ZUCKERFABRIK SÜDERDITHMARSCHEN AND ZUCKERFABRIK SOEST

OPINION OF MR ADVOCATE GENERAL CARL OTTO LENZ delivered on 8 November 1990 *

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Mr President,
Members of the Court,

A — Facts

1. The case with which I shall be dealing today concerns a reference for a preliminary ruling made by the Finanzgericht Hamburg. The questions referred to the Court deal with two quite separate groups of issues.

2. The national court first raises a problem of an institutional nature. This concerns the jurisdiction of national courts in proceedings for interim relief, where the contested administrative measure is based on a provision of Community law, the legality of which is put in doubt. The national court seeks to ascertain whether the general validity of regulations precludes a national court from staying proceedings in the context of an application for interim relief. If it should transpire that courts in Member States are entitled to grant interim relief without having previously requested the Court of Justice to rule on the validity of the Community legislation in question, the national court wishes further to know whether the criteria for the granting of the interim measures of protection requested are derived from the procedural law of the Member State in question or from the Community's legal system.

3. As the second main issue in its reference for a preliminary ruling the national court directly raises the question of the validity of the regulation on which the decision in the national proceedings will turn. At issue is the legality of the introduction, by way of Regulation No 1914/87,[1] of a special elimination levy for sugar during the 1986/87 marketing year. The national court believes that this regulation infringes the prohibition of retroactivity. The plaintiff, which is the judgment debtor in respect of a decision concerning levies based on the regulation, puts forward further grounds which cast doubt on the legality of that regulation.

4. Apart from the present proceedings, a number of German courts are in doubt as to the validity of Regulation No 1914/87.[2] One of those courts, the Finanzgericht

1 — Council Regulation No 1914/87 of 2 July 1987, OJ 1987 L 183, p. 5.

2 — *Inter alia:* Order of the Bundesfinanzhof of 11 July 1989, Reference No VII B 183/88.

Düsseldorf, has also sought a preliminary ruling from the Court of Justice on the question of validity.[3] The Finanzgericht Hamburg has referred the following questions to the Court of Justice:

'(1) (a) Is the second paragraph of Article 189 of the EEC Treaty to be interpreted as meaning that the general application of regulations in Member States does not preclude the powers of national courts to suspend, by way of an interim measure, the operation of an administrative measure based on a regulation until a decision is reached in the main action?

(b) If so: under what conditions may national courts adopt interim measures? Is there an applicable criterion of Community law and if so which? Or do interim measures depend on national law?

(2) Is Council Regulation (EEC) No 1914/87 of 2 July 1987 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year valid? In particular, is it invalid because it infringes the principle that regulations imposing taxation must not be retroactive?'

3 — See Case C-92/89 *Zuckerfabrik Soest* v *Hauptzollamt Paderborn*

5. I would refer to the Report for the Hearing for the facts of the case, the reasoning of the Finanzgericht and the arguments of the parties, which I shall mention or discuss hereinafter only in so far as is necessary for the understanding and reasoning of my Opinion.

B — Opinion

I — *The first question*

6. The parties in the main proceedings have very different views on the answer to be given to the first question.

7. The *national court* is itself uncertain as to the jurisdiction of national courts to suspend enforcement of a measure, on the ground that such a decision could cast doubt on the direct applicability of regulations in all Member States in accordance with the second paragraph of Article 189 of the EEC Treaty. At the same time, it acknowledges that suspension of enforcement, in the same manner as the suspensory effect of an appeal in ordinary administrative proceedings, does not affect the existence of the administrative measure and consequently does not strictly encroach on the validity of the Community legislation.

8. Another source of doubt for the national court is the fact that the suspension of acts or the adoption of interim measures under Articles 185 and 186 of the EEC Treaty is subject to criteria different from those which apply in the case of interim protective measures under German law. Reference to applicable national criteria may result in discrimination between Community citizens.

1. The views of the parties

9. The *plaintiff* does not share the doubts of the national court, if only because the suspension of enforcement in no way places in question the effectiveness of the Community regulation. The only thing which is postponed is the date on which the amount due must be paid. Furthermore, no doubt is cast on the effectiveness of the regulation in the economic sense, since the person claiming interim relief must, in the event that he should fail in his claim, pay interest for delay at 3% above the discount rate of the Deutsche Bundesbank, regardless of any security lodged.

