OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 22 NOVEMBER 1973

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Tribunal administratif of Paris. The dispute between the parties is as to the amount of refund to which the plaintiff is entitled in respect of certain exports to Algeria of sweetened condensed milk, a product which, as Your Lordships know, is compounded primarily of milk and of sugar. The first Defendant is the French intervention agency for, among other things, milk products; the second Defendant is the French intervention agency for sugar.

Your Lordships will remember that the common organization of the Community market in sugar was established by Regulation No 1009/67/EEC of the Council. This Regulation provides among other things for the annual fixing of target, threshold and intervention prices for white sugar; for the charging of levies on imports and for the payment of refunds on exports of sugar; and also for such imports and exports to be made conditional on the submission of an import or export licence issued by a Member State.

General rules for the granting of those export refunds are laid down by Regulation (EEC) No 766/68 of the Council. By virtue of Article 11 (1) of this Regulation, the amount of a refund, unless it has been fixed by tender, is to be that in force on the day of exportation, subject to the proviso, contained in Article 11 (2), that, if the applicant so requests when applying for an export licence, the amount of the refund in force on the day on which the application is lodged is to be applied to an export transaction effected during the validity of the licence. Article 12, until it was amended in 1971, provided so far as material as follows:

'If between the time the refund is fixed, either by tender or pursuant to Article 11 (2), and the time exportation is effected an alteration is made to:

(a) the intervention price for white sugar . . .

the refund shall be adjusted on the basis of such alteration.'

The common organization of the Community market in milk and milk products was established on similar lines by Regulations (EEC) No 804/68 and (EEC) No 876/68 of the Council.

A Regulation of the Commission, (EEC) No 1098/68 prescribes detailed rules for, among other things, determining the amount of refund payable on the export of products compounded of milk and sugar. Article 2 (1) of this Regulation provides that the refund shall be equal to the sum of two components, one reflecting the quantity of milk in the product and the other the quantity of added sucrose. Article 2 (2) prescribes the method of calculating the first component. Nothing turns on it in this case, for there is no dispute as to the amount of 'milk component' to be included in the refunds to which the plaintiff is entitled. The dispute is as to the amount of the 'sugar component'. Article 2 (3) provides that that component is to be calculated by multiplying the sucrose content of the product by the basic amount of the refund valid on the day of exportation for certain sugar products listed in Article 1 (1) (d) of Regulation No 1009/67/EEC. But Article 2 (3) contains a proviso which, until it was amended in 1971, was in the following terms:

'However, when the refund is fixed in advance, the basic amount referred to in the preceding subparagraph shall be that applicable on the day when the application for an export licence was

lodged, adjusted, as necessary, for any alteration in the intervention price for white sugar.'

That was the state of the relevant legislation when, in 1970, the plaintiff entered into a fixed-price contract with the Algerian Government for the supply to that Government of 10 000 000 kg of sweetened condensed milk for delivery over a period ending in February 1972. It is said on the plaintiff's behalf that, in committing itself to a fixed price, the plaintiff, which is not a producer of sugar and which has no facilities for holding large stocks of it, relied first on its right to have the refund to which it would be entitled fixed in advance at the time of the issue of the export licence and secondly on the expectation of an automatic increase in the amount of that refund, under the proviso to Article 2 (3), in the event of an increase in Community prices for sugar.

There are before the Court copies of a completed form containing, in part A, the plaintiff's application to the first defendant for the relevant export licence and, in Part B, that licence itself. Both parts are dated 29 October 1970. This document shows clearly that the plaintiff did apply for the refund to be fixed in advance and that it was so fixed. The licence states that the rate of refund 'pourra être ajusté en fonction .. d'une modification du prix d'intervention du sucre blanc' — a clear allusion to the proviso to Article 2 (3).

With the rate of refund fixed by that licence, and the prospect of an increase in that rate in the event of an increase in the price of sugar, the plaintiff was content. Its contentment was however shattered by the combined effect of three Community Regulations that were adopted in May 1971.

Of these, the first in logical order (albeit not, for fortuitous reasons, in order of date) was Regulation (EEC) No 1048/71 of the Council. The purpose and effect of this was to substitute a new Article for the old Article 12 of Regulation (EEC) No 766/68. The authentic English text of Regulation No 1048/71 has not yet been published, so I read the French. It recites, referring to Article 12, 'que cette disposition s'est avérée trop rigide, qu'il y a lieu dès lors de modifier les dispositions de l'article 12 pour permettre éventuellement de déterminer l'ajustement approprié', and then provides:

'Le texte de l'article 12 du règlement (CEE) no 766/68 est remplacé par le texte suivant:

'Si, au cours de la période comprise entre:

— le jour du dépôt de la demande de certificat d'exportation assortie d'une demande de préfixation de la restitution, ou

