OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 14 OCTOBER 1982

My Lords,

The Verwaltungsgericht at Frankfurt am Main has referred to the Court under Article 177 of the EEC Treaty the following questions:

"1. Does sugar which is in transit from a warehouse approved under the first sentence of Article 3 (1) of Council Regulation (EEC) No 1358/77 of 20 June 1977 laying down general rules for offsetting storage costs for sugar and repealing Regulation (EEC) No 750/68 (OJ L 156, 25. 6. 1977, p. 4) to another approved warehouse constitute sugar which is 'stored in a warehouse' within the meaning of the aforesaid provision even if the two warehouses are situated in different Member States?

If it does not:

2. Does the general prohibition of arbitrariness or the prohibition of discrimination contained in the second subparagraph of Article 40 (3) of the EEC Treaty require similar special treatment to be granted to the trader put at a disadvantage, at any rate for as long as such treatment is granted unlawfully to the favoured trader?

If it does:

3. Is the special provision of Article 11 (1) of Commission Regulation (EEC) No 1998/78 of 18 August 1978 laying down detailed rules for the offsetting of storage costs for sugar (OJ L 231, 23. 8. 1978, p. 5) covered by the power conferred in Article 3 (2) of Council Regulation (EEC) No 1358/77?

If it is not:

4. Does the resultant unlawful preference of sugar transported between approved warehouses in the same Member State over sugar transported between approved warehouses in different Member States constitute discrimination within the meaning of the second subparagraph of Article 40 (3) of the EEC Treaty, or does it at any rate offend against the general prohibition of arbitrariness which rests on common legal principles?"

The questions arise in this way. Article 8 of Council Regulation No 3330/74 of 19 December 1974 (OJ L 359, 31. 12. 1974, p. 1) provided for the reimbursement by the Member States of storage costs for sugar produced from raw materials of Community origin. General rules governing reimbursement were laid down by Regulation No 1358/77, Article 1 of which provides that reimbursement of storage costs should in principle be made by the Member State on whose territory the products are stored. Article 4 thereof provides that the reimbursement shall be calculated on the basis of monthly returns on the quantities in store, the quantity taken

into account in any one month being "equal to the arithmetic mean of the quantities held in store at the beginning and at the end of the month in question". Article 3 (2) provides that "in special circumstances special provisions may be adopted . . . to deal with sugar in transit at the beginning " of the month in question. These provisions were laid down in Articles 10 and 11 of Commission Regulation No 1998/78. The former provides that reimbursement shall be granted in respect of cane sugar originating in the French overseas departments which is at sea at 00.00 hours on the first day of a month. Under Article 11 (1) reimbursement is to be granted to sugar "which at 00.00 hours on the first day of a month is within a Member State in transit from an approved warehouse . . . and which, on arrival, is stored in another approved warehouse in the same Member State".

In 1979 a German firm ("Wagner") requested reimbursement of its storage costs in respect of quantities of sugar, bought from a French undertaking in Dijon, which were in the course of carriage from an approved warehouse in France (apparently that of the manufacturer) to an approved warehouse in Germany (apparently Wagner's) on the last day of the month in question. The competent German authority, the Bundesanstalt für landwirtschaftliche Marktordnung, rejected the request on the ground that, under Article 11 of Regulation No 1998/78, only goods in transit between agreed warehouses in the same Member State could be taken into account. Wagner then brought the matter before the Verwaltungsgericht at Frankfurt am Main. The latter took the view that, under Regulation No 1358/77, reimbursement is to be made only in respect of sugar which has been taken off the market in the conditions applicable to State storage. The transport of sugar from one approved warehouse to another does not alter the fact that the sugar is still withdrawn from the market. The conclusion is that the transport of sugar between approved warehouses must be regarded as being the same as storage in one place in an approved warehouse, in which case, in the view of the Verwaltungsgericht, it does not matter if the warehouses are situated in the same or in different Member States. This view was supported in the argument put to the Court on behalf of Wagner.

The regulations do not say that storage costs are to be reimbursed on the basis that the sugar is treated as "withdrawn from the market". Even if the Verwaltungsgericht were right in thinking that this was the reason for repaying storage costs, *sed quaere*, the essential matter is whether the sugar in question satisfies the conditions laid down.

The preamble to Regulation No 1358/77 stresses the need for controls and checks of stocks of sugar in respect of which reimbursement is to be made. For this reason warehouses must be officially approved. The general rule is set out in Article 3 (1). Reimbursement is to be made in respect of sugar "*stored* in a warehouse approved by the Member State in whose territory the warehouse is situated" and calculation is to be based on monthly returns of quantities in *store* (Article 4 (1)). Article 3 (1) says nothing

about sugar in transit, and plainly sugar in transit is not "stored in a warehouse" whether the transit be between two approved warehouses in the same Member State or in two different Member States.

Article 3 (2) empowers the making of special provisions "in special circumstances" to deal with sugar in transit. Articles 10 and 11 of Regulation No 1998/78 deal with the two special categories to which I have referred. Article 10 is not relevant here and Article 11 is limited to sugar in transit from an approved warehouse which on arrival is stored in another approved warehouse in the same Member State. These provisions do not deem the sugar to be in a warehouse whilst in transit; they expressly provide for reimbursement for sugar in transit. Even if they were to be construed as deeming the sugar to be in a warehouse, they only do so where transit is within the same Member State.

