CAVARZERE PRODUZIONI INDUSTRIALI AND OTHERS v MINISTERO DELL'AGRICOLTURA E DELLE FORESTE AND OTHERS

OPINION OF ADVOCATE GENERAL LÉGER

delivered on 1 June 1995 *

1. In this reference for a preliminary ruling the Consiglio di Stato asks for an interpretation of various articles of Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector [1] and Council Regulation (EEC) No 193/82 of 26 January 1982 laying down general rules for transfers of quotas in the sugar sector. [2]

2. On the basis of Article 40(2)(c) of the EEC Treaty, the common organization of the market in sugar was introduced on 1 July 1968. [3] Now governed by Regulation No 1785/81, its purpose is to 'provide beet growers with price and marketing guarantees in respect of quantities which reflect and are linked to sugar consumption requirements and to the Community's scope for exporting sugar'. [4]

3. That common organization of the market is based on a system of quotas which 'at a time when surpluses exist on both the common market and the world market, ... curbs production and aligns it as closely as possible with internal consumption whilst promoting regional specialization'. [5] Quantities of sugar to be produced are first allocated to the Member States, who must then share them out among the various producers.

4. Article 24 of Regulation No 1785/81 distinguishes three types of quota, with the following characteristics: 'the A quota, which represents consumption within the Community, may be freely marketed on the common market and the disposal of A quota sugar is guaranteed by the intervention price; the B quota is the quantity of sugar produced in excess of the basic quota ("A quota") without exceeding the "maximum quota", which is equal to the A quota multiplied by a coefficient; it may also be freely marketed on the common market, but without an intervention price guarantee, or exported to non-member countries with export aid ...; finally, the C quota, which is the quantity produced in excess of the "maximum quota" (A and B quotas), may be marketed only in non-member countries and no export aid may be granted'. [6]

* Original language: French.

1 — OJ 1981 L 177, p. 4.

2 — OJ 1982 L 21, p. 3.

3 — By Regulation No 1009/67/EEC of the Council of 18 December 1967 (OJ, English Special Edition 1967, p. 304).

4 — Commission Decision 90/45/EEC of 19 December 1989 relating to a proceeding under Article 85 of the EEC Treaty (OJ 1990 L 32, p. 31), point 14.

5 — Judgment in Case 250/84 *Eridania* v *Cassa Conguaglio Zucchero* [1986] ECR 117, paragraph 19.

6 — Ibid., paragraph 8.

5. An A quota and a B quota are allocated by the Member States to each sugar-producing undertaking established in their territory for each marketing year (running from 1 July to 30 June of the following year).

6. Article 25 of Regulation No 1785/81 permits Member States to *transfer* the A and B quotas between undertakings, 'taking into consideration the interests of each of the parties concerned and in particular those of sugar beet producers or sugar cane producers'. [7]

7. That 'margin of manoeuvre' [8] given to Member States is intended to 'meet, should the case arise, the restructuring needs of the sugar beet and sugar cane crop sectors, the sugar production sector and the isoglucose production sector both as regards their existing production units and those likely to be created'. [9]

8. Under Article 25(2),

'Member States may reduce the A quota and the B quota of each sugar-producing undertaking or each isoglucose-producing undertaking situated in their territories by a total quantity not exceeding, for the period referred to in Article 23(1) [the 1981/82 to 1985/86 marketing years], 10% of the A quota or of the B quota, as the case may be, fixed for each of them in accordance with Article 24.

The limit of 10% referred to in the first subparagraph shall not apply in Italy or in the French overseas departments in cases where the transfer of quotas is made *on the basis of restructuring plans* in the beet, cane and sugar manufacturing sectors in the region concerned and to the extent necessary to permit such plans to be implemented.

...' [10]

9. Finally, Article 25(3) provides that such transfers of quotas can be for the benefit only of 'one or more other undertakings, whether or not in possession of a quota,

7 — Paragraph 1.

8 — The expression is used in the sixth recital in the preamble to Council Regulation (EEC) No 934/86 of 24 March 1986 amending Regulation (EEC) No 1785/81 on the common organization of the markets in the sugar sector (OJ 1986 L 87, p. 1).

9 — Fourteenth recital in the preamble to Regulation No 1785/81.

10 — Emphasis added.

situated in the same region ... [as] the undertakings from which those quantities were withdrawn'.

