OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 16 MAY 1984 [1]

Mr President,
Members of the Court,

In this case, an Italian court has submitted a number of questions to the Court of Justice concerning the system of production levies on sugar, the object of which to cover the costs incurred by the Community in connection with the disposal of sugar. Before I consider those questions, it is necessary in my view to give a brief summary of the relevant Community legislation.

1. Relevant Community legislation

The common organization of the market in sugar was originally established by Regulation No 1009/67/EEC of the Council (Official Journal, English Special Edition 1967, p. 304). It was replaced by Regulation No 3330/74 (Official Journal 1974, L 359, p. 1). That regulation was in its turn replaced, as from 1 July 1981, by Council Regulation (EEC) No 1785/81 (Official Journal 1981, L 177, p. 1), which is currently in force. However, for reasons which I shall explain, Regulation No 3330/74 still plays a crucial role in these proceedings.

As the Court is aware, the distinctive feature of the organization of the market in sugar is a system of production quotas laid down by Article 23 et seq. of Regulation No 3330/74. Under that system a production quota is established every year for each undertaking and is subdivided into an A and a B quota. The A quota corresponds more or less to the quantity of sugar which is expected to be disposed of on the common market, such disposal being guaranteed by the intervention price. The B quota corresponds to the quantity of sugar which may be produced in excess of the A quota and which may be exported with the aid of refunds paid by the Community. Sugar produced in excess of the maximum quota (C quota sugar) may not be disposed of on the common market. Therefore such sugar can only be exported, but without benefiting from refunds.

One of the principles underlying the organization of the market in sugar is that the cost of the disposal of sugar — mainly the financing of export refunds — is borne by the producers collectively by means of a production levy. Under Regulation No 3330/74 that levy was imposed only in respect of B quota sugar and the amount of the levy was not to exceed 30% of the intervention price. Losses not covered by the system were borne ultimately by the European Agricultural Guidance and Guarantee Fund (EAGGF). Regulation No 1785/81 provides that the producers are to bear the entire cost of financing, hence *inter alia* the imposition of a production levy also in respect of A quota sugar, at a rate not exceeding 2% of the intervention price.

In Regulation No 3330/74 that levy was provided for by Article 27. Detailed rules for the charging of the levy were laid down by Regulation No 700/73 of the Commission (Official Journal 1973, L 67, p. 12), the validity of which was extended by Article 44 (4) of Regulation No 3330/74. Article 7 of Regulation No 700/73 makes provision for the calcu-

1 — Translated from the Dutch.

lation of the annual production levy. That provision reads as follow:

"1. The amount of the production levy valid for a given marketing year shall be fixed before 1 December of the following marketing year.

2. Overall losses incurred in disposing of the quantity produced in the Community in excess of the guaranteed quantity shall be calculated on the basis of:

(a) total sugar production in the Community during the marketing year in question, expressed as white sugar, minus:

the guaranteed quantity valid for that marketing year,

quantities produced in excess of the maximum quotas,

quantities within the maximum quota carried forward pursuant to Article 32 of Regulation No 1009/67/EEC,

a quantity equal to the difference between recorded sales for human consumption from 1 October of the relevant marketing year to 30 September of the following year and the guaranteed quantity, where the guaranteed quantity is lower than the consumption aforesaid, and

(b) a standard amount per unit of weight to compensate losses incurred in disposing of that sugar. This standard amount shall be calculated on the basis of a weighted average of losses incurred in disposing of sugar during the period from 1 October of the relevant marketing year to 30 September of the following year."

According to that provision, the levy is based on two factors, a quantitative factor (subparagraph 2 (a)) and a financial factor (subparagraph 2 (b)). The quantitative factor is the amount of sugar qualifying for export refunds. The financial factor is a standard amount: the average loss on export refunds per 100 kg of sugar in respect of a given quantity of sugar exported during a given period. That reference period runs from 1 October to 30 September. The average loss per 100 kg of sugar, calculated in the manner described, is multiplied by the quantitative factor and that gives the total loss resulting from the disposal of the guaranteed quantities of sugar. That amount is apportioned over B quota sugar pursuant to Regulation No 3330/74.