— le jour de l'expiration du délai pour la présentation des offres lorsqu'il s'agit d'une restitution fixée par voie d'adjudication,

et le jour de l'exportation, intervient une modification des prix du sucre ... fixés en vertu de règlement no 1009/67/CEE, il peut être prévu un ajustement du montant de la restitution.' "

My Lords, I think it convenient to mention here, in order to get it out of the way, an argument that was submitted on behalf of the plaintiff, to the effect that the use of the phrase 'il peut être prévu' implied that Regulation No 1048/71 required to be implemented by a further Regulation and that, until it was so implemented, there was a void in the law that could be filled only by holding that the old Article 12 remained in force. My Lords, I would reject this argument. It seems to me inconsistent first with the recital that uses the adverb 'éventuellement', secondly with the categorical terms of the operative part: 'Le texte de l'article 12 ... est remplacé ...' and last but not least with the use of the verb 'peut'. I do not for my part doubt that the effect of Regulation No 1048/71 was to substitute for the provision for automatic adjustment of refunds contained in the old Article 12 a provision for such adjustment at

discretion. In whom that discretion was vested is one of the questions that the Court has to answer in this case.

The second of the relevant trio of Regulations adopted in May 1971 was Regulation (EEC) No 951/71 of the Commission. This, although earlier in date than Regulation No 1048/71, was really consequential upon it. It substituted a new proviso to Article 2 (3) of Regulation No 1098/68. That proviso was henceforth to be as follows:

'However, when the refund is fixed in advance, the basic amount shall be that applicable on the day when the application for an export licence was lodged. When, in this case, the prices for sugar fixed on the basis of Regulation No 1009/67/EEC are altered during the period between the day when the application for an export licence was lodged and the day on which the goods are exported, the amount of the refund shall be adjusted if an adjustment is provided for pursuant to Article 12 of Regulation (EEC) No 766/68.'

Lastly, Regulation (EEC) No 1061/71 of the Council fixed the target and intervention prices for white sugar for the year beginning on 1 July 1971. It fixed them slightly higher than they had been for the previous year.

The plaintiff thereupon sought an increase in the rate of refund on its exports effected after 1 July 1971 under the licence dated 29 October 1970. This was refused by the defendants on the ground that Regulations Nos 1048/71 and 951/71 had abolished the system of automatic adjustments and that there had been no exercise of the discretion conferred by the new Article 12. The plaintiff then took the matter to the Tribunal administratif of Paris, contending that the attitude of the Defendants involved wrongly attributing a retroactive effect to the Regulations of 1971.

Two questions are referred by the Tribunal administratif of Paris to this Court. They are in substance these:

1. whether, in the case of exportations of products to which Article 2 of Regulation No 1098/68 applies effected after the entry into force of Regulations Nos 1048/71 and 951/71 under a licence issued before that time whereby the rate of refund was fixed in advance, the question whether there should be any adjustment of that rate is governed by the proviso to paragraph (3) of that Article in its original form or by that proviso as amended by the combined effect of Regulations Nos 1048/71 and 951/71; and
2. whatever may be the answer to question (1), whether an act of the competent Community authority is necessary to empower the relevant national intervention agency to make any such adjustment.

My Lords, it seems to me that the answer to the first question is given by the decision of this Court in Case 1/73 *Firma Westzucker GmbH v Einfuhr- und Vorratsstelle für Zucker* (not yet reported). Indeed Counsel for the plaintiff appreciated the difficulty that that decision created for them and directed their arguments, in the main, to distinguishing it.

At first sight, perhaps the most obvious ground of possible distinction between the two cases lies in the fact that in Case 1/73 the refund had been fixed by tender. But Counsel for the plaintiff, in my opinion rightly, did not rely upon this. The reasoning of the Court in Case 1/73 is clearly applicable as much to a case where the refund was fixed in advance on the exporter's application as to a case where it was fixed by tender.

In their written observations Counsel for the plaintiff fastened on paragraph 9 of the Grounds of the Court's Judgment in Case 1/73 and suggested that that paragraph could not apply in the present case where there had been a change in the relevant intervention price. But, my Lords, in Case 1/73 too there had been a change in the relevant intervention price. Indeed it was the very same change as is

material in the present case. What the Court was saying in paragraph 9 was that to apply Article 12 in its amended form in the case of an export licence issued before the date of the amendment of that Article did not involve giving a retroactive effect to the amendment if both the relevant exportation and the relevant change in the intervention price occurred after that date.

At the hearing Counsel for the plaintiff put forward two other grounds of distinction.