10. For the purposes of transfers of quotas in Italy under the restructuring plans referred to in the second subparagraph of Article 25(2) of Regulation No 1785/81, 'a *group of sugar-producing undertakings* having technical, economic and structural links and jointly and severally liable for their obligations, particularly in respect of beet growers or cane growers, under Community rules may be regarded as a sugar-producing undertaking'. [11]

11. Under Article 25(4) of that regulation, the provisions on transfers of quotas are to be supplemented by a Council act fixing the rules for adjusting A and B quotas in the event of the merger or transfer of sugar-producing undertakings and in the event of the transfer of sugar factories. That is precisely the purpose of Regulation No 193/82.

11 — Article 9 of Regulation No 193/82, emphasis added.

12. Article 2(1)(b) and (c) of Regulation No 193/82 provides:

'...

(b) in the event of the transfer of a sugar-producing undertaking, the Member State shall allocate to the transferee undertaking for the production of sugar the A quota and the B quota of the undertaking transferred or, if there is more than one transferee undertaking, the allocation shall be made in proportion to the sugar production absorbed by each of them;

(c) in the event of the transfer of a sugar factory, the Member State shall reduce the A quota and the B quota of the undertaking transferring ownership of the factory and shall increase the A quota and the B quota of the sugar-producing undertaking or undertakings purchasing the factory in question by the quantity deducted in proportion to the production absorbed.'

13. Hence the margin of manoeuvre given to Member States under Article 25 of Regulation No 1785/81 may in some cases — under restructuring plans — be unlimited, whereas the adjustment of quotas in the event of a merger or sale provided for in Regulation No 193/82 is not left to the dis-

cretion of Member States, strict proportionality being applied.

14. The inter-relationship of those two causes of adjustment has created difficulties in the context of extensive restructuring operations in the sugar production sector in Italy.

15. The companies Cavarzere Produzioni Industriali Spa ('Cavarzere'), Saccarifera del Rendina SpA ('Saccarifera') and Italiana per la Industria degli Zuccheri ('SIZ') make up the Gruppo Saccarifero Veneto group ('GSV').

16. Cavarzere and SIZ sold some or all of their factories to Industria Saccarifera Italiana Agro-Industriale SpA ('ISI').

17. By Ministerial Order of 11 August 1986, [12] made pursuant to Article 25 of Regulation No 1785/81, the GSV group's quotas for the 1986/87 sugar marketing year were revised to take account of the reduction of its production capacity. Of the total of 3 225 500 quintals allocated to GSV as the A quota by Ministerial Order of 22 April 1986, [13] 2 573 300 quintals were transferred to ISI. With respect to the B quota, 508 900 quintals out of a total of 600 700 quintals were transferred to ISI.

18. The Ministerial Order of 11 August 1986 was challenged in administrative court proceedings by Cavarzere and Saccarifera. They argue in particular that it was adopted after the time-limit laid down by the Community legislation for transfers of quotas.

19. Cavarzere and Saccarifera also contest the Ministerial Order of 27 February 1987 (published on 16 March), [14] which fixed the quotas for the 1987/88 marketing year. That order left unaltered the quotas allocated to the GSV group for the previous marketing year by the Order of 11 August 1986 and increased the quotas of competing undertakings. Cavarzere and Saccarifera submit that the time-limits were not complied with and that the quantitative limits imposed by the Community provisions on the use of the 'power of manoeuvre' in the allocation of quotas had been exceeded.

20. The applications against the Ministerial Orders of 11 August 1986 and 27 February

12 — GURI No 191 of 19 August 1986.

13 — GURI No 102 of 5 May 1986.

14 — GURI No 62 of 16 March 1987.

1987 were dismissed by the Tribunale Amministrativo Regionale del Lazio. [15]

21. Moreover, on the basis of Council Regulation (EEC) No 1107/88 of 25 April 1988 amending Regulation No 1785/81, [16] a Ministerial Order of 30 June 1988, [17] applying the Member States' 'power of manoeuvre', allocated the production quotas for sugar for the 1988/89 marketing year, reducing the production quotas for Cavarzere and Saccarifera. They applied to the Tribunale Amministrativo Regionale, which annulled the order by judgment 1245/91 on the ground that the time-limit for the exercise of the 'power of manoeuvre' in relation to quotas within the meaning of Article 25(2) of Regulation No 1785/81 had expired by the date of the order.

