:

"The Enlarged Bureau ...

— is nevertheless of the view that in so far as the Council or Commission considers it necessary to provide for an additional session they may, pursuant to Article 1 (4) of the Rules of Procedure, call for an extraordinary session of the Parliament; any such session would be for the purpose only of considering reports which had been adopted following urgent consultation."

That proposal by the Bureau of the Parliament was confirmed at its meeting on 10 May 1979 in the following words:

— "Confirms the position adopted at the above-mentioned meeting when it was decided not to provide for an additional session between the last session of the present Parliament and the session of the Parliament elected by direct universal suffrage, provided always that where the majority of the effective members of the Parliament,

the Council or the Commission desire the holding of an additional session they may, pursuant to the provisions of Article 1 (4) of the Rules of Procedure, ask for the Parliament to be summoned;

— Decides further having regard to the provisions of Article 139 of the EEC Treaty that where the President has such an application before him the Enlarged Bureau will meet to consider how it should be dealt with."

The Act concerning direct elections provided that the mandate of the members of the former Parliament would expire upon the opening of the first sitting of the Parliament elected by universal suffrage, namely 17 July 1979 (Article 10 (4)).

On the basis of the proposal for a regulation by the Commission on which the Parliament had been consulted on 19 March 1979 but had not given its formal opinion the Council adopted on 25 June 1979 Regulation No 1293/79 (Official Journal L 162, p. 10 with corrigendum in Official Journal L 176, p. 37) amending Regulation No 1111/77. However the preamble to Regulation No 1293/79 contains the words "having regard to the fact that the European Parliament has been consulted". Pursuant to Article 5 thereof the regulation entered into force on 1 July 1979.

B — Regulation No 1293/79

The regulation amended Regulation No 1111/77 in the light of the judgment of the Court of 25 October 1978. Taking the view that the most appropriate means for avoiding any inequality of treatment between sugar and isoglucose manufacturers was to subject isoglucose production to rules analogous to those applying to sugar production until 30 June 1980 Regulation No 1293/79 introduced as a transitional measure till that date a *temporary system of production quotas for isoglucose* (cf. the sixth recital). The reasons for imposing quotas and for the terms thereof are set out in the seventh recital. The eighth recital deals with the need to fix the specific amount of the production levy applicable to isoglucose production.

Those various considerations feature in the system provided for in Article 3 of Regulation No 1293/79 which inserts after Article 7 of Regulation No 1111/77 the following title:

"TITLE II

Quota arrangements

Article 8

1. Article 9 shall apply for the period 1 July 1979 to 30 June 1980.

2. The arrangements applicable from 1 July 1980 shall be adopted by the Council before 1 January 1980 in accordance with the procedure laid down in Article 43 (2) of the Treaty.

Article 9

1. A basic quota shall be allotted to each isoglucose-producing undertaking established in the Community, for the period referred to in Article 8 (1)

Without prejudice to implementation of paragraph (3), the basic quota of each such undertaking shall be equal to twice its production as determined under this regulation, during the period 1 November 1978 to 30 April 1979.

2. To each undertaking having a basic quota, there shall also be allotted a

maximum quota equal to its basic quota multiplied by a coefficient. This coefficient shall be that fixed by virtue of the second subparagraph of Article 25 (2) of Regulation (EEC) No 3330/74 for the period 1 July 1979 to 30 June 1980.

3. The basic quota referred to in paragraph (1) shall, if necessary, be corrected so that the maximum quota determined in accordance with paragraph (2):

— does not exceed 85 %,

— is not less than 65 %

of the technical production capacity per annum of the undertaking in question.

4. The basic quotas established pursuant to paragraphs (1) and (3) are fixed for each undertaking as set out in Annex II.

5. Isoglucose-producing undertakings which have not produced any during the reference period referred to in the second subparagraph of paragraph (1) and which can be shown to have resumed systematic production during the period referred to in Article 8 (1) shall be allotted a basic quota equal to the highest volume of their production attained during one of the following periods:

— 1 August 1976 to 31 July 1977,

— 1 July 1977 to 30 June 1978.

A maximum quota shall be allotted to such undertakings, determined in accordance with the provisions of paragraph (2).

6. A basic quota shall be allotted to undertakings starting systematic production of isoglucose during the period referred to in Article 8 (1) within the limits of a Community reserve quantity equal to 5 % of the total of basic quotas established pursuant to paragraph (1).

7. The quantity of isoglucose produced during the period referred to in Article 8 (1) which:

— exceeds the maximum quota of the undertaking,

or

— was produced by an undertaking not having a basic quota, may not be

disposed of on the Community's internal market and must be exported in the natural state to third countries without the application of Article 4.

8. For the quantity of isoglucose production which exceeds the basic quota without exceeding the maximum quota Member States shall charge a production levy on the isoglucose producer concerned.

For the period referred to in Article 8 (1), the amount of the isoglucose production levy shall be equal to the share of the sugar production levy, as fixed for the 1979/80 sugar year by virtue of Article 28 of Regulation (EEC) No 3330/74, borne by the sugar manufacturers.

9. The Council, acting by a qualified majority on a proposal from the Commission, shall allocate the quotas referred to in paragraphs (5) and (6) and shall adopt any general rules necessary for the application of this article.

10. Detailed rules for the application of this article, which shall in particular provide for the levying of a charge on the quantity of isoglucose referred to in paragraph (7) which has not been exported in the natural state during the period referred to in Article 8 (1) and fix the amount of the production levy

referred to in paragraph (8) shall be adopted in accordance with the procedure laid down in Article 12."

Article 4 of the regulation provides that Annex II hereunder shall be added to Regulation (EEC) No 1111/77:

"ANNEX II

Undertaking	Address of registered office	Basic quota in tonnes expressed as dry matter
Maizena GmbH	2000 Hamburg 1, Postfach 1000	28 000
Amylum SA	49, Rue de l'Intendant, 1020 Bruxelles	56 667
Roquette Frères SA	17, Boulevard Vauban, 59000 Lille	15 887
SPAD	15063 Cassano Spinola, Alessandria, Casella Postale 1	5 863
Fabbriche Riunite Amido Glucosio Destrina, SpA	Piazza Erculea 9, Milano	10 706
Tunnel Refineries Ltd	Thames Bank House, Greenwich, London SE10 0PA	21 696"

C — The course of procedure and the events relating thereto

By application registered at the Court Registry on 5 September 1979 Maizena GmbH, an undertaking in the maize processing sector which manufactures starch and products derived from starch mainly at Krefeld in the Federal Republic of Germany, asked the Court to declare that Regulation No 1111/77 as amended by Regulation No 1293/79 is null and void in so far as by Article 9 (4) it lays down in Annex II thereto a production quota for isoglucose relating to the applicant on the basis of Article 9 (1) to (3).

On 17 August 1979 the President elected by the directly-elected Parliament wrote to the President of the Council a letter in which it was said:

"In spite of the fact that consultation of the European Parliament on this matter was compulsory the Council has acted before the European Parliament gave its opinion.

Having regard to the aforementioned matters I should be glad if you would let me know the attitude of your institution on this issue; the Bureau of the European Parliament obviously reserves its right of action to enforce respect for the provisions of the Treaties."

The President of the Council answered that letter by a letter dated 23 October 1979 in which he defended the adoption of Regulation No 1293/79 before the opinion of the Parliament had been received and referred to the "legal need to implement before too long the judgment of the Court of Justice ... given on 25 October 1978" and to the "extreme importance for the public that the isoglucose arrangements be adopted

before the beginning of the sugar marketing year on 1 July 1979 pursuant to the basic regulation on the common organization of the market in sugar". Those considerations were set out in the fourth recital in the preamble to the regulation.

At its sitting on 14 December 1979 the Parliament adopted a motion for a resolution contained in a report made by the Legal Affairs Committee of which Mer Ferri was the Rapporteur and President. The said resolution provided that the Parliament "decides ... to intervene in Cases 138/79 and 139/79 before the Court of Justice of the European Communities so that the Council's adoption of Regulation No 1293/79 before receiving the compulsory opinion of the European Parliament can be censured.".

By order of the Court of 6 January 1980 the Parliament was allowed to intervene in the present case in support of the claims of the applicant alleging infringement of essential procedural requirements.

By order of 13 February 1980 the Court allowed the Commission to intervene in support of the contentions of the Council.

On 28 May 1980 the applicant sent the Court an addendum to the reply in which, citing Article 42 of the Rules of Procedure, it dealt with "various new and relatively independent defences" put forward by the Council in its rejoinder; they were discussed by the Commission at greater length in its pleading as intervener.

By letter of 12 June 1980 the Registrar of the Court informed the applicant's representatives that the Court had decided at its administrative meeting to reject the aforementioned pleading on the following grounds: according to Article 42 (2) of the Rules of Procedure a party may answer a "fresh issue" only if the President expressly allows him to do so, which is not the case here. The parts of the rejoinder to which the applicant addressed itself contained no "fresh issues" within the meaning of Article 42 of the Rules of Procedure; they had simply expanded the arguments in answer to what the applicant had said.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. It nevertheless invited the applicant to lodge any written observations it might have on the comparative table of costs annexed to the Commission's application to intervene.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Declare that Council Regulation No 1111/77 laying down common provisions for isoglucose, as amended by Council Regulation No 1293/79 of 25 June 1979, is null and void in so far as by Article 9 (4) it lays down in Annex II thereto a production quota for isoglucose relating to the applicant on the basis of Article 9 (1) to (3);

2. Order the Council to pay the costs.

The *Council* in its defence contends that the application should be dismissed as inadmissible or alternatively as unfounded and that the applicant should be ordered to pay the costs.

In its rejoinder the Council maintains its contention that the application be dismissed and further contends that the Parliament's intervention in support of the applicant be declared inadmissible.

The *European Parliament,* as *intervener,* claims that the Court should allow the application for annulment by reason of infringement of an essential procedural requirement and breach of the Treaty.

The *Commission,* as *intervener,* supports the contentions of the Council that the applicant's claim should be dismissed.

III — Submissions and arguments of the parties

A — Admissibility of the application

The *applicant* claims that the application is admissible under the second paragraph of Article 173 which provides that any legal person may institute proceedings against a decision which, although in the form of a regulation, is of direct and individual concern to him.

The applicant maintains that the regulation is of *direct* concern to it because it is the contested system itself which materially affects the applicant's legal position without there being any necessity for a further measure of the institutions or of the Member States. In the applicant's case there is a direct allocation of a quota by Article 9 (4) of the regulation in conjunction with Annex II according to which the applicant's basic quota is 28 000 tonnes expressed as dry matter.

Since the applicant is referred to, in particular in Annex II, the contested rules are of *individual* concern to it.

Moreover, Article 9 (4) is *not* a measure of a *legislative nature.* On the contrary it is a collective *decision* in respect of six individual cases and applies to a closed and restricted circle which cannot vary while the contested rules are in force. That view accords with the established case-law of the Court (cf. Mr Advocate General Warner in Joined Cases 103 to 109/78 *Beaufort* [1979] ECR at p. 26 *et seq.).*

In its defence the *Council* contends that the applicant is challenging the very principle of limitation of production achieved by any system of quotas claiming that it is contrary to various basic rules of the Community system and in particular the liberal philosophy of the Treaty and the system of competition.

The Council however admits that the question is complicated by the fact that the regulation contains on the one hand general provisions not applying individually and aimed at all isoglucose manufacturers and on the other hand provisions in the annex referring to the quota of each manufacturer. The applicant however considers the regulation in conjunction with its annex as constituting in fact a disguised special decision of direct and individual concern to it and challenges all its provisions especially those of a general and impersonal nature.

Accordingly, without referring to Article 91 of the Rules of Procedure, the Council contends that the *application is inadmissible.*

As regards the legislative nature of the regulation the Council maintains that care must be taken to avoid being misled

by what is in the annex which lists the present isoglucose manufacturing undertakings and determines the basic quota for each of them. It is necessary to bear in mind that the regulation determines the amount to which each undertaking is entitled generally and impersonally on the basis of its production during the reference period which applies to all and is also determined impersonally. The annex with its appearance of a decision must be placed in its context as a regulation, that is to say in the context of the insertion of Article 9 into Regulation No 1111/77 effected by Regulation No 1293/79. That provision establishes a system of quotas almost identical to that of the basic quotas established for sugar by Article 24 (2) of Regulation No 3330/74 and no one has ever challenged the nature of that instrument as a regulation. The only important difference is that whereas in the sugar sector the quota is set by the Member States according to the very precise criteria laid down in Regulation No 3330/74, under Regulation No 1293/79 it is the Council which, on the basis of the criteria which it has itself fixed, has set out the corresponding basic quota for each undertaking.

The annex is therefore not of individual or direct concern to the applicant. It is not of individual concern because the measure in question is of concern to all isoglucose manufacturing undertakings, a description which could apply to undertakings other than those listed in the annex (cf. paragraphs (5) and (6) of Article 9). It is not of direct concern because the measure in question is only a means by way of regulation to apply in a general and equitable manner in relation to the sugar sector the system of production levies to which all isoglucose manufacturers are subject.

The *applicant* replies that it is challenging only the provisions of Article 9 (4) and Annex II to the regulation which have not only the *appearance* but also the *legal nature* of a decision. It is not challenging the legislative nature of other provisions of the regulation and in particular those of the new Article 9 (1) and (3) which constitute the basic measure for the contested implementing provisions, namely those fixing the quotas. To substantiate its application for a declaration of nullity pursuant to Article 173 of the Treaty the applicant declares that it is relying on Article 184 to challenge the validity of the legislative provisions of Article 9 (1) to (3).

In its rejoinder the *Council* admits that at first sight certain aspects may incline to give Annex II the character of a decision. It contends however that the annex must be considered with regard to Article 9 (1) to (3) without which it would be incomprehensible. The table published as Annex II is confined to setting out once again what already follows in figures from the rules contained in Article 9 (1) to (3) which have an abstract general nature. In other words the table provides particularly clear and comprehensible information on the content of the regulation and thus acts simply as a reference and as a purely informal declaratory notice from the Council.

The Council admits that the completion of a Community regulation by annexing thereto a notice of a purely informative nature such as Annex II is not a common practice. That in no way changes the fact that the annex represents only the result of a purely mathematical calculation on the basis of the criteria set out in Article

9 (1) to (3). The specification of basic quotas in Annex II does not therefore constitute an independent rule and cannot be regarded as a disguised decision.

Neither the *Parliament* nor the *Commission* addresses any argument to the question of the admissibility of the application. On the other hand the *Commission* considers that there is a major interest in having the *substantive questions* settled once and for all by the Court. If there were no judgment on the merit the issue would return in the form of references for preliminary rulings by the national courts.

B — The merits of the application

In the *applicant's* opinion the Community institutions are anxious to reserve a quasi-monopoly of the market in sweeteners for sugar and to prevent access to that market of new products arising from research and the capacity for innovation on the part of undertakings in the Community. Regulation No 1293/79 which is aimed against the nascent isoglucose industry in general and against the applicant in particular breaches various fundamental principles of the Treaty and in particular:

— The bases of the system of competition;

— The principle of proportionality; and

— Equality of treatment.

1. Breach by the system of quotas for isoglucose of certain fundamental principles of the law on competition and of Articles 39 to 46 of the EEC Treaty

The applicant takes as premise, which it explains in detail, that it is apparent from all the provisions of the EEC Treaty in relation to agriculture and competition, and from their relationship *inter se*, that the extensive powers which are granted to the Community institutions must be exercised *with due regard to the creation of effective competition in the agricultural sector.* Council Regulation No 26 applying certain rules of competition, production of and trade in agricultural products (Official Journal, English Special Edition 1959-1962, p. 129) has the same philosophy.

In the applicant's view the minimum requirements of the principles of Community law on competition are not satisfied for two reasons in particular.

In the first place isoglucose has been made subject to a quota system before sufficient access to the market in sweeteners has been allowed it. The quota system bars access for isoglucose to the market in sweeteners while the product is still in the first stage of development. It also obstructs development after the initial stage and bars subsequent access to the market in sweeteners. The A quota allots isoglucose 138 819 tonnes which is 1.3 % of the market. As for subsequent access to the market, Article 9 (6) of the regulation provides for a reserve quantity of not more than 5 % of the A quota, that is 6 941 tonnes or 0.06 %. Even that opportunity is not available to those who already have quotas.

It follows from those considerations that the principle of the open market and free access to the market has been breached by the quota system for isoglucose. Such a breach cannot be justified either by the objective of stability of the market referred to in Article 39 of the Treaty or by the "transitional" nature of the provisions in question.

In the second place certain terms of the quota system for isoglucose create *more restrictive structures of competition* for isoglucose than are *necessary* for attaining the aim pursued.

In the applicant's view by providing for *absolutely unalterable quotas* the contested regulation allows no margin or potential competition. A reserve quantity allowing sufficient competition and intended for newcomers and those already having a quota would have remedied the situation.

Effective competition between isoglucose and sugar is *excluded.* No matter what effort at competition isoglucose makes it has no opportunity of obtaining a greater percentage of the market in sweeteners. In the applicant's view the Community institutions ought to have fixed quotas for isoglucose allowing a minimum of competition.

Finally the distribution of the quotas among the undertakings concerned itself interferes with competition. The contested regulation allocates the single undertaking *Amylum* a quota representing 40 % of the isoglucose market.

2. Breach of the principle of proportionality

The applicant claims further that the quota system breaches the principle of proportionality between the means used and the aim, namely not to increase the disequilibrium between supply and demand on the sugar market. Such disequilibrium is the result of the Council's policy of fixing prices and quotas higher than is necessary and thus continually giving preference to increasing profit at the expense of stabilizing the market. Further the Community institutions had grossly overestimated the isoglucose production to be expected.

3. The quota system breaches the principle of equal treatment

The applicant alleges that the quota system for isoglucose creates conditions which do not allow a balanced competitive relationship between isoglucose and sugar albeit they are in a comparable situation. In that respect the applicant to a large extent refers back to the reasons given at B. 1 for its view that the quota system does not satisfy the minimum requirements of the Community law on competition. The applicant further alleges that there are no objective reasons for the unequal treatment of which it complains.

It further alleges that the quota system introduces discriminatory conditions of competition for isoglucose manufacturers *inter se.* The regulation fixes patently different quotas for manufacturers. Such inequality cannot be justified by the argument that the quotas were calculated on the basis of the production and production capacity during the reference period. Such allocation is arbitrary. The choice made works to the disadvantage of those who like the applicant began very cautiously to produce isoglucose having regard to the legal uncertainty attaching to it under the common agricultural policy.

By way of introductory remarks the *Council* stresses the fundamental nature of the recognition of its discretionary power with regard to intervention in the economy and in particular regarding its conduct of the common agricultural policy. There is a danger of conflict between the principle of the Council's discretionary power in economic matters and recourse to concepts such as that of

discrimination and disproportionality. "Review" by the Court must therefore be "restrained" so that it recognizes only *manifest* cases of discrimination or disproportionality.

Subject to its observations on the admissibility of the action the Council considers the submissions on the merits made by the applicant and challenges each of them.

In the Council's view Regulation No 1293/79 infringes neither the objectives of Article 39 of the Treaty nor the general rules on competition of the Treaty. The regulation seeks both a balance between sugar and isoglucose, that is to say between two products closely linked and interdependent, and stabilization between those two products. Further the Court stated in its judgment of 13 May 1971 in Joined Cases 41 to 44/70 *NV International Fruit Company and Others* v *Commission* [1971] ECR 411, at p. 427 (paragraph 70) that "the provisions relating to competition shall apply to agricultural products only to the extent determined by the Council, account being taken of the objectives set out in Article 39." In those circumstances the Council cannot, pursuant to those objectives, be accused of departing from those provisions since the Treaty and the Court allow it the possibility of so doing.

Moreover the quota system introduced by Regulation No 1293/79 for isoglucose cannot be regarded as out of proportion with the objective pursued, namely a certain stabilizing of the market in sweeteners, since the quota system is the same as that applying to sugar.

The Council refutes in detail each of the arguments put forward by the applicant in support of the submission that there is discrimination against isoglucose in favour of sugar. In a more general way it recalls the transitional nature of the regulation, the extreme importance for the public of a balance between the two products, and Article 39 (c) of the EEC Treaty and considers that each of those reasons is amply sufficient to justify the measure in question which is merely a protective measure in anticipation of new rules relating to sugar to be adopted by the Council as from the 1980/81 marketing year.

As regards the discrimination between manufacturers as a result of fixing their quotas the Council recalls the transitional nature of the regulation in question which applies only for one marketing year and is intended to be replaced and reconsidered in the context of the new sugar rules and draws up a comparative table in percentages of the basic quotas of the four main manufacturers (namely *Amylum, Maizena, Roquette* and *Tunnel)* in relation to their production capacity. It is apparent from that table that the four companies are very close to one another.

The *applicant* replies that as regards the question of the application and the function of the rules on competition in relation to Article 39 *et seq.* the Court has interpreted *Article 3 (f)* as meaning that it fixes inherent *limits* to the other provisions of the Treaty beyond which there is a risk of conflict with the aims of the common market (judgment in Case 6/72 *Europemballage Corporation* [1973] ECR 215, at p. 244 (paragraph 24). The same limitation applies to the legislature's discretion in relation to agriculture. It is beyond doubt that those limits include the protection of free access to the market. Even assuming

what in fact the applicant challenges, that the imposition of quotas is legal from that point of view, free access to the market is excessively restricted by the terms of the system and in particular its lack of flexibility, its exclusion of effective competition between isoglucose and sugar, its obstacles to the rational use of production capacity and the very distribution of the quotas. In the exercise of the discretion which it has under Article 40 (3) and Article 39 the Council has therefore manifestly disregarded and exceeded the limits which the principle of free access to the market imposes on it.

The applicant maintains the argument that the quota system infringes the principle of proportionality by reason of the date on which it was introduced and the restrictive nature of its provisions. It alleges in particular that the said system was imposed at a date and with terms which had as their sole aim to bar isoglucose from access to the market. Limitation of production to a maximum of 85 % of capacity shows this clearly. In so doing the Community institutions are making a fresh attempt to remove the alleged advantage amounting to 15 % of the intervention price which the organization of the market in sugar allows isoglucose.

As regards the submission of discrimination against isoglucose in relation to sugar and discrimination between isoglucose manufacturers *inter se* the applicant joins issue with the Council both as regards facts and the law.

In its rejoinder the *Council* maintains that the applicant has in no way shown, at least not in relation to its observations on discretion, that "general rules" or "principles" of Community law (in the present case, the principle of free competition) prescribe quite clear limits to the legislature in the agricultural sector.

It is the Council's view that the applicant's *first submission* mixes up in a most confusing manner two completely different aspects of the question which ought to be clearly distinguished one from the other: on the one hand the general rules in relation to competition between undertakings in the common market and on the other hand the much wider question of the existence of any precise basic Community rules governing the economy. Article 3 (f) of the Treaty is no doubt aimed at these two aspects of the problem. However as regards the second aspect the applicant is assuming that basically the Treaty prescribes on principle a liberal economic order, namely a free market economy in which certain closely defined restrictions are allowed only by way of exception. Recent case-law of the Court (see in particular the judgment of 13 December 1979 in Case 44/79 *Hauer;* judgment of 5 December 1979 in Joined Cases 116 and 124/77 *Amylum* v *Council and Commission; Tunnel* v *Council and Commission)* shows that the fundamentally free economic order which the applicant is demanding for the Community, and especially in the agricultural sector, has no foundation in the Treaty.

The Council is of the opinion that the applicant has no doubt deliberately avoided extending the arguments in relation to the first submission to claiming an infringement of a rule of law inasmuch as it avoids making the problem one of fundamental rights and in particular freedom to trade.

Contrary to what the applicant assumes, the aim of undistorted competition in the

Community cannot be regarded pursuant to *Article 3 (f) of the EEC Treaty as of an absolute nature.* On the contrary it must be related to other equally important aims in the Treaty. Consequently from the point of view of freedom to engage in economic activity the applicant's claim must come down to the question whether the rules in relation to quotas, having regard to the agricultural aims they pursue, constitute an appropriate, necessary, sufficient and not excessively burdensome means of attaining those aims.

The rules in relation to quotas for isoglucose must according to the Council be regarded against the background of the organization of the market in sugar and in direct relation thereto. The rules in relation to quotas of the two organizations of the market are essentially intended to deal with the present surplus on the market in sweeteners and to complement one another. In its judgment in the Joined Cases *Amylum* and *Tunnel* the Court of Justice recognized that the Council could take restrictive measures in respect to isoglucose since the isoglucose production contributes to increasing the sugar surplus.

The Council discusses the system of quotas in relation to its objectives in great factual detail and concludes that there is no concrete and worthwhile evidence in support of the claim that the system has restrictive effects in many respects. Even if, moreover, manufacturers could have expected something of an explosive increase in their sales for the current marketing year and had wished considerably to increase their production capacity, the rules on quotas could not be regarded as unlawful intervention in their freedom of economic activity, since the manufacture of isoglucose cannot be regarded as an independent form of economic activity. It is only a particular type of enterprise directly related to numerous other activities and in particular the manufacture of starch.

The complaint too that there is a breach of the principle of proportionality is unfounded especially the allegation that the quota system is too severe a measure and that future isoglucose production has been wrongly estimated.

As regards the alleged discrimination against isoglucose in relation to sugar the Council asserts in particular that in amending Regulation No 1111/77 it treated particular matters differently only in so far as this was justified by the facts. Having regard to the applicant's actual starting position in 1978/79 it had the same market opportunities as a sugar manufacturer. In fact the applicant aims at unbridled isoglucose production and unrestricted competition with sugar while maintaining its advantages in relation to costs. In view of its obligations under Article 39 of the EEC Treaty the Council cannot go along with that.

As regards the alleged discrimination of the isoglucose manufacturers *inter se* it must be said that when Regulation No 1293/79 was drawn up more than two years had elapsed in which production had left the purely experimental stage and isoglucose had found its outlets in the market in sweeteners. It was open to the Council to take account of those facts selecting the most recent production figures as the

basis for the rules in relation to the quotas. The diverse effect of the quota rules on the individual manufacturers accordingly rightly reflects only the diverse circumstances. The applicant has also not been able to explain what form, in its view, an allegedly non-discriminatory distribution of quotas ought to have taken.

The *Commission*, as *intervener*, submits very detailed observations intended to supplement the Council's defence, as appears in particular in the Council's rejoinder regarding the merits of the application from the point of view of economic law. In doing so it basically keeps to the order of the submission in the application.

C — *Infringement of essential procedural requirements*

In the *applicant's* view Regulation No 1293/79 as adopted precipitately *without consulting the European Parliament* as required by Article 43 (2) of the EEC Treaty. That failure *ispo facto* makes the regulation void.

There is no apparent justification for the failure to consult the Assembly. The judgment of the Court of Justice of 25 October 1978 *is not of a nature* to justify the infringement of the Treaty by the Council even if it is understood as an invitation to the Council to draw up an organization of the market for sweeteners. Likewise the alleged *extreme importance for the public* of having rules in relation to isoglucose before the beginning of the sugar marketing year cannot justify disregard of the Treaty's distribution of powers between the institutions of the Community.

After referring to the reasons why it did not consider it possible to wait beyond 1 July 1979, the beginning of the sugar marketing year, to adopt Regulation No 1293/79 (the need to implement the judgment of the Court; the extreme importance for the public of the adoption simultaneously of the sugar and isoglucose systems; the temporary nature of the matter) the *Council* nevertheless admits that consultation of the Assembly constitutes an "essential procedural requirement" within the meaning of Article 173 of the Treaty. Nevertheless the Court is not without any discretion in that respect. According to the case-law of certain countries since a consultative system cannot paralyse the procedure of which it has to form part the incorrect nature of the consultation does not therefore necessarily involve a fundamental defect. Although the articles of the EEC Treaty provide for consultation of the Assembly there is no mention of the need for the opinion of the Assembly to have been given. Of course, the Assembly must have been given an opportunity (in particular as regards time) to give its opinion, but that is not in question in the present case.

The Council accordingly considers the submission that the Assembly was not consulted to be unacceptable.

In its reply the *applicant* refers to the failure to consult the European Parliament.

The legal arguments put forward by the *European Parliament*, as *intervener*, takes the following form:

1. Time-limit

The European Parliament observes that Article 43 of the Treaty constitutes the

basis of Regulation No 1293/79 and that that article provides that the Council may act upon a proposal from the Commission *after consulting* the European Parliament; the present case is one in which the Treaty requires the Council to receive the opinion of the Parliament before acting upon a proposal from the Commission. Further the Treaty did not impose any time-limit on the Parliament in the present case.

The Parliament maintains however that it did everything to give its opinion within a reasonable time. It adds that neither in the May session when it rejected the proposed resolution nor subsequently did either the Commission or the Council inform it that they considerred the adoption of the regulation in question before 30 June as urgent. The Parliament had not intended to hold further sessions before 17 July 1979, *but nevertheless left it to the Council and the Commission to summon it if need be.*

2. The nature of the consultation

Consultation of the Parliament is the form, peculiar to the EEC Treaty, of participation of the Parliament in the legislative process of the Community. Consultation forms a large part of the parliamentary business. It is, at least where the Treaty expressly provides for it, a necessary condition (theory of the composite measure) of the validity of the legal measure of the Community. The institutions therefore have no discretion regarding consultation. It follows that any failure to consult the Parliament constitutes an infringement of an essential procedural requirement within the meaning of Article 173 of the Treaty.

Complete respect for the authority of the institutions is one of the fundamental principles of constitutional law of the Member States. Any disregard of those principles must be treated as infringement of an essential requirement.

3. The procedure of consultation

The procedure for consultation of the Parliament involves several stages none of which must be omitted if it is intended that the procedure should be fully carried out as understood in a legal sense. In the present case when the Council adopted the regulation consultation of the Parliament was not finished, and therefore legally incomplete, in the absence of an essential part of that procedure, namely the expression of the will of the plenary Assembly.

If the Treaty requires a consultation of the Assembly before the adoption of a provision that means that the Council before adopting the provision must have knowledge of the opinion of the Assembly.

In rejecting the motion for a resolution contained in the Tolman report the Parliament had not given an opinion on the proposal for a regulation which was the subject of the report. So long as the Parliament does not adopt a resolution its will cannot be determined with certainty.

In meeting the obligations, incumbent upon all the institutions, to fulfil the tasks defined by the Treaties the Parliament must be its own judge of how and for how long it considers draft legislation.

The Parliament admits that there are problems of coordination with the Council and points out that it has established a special procedure involving inviting the Council to take part in the work of the Bureau of the Parliament and its committees. In the present case

the Council did not make use of that procedure to obtain the opinion of the Parliament in due time.

In adopting Regulation No 1293/79 before the Parliament gave an opinion the Council therefore disregarded the essential procedural requirement laid down in Article 43 of the Treaty which provides for consultation of the Assembly.

4. The position of the Council

Refering to the position of the Council as it appears from the defence the Parliament recalls that the Council has in Article 139 of the Treaty, which authorizes it to request the meeting of the Parliament in extraordinary session, a means of action enabling it to deal with emergency cases. So long as it fails to make use of that means it cannot rely on any ground in support of conduct contrary to the Treaty.

It is therefore in the alternative that the Parliament considers and challenges the various arguments put forward by the Council.

It points out in the first place that after the rejection of the motion for a resolution from the Committee on Agriculture the Council did not have recourse to the procedure in Article 139 (2) so that it cannot allege slowness on the part of the Parliament in reaching a decision.

The other ground put forward by the Council to the effect that the judgment of the Court had to be complied with is also invalid. The measure adopted by the Council in the form of Regulation No 1293/79 was not the only conceivable way of solving the hypothetical problems of the market in sweetners. If a measure had been asbolutely indispensable from the point of view of time and if all efforts to obtain an opinion from the Parliament in due time had failed, the Council could have taken measures only of an undoubtedly transitional nature.

As regards the primordial "public" interest in the adoption of rules before 1 July 1979, a ground which conjures up the plea of "state of emergency", the Parliament maintains that it is not for the Council unilaterally to determine the appropriate procedure to serve the public interest. Since Article 137 of the Treaty made the Parliament responsible for representing the peoples of the Community, it is the Parliament which constitutes the forum to which the treaties entrust the definition of the European "public interest". So long as the institution appointed for that purpose has not expressed its view it cannot be maintained that there is a public interest without going counter to the tasks entrusted to the various institutions.

The Parliament claims that by adopting Regulation No 1293/79 the Council infringed a procedural requirement thus depriving the Parliament of its right to express its opinion on a measure adopted pursuant to Article 43 of the Treaty and so committing a breach of the Treaty. It stresses that the regulation might have been different if the Council had been aware of the opinion of the Parliament.

In its rejoinder the *Council* answers the arguments put forward by the Parliament and stresses that it is through consultation that the parliamentary institution participates in the Community's legislative process. Logically it is possible to distinguish three kinds of consultation

namely *optional, compulsory* where the *opinion* is not binding and *compulsory with* an opinion having a binding effect. Only the latter involves true sharing of the power of decision between the authority which formally has that power and the authority whose opinion must be followed.

The three Treaties mention *only compulsory consultation* as the consultative function of the Assembly. This requires the authority having the power of decision to consult the appropriate authority for an opinion. That is what is meant by "after consulting the Assembly".

On the one hand it is accepted in the public law of various Member States that the authority having power of decision may in certain circumstances be relieved of the obligation to enter into consultation.

Further a defect affecting a measure taken without consultation is censured as an infringement of an essential procedural requirement and not as being *ultra vires* as would be the case if consultation had to be regarded as involving true sharing of the power of decision.

It follows that having complied with the obligation to enter into consultation by way of giving information and allowing a period sufficient for the body being consulted to express its opinion the authority having the power of decision is not only not bound to follow that opinion but normally does not even have the right to consider itself legally bound by the opinion for if it did it would legally mean alienating a power which that authority had to exercise but had no right to delegate.

In turn the body consulted must consider and give its opinion. That obligation arises from the power which it has been given and constitutes an effective condition of its exercise.

Although as regards consultation of the Economic and Social Committee Article 198 of the Treaty allows action in the absence of an opinion, there is no similar provision regarding the Parliament. Nevertheless in reliance upon the logic of the system of the Treaty and guidelines from national case-law the Council alleges that in certain circumstances it is entitled and even obliged to act without the opinion of the Parliament.

It is in the light of the above consideration that the Council discusses *the existence of the complaint of infringement of essential procedural requirements.* In the Council's view that question means in the present case whether the absence of a *formal* opinion may in itself be regarded as constituting such an infringement. The Council discusses this problem from the following three aspects:

(a) Is there in fact, otherwise than formally, an absence of an opinion?

In answer to that question the Council points out that the procedure was followed almost until the final stage; discussion was terminated, the general debate closed, the substance of what could have become the opinion (namely the motion for a resolution drafted by the Agricultural Committee) was adopted since further amendment to the

proposal was admissible and the only reason for its rejection was a legal scruple raised at the last minute by a member of the Assembly. There had effectively thus been consultation.

(b) Was the power of the Council fettered? In other words the question arises whether the Council risked allowing a discriminatory lacuna in the law *to the detriment of sugar* had it not adopted the contested regulation without delay. In the Council's view the answer to that question must be in the affirmative.

The Council contends that in acting in the absence of a formal opinion from the Assembly when its power of decision was fettered by the obligation to deal with the situation created by the judgment of 25 October 1978 and a reasonable period had elapsed since the matter had been put before the parliamentary institution it did not adopt a measure vitiated by infringement of an essential procedural requirement.

(c) Lastly the Council queries whether even if it was entitled to act in the absence of the formal opinion from the Assembly for the reasons set out at (a) and (b) it had the means of *causing a formal opinion to be issued.*

(i) In that respect the Council observes that whereas in the present case the Council was able effectively to have recourse to the provisions of Article 198 of the Treaty as regards the Economic and Social Committee as part of consultation which was moreover voluntary, paradoxically as regards the Assembly, the consultation of which was compulsory, there is no express provision allowing it similar recourse.

(ii) As regards the possibility for the Council, in the absence of appropriate rules, of using the parliamentary procedure itself, the Council refers in first of all to the emergency procedure (internal regulation, Article 14). It is only the Assembly which can classify a mater as of an emergency nature and although the Assembly was properly informed, that did not prevent it from rejecting the motion for a resolution from the Committee on Agriculture in the circumstances described above. As to the possibility of an extraordinary session which the Ferri report charges the Council with not having requested, the Council contends that, contrary to its wishes, the Assembly did not consider such a session appropriate. Since the attention of the Parliament was drawn to the urgency and to the discrimination arising from the lacuna in the law, the vote of 12 May constituted a refusal to treat the matter as an emergency or at least a refusal by the Parliament to consider in due time the proposals submitted to it for an opinion and, as far as the Council was concerned, exhausted the Council's efforts to obtain the opinion sought in sufficient time.

Finally the Council rejects the Parliament's claim to the effect that "the Parliament must . . . be its own judge of how and for how long it considers draft legislation". Unless it is accepted that the

Assembly has a true power to block the legislative body constituted by the Council acting on a proposal from the Commission, which would be contrary to the Treaties and to the division of powers between the four institutions, it must be held that once a reasonable period has elapsed the Council must, in certain exceptional circumstances of an emergency nature such as those in the present case, be entitled to act in the absence of a formal opinion.

The Council concludes its discussions by querying the admissibility of the Parliament's intervention in the present case and in Case 138/79 *Roquette* v *Council.* It is of the view that in reality that intervention is neither ancillary nor even essential and that it constitutes in truth a supplemental action by the misuse of the process of intervention because the Parliament is not included among those who have a right under Article 173 to bring an action for a declaration that a measure is void.

The *Commission* considers that the Council could in the present case act in the absence of an opinion from the Parliament since the Parliament had a reasonable time to inquire fully into the matter.

It stresses that the Parliament's attention had been drawn both by the Council in its letter of 19 March 1979 and by the Commission in a telex from Mr Gundelach of 11 April 1979 to the President of the Parliament and to the President of the Committee on Agriculture pointing out the relationship between the proposed isoglucose regulation and all the agricultural price proposals for 1979/80 and consequently of the imperative need that the opinion be given during the May session.

Nevertheless if the Court has to declare Regulation No 1293/79 void for infringement of the essential procedural requirements of the Treaty the Commission suggests that the provisions of the said regulation be treated as provisionally applicable until a new measure by the Council be validly adopted after an opinion from the Parliament. Such a possibility seems open to the Court under the second paragraph of Article 174 of the Treaty which provides that "in the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive".

The possibility of a decision temporarily applying an unlawful measure moreover exists under certain national legal systems, for example in the Federal Republic of Germany where the Constitutional Court has made use thereof in revenue matters.

IV — Oral procedure

At the hearing on 9 July 1980 the *applicant,* represented by B. Rapp-Jung and A. Boehlke, of the Frankfurt am Main Bar, the *Council,* represented by Daniel Vignes, Director in the Legal Department, assisted by Arthur Brautigam and Hans-Joachim Glaesner, as Joint Agents, and Professor Jean Boulouis and Hans-Jürgen Rabe, of the Hamburg Bar, the *European Parliament,* represented by its Director-General, Francesco Pasetti Bombardella, assisted by Roland Bieber, Principal Adminis-

trator in its Legal Department, and Professor Arved Deringer, and the *Commission*, represented by its Legal Adviser, Peter Gilsdorf, acting as Agent, assisted by Jacques Delmoly, a member of the Legal Department, presented oral argument.

The Advocate General delivered his opinion on 18 September 1980.

Decision

1 By application registered at the Court Registry on 5 September 1979 the applicant, a German company manufacturing *inter alia* isoglucose, asked the Court to declare Council Regulation No 1111/77 of 17 May 1977, as amended by Regulation No 1293/79 of 25 June 1979 (Official Journal L 162, p. 10 with corrigendum in Official Journal 1979 L 176, p. 37) to be invalid in so far as it lays down in Annex II thereto a production quota for isoglucose relating to the applicant.

2 In support of its application, the applicant, apart from various substantive submissions, makes a formal submission that its production quota fixed by the said regulation be declared void on the ground that the Council adopted that regulation without having received the opinion of the European Parliament as required by Article 43 (2) of the EEC Treaty which action constitutes an infringement of an essential procedural requirement within the meaning of Article 173 of the said Treaty.

3 By order of 16 January 1980 the Court allowed the Parliament to intervene in support of the applicant's claims of infringement of essential procedural requirements. By order of 13 February 1980 it also allowed the Commission to intervene in support of the Council.

4 The Council contended that both the application and the intervention by the Parliament in favour of the applicant were inadmissible. Alternatively it contended that the application should be rejected as unfounded.

5 Before considering the questions of admissibility raised by the Council and the claim by the applicant it is well to recall briefly the history of the adoption of the contested regulation and the provisions thereof.

6 By judgment of 25 October 1978 in Joined Cases 103 and 145/77 *Royal Scholten Honig (Holdings) Ltd* v *Intervention Board for Agricultural Produce; Tunnel Refineries Ltd* v *Intervention Board for Agricultural Produce* [1978] ECR 2037 the Court held that Council Regulation No 1111/77 of 17 May 1977 laying down common provisions for isoglucose (Official Journal L 134, p. 4) was invalid to the extent to which Articles 8 and 9 thereof imposed a production levy on isoglucose of 5 units of account per 100 kilograms of dry matter for the period corresponding to the sugar marketing year 1977/78. The Court found that the system established by the above-mentioned articles offended against the general principle of equality (in those cases between sugar and isoglucose manufacturers) of which the prohibition on discrimination as set out in Article 40 (3) of the Treaty was a specific expression. The Court however added that its judgment left the Council free to take any necessary measures compatible with Community law for ensuring the proper functioning of the market in sweeteners.

7 On 7 March 1979 following that judgment the Commission submitted a proposal for an amendment of Regulation No 1111/77 to the Council. By letter of 19 March 1979 received by the Parliament on 22 March the Council asked the Parliament for its opinion pursuant to the third subparagraph of Article 43 (2) of the Treaty. In its letter seeking an opinion it wrote that:

"This proposal takes account of the position after the judgment of the Court of 25 October 1978 in anticipation of new arrangements for sweeteners which should enter into force on 1 July 1980. ... Since the regulation is intended to apply as from 1 July 1979, the Council would welcome it if the European Parliament could give an opinion on the proposal at its April session."

8 The urgency of the consultation requested in the Council's letter related to the fact that in order to avoid inequality of treatment between sugar manufacturers and isoglucose manufacturers the proposed regulation was basically

intended to subject isoglucose production to rules similar to those applying to sugar manufacture until 30 June 1980 pursuant to the common organization of the market in sugar established by Council Regulation No 3330/74 of 19 December 1974 (Official Journal L 369, p. 1). In particular it was a question of making transitional arrangements until then for production quotas for isoglucose which were to apply from 1 July 1979 which was the beginning of the new sugar marketing year.

9 The President of the Parliament immediately referred the matter to the Committee on Agriculture for further consideration and to the Committee on Budgets for its opinion. The Committee on Budgets forwarded its opinion to the Committee on Agriculture on 10 April 1979. On 9 May 1979 the Committee on Agriculture adopted the motion for a resolution of its Rapporteur. The report and draft resolution adopted by the Committee on Agriculture were debated by the Parliament at its session on 10 May 1979. At its session on 11 May the Parliament rejected the motion for a resolution and referred it back to the Committee on Agriculture for reconsideration.

10 The parliamentary session from 7 to 11 May 1979 was to be the last before the sitting of the Parliament elected by direct universal suffrage as provided for by the Act concerning the election of the representatives of the Assembly by direct universal suffrage and fixed for 17 July 1979. At its meeting on 1 March 1979 the Bureau of the Parliament had decided not to provide for an additional session between those of May and July. It had however stated:

"The Enlarged Bureau . . .

— is nevertheless of the view that in so far as the Council or Commission consider it necessary to provide for an additional session they may, pursuant to Article 1 (4) of the Rules of Procedure, call for an extraordinary session of the Parliament; any such session would be for the purpose only of considering reports which had been adopted following urgent consultation."

At its meeting on 10 May 1979 the Bureau was to confirm its position in the following words:

— "Confirms the position adopted at the above-mentioned meeting when it decided not to provide for an additional session between the last session of the present Parliament and the session of the Parliament elected by

direct universal suffrage, provided always that where the majority of the effective members of the Parliament, the Council or the Commission desire the holding of an additional session they may, pursuant to the provisions of Article 1 (4) of the Rules of Procedure, ask for the Parliament to be summoned;

— Decides further having regard to the provisions of Article 139 of the EEC Treaty that where the President has such an application before him the Enlarged Bureau will meet to consider how it should be dealt with."

11 On 25 June 1979 the Council without obtaining the opinion requested adopted the regulation proposed by the Commission which thus became Regulation No 1293/79 amending Regulation No 1111/77. The third reference in the preamble to Regulation No 1293/79 refers to consultation of the Parliament. The Council nevertheless took account of the absence of an opinion from the Parliament by observing in the third recital in the preamble to the regulation that "the European Parliament which was consulted on 16 March 1979 on the Commission proposal did not deliver its opinion at its May part-session; whereas it has referred the matter to the Assembly for its opinion".

12 The Court is asked to declare Regulation No 1293/79 void in so far as it amends regulation No 1111/77.

Admissibility of the application

13 In the Council's view the application is inadmissible for it is directed against a regulation and the conditions provided for in the second paragraph of Article 173 of the Treaty are not satisfied. The contested measure is claimed not to constitute a decision in the form of a regulation and not to be of direct and individual concern to the applicant. The applicant maintains on the other hand that the contested regulation is a set of individual decisions one of which is taken in respect of the applicant and is of direct and individual concern to it.

14 Article 9 (1), (2) and (3) of Regulation No 1111/77 as amended by Article 3 of Regulation No 1293/79 provides:

"1. A basic quota shall be allotted to each isoglucose-producing undertaking established in the Community, for the period referred to in Article 8 (1).

Without prejudice to implementation of paragraph (3), the basic quota of each such undertaking shall be equal to twice its production as determined, under this regulation, during the period 1 November 1978 to 30 April 1979.

2. To each undertaking having a basic quota, there shall also be allotted a maximum quota equal to its basic quota multiplied by a coefficient. This coefficient shall be that fixed by virtue of the second subparagraph of Article 25 (2) of Regulation (EEC) No 3330/74 for the period 1 July 1979 to 30 June 1980.

3. The basic quota referred to in paragraph (1) shall, if necessary, be corrected so that the maximum quota determined in accordance with paragraph (2):

— does not exceed 85%,

— is not less than 65%

of the technical production capacity per annum of the undertaking in question."

15 Article 9 (4) provides that the basic quotas established pursuant to paragraphs (1) and (3) are fixed for each undertaking as set out in Annex II. That annex, which is an integral part of Article 9, provides that the applicant's basic quota is 28 000 tonnes.

16 It follows that Article 9 (4) of Regulation No 1111/77 (as amended by Article 3 of Regulation No 1293/79) in conjunction with Annex II, itself applies the criteria laid down in Article 9 (1) to (3) to each of the undertakings in question who are the addressees and thus directly and individually concerned. Regulation No 1293/79 therefore is a measure against which the undertakings concerned manufacturing isoglucose may bring proceedings for a declaration that it is void pursuant to the second paragraph of Article 173 of the Treaty.

Admissibility of the Parliament's intervention

17 The Council queries the possibility of the Parliament's intervening voluntarily in the proceedings pending before the Court. In the Council's view a power to intervene of this kind is to be equated with a right of action which the Parliament does not have under the Treaty. In that respect it observes that Article 173 of the Treaty does not mention the Parliament among the institutions entitled to seek a declaration that a measure is void and that Article 20 of the Statute of the Court does not mention it among the institutions invited to lodge observations pursuant to the procedure under Article 177 for a preliminary ruling.

18 Article 37 of the Statute of the Court provides:

"Member States and institutions of the Community may intervene in cases before the Court.

The same right shall be open to any other person establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institutions of the Community or between Member States and institutions of the Community.

Submissions made in an application to intervene shall be limited to supporting the submissions of one of the parties."

19 The first paragraph of that article provides that all the institutions of the Community have the right to intervene. It is not possible to restrict the exercise of that right by one of them without adversely affecting its institutional position as intended by the Treaty and in particular Article 4 (1).

20 Alternatively the Council alleges that even if the Parliament's right to intervene had to be accepted such right would depend upon the existence of a legal interest. Such an interest may no doubt be presumed but it does not prevent the Court from checking, if necessary, that it exists. In the present case, in the Council's view, if the Court were to consider the matter it would be led to find that the Parliament had no interest in the outcome of the proceedings.

21 That submission must be rejected as incompatible with Article 37 of the Statute of the Court. Although the second paragraph of Article 37 of the Statute of the Court provides that persons other than States and the institutions may intervene in cases before the Court only if they establish an interest in the result, the right to intervene which institutions, and thus the Parliament, have under the first paragraph of Article 37 is not subject to that condition.

Breach of the principles of the right of competition

22 In the applicant's view Article 42 of the Treaty according to which it is for the Council to determine how far the rules on competition shall apply to agriculture does not empower the Council to restrict more than necessary free competition which is one of the fundamental objectives of the Treaty referred to in Article 3 (f). The measures however adopted by the Council in relation to isoglucose go beyond what is necessary.

23 The institution of a system of competition which is not distorted is not the only objective referred to in Article 3 of the Treaty which also provides in particular for the adoption of a common agricultural policy. Those responsible for the Treaty, conscious that the simultaneous pursuit of those two objectives could sometimes and in certain circumstances prove difficult, provided in the first paragraph of Article 32 that:

"The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of Article 43 (2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39."

That simultaneously recognizes the precedence the agricultural policy has over the aims of the Treaty in relation to competition and the power of the Council to decide how far the rules on competition should apply to the agricultural sector. The Council has a wide discretion in the exercise of that power as it has in the implementation of the whole agricultural policy.

24 As consideration of the contested measures shows, the effects which they may perhaps have on competition are the unavoidable consequence of the legitimate desire of the Council to limit isoglucose production. The measures moreover permit some competition to continue in respect of price, terms of sale and the quality of isoglucose. The Council has therefore not exceeded its discretion.

Breach of the principle of proportionality

25 The applicant maintains that in establishing a system of quotas for isoglucose the Council chose the most restrictive means of action which meant that the applicant could not rationally exploit its production capacity. On the other hand no measure has been taken against the sugar industry. The burdens thus unilaterally placed on the isoglucose industry breach the principle of proportionality.

26 In the first place the applicant cannot claim that the Council has made the rational use of the applicant's production capacity impossible when its actual production has not even attained the maximum quota allowed it. Further, here too the real problem is whether in adopting the measures which it took the Council exceeded the limits of the discretion which it has. That is not so as appears from the previous considerations. It must moreover be stressed in that respect that it is not correct to say, as does the applicant, that no restrictive measure has been taken with regard to the sugar industry and in any event the possibilities for action with regard to that industry are limited by the need for the Council to ensure a fair standard of living for the agricultural community which is one of the objectives referred to in Article 39 (1) (b) of the Treaty.

Alleged discrimination against isoglucose manufacturers *vis-à-vis* sugar manufacturers

27 The applicant complains of discrimination against isoglucose manufacturers. Although isoglucose manufacturers and sugar manufacturers are in a comparable situation isoglucose manufacturers are subject to a different quota system. The quota system applied to isoglucose takes account neither of the need to maintain free competition nor the fact that sugar and isoglucose are at different stages of development. The quotas are calculated on the basis of reference periods which do not correspond with those applying to sugar and the whole system lacks the flexibility which characterizes the system for sugar. Finally the isoglucose industry does not enjoy the guarantees of an organization of the market.

28 The arguments in relation to competition and the different stages of development of the two industries are merely a repetition of the arguments which have already been answered when a breach of the principles of the right of competition was alleged. The reason for the other differences pointed out by the applicant is to be found in the objective differences between the situations of the sugar and isoglucose industries which the Council has taken into account in exercising its discretion. That submission must therefore be rejected as unfounded.

Discrimination as between isoglucose manufacturers

29 The applicant complains that when allocating the quotas between the various isoglucose manufacturers the Council did not take account of the fact that certain undertakings voluntarily restricted their investment in anticipation of the regulation which, after the aforementioned judgment of the Court of 25 October 1978, was to alter the system for isoglucose.

30 After the judgment of 25 October 1978 the future market prospects for isoglucose were the same for all the isoglucose-manufacturing undertakings in the Community. Faced with that problem they reacted differently but the Council is not to blame for failing to take into account the commercial choices and internal policy of each particular undertaking when it adopts measures of general interest to prevent the uncontrolled isoglucose production from jeopardizing the sugar policy of the Community.

Error in calculating the applicant's quota

31 The applicant alleged during the oral procedure that the maximum quota fixed for it was calculated on the basis of the capacity which it reported taking into account unavoidable interruption of work whereas according to the Council's reply the capacity taken into account in calculating the maximum quotas was a gross capacity without deduction for losses due to interruption of work. In consequence the quota allotted to the applicant is based on an arithmetical error and Annex II ought to be corrected at least to that extent.

32 Since that submission was not made until late in the proceedings the Court has no information before it upon which to decide whether there was such an error. That is moreover not necessary for a decision in the case having regard to the infringement of essential procedural requirements which is found below. It is for the Council to draw the consequences of such error if it is established.

Infringement of essential procedural requirements

33 The applicant and the Parliament in its intervention maintain that since Regulation No 1111/77 as amended was adopted by the Council without regard to the consultation procedure provided for in the second paragraph of Article 43 of the Treaty it must be treated as void for infringement of essential procedural requirements.

34 The consultation provided for in the third subparagraph of Article 43 (2), as in other similar provisions of the Treaty, is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void.

35 In that respect it is pertintent to point out that observance of that requirement implies that the Parliament has expressed its opinion. It is impossible to take the view that the requirement is satisfied by the Council's simply asking for the opinion. The Council is, therefore, wrong to include in the reference in the preamble to Regulation No 1293/79 a statement to the effect that the Parliament has been consulted.

36 The Council has not denied that consultation of the Parliament was in the nature of an essential procedural requirement. It maintains however that in

the circumstances of the present case the Parliament, by its own conduct, made observance of that requirement impossible and that it is therefore not proper to rely on the infringement thereof.

37 Without prejudice to the questions of principle raised by that argument of the Council it suffices to observe that in the present case on 25 June 1979 when the Council adopted Regulation No 1293/79 amending Regulation No 1111/77 without the opinion of the Assembly the Council had not exhausted all the possibilities of obtaining the preliminary opinion of the Parliament. In the first place the Council did not request the application of the emergency procedure provided for by the internal regulation of the Parliament although in other sectors and as regards other draft regulations it availed itself of that power at the same time. Further the Council could have made use of the possibility it had under Article 139 of the Treaty to ask for an extraordinary session of the Assembly especially as the Bureau of the Parliament on 1 March and 10 May 1979 drew its attention to that possibility.

38 It follows that in the absence of the opinion of the Parliament required by Article 43 of the Treaty Regulation No 1293/79 amending Council Regulation No 1111/77 must be declared void without prejudice to the Council's power following the present judgment to take all appropriate measures pursuant to the first paragraph of Article 176 of the Treaty.

Costs

39 Pursuant to Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs if they have been asked for in the pleadings.

40 The Council has been unsuccessful and the applicant, albeit not the Parliament, has asked for an order for costs. It follows that the Council must be ordered to pay only the costs of the applicant.

On those grounds,

THE COURT

hereby:

1. **Declares Regulation No 1293/79 (Official Journal L 162, p. 10 with corrigendum in Official Journal L 176, p. 37) amending Regulation No 1111/77 (Official Journal L 134, p. 4) to be void.**

2. **Orders the Council to pay the costs of the applicant.**

3. **Orders the Parliament to bear its own costs.**

Kutscher Pescatore Koopmans Mertens de Wilmars Mackenzie Stuart

O'Keeffe Bosco Touffait Due

Delivered in open court in Luxembourg on 29 October 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL

(see Case 138/79, p. 3362)