Regulation (EEC) No 3358/81 of 25 November 1981 (Official Journal 1981, L 339, p. 17) fixed the levy at 3.407 ECU per 100 kg of white sugar for the 1980/81 and the 1981/82 sugar marketing years, which each ran from 1 July to 30 June. Regulation No 3330/74 was repealed as from 30 June 1981 and was replaced by Regulation No 1785/81, with the result that the basis for Regulation No 700/73 was also removed. However, Regulation No 3358/81 extended the application of the rules contained in the last-mentioned regu-

lation to the calculation of the levy for the 1980/1981 marketing year. That regulation was based on Article 48 of Regulation No 1785/81. The new rules for fixing the production levy laid down by Article 28 of Regulation No 1785/81 did not become applicable until the 1981/82 marketing year.

2. The facts and the questions submitted

By a notice of assessment dated 10 May 1982 Sermide was instructed to pay its share of the production levy, namely LIT 321 000 850, in respect of the B quota sugar produced in the 1980/1981 marketing year. That amount was later reduced to LIT 261 515 085. In proceedings challenging that notice of assessment, Sermide contested the validity of Article 1 of Regulation No 3358/81 (the amount of the production levy per 100 kg of sugar for 1980/81) and of Article 7 of Regulation No 700/73 (the method of calculation). By order of 28 March 1983 the Tribunale di Genova referred the following questions to the Court for a preliminary ruling:

"1. Is Article 7 (2) of Regulation No 700/73 of the Commission — which provides that the total losses resulting from the disposal of the quantity of sugar produced in the Community are to be calculated on the basis of a weighted average of losses resulting from the disposal of sugar during the period from 1 October of the relevant sugar marketing year to 30 September of the following year — unlawful on the ground that it is contrary to (a) the prohibition of discrimination laid down in the first paragraph of Article 7 of the EEC Treaty, (b) the prohibition of discrimination laid down in Article 40 (3) of the EEC Treaty, (c) Article 2 of Council Regulation No 1785/81, which provides that the sugar marketing year is to begin on 1 July and is to end on 30 June of the following year, or (d) Article 28 of Council Regulation No 1785/81, which provides that the levy on the sugar produced in each marketing year is to be based, *inter alia*, on the average loss resulting from export obligations to be fulfilled during the same marketing year?

2. If the first question is answered in the affirmative, does it follow that Article 1 of Commission Regulation No 3358/81 — which fixes the amount of the sugar production levy for the 1980/81 marketing year at 3.407 ECU per 100 kg of white sugar — is also unlawful?

3. Even if the first two questions are both answered in the negative, is Article 1 of Commission Regulation No 3358/81 — which fixes the amount of the sugar production levy for the 1980/81 sugar marketing year at 3.407 ECU per 100 kg of white sugar — unlawful on the ground that it is contrary to

   (a) Article 27 (2) of Regulation No 3330/74 of the Council, which provides that the production levy for the 1980/81 marketing year is to be calculated on the basis of the quantity of sugar actually exported to non-member countries, or

   (b) Article 28 of Council Regulation No 1785/81, which provides that only as from the 1981/82 marketing year is the production levy on sugar to be calculated on the basis of the quantity of sugar which is merely the subject of an export obligation?"

It is clear from the explanation given by the national court that those questions are concerned with the calculation of the *financial factor* in the production levy. The first two questions relate to the *reference period* running from 1 October to 30 September. The national court

considers that this gives rise to discrimination for a number of reasons, particularly in relation to Italian producers, since the sugar marketing year runs from 1 July to 30 June. The third question is concerned with the term "disposal" in Article 7 (2) (b) of Regulation No 700/73. The national court questions whether such disposal must be calculated on the basis of the quantity actually exported or on the basis of the quantity which is the subject of export obligations.