22. Those three decisions of the Tribunale Amministrativo Regionale were all contested by appeals to the litigation division of the Consiglio di Stato, which has now referred six questions to the Court for a preliminary ruling. I shall consider each one in turn.

Question 1: Is the time-limit fixed by Article 7 of Regulation No 193/82 for the exercise by a Member State of its 'power of manoeuvre' under Article 25(2) of Regulation No 1785/81 mandatory?

23. The margin of manoeuvre given to Member States by Article 25 of Regulation No 1785/81 was confirmed by Article 1(4) of Regulation No 934/86, [18] which made only slight amendments to Article 25(2). Regulation No 1107/88 neither amended nor repealed Article 25, which therefore continued to apply. [19] Member States were consequently able to use the power of manoeuvre during the 1986/87, 1987/88 and 1988/89 marketing years, which are the subject of the proceedings in the national court.

24. The time-limit for exercising that power was fixed at 1 March by Article 7 of Regulation No 193/82, which establishes a general rule without referring to a specific marketing year or calendar year. By way of derogation from that rule, Article 1 of Commission Regulation (EEC) No 1662/86 of 29 May 1986 [20] postponed the deadline until 1 July 1986 for the 1986/87 marketing year only.

15 — Judgments 1737/87, 17/89 and 16/89.

16 — OJ 1988 L 110, p. 20.

17 — GURI No 187 of 10 August 1988.

18 — Cited in note 8 above.

19 — See Article 1(5) of Regulation No 1107/88, which refers to Article 25.

20 — Laying down transitional measures on the transfer of quotas in the sugar sector (OJ 1986 L 145, p. 41).

25. The ministerial orders challenged in the national court were all made *after* the time-limits laid down by the Community provisions. The Ministerial Order of 11 August 1986 should have been published before 1 July 1986, the Order of 27 February 1987, which was published on 16 March 1987, should have been published before 1 March 1987, and that of 30 June 1988, published on 10 August 1988, should have been published before 1 March 1988.

26. Those are the circumstances in which the Court has been asked whether the time-limit of 1 March (or 1 July for 1986) is mandatory or 'imperative'.

27. Let me say at once that, in my view, those time-limits are binding on the Member States, which are not empowered to amend them unilaterally.

28. It is true that delays in adopting the Community legislation have created difficulties for Member States and traders.

29. The 1988/89 marketing year may be taken as an example. Regulation No 1107/88 does not exclude the application of Article 25 of Regulation No 1785/81, not having repealed it. [21] The new Article 23(2) of Regulation No 1785/81, as amended by Article 1(5) of Regulation No 1107/88, provides that:

'For the *1988/89*, 1989/90 and 1990/91 marketing years, and *without prejudice to* Articles 24(1a) and *25*, the A and B quotas of sugar-producing undertakings and isoglucose-producing undertakings shall be those which obtained in the 1987/88 marketing year.' [22]

30. It follows that the Member States were given a power of manoeuvre for the 1988/89 marketing year, but without the 1 March time-limit, which it was impossible for the Member States to observe, being amended.

31. At the same time, Regulation No 1107/88 applies, in accordance with Article 2(2) thereof, only from *1 July 1988*.

21 — See Article 1(5) of Regulation No 1107/88.

22 — Emphasis added; see also Article 1(2) of Regulation No 934/86.

32. The result is a contradiction between the latter article — which makes it impossible for Member States to exercise their power of manoeuvre for the 1988/89 marketing year — and the new Article 23(2) of Regulation No 1785/81, which does not exclude the application of Article 25 for that same marketing year.

33. Nevertheless, it is clear that the 1 March time-limit fixed by Article 7 of Regulation No 193/82 could not be altered except by a Community act, for the following three reasons: first, only the Community was competent to amend that date; second, the *ratio legis* of that provision required a time-limit to be fixed which was sufficiently distant from the start of the marketing year; finally, the principle of legal certainty means that traders should be able to rely on the date of 1 March fixed by the Community legislature. Let us consider those three points.

34. First, having been adopted by the Council, that date could be altered only by the Council or by the Commission delegated by the Council. The Court held in *Nykøbing* [23] that:

'Since ... the common organization of the market in sugar covers relations between sugar manufacturers and beet growers, such relations, in so far as they specifically concern sugar production, fall exclusively within the competence of the Community so that the Member States are no longer in a position to adopt unilateral measures.'