10. The plaintiff also argues that if the Court admitted an exception to its monopoly on ruling on the validity of Community legal measures in proceedings for interim relief in Case 314/85 (*Foto-Frost*[4]), a case which concerned the validity of a decision by the Commission in a specific case with respect to a Member State, this must apply *a fortiori* in the case of enforcement measures adopted by national authorities.

11. Adequate interim relief against measures of execution are in any case included among the guarantees of legal protection referred to in Article 19(4) of the Grundgesetz (Basic Law). Any reduction in the power of national courts, in proceedings on an application for interim relief, to ascertain the legal rule to be applied would constitute a major restriction of legal protection and would lead to uncertainties in the law.

12. Finally, the granting of interim relief follows necessarily from the system of protection under the Community legal order, under which, depending on the implementing measures of Community law, interim measures may be ordered by the European Court of Justice or by national courts.

13. Although the plaintiff considers it unnecessary to address Question 1(b) in view of its opinion on Question 1(a), it does submit that national authorities and courts may grant interim relief against national enforcement measures only in accordance with the requirements of national procedural law. As is the case with other procedural questions under the national legal systems, it has to be accepted that there may be discrepancies between the various Member States of the Community.

14. The *Commission* also proceeds essentially on the basis of the idea that a national court may suspend the execution of an administrative measure 'without having to await the outcome of a reference under Article 177 to *confirm* its *doubts* as to the validity of the Community measure which forms the basis for the administrative act in question'.[5]

15. In support of this contention, the Commission first of all argues that the court does not determine the existence or non-existence of a right, but merely postpones the execution of an administrative measure. Although there are differences in the conditions governing the restoration of the *status quo ante* in the individual Member

4 — Judgment in Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

5 — My emphasis.

States, the court in all those proceedings does not rule on the validity or invalidity of the administrative measure, but solely decides the question whether individual interests deserving protection prevail over the public interest in the enforcement of the measure prior to the Court's decision on the substance of the case.

16. On the other hand, according to the Commission, the urgency which is normally a characteristic of an interim decision argues against prior completion of the preliminary ruling proceedings in view of the length of time required for the Article 177 procedure, if only because of the participation therein provided for under Article 20 of the Statute of the Court of Justice of the EEC.

17. However, the Commission raises the question whether specific circumstances deriving from Community law must exist in order for suspension of enforcement to be permitted. One might, for example, think of criteria deriving from Article 83 of the Rules of Procedure of the Court, namely the need 'to prevent serious and irreparable damage' or the initiation of the main proceedings at the same time as the application for interim relief. Even though this latter criterion will in general be satisfied where an order is made for the suspension of enforcement of an administrative measure, the Commission does not believe it justified to impose such additional conditions 'because this would in fact require an amendment to the rules of the courts in the Member States'.

18. The Commission also bases its arguments on the case-law of the Court of Justice, according to which it has to be accepted that demands for repayment are treated in a different manner from one Member State to another, provided that the legal systems of the Member States endeavour to strike a balance between, on the one hand, the principle that their administrative authorities should act within the law and, on the other, the principles of legal certainty and protection of legitimate expectations, that the scope and effectiveness of Community law are not restricted, and that full account is taken of the Community's interests.

19. The Commission develops a point of view of its own as to how full account is to be taken of the Community's interests.

20. According to this view, the question of the validity of the legal measure must be submitted to the Court of Justice at the same time as enforcement is suspended, even though this is at variance with dogmatic reservations and reservations concerning procedural economy which are based on the fact that no decision has yet been taken on the validity of the measure of Community law and a reference to the Court of Justice might subsequently prove to be unnecessary. According to the Commission, the following arguments militate in favour of the manner of proceeding proposed by it: in the first place, the temporary interference with the decision-making monopoly of the Court of Justice with respect to the validity of Community law measures is kept to a minimum. That monopoly is recognized, while at the same time effective legal protection is granted.

21. Furthermore, national courts must, in arriving at their decision *ex aequo et bono*, take full account of the interests of the Community. They must therefore exercise their discretion in such a way that the 'effet utile' of the provision of Community law is obstructed as little as possible.