3. The order in which the questions may best be dealt with

The questions submitted by the national court are concerned *in the first place* with the possibility that Regulation No 3358/81 may be unlawful as being contrary to Article 28 of the new basic regulation, namely Regulation No 1785/81 (Question 1 (d)). That question asks in effect what rules Regulation No 3358/81 was supposed to apply. *Secondly,* the national court asks whether the application by Regulation No 3358/81 of the reference period specified in Article 7 (2) of clear from the observations submitted that that question consists of two parts. To begin with, the Italian Government and Sermide consider that the reference period discriminates against them, in view of the specific features of the Italian sugar market. They also contend that, in connexion with the production levy for the following marketing year (1981/82), that is to say as a result of the application of the new basic regulation, No 1785/81, they are adversely affected by partially overlapping reference periods. *Thirdly,* in its final question, the national court seeks an interpretation of the term "disposal" in Article 7 (2) (b) of Regulation No 700/73, Article 27 (2) of Regulation No 3330/74 and Article 28 of Regulation No 1785/81: does that concept include the quantity actually exported or only the quantity which is the subject of export obligations (Question 3)? I propose to consider the questions in that order. The answer to Question 2 in the order for reference follows naturally from the answer to Question 1.

4. Regulation No 3358/81 as a transitional measure

Before I suggest a practical solution to the questions submitted, in my view, it is necessary in the first place, as I said earlier, to consider whether the relationship inferred by the national court in Question 1 (d) between Article 28 of Regulation No 1785/81 and Regulation No 3358/81 actually exists. In fact, there is no such relationship. Regulation No 3358/81, according to the preamble thereto, is based on Article 48 of the new basic regulation, which reads as follows:

"Should transitional measures be necessary to facilitate transition to the system established by this regulation, in particular if the introduction of the new system on the date provided for would give rise to substantial difficulties, such measures shall be adopted in accordance with the procedure laid down in Article 41. They shall be applicable until 30 June 1982 at the latest."

Regulation No 3358/81 is therefore a transitional measure with the peculiarity that it is based on a provision of a new regulation but extends the validity of

certain parts of the old, repealed regulation for a specific period. In terms of legislative technique, this is an anomaly and by no means a textbook example of transparency, although it is understandable, having regard to the alternatives open to the Commission. It is clear that the production levy for the period from 1 July 1980 to 30 June 1981 had to be fixed by reference to the criteria contained in the old basic regulation, No 3330/74, and in the relevant implementing regulations, because the new basic regulation did not become applicable to the production levy until the beginning of the 1981/82 sugar marketing year. However, the levy is fixed retroactively, following the expiry of the sugar maketing year. In this case, therefore, it was fixed under the new basic regulation, No 1785/81 (on 1 July 1981). That problem could have been resolved under the old basic regulation, No 3330/74, by the inclusion in Regulation No 1785/81 itself of a transitional rule retaining part of Regulation No 3330/74 whilst at the same time removing or adapting the relevant provisions of the new regulation. The unqualified application of Regulation No 3330/74 would have been impossible in view of its repeal. The fact that the Commission chose not to adopt that course of action, which would have had to be implemented by the Council, and adopted instead a transitional measure on the basis of Article 48 of the new basic regulation, constitutes in my view a choice of legislative technique which is acceptable in every respect. That measure is also acceptable in the light of the conditions laid down by Article 48, since the application of the old criteria for the calculation of the production levy was *necessary*. In the light of those considerations, and having regard to Article 48 of Regulation No 1785/81, Regulation No 3358/81 is clearly lawful in my opinion. There is another aspect of Article 28 of Regulation No 3358/81 (namely the double levy entailed thereby) to which I shall return in due course.