35. Authorization for a Member State unilaterally — and with retrospective effect — to amend the time-limit fixed by the Council would amount to destroying the uniform application of the common organization of the market in the Community and above all to violating the rules on the division of powers between the Member States and the Community.

36. That is so much the case that when in 1986 the regulation allocating quotas was belatedly adopted after 1 March, the Member States were authorized, by way of derogation from Article 7 of Regulation No 193/82, to exercise their power of manoeuvre before 1 July 1986 *by a Commission regulation.* [24] The fixing of that date was never delegated to the Member States.

37. Second, as the Commission has observed, [25] the 1 March deadline 'is attributable to the need to allow undertakings a

23 — Case 151/78 *Sukkerfabriken Nykobing* v *Ministry of Agriculture* [1979] ECR 1, paragraph 17.

24 — Article 1(1) of Regulation No 1662/86.

25 — Observations, p. 13 of the French translation.

period of time, from 1 March to 30 June to be precise, to plan their activity'. In particular, they need to know exactly what production quotas are allocated to them, in order to buy beet before 1 July, when the marketing year starts, and to avoid producing in excess of the quotas, which deprives the sugar-producing undertaking of all price guarantees and may cause it to incur losses.

38. Moreover, calling the 1 March date into question disrupts the application of the common organization of the sugar market as a whole. It is not possible to conclude contracts for the purchase of beet without knowing the production quotas. Article 30(1) of Regulation No 1785/81 provides that sugar manufacturers are to notify the quantities of beet corresponding to the A quota for which contracts have been signed *before* sowing, that is, before March. If no such pre-sowing delivery contracts have been signed, manufacturers are required to pay at least the minimum price for all beet processed. [26]

39. Finally, it follows from the principle of legal certainty that the quotas must not be called into question *after 1 March* if traders have not been warned *beforehand*. That principle applies *a fortiori* where transfers of quotas may be unlimited. With respect to Community acts, the Court has held that:

'... although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected'. [27]

40. I note that in 1988 the order reducing Cavarzere and Saccarifera's quotas was made on the day before (30 June) the beginning of the marketing year (1 July) and published on 10 August, when the marketing year was already well underway.

41. It follows that Article 7 of Regulation No 193/82 and Article 1 of Regulation No 1662/86 precluded the exercise by the Italian Republic of its margin of manoeuvre after 1 July 1986 (Ministerial Order of 11 August 1986) for the 1986/87 marketing year and after 1 March for the 1987/88 and 1988/89 marketing years (Ministerial Orders of 27 February 1987 and 30 June 1988).

26 — Article 30(2) of Regulation No 1785/81.

27 — Case 258/80 *Rumi* v *Commission* [1982] ECR 487, paragraph 11.

Questions 2 and 3, which I reformulate as follows: With respect to the sharing out of quotas in the event of the merger or transfer of undertakings, is it only Article 2 of Regulation No 193/82 which applies? May Member States also make use at the same time of the 'power of manoeuvre' provided for in Article 25(2) of Regulation No 1785/81?

42. Those two powers of the Member States pursue different objectives: in the one case to permit structural adaptation of the beet and cane growing and processing industry during the period of application of the quotas, in the other case to react to mergers and transfers of undertakings. They involve recourse to different procedures: in the one case the Italian Republic's margin of manoeuvre is unlimited where restructuring plans are implemented, in the other case the Member State allocates the quotas in proportion to the sugar production absorbed or withdrawn. The rules on time-limits are different: in the one case the allocation of the adjusted quotas must take place before 1 March in order to apply during the following marketing year, in the other case the allocation takes effect for the current marketing year if the merger or transfer takes place between 1 July and 31 January of the following year.

43. It follows that the application of Article 2 of Regulation No 193/82 does not preclude the application of Article 25(2) of Regulation No 1785/81 *provided that the conditions for the application of that provision are met*, including the conditions regarding time-limits. It will be observed in this respect that the second subparagraph of Article 25(2) of Regulation No 1785/81 states that 'the limit of 10% ... shall not apply in Italy ... in cases where the transfer of quotas is made on the basis of restructuring plans ... *to the extent necessary to permit such plans to be implemented*'. [28]

44. Consequently, a Member State may at the same time implement a restructuring plan for its sugar industry pursuant to Article 25(2) of Regulation No 1785/81 and carry out transfers of quotas following a merger or transfer of undertakings under Article 2 of Regulation No 193/82.