22. Finally, a preliminary reference made on the occasion of the proceedings for suspension of enforcement could shorten the period of uncertainty as to the validity of the Community measure. In such a case, the court hearing the main proceedings would not have to give its decision until after the Court of Justice had given judgment.

23. The Commission believes that the manner of proceeding proposed by it merely gives concrete effect to the reference to the Court of Justice which is in any case provided for under Community law and makes it possible to avoid interference with the national proceedings relating to suspension of enforcement.

24. The Commission has also put forward substantive arguments against a possible refusal to recognize the power of national courts to suspend enforcement of an administrative act in proceedings for interim relief. Confidence in the Community legal order could be permanently shaken in such a case, since an individual might in certain circumstances be deprived for several years of his rights in view of the length of time taken by proceedings for a preliminary ruling.

25. The Commission also wonders whether the right to effective legal protection must not as such be regarded as a fundamental right. In any event, the situation in point is very close to those protected by the Basic Law. The principle of rapid legal protection also finds expression in the Community legal order, namely in Articles 185 and 186 of the EEC Treaty. In any case, it is a principle that is closely linked to that of the uniform application of Community law.

26. The *Council* addresses the first question in the reference for a preliminary ruling only very briefly. It takes the view that the question must in principle be resolved in the light of the principle of the primacy of Community law, in accordance with the case-law of the Court, but it refrains from formulating any proposal for a ruling on the question.

27. The *Italian Government*, on the other hand, adopts a more qualified position. It argues that national courts are at liberty to suspend, by way of interim protection, the operation of administrative measures based on Community regulations, even though the Court of Justice has not yet declared the regulation in question to be invalid. In support of this contention, the Italian Government argues that this conclusion is derived from the allocation of jurisdiction between national courts and the Court of Justice as laid down in the EEC Treaty. Moreover, an interim decision does not affect the validity of the regulation but is simply a protective measure which does not anticipate any future decision.

28. Referring to the Opinion of Mr Advocate General Mancini in Case 314/85,[6] the Italian Government points out that the interim relief sought may not be rendered ineffective by the length of the preliminary rulings procedure. Any refusal to allow a national court to suspend a questionable administrative measure would have serious consequences for individuals, given that they are not entitled to contest the validity of the Community regulation in question directly before the Court of Justice, something which is tantamount to depriving them of any legal protection. If,

6 — Opinion in Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

on the other hand, it is accepted that courts in the Member States do have the power to suspend enforcement of an administrative measure, the conditions governing the exercise of that power must be sought within national legal provisions. Differences in the conditions governing interim protection under the legal systems of individual Member States are all the less discriminatory when one considers the variation in judicial procedures which must be complied with in order to obtain protection for personal rights guaranteed by Community law. It is not possible to achieve harmonization of procedural rules through the application by analogy of the conditions laid down in the EEC Treaty for the suspension of execution of measures.

29. The *United Kingdom* takes the opposite view. It believes that national courts should not be recognized as having the power 'to suspend, by way of an interim measure, the operation of an administrative measure based on a regulation until a decision is reached in the main action concerning that regulation'. If this were not the case, the integrity and uniform application of Community law would be placed in jeopardy. In reaching its view on this question, the United Kingdom starts from the premise that the EEC Treaty was intended 'to establish a coherent system of legal remedies and procedures designed to enable the Court of Justice to review the legality of measures adopted by institutions'. It also proceeds on the assumption that if national courts were entitled to grant such interim relief, they would be determining 'the validity of acts of Community institutions'.

30. Finally, the United Kingdom submitted a further argument in support of its contention at the hearing. 'Absolute discretion' on the part of national courts regarding the suspension of a decision imposing a levy and based on a Community regulation could lead to distortions of competition. In that event, courts would be at liberty to release national undertakings from their obligation to make payment, and in this way it might be possible to refrain from implementing a regulation within a Member State. In such a case, there would also be reason to fear a distortion of competition by reason of the fact that the period within which payment must be made forms an integral part of the Community provision, whereas the time factor could be eliminated if national courts were empowered to order suspension of execution.