5. The reference period referred to in Article 7 (2) of Regulation No 700/73 and the prohibition of discrimination

5.1. The plaintiff in the main proceedings and the Italian Government raised a number of general objections against the validity of Regulation No 700/73 which are connected with the fact that Italian sugar production is not sufficient to meet demand. To begin with, they contend that sugar producers in areas where demand exceeds supply are not obliged to contribute towards financing the disposal of excess production since responsibility for the excess production lies not with them but with undertakings operating in surplus-producing areas. At first sight, that argument seems reasonable but closer scrutiny shows that it is fundamentally contrary to the basic principle of a common market. The common organizations of the market are based on the principle of a single market in which there are no longer any differences based on nationality. It is that single market which as a whole is characterized by excess production. The machinery for eliminating surpluses also operates to the benefit of the whole market since it supports the intervention system, which constitutes a gurantee for all producers. If the market organization is based on a system whereby producers collectively finance disposal costs, exemption therefrom for certain producers solely by virtue of their geographical location in the market would in fact constitute

discrimination and consequently a distortion of competition. I would add that the arguments put forward by the Italian parties are bound to fail also in practical terms since under the system of production quotas, which is not contested as such, it is impossible to determine which undertakings are responsible for the excess production. An A quota and a B quota are allocated to all undertakings and if they exceed their A quota, their excess production is by definition for export, regardless of their geographical location.

Next, the Italian parties contend that, owing to their location in an area where demand exceeds supply, they are discriminated against as regards exportation by the system of regional prices. As the Court is aware, in areas where demand exceeds supply the intervention price is higher and, consequently, so too is the minimum price which undertakings must pay to beet growers. The export refund is, however, the same for the whole Community, so an export undertaking in an area where demand exceeds supply is at a disadvantage, as a result of the higher minimum price for sugar beet, in comparison with an export undertaking. in a surplus-producing area. At first sight that argument is not entirely unreasonable either, but on closer scrutiny it too offends against the basic principles underlying the common organization of the market. The argument put forward by the Italian parties amounts to a demand for a higher refund, since they cannot contest the system of regional prices. However, it is precisely by the payment of variable refunds that the objectives of the system of regional prices would be undermined. The purpose of that system is to promote intra-Community trade between surplus-producing areas and areas where demand exceeds supply, so that underproductive areas need not import sugar from non-member countries and surplus-producing areas need not export sugar to such countries. It follows of course that exports from underproductive areas to non-member countries must not be encouraged by also varying the amount of the refunds. Otherwise the incentive to sell in underproductive areas as a result of the higher intervention price would disappear. Accordingly, in order to achieve its objectives, regional pricing must be accompanied by a system of uniform refunds for the whole Community.

5.2. More specifically, the Italian parties contend that they are adversely affected by the reference period which runs from 1 October to 30 September. In Italy, the sugar marketing year runs approximately from 1 July to 30 June, whilst in northern Europe it runs approximately from 1 October to 30 September. Since Italian producers have virtually exhausted their stocks by 30 June, they are no longer able to take advantage of the new and generally higher intervention prices which come into force on 1 July. Producers located in northern Europe do not exhaust their stocks until 30 September and therefore benefit for a further three months from the new prices for the old crop. Since the higher prices also entail higher refunds (if the world market price remains unchanged or declines), leading to higher costs of disposal, undertakings in the south pay for the disposal of sugar produced by undertakings in the north. I am not swayed by that argument for the following reasons. In the north a sugar producer benefits during those months from the new prices and refunds, but on the other hand he benefits from the old prices and refunds for only nine months. In the south, an undertaking starts to

benefit immediately on 1 July, as regards its new crop, from the new prices and refunds, whilst in the north an undertaking does not benefit therefrom until 1 October. Moreover, it must be borne in mind that the sugar marketing year runs from 1 July to 30 June mainly for the benefit of Italian producers, whilst in countries in northern Europe production is concentrated essentially in the period from 1 October to 30 September. Since, as I said earlier, they also export their sugar after the expiry of the reference period from 1 July to 30 June, it is only natural that the Commission determined in Regulation No 700/73 that the period was to run from 1 October to 30 September. I therefore consider that not even this specific objection supports the view that the system in question has a discriminatory effect.