Question 4: Does the margin of manoeuvre conferred on Member States by the first subparagraph of Article 25(2) of Regulation No 1785/81 permit a maximum reduction of 10% of the A and B quotas together or a reduction of 10% of each of those quotas?

45. The contested orders do not appear to have applied that article. However, even

28 — Emphasis added.

though it gave no reasons, the Consiglio di Stato may nevertheless have considered the answer to the question to be not without relevance to the outcome of the proceedings before it.

Question 5: Which quota must Member States use as the basis for calculating the 10% margin of manoeuvre, that determined by the original allocation order or that resulting from any supplementary allocations carried forward from preceding years and any reductions for quantities of sugar not produced?

46. The first subparagraph of Article 25(2) provides that 'Member States may reduce the A quota and the B quota of each sugar-producing undertaking ... by a total quantity not exceeding ... 10% of the A quota or of the B quota, *as the case may be*, fixed for each of them in accordance with Article 24'. The use of the disjunctive conjunction 'or' shows that 'the 10% margin is calculated for the A quota by reference to the A quantity and for the B quota by reference to the B quantity'. [29]

48. It follows from the first subparagraph of Article 25(2) of Regulation No 1785/81 that the margin of 10% is to be calculated for the A quota or the B quota, as the case may be, fixed in accordance with Article 24. It is thus based on the national decision sharing out the basic A quantities and basic B quantities among the sugar manufacturers established in the national territory. In the absence of other details, the State's power of manoeuvre must be exercised with respect not to the *theoretical quota* but to the quota *actually* allocated to the undertaking in question. Consequently, there is nothing to prevent a Member State taking account of supplementary allocations carried forward from preceding years or deducting from the basic quota the quantities of sugar not produced.

Question 6: What is to be understood by 'restructuring plans'? Are they plans defined at national level or at the level of smaller territorial subdivisions?

47. Secondly, the A quotas and B quotas should not be confused. As we have seen, they are governed by different rules [30] and are not interchangeable.

49. This question is of some importance in Italy because it is only 'on the basis of

29 — Commission's observations, point 12.

30 — See Article 24 of Regulation No 1785/81.

restructuring plans in the beet, cane and sugar manufacturing sectors in the region concerned' [31] that that Member State may carry out unlimited transfers.

50. In my view, it follows from the very wording of the second subparagraph of Article 25(2) of Regulation No 1785/81 — as is confirmed by the fourteenth recital in the preamble to that regulation — that those plans must relate to the restructuring of the sugar sector in a specifically delimited region or geographical area, it being understood that the plans must obviously concern sugar manufacturers.

51. I therefore propose that the Court rule as follows:

— Article 7 of Council Regulation (EEC) No 193/82 of 26 January 1982 laying down general rules for transfers of quotas in the sugar sector and Article 1 of Commission Regulation (EEC) No 1662/86 of 29 May 1986 laying down transitional measures on the transfer of quotas in the sugar sector are to be interpreted as meaning that a Member State does not have the power unilaterally to alter the time-limit fixed by those provisions for the exercise by Member States of the 'power of manoeuvre' provided for in Article 25 of Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector.

— The application of Article 2 of Regulation (EEC) No 193/82, which permits the adjustment of the A and B quotas in the event of the merger or transfer of sugar undertakings, does not preclude the application, even at the same time and in respect of the same undertaking, of the power of manoeuvre conferred on Member States by Article 25 of Regulation (EEC) No 1785/81, provided that the particular conditions for the application of each of those provisions are fulfilled.

— The second subparagraph of Article 25(2) of Regulation (EEC) No 1785/81 is to be interpreted as meaning that Member States may reduce the A quota and the B quota by up to 10% each.

31 — Second subparagraph of Article 25(2).

— The 10% margin of manoeuvre provided for in Article 25(2) of Regulation (EEC) No 1785/81 relates to the quotas *actually* allocated to an undertaking, taking account of any adjustments made subsequent to the national decision sharing out the quotas.

— The term 'restructuring plan' within the meaning of the second subparagraph of Article 25(2) of Regulation (EEC) No 1785/81 refers to a restructuring in a specifically delimited region or geographical area.