31. The United Kingdom believes that the apprehended distortion of competition could manifest itself in all areas affecting the parties involved, that is to say the undertakings producing sugar as well as the sugar-beet producers, by virtue of the power, for which provision is made, to pass on liability for the levy. Should the Community provision be declared unlawful and invalid, it would always be possible subsequently to repay the levies.

32. It also submits that the uncertainty surrounding the Community regulation is the same in the proceedings for an 'interim decision' as in the main proceedings. However, the United Kingdom does accept that there may be exceptions, as, for example, in cases of hardship. In such cases, however, it is necessary to adopt protective measures in accordance with the rules of national procedural law.

2. The obligation to make a preliminary reference in proceedings for interim relief

33. The starting point for my answer to the present question must be the Court's

case-law on the subject. With regard to the *obligation to make a preliminary reference*, there is first of all the judgment in Case 314/85 *(Foto-Frost)*, in which the Court first of all laid down the rule that it alone has jurisdiction to declare acts of Community institutions to be invalid, and that national courts are not entitled to make such a declaration themselves. However, the Court added that such a rule 'may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures'; however, it considered that there was no need to address the issue since 'that case is not referred to in the national court's question'. [7]

34. The Court did not on that occasion refer to its earlier case-law, to the effect that the third paragraph of Article 177 must be interpreted as meaning that 'a national court or tribunal is not required to refer to the Court a question of interpretation or of validity . . . when the question is raised in interlocutory proceedings for an interim order (einstweilige Verfügung), even where no judicial remedy is available against the decision . . . , provided that each of the parties is entitled to institute proceedings . . . and that during such proceedings the question provisionally decided in the summary proceedings may be re-examined and may be the subject of a reference to the Court under Article 177'. [8]

35. Admittedly, in 1977, the year in which this judgment was delivered, the decision in *Foto-Frost* did not exist, coming as it did only 10 years later. It is for that reason necessary to examine whether the decision in *Hoffmann-La Roche* v *Centrafarm* can still be upheld in the light of the decision in *Foto-Frost.*

36. The Court, in its judgment in *Foto-Frost*, bases itself on the coherence of the system of judicial protection established by the Treaty. [9] Since Article 173 gives the Court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice. [10]

37. According to the decision in *Hoffmann-La Roche* v *Centrafarm*, national courts are not required to refer a matter to the Court of Justice, even where there is a question as to the validity of a measure of Community law, provided only that there is a *possibility* that this issue will be re-examined in the subsequent main proceedings and that it *may* form the subject of a reference under Article 177.

38. In its reply to the question referred to it for a preliminary ruling, the Court proceeded on the basis that judicial remedies still existed against the decisions of the Finanzgericht Hamburg. [11] It also held that those courts, which moreover are not subject to the obligation to refer a case under Article 177 of the EEC Treaty, have no jurisdiction to decide for themselves that acts of Community institutions are invalid. It is for that reason necessary to examine whether the Court's reasoning in its decision in *Foto-Frost* also applies in the case of proceedings for interim relief.

39. In its judgment in *Hoffmann-La Roche* v *Centrafarm*, the Court held that there was no obligation to make a reference for a

7 — [1987] ECR 4199, at paragraph 19 of the judgment.

8 — Judgment in Case 107/76 *Hoffmann-La Roche* v *Centrafarm* [1977] ECR 957.

9 — Loc. cit., at paragraph 16.

10 — Loc. cit., at paragraph 17.

11 — Judgment in *Foto-Frost*, loc. cit. at paragraph 13 (see also point 1 in the summary).

preliminary ruling, on the ground that such a reference could subsequently be made in the main proceedings. That is precisely the reasoning which ought to have led, in *Foto-Frost*, to a ruling that there was no obligation to make a reference. There was an opportunity in that case to raise such an issue during the appeal proceedings, since the Court of Justice had proceeded on the basis that an appeal could still be brought against the judgment of the court making the reference. After the judgment in *Foto-Frost*, this point of view is in itself insufficient as a ground for precluding the obligation to make a reference. Rather, it is necessary to examine the individual reasons which led the Court to adopt that decision.

40. Three grounds are mentioned by the Court itself. The first is the uniformity of the Community legal order. This uniformity is placed in jeopardy and the fundamental requirement of legal certainty is impaired if there are divergences between courts in the Member States as to the validity of Community acts.

