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

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

Delivered in open court in Luxembourg on 30 January 1974.

A. Van Houtte
Registrar

R. Lecourt
President

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

Mr President,
Members of the Court,

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

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

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

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

1 — Translated from the Italian.

rules for the common organization of the market in sugar, and Regulation No 142/69/EEC of the Commission implementing them.

2. In order to prevent over-production in the sugar sector, Article 23 of Regulation No 1009/67 lays down that, for a transitional period which will expire on 1 July 1975, the States shall fix a basic quota for each factory or for each undertaking producing sugar on their territory, calculated in accordance with the formula set out in the Article.

Article 24 further provides that the Member States shall fix a maximum quota for each sugar factory and for each undertaking for which they have laid down a basic quota, by applying a coefficient to this quota.

The quantity of sugar produced by each firm outside the basic but within the maximum quota, calculated for each marketing year, enjoys the advantage of the Community guarantee on sales, but it is subject to a production levy imposed by the States under Article 27 of the Regulation concerned. In this way, producers who exceed their basic quota must make a contribution to the Community sales guarantee. The quantity of sugar produced outside the maximum quota of the undertaking, on the other hand, cannot be disposed of on the internal market.

The right to carry forward surplus production to the following marketing year is strictly limited by Article 32 of the Regulation.

The way in which the system of quotas and in particular the system laid down in Article 27 of Regulation No 1009/67 are to be applied was promulgated by the Commission in Regulation No 142/69, to which reference has already been made. The first paragraph of Article 3 of Regulation No 142/69 provides as follows: 'For the purposes of Articles 25, 27, and 32 of Regulation No 1009/67/EEC, "the sugar production of a factory or undertaking" means the quantity of sugar actually manufactured by that factory or by the factory or factories of that undertaking as the case may be'.

The rules set out in the subsequent paragraphs of this Article specify the way in which the quantity of sugar produced has to be fixed for individual undertakings or factories, with the object of avoiding a situation in which the objectives pursued by means of the quota system are frustrated.

3. The Hamburg Finanzgericht in the first place asks:

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

Article 2 of Regulation No 142/69, referred to above, entrusts each Member State with the task of establishing at a given date each year definitive figures for sugar production in the preceding marketing year for each factory or undertaking situated on its territory as at 30 June. And it is on this basis that surpluses which attract the levy under Article 27 of Regulation No 1009/67 are established.

By virtue of Article 46 (2), most of the provisions of this Regulation, including Article 27, are applicable from 1 July 1968.

The German court asks therefore whether the national authorities responsible for implementing the Community rules referred to are, when applying Article 27 and the levy provided thereunder, permitted to take account of surpluses dating back to before 1 July 1968.

In the second place, in the event of an affirmative reply to the first question, the Court asks:

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

4. In the course of the proceedings, the Commission pointed out that retrospective allocation of additional quantities of sugar to a production year previous to the current one would give rise to enormous administrative problems. The outcome of Article 27 (2), taken together with Article 6 of Regulation No 142/69, is that the total production of sugar recorded in the Community during a given marketing year is one of the factors taken into account in calculating the production levy to be charged for that year under Article 27. Accordingly, if an undertaking's final production figures, established for each year on the date laid down in Article 2 (2) of Regulation No 142/69, were to be later corrected, even slightly, it would become necessary for this change to be reflected in the Community's overall production figure and therefore in the production levy imposed on sugar-producing undertakings throughout the Community. The loss of time, administrative complication and expense of making these re-calculations would be quite disproportionate to the importance of the correction.

The Commission also points to other difficulties which could arise from altering the quantity of production credited to a given marketing year, particularly as regards application of Article 32 (1) of Regulation No 1009/67, and the need to ensure uniform application of the levy system, which could be compromised if the date of production was not fixed on the basis of considerations which are the same for all.

Prior to 1 July 1968, the sugar market was for the time being governed by Regulation No 44/67 of the Council of 21 February 1967 (OJ 40 of 3 March 1967, p. 597). Article 7 of the Regulation fixes, for each Member State, the permitted output for the 1967/68 marketing year. The surplus could not be disposed of in the Community during that marketing year. As for the sugar in hand at the beginning of the 1967/68 marketing year, Article 8 (2) laid down the maximum quantity of stock which could be carried forward to that marketing year. Article 8 (1) laid down the maximum quantities to be carried forward by each Member State to the 1968/69 marketing year. Since, as a result of subsequent re-calculation, the actual amount of stock held by Germany on 1 July 1967 turned out to be less than the permitted amount, by Regulation No 1029/67/EEC of the Commission of 21 December 1967 (OJ 313 of 22 December 1967) the amount of production permitted for the 1967/1968 marketing year was increased accordingly. This is the 'adjusted' quantity referred to in Article 33 of Regulation No 1009/67. On the basis of this provision, the tonnage of sugar produced in excess of this adjusted quantity is, insofar as it has not been exported without refund to third states, distributed by Member States between factories or undertakings as carried-forward production. This quantity, as defined in Article 33, is regarded as production included in the basic quota for the 1968/69 sugar marketing year.