5.3. The Italian parties maintain however that the application of the reference period from 1 October to 30 September for the 1980/81 marketing year is also unlawful in the light of the reference period fixed by the *new* basic regulation. Article 28 of Regulation No 1785/81 provides that the new reference period for the calculation of the production levy for the 1981/82 marketing year is to coincide with the previous marketing year. The reason for that amendment — which is not contested in itself — is not entirely clear. If I have properly understood the Commission's submissions on this point, the amendment is connected with the fact that, under the new system, A quota sugar is also subject to the levy. The Italian parties contend that the third quarter of 1981 was taken into account twice in the calculation of the production levy, that is to say under the old reference period (1 October 1980 to 30 September 1981) and under the new reference period (1 July 1981 to 30 June 1982). Although Italian undertakings did not export any sugar in that quarter, they allegedly had to bear the twofold burden resulting from the sugar exported during that period by undertakings in northern Europe. Initially the Commission wrongly left that contention unanswered and only dealt with it in response to an express question from the Court.

It is clear from the Commission's answer to that question that export refunds cannot have been taken into account twice in that manner under the system whereby the refunds are granted by tender. Under that system the sugar is distinguished by reference to the marketing year in which it was produced with the aid of the export licences issued. That is not however the case if the system of fixing refunds at regular intervals is applied. According to the Commission, however, such double counting involved negligible amounts. The Italian parties deny this, but without providing any details. It is clear that during the reference period, out of a total sum of 136 555 025 ECU granted by way of refunds, 8 152 209 ECU, that is to say approximately 7% of the total, was allocated in the form of refunds fixed at regular intervals. The quarterly figures were not provided but, in any event, it is possible to infer from the figures given that the double counting could not have affected the figures by more than a few percentage points. It is unclear whether in the circumstances that actually had an adverse effect on producers in general and on Italian producers in particular. The possibility cannot be discounted that, in the calculation of the financial factor in the levy,

the exportation of sugar at a high(er) world market price and consequently with the benefit of low(er) refunds may also lead to a decline in the significance of that factor. According to the Commission, that is what actually happened. However, that possibility cannot help to justify the fact that a particular quarter was taken into consideration twice, since the effect in question did not become apparent until the production levy for the 1981/82 marketing year was fixed, that is to say a year later.

It must be borne in mind, in deciding whether or not such twofold consideration of a quarter was lawful, that at the time of the entry into force of Regulation No 1785/81 (1 July 1981) it was clear that the application of the reference period established by Regulation No 700/83 inevitably entailed the twofold consideration of a quarter, unless certain adjustments were made. When Regulation No 3358/81 was adopted, a quarter had already been taken into account twice in the calculation of the production levy for the 1981/82 sugar marketing year, which had already begun.

In general, I consider the twofold consideration of factors which are decisive for the calculation of the amount of a Community charge to be incompatible with the principles of proper administration and legal certainty. The basis of the levy as a combination of the relevant factors and the period in which those factors are operative must be such that — however small a difference it may make — the amount of the levy is not determined in an arbitrary manner. The amount is determined arbitrarily, in my view, where, in the absence of express authorization by the Community legislature or of sufficient justification based on the system of levies, a single factor is taken into account twice as a result of overlapping reference periods.

In my view, no such justification exists in this case. *In the first place,* there was no financial need for such twofold consideration since it was clear that, as I explained earlier, at the time of the adoption of Regulation No 3358/81 the losses incurred in the third quarter were already covered by the production levy for the 1981/82 sugar marketing year. In my view, it is contrary to the principle of proportionality since, having regard to the limits set by the basic regulation, the system of production levies had as its sole purpose to cover the costs incurred by the Community in disposing of sugar. As the Court held in paragraph 14 of its decision in Case 2/77 *(Hoffmann's Stärkefabriken* v *Hauptzollamt Bielefeld,* [1977] ECR 1375), the granting of Community aids which have ceased to be necessary constitutes an infringement of Article 40 of the EEC Treaty, and in my view the same principle applies to Community levies. *Secondly,* I consider it unjustified to rely, as the Commission has done, on the contention that difficulties of an administrative nature would have arisen had such twofold consideration of a quarter been avoided. It is quite conceivable that, owing to administrative problems, standard factors may be applied in the calculation of Community levies. That has been clearly recognized by the Court, as is apparent *inter alia* from the judgments in Case 5/73 *(Balkan-Import-Export* v *Hauptzollamt Berlin-Packhof,* [1973] ECR 1091), Case 154/73 *(Becher* v *Hauptzollamt Emden,* [1974] ECR 19) and Case 17/72 *(Getreidehandel* v *Einfuhr- und Vorratsstelle Getreide,* [1972] ECR 1071). It is also clear, however, from