The first rested on the fact that the plaintiff was required, in its application for an export licence, to undertake to respect 'd'une part, les dispositions de la Réglementation communautaire applicables au produit exporté, et, d'autre part, les dispositions législatives et réglementaires françaises' and on the further fact that the licence itself was expressed to be issued 'En vertu d'une part du Règlement (CEE) No 804/68 ... et des règlements subséquents de la CEE, et d'autre part, de la législation et de la réglementation nationales'. It was suggested that these references to French legislation imported that general principles of French law applied here in a way that they could not in Case 1/73, which arose in Germany. But, my Lords, the questions before this Court are questions of Community law, and that law is the same in all the Member States. Of course, in ascertaining what that law is, the Court has regard where appropriate to the principles to be found in the laws of Member States. It is for this reason and for this reason alone that the copious French authorities cited on behalf of the plaintiff could be in point. If a perusal of them evinced something pertinent that the Court had overlooked in reaching its decision in Case 1/73, this would afford a ground, not indeed for distinguishing that decision, but for reconsidering it. But such a perusal evinces nothing of the kind. Those French authorities are not in point because Regulations Nos 1048/71 and 951/71 did not purport to alter the contract between the plaintiff and the Algerian Government, nor did they purport to deprive the plaintiff of any vested right. It is not as though they had sought to reduce the amount of the refund to which the plaintiff was entitled in respect of a past exportation.

The other ground of distinction suggested on behalf of the plaintiff was that Case 1/73 was concerned with exportations of sugar by a dealer in sugar, whereas the plaintiff is not a dealer in sugar but a user of it with, as I have already mentioned, only limited facilities for stocking it. This, it is argued, makes inapplicable in the plaintiff's case so much of the reasoning of the Court in Case 1/73 as rested on the circumstance that Article 12 of Regulation No 766/68 in its original form involved for an exporter as much the risk of a reduction in his refund as the possibility of an increase in it, and also so much of that reasoning as rested on Article 37 (2) of Regulation No 1009/67, which empowered the Council to take steps to prevent the sugar market being disturbed as a result of an alteration in price levels at the change-over from one marketing year to the next. The plaintiff, it is said, was bound, by virtue of its contract with the Algerian Government, to buy sugar periodically at the prices currently ruling in the market. If those prices went down, it was only right that its refunds should be correspondingly reduced. If they went up it would suffer hardship unless its refunds were correspondingly increased.

But my Lords the question whether Regulations Nos 1048/71 and 951/71 apply or do not apply in the case of exportations effected after their entry into force under licences issued before it cannot depend for its answer upon the nature of the business carried on by the exporter concerned in a particular case, much less upon what storage facilities he happens to have. It must receive the same answer in all cases. So here again the plaintiff's argument amounts logically to saying not just that Case

1/73 should be dinstiguished, but that, having regard to the hardship that would be inflicted on the plaintiff if it were followed, it should be reconsidered.

My Lords, in my opinion, the decision of the Court in Case 1/73 was, if I may respectfully say so, clearly right. A trader cannot have a vested right in legislation that affords him a subsidy remaining in force unaltered indefinitely. Risks, after all, are the very stuff of trade. A trader may seek to safeguard himself against them or, in the hope of greater profit, he may accept them. The choice is his, and a trader who chooses to enter into a long term contract for the supply of foodstuffs at a fixed price is taking a notorious risk. His right to take that risk is unquestionable, but there does not go with it an immutable right to be indemnified against the consequences out of public funds.

I am therefore of the opinion that the first question asked by the Tribunal administratif of Paris should be answered as follows:

'In the case of exportations of products to which Article 2 of Regulation (EEC) No 1098/68 applies effected after the entry into force of Regulations Nos 1048/71 and 951/71 under a licence issued before that time whereby the rate of refund was fixed in advance, the question whether there should be any adjustment of that rate is governed by the proviso to paragraph (3) of that Article as amended by the combined effect of Regulations (EEC) Nos 1048/71 and 951/71.'

My Lords, if that is right, the second question becomes in effect whether the discretion conferred by the amended proviso is conferred on the Commission or on the national intervention agencies. To my mind the answer to this question can admit of no doubt.

I agree of course with the view expressed by Mr Advocate-General Roemer in Case 1/73 that, before the amendment of the proviso, no act of any Community authority was necessary to empower a national intervention agency to adjust a refund following an alteration in the intervention price of white sugar. At that time, such an adjustment was mandatory and to make it was a simple arithmetical operation.

Owing to the way in which the Hessisches Finanzgericht had formulated its questions in Case 1/73 neither Mr Advocate-General Roemer nor Your Lordships were called upon in that case to express a view on the corresponding position after the amendment. But it must be different since, as I have said, the amendment conferred a discretion. That discretion, if exercised in the direction of an increase in particular refunds, must involve an expenditure of Community funds. Moreover, however it is exercised, unless it is exercised uniformly throughout the Community, disparities will be created in the treatment of traders in different parts of it. It is consequently to my mind unthinkable that the authors of the amendment should have intended to confer the discretion on national agencies.

I am therefore of the opinion that the second question asked by the Tribunal administratif of Paris should be answered as follows:

'Whereas no act of any Community authority was necessary to empower a national intervention agency to make such an adjustment before the entry into force of Regulations Nos 1048/71 and 951/71, such an act is rendered necessary for that purpose by those Regulations.'