5. In the light of these adjustments, the Commission, in Regulation No 1789 of 8 November 1968 (OJ L 273) fixed the sum of the quantities to be carried over to the 1968/69 sugar marketing year. This Regulation serves therefore to establish a factor which must be taken into account in the calculation of the production levy for the 1968/69 marketing year. As the Commission pointed out, if, during previous marketing years, there had been a realization at that time that additional quantities of sugar had been produced in

Germany, the surplus ascertained for that country would have been higher, with the result that the additional tonnage produced in the 1966/67 marketing year would have affected the extent to which production in the 1967/68 marketing year had to be adjusted, while the additional tonnage in the 1967/68 marketing year would have had a direct effect on the excess quantity as defined by Article 33 (1) of Regulation No 1009/67.

In particular, the adjustment under Article 8 (3) of Regulation No 44/67 of the basic quota laid down for Germany would have produced a different result because its effect, when further stocks came to light, would be to reduce the increase allowed in the basic quota fixed under Article 7 of the Regulation due to the fact that the amount of stock as at 1 July 1967 had proved to be less than the carried-forward quota laid down in Article 8 (1).

The adjusted basic quota, assessed by Germany in accordance with Article 8 (3) of Regulation No 44/67, was divided among German producers on the basis of the relevant domestic rules at that time still in force governing the organization of the market in sugar. The amount which each producer could carry forward to the 1968/69 marketing year represented the difference between his output and the basic quota allocated to him for the 1967/68 marketing year.

6. Accordingly if, in the case of an individual undertaking, some of the tonnage produced was omitted from the returns, this had a direct effect on the individual quota to be carried forward and might have been reflected in the amount of the levy to be paid on excess production after Regulation No 1009/67 came into force.

It is true that, if one went beyond the general question of the effect which tonnage produced but not accounted for could have on the national quota and the possible effect on the production levy due from the undertakings, and proceeded to give retrospective consideration to the actual position of the particular undertaking in which surpluses were later identified, it could be equally true that, if the tonnage in question had been ascertained in the year in which it was produced, it could not have given rise, directly or indirectly, to levies, whilst if this tonnage were taken into account for the production year in which it was ascertained, the outcome could be an increase in the charge which the undertaking was called upon to bear as a production levy under Article 27. But, apart from the fact that the reverse might be true, there are considerations associated with practical difficulties of an administrative character which, as we have seen, are of sufficient weight to affect the operation of the system and the extent to which its application is consistent with general principles and requirements. This makes it imperative to find a solution to the problem which accords with the general interest, even if this falls short of the expectations and conflicts with the specific interests of individual undertakings.

It must be made clear at once that no question arises of the good faith of undertaking which, as a result of a physical stocktaking, discover surpluses greater than those previously returned.

The possibility of differences being revealed between stocks declared on the basis of calculations conducted in accordance with the entries in the sugar tax register, which, under German tax legislation, every producer must maintain, and the stocks actually found during physical stocktaking is, as the German Government agent explained, the result of the particular system operated in Germany, which is based on maintenance of the sugar tax register and on a series of suppositions. This explains why it could happen that the reality was found to differ from the estimates after stocktaking which, in line

with general practice and for practical reasons, was carried out at intervals of several years — not that the differences between the estimated and actual quantities suggest any misconduct or negligence on the part of the producer undertaking.

7. It is clear, therefore, that the production figures arrived at in each Member State before Regulation No 1009/67 came into force subsequently affected the calculation pursuant to Article 33 of the Regulation, of sugar production in the 1968/69 marketing year, and therefore also affected the application of the levy pursuant to Article 27. Indeed the quantities produced, but not identified at the time, had the result that the surplus taken into account as required under Article 33 was lower than the real surplus. As the quotas fixed on a national basis under the transitional arrangements represented a foretaste of the stricter control laid down in Regulation No 1009/67, and had themselves the effect of preventing surpluses by restricting Community output, it is clearly in the general interest of the Community that no production quota, even one relating to a period of time before the present arrangements came into force, should be exempt from the rules for calculating surpluses and carrying them forward. Otherwise there would be a danger that the levy on surplus production payable by each undertaking under Article 27 could be avoided.

The national authority, the defendant before the German court, stated that the tonnage produced in the course of a sugar marketing year is arrived at wholly on the basis of entries in the sugar tax register; for tax purposes, it was of no importance when the additional tonnage not previously included in the returns had actually been produced. However, we are not here concerned with assigning additional quantities identified by the idiosyncracies of the national system of tax returns to one or other production year; we are concerned to find a single guideline which will hold good for the whole Community.

Today, legislation in force expressly provides just such a guideline. In Regulation No 700 of 12 March 1973, to which I referred when I began, the Commission has in fact provided in Article 2 (3), that 'where it is subsequently found that actual production figures are different from those established pursuant to paragraph 2, such differences shall be taken into account when final production figures are established for the sugar year during which the difference was recorded.' In the absence of a provision expressly covering this point, is it legitimate to apply a similar formula to the period before this Regulation appeared?