judgments of the Court that recourse to standard methods of that kind must be *necessary* (Case 125/76, *Cremer* v *Bundesanstalt für landwirtschaftliche Marktordnung*, [1977] ECR 1593, paragraph 21). That applies particularly to the time factor, as is clear in particular from the judgment of the Court in Case 95/75 *(Effem* v *Hauptzollamt Lüneburg*, [1976] ECR 361). In this case, however, the Commission cannot plead lack of time, which, according to that judgment, constitutes a valid justification for recourse to standard factors in the calculation of the levy. In the circumstances it was already clear at the time of the entry into force of Regulation No 1785/81 that the application of the old regulation, No 700/73, without amendment would lead to the overlapping of reference periods. In my view, therefore, Regulation No 3358/81 is contrary to the principle of proportionality on account of the fact that part of the reference period was taken into account twice in the calculation of a Community levy at the time of the adoption of that regulation and without valid justification.[1]

6. The meaning of the term "disposal" in Article 7 (2) of Regulation No 700/73

The term "disposal" in Article 27 of Regulation No 3330/74 and in Article 7 (2) of Regulation No 700/73 is not defined. It is common ground in any event that the term applies to exports. The Commission has interpreted — and applied — the term as denoting the quantity which is the subject of existing export obligations and has referred, in that connection, to the export licences issued. The Italian parties contend however that the term relates to the quantity actually exported. In their view, that provides a more accurate picture of the true state of affairs, since in the third quarter of 1981 licences issued in respect of 360 000 tonnes of sugar were revoked, without challenge on the part of the Commission. It is not clear, however, in what way the Italian parties were adversely affected by this. Where export licences are issued and then revoked, no refunds are paid, which implies that in the calculation carried out on the basis of the licences issued the average loss decreases.

Be that as it may, I consider that, as far as this point is concerned, the contention of the Italian parties is unfounded. According to the well-established case-law of the Court, the Commission may, for the purpose of quantifying and calculating import and export patterns, avail itself of, and rely on, the information resulting from the system of import and export licences. In that connection I would refer to the judgments of the Court in Case 11/70 *(Internationale Handelsgesellschaft* v *Einfuhr- und Vorratsstelle Getreide*, [1970] ECR 1125) and in Case 25/70 *(Einfuhr- und Vorratsstelle* v *Köster*, [1970] ECR 1161), in which the Court held *inter alia* that the provision of such information is one of the aims of the licensing system. From that point of view, I do not regard Regulation No 3358/81 as unlawful. If, however, the Court shares my opinion that Article 1 of that regulation is void on other grounds, the third question submitted by the national court does not call for an express answer.

1 — Naturally that double levy could also be corrected by means of an adjustment in the levy for the following year. The choice between those two possibilities of adjustment may, in my view, be left to the competent institutions.

7. Conclusion

To summarize, the questions submitted should, in my opinion, be answered in the following manner:

1. Consideration of Regulation No 700/73 of the Commission of 12 March 1973 has disclosed no factor or circumstances of such a kind as to affect its validity.

2. Article 1 of Commission Regulation No 3358/81 of 25 November 1981 is void for breach of the principle of proportionality, inasmuch as the calculation of the production levy for the 1980/81 marketing year which is provided for by that article led to the twofold consideration of the third quarter of 1981 in the calculation of the production levy for the 1981/82 marketing year pursuant to Article 28 of Regulation No 1785/81.

3. It is for the institutions responsible for the common agricultural policy to adopt the measures needed to remedy that illegality.