The answer to first question is thus in my opinion clearly in the negative.

The second question only seems to arise in this case if a negative answer is given to the third and an affirmative answer given to the fourth question. Accordingly I deal with them first.

The third question goes to the vires of Article 11 (1) of Regulation 1998/78; the fourth, on the basis that preference of internal transit is unlawful, asks whether the result constitutes discriminatory or arbitrary treatment.

As has been seen, the power to make "special provisions" is conferred only "in special circumstances". Whether the facts relied on are capable of being "special circumstances", within the proper construction of the regulation, is, as a matter of law, for the Court. Within this definition it is, however, largely a matter for the appreciation or discretion of the Commission as to whether the circumstances justify or require special provisions, and what those should be.

In the present case, sugar coming from French overseas departments was regarded as needing special provisions, because practically all of it is shipped to refineries in metropolitan France, and the voyage takes several weeks. Sugar transferred between approved warehouses in the same Member State was said to be the subject-matter of representations by traders, in view of the structure of the trade and the need to move sugar between warehouses pending disposal. The controls and checks on which stress is laid in the preamble to which I have referred, could satisfactorily be kept and made in respect of that sugar. This position was said to be distinguishable from a case where sugar crossed the frontiers of Member States, even between approved warehouses, where it would be much more difficult and more costly to maintain the necessary supervision, particularly in view of the small quantities involved.

At first sight it seems that the difference, in degree, of the difficulty of supervision between the two situations can be exaggerated, not least because (a) the quantity crossing frontiers is apparently very small (even if not as small as the

Commission contends) and (b) because of the provisions of Article 18 (2) of Regulation No 1998/78 (where measures with regard to reimbursement in respect of sugar produced in one Member State and stored in another are contemplated).

Moreover, it is pointed out that when Article 11 (1) of Regulation No 1998/78 was amended by Regulation No 2671/81 of 14 September 1981 (OJ L 262, 16. 9. 1981, p. 17) the limitation to transit between two approved warehouses in the same Member State is removed. Transfer between two approved warehouses is sufficient. A different limitation is, however, introduced in that reimbursement of storage costs is only to be granted "in so far as the storage levy has not already been incurred". This, it seems excludes any case where the sugar is disposed of, which as I understand the Commission's argument, covers the majority of cases, since, where sugar crosses a frontier, it is normally disposed of. Control, where sugar remains the property of the same trader, is easier than where there is a disposal, and the latter category would have caused the greater difficulty if Article 11 had initially covered warehouses in different Member States.

Despite the force of the criticisms which have been made, at the end of the day it seems to me that the Commission has given adequate reasons (relating to the issue of control) as to why it was justifiable to distinguish the case of transit between approved warehouses in the same Member State. There was, accordingly, in my view, material on which the Commission could conclude that special circumstances existed in this case but not in the case of transit between Member States.

Finally, it is said that the preamble to Regulation No 1998/78 recites the need to deal with sugar produced in French overseas territories and continues in the German text "ist daher" ("thus") a system should be provided to deal with sugar in transit between approved warehouses in the Member States. There is no possible causal link between these two, therefore, runs the argument, the latter provision is invalid. Clearly there is no such causal link, and the equivalent of "ist daher" does not appear in other language versions. In my view these words should be ignored.

Accordingly, I am of the opinion that Article 11 (2) of Regulation No 1198/78 was made validly under the powers given by Article 3 (2) of Regulation No 1358/77, and that since the reasons given are shown to be objectively justifiable, there is neither discrimination within the meaning of the second subparagraph of Article 40 (3) of the EEC Treaty, nor a breach of the general prohibition of arbitrariness.

Even if it were found that the Commission had acted unlawfully in excluding sugar in transit between Member States, the result would not, in my view, be that Wagner would be entitled to the refund or "similar special treatment", as mentioned in the second question referred. It is for the competent Community institutions to adopt the

measures necessary to remedy the situation; this may involve an assessment of economic and political considerations, which lies within the discretion of those institutions. Whether, as has been suggested, Wagner itself might, on the basis that the Commission's acts were unlawful, pursue a claim for damages under Articles 178 and 215 of the Treaty, it is not necessary to decide.

Accordingly, it is my opinion that the questions referred should be answered on the following lines:

1. Sugar in transit from a warehouse approved under Article 3 (1) of Regulation No 1358/77 to another approved warehouse does not constitute sugar "stored in a warehouse" within the meaning of Article 3 (1), whether or not the warehouses are situated in the same or different Member States.

2. The adoption by the Commission of Article 11 (1) of Regulation No 1998/78 has not been shown to be outside the power to adopt special provisions conferred by Article 3 (2) of Regulation No 1358/77.

3. Examination of the question has not shown that the preference of sugar transported between approved warehouses in the same Member State over sugar transported between approved warehouses in different Member States was arbitrary or constituted discrimination within the meaning of Article 40 (3) of the EEC Treaty.

In view of the foregoing, the second question does not arise.