41. The second ground is the necessary coherence of the system of judicial protection established by the Treaty, under which the Court of Justice has exclusive jurisdiction to declare void an act of a Community institution. The coherence of the system requires that where the validity of such an act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.

42. Thirdly, the Court of Justice is in the best position to decide on the validity of Community acts.

43. These considerations are of course also applicable in the case of proceedings for interim relief. How could it be possible for a court hearing an application for interim relief to cast doubt on the validity of Community measures if it is not empowered to do so in the main proceedings? The only argument possible in this regard is that the interim protection which an applicant seeks in instituting summary proceedings can be frustrated by reason of the time taken up by the proceedings for a preliminary ruling (see the Opinion of Mr Advocate General Mancini, loc. cit., at 4221).

44. Those considerations are based on a factual situation which is different from that in the present case. The Finanzgericht in this case suspended enforcement of the administrative measure on the condition of the lodging of a security and at the same time stayed its own proceedings. [12]

45. There is no danger in the present case that the time taken up by the reference for a preliminary ruling will frustrate the interim relief which the applicant seeks by instituting summary proceedings. The proceedings are stayed until such time as the Court has delivered its ruling on the questions referred to it.

46. However, even if it were conceivable that the proceedings for interim relief were to continue before a different court and it were not possible to await the ruling of the Court of Justice before taking a decision, this argues only against the period of waiting involved, and not against the obligation to make a reference for a ruling. If we suppose that the court before which the matter is brought confirms the suspension of execution in view of its doubts on the validity or efficacity of the Community measure, the question referred by the first court remains relevant and, since it is already before the Court of Justice, the point of law may be clarified all the more quickly.

12 — Order of the Finanzgericht Hamburg seeking a preliminary ruling, II.

47. It is thus in the interests of procedural economy that the question at issue has already been submitted to the Court. If the case is settled without any decision in the main proceedings, the doubts previously raised are not dispelled and a decision by the Court is thus necessary despite the settlement reached in the specific case in point.

48. If, on the other hand, the second court does not consider it necessary to suspend the operation of the administrative measure and on that ground dismisses the application for suspension, this (just in case there may be any doubt concerning the validity or effectiveness of the Community measure) has in any event no practical consequences. In such a case, the contrary interpretation of the lower court is no longer capable of limiting the effectiveness of Community law. The question then also arises whether the first or second court could have or ought to have withdrawn the request for a preliminary ruling. [13]

49. If the court dealing with the substantive issues does not share this doubt as to validity, the result may be a decision of the Court of Justice that was unnecessary. This situation corresponds to that in which a lower court makes a reference for a preliminary ruling to the Court of Justice which a higher national court does not consider to be necessary. Even in such a case, the Court of Justice must give its ruling if the reference has not been withdrawn. The same also applies with regard to questions on interpretation.

50. It is not necessary in the present case to decide this matter. Contrary to the theory underlying the present case-law of the Court, therefore, urgency and the obligation to seek a preliminary ruling are in no way mutually exclusive.

51. If the proceedings continue before the court which is dealing with the main issues the argument of urgency loses its force. It may consequently be expected in this regard that the court dealing with the main issues will base its decision on the judgment of the Court of Justice, in so far as it considers that the reservations expressed by the court which made the reference are well founded. If, on the other hand, it takes the view the such reservations are unfounded, the matter will proceed in the same way as the proceedings for interim relief.

52. The question arises as to what effect the judgment of the Court of Justice has for the court dealing with the substantive issues. There is no case-law on this point. The predominant view is that 'the preliminary ruling is binding for the purposes of the proceedings which gave rise to the reference by the national court'. [14] According to this view, both the higher court and the lower court, which must give a decision following the referral of the case back to it by the higher court, are bound by the ruling. It is also possible to accept this solution for the court dealing with the main proceedings, since its decision is closely linked to the proceedings for interim relief during which the request for a preliminary ruling was made.

53. Nor may it be objected to this that the question referred in the case was judged by the court called upon to decide the case to be quite unnecessary for the purpose of reaching its decision: if that court has such doubts as to the validity or effectiveness of

13 — On this point, see Dauses *Das Vorabentscheidungsverfahren nach Artikel 177 EWG-Vertrag*, Luxembourg 1