8. In this connection, I attach little importance to the argument, adduced by the Commission, that maintenance of the principle that Community law must be uniformly applied may, in the absence of a standard basis for fixing the date of production, be jeopardized by difficulties which may be created by *ex post facto* alterations in the production figures already declared in respect of a given production year.

This argument seems to carry little conviction here in view of the fact that the main obstacle in the way of uniformity could be the absence of a standard basis for establishing current sugar output; and that, in consequence, *ex post facto* revisions of the figure could be regarded as offsetting the lack of uniformity in application of Community law brought about by the different assessment systems employed in individual States.

If account is taken of the object of Community legislation, which is designed to discourage surplus production within the Community, it is clearly consistent with that object for the quantity of sugar which is actually at the disposal of each undertaking in the sugar

year under review to be reflected in its quota, to the extent to which this has not already been taken into account, even though part of this quantity was produced during a previous sugar year.

It would be wrong to write off quantities which were not taken into account at the appropriate time for establishing the national surplus in relation to the figure fixed by the Community; and, since, for reasons stated earlier, it would not in practice be feasible to take them into account *ex post facto* in recalculating the figures for all the previous years, it fits in with the restrictive purpose of the Community rules to take them into account for the current year at the time they are established.

9. But, for the guideline laid down in Regulation No 700 of 1973 to be accepted as applying to previous years despite the absence of any express provision to this effect in legislation then in force, it is not enought merely to recognize its usefulness, practical value and consistency with the general objects of the common organization of the market in sugar: it is also important to make sure that it is not in conflict with any specific Community Regulation.

In this respect, it is significant that Article 32, which enables surpluses to be carried forward to the next year, strictly limits the possibility to the case of a surplus in the immediately preceding sugar year and not in others. The German court asks whether it is possible to take account of quantities produced in years prior to the immediately preceding one: would not a calculation which took into account the surplus produced in the 1966/67 and 1967/68 sugar years in the return for the 1970/71 year in practice mean increasing the quanitity which can, under Article 32, be carried forward? The German court sees further confirmation of its doubts in the transitional rule in Article 33 which, to enable the surpluses of the 1967/68 marketing year to be carried forward to the 1968/69 marketing year, has been obliged to introduce a sort of legal fiction.

In this context, an important consideration is that the fixing of the benefit consisting in the right to carry forward represents a restriction on the undertaking, and it is certainly not intended to prevent account being taken of production belonging to earlier years but whose tonnage was not included in returns during the year in which it occurred. The is accordingly no conflict between the guideline referred to earlier and the requirements of the basic Regulation.

As for the reference in Article 3 to the quantity of sugar 'actually manufactured' by the undertaking for the purposes of Article 27 of Regulation No 1009/67, it should be noted that this is not necessarily a reference to the quantity of sugar actually manufactured in the course of the year in question. On the contrary, the requirement contained in this provision that the quantity actually manufactured by each undertaking must be taken into account means that account must be taken, albeit late, of the quantities manufactured by the undertaking in other years and which have not yet entered into the calculations.

It is true that Article 1 (2) of Regulation No 142/69 of the Commission provides that, in calculating the quantity referred to under paragraph 1 of that Article which defines 'sugar production' within the meaning of Article 27, account shall not be taken of the quantities of white sugar produced from raw sugar or syrups which were produced before the marketing year in which white sugar was manufactured. As the German Government has correctly observed, however, this rule is designed to do no more than ensure that, when the sugar production levy is calculated, quantities which have already been taken into account because they were produced in the course of a previous marketing year are excluded from the calculation. Given its purpose,

therefore, this provision does not conflict with a system of accounting which includes quantities which have not previously been taken into account.

Moreover, it would cause serious distortion of the way in which the system works and would also have the effect of creating discrimination if the formula laid down in Article 2 (3) of the present Regulation, No 700/73, were now to be applied to the additional quantities, attributable to earlier marketing years, which came to light after the present Regulation came into force. These quantities could be subject to a supplementary production levy in the light of the production position of the undertaking in the current sugar year and it would be unfair not to apply the same rule to the additional quantities attributable to the same period which had been ascertained before 15 March 1973.

Since, therefore, the principle of subsequent allocation of production established after the year in which it occurred is not in conflict with the specific provisions of the Regulations in force at the material time, and the principle accords with the general objectives of the system, its operational requirements and the need to avoid differences of treatment for which there is no objective justification between undertakings subject to the common mechanism of the market, it is reasonable to conclude that this principle is sufficient to cover the question left open by the legislation under review.

I accordingly suggest that the Hamburg Finanzgericht should be answered as follows:

1. In applying Article 27 (1) of Regulation No 1009/67 of the Council of 18 December 1967 and Article 3 (1) of Regulation No 142/69 of the Commission of 25 January 1969, excesses ascertained after the legislation on sugar production levies came into force must be taken into account even if they arose on a date prior to 1 July 1968.

2. The excesses must be allocated to the sugar marketing year in which they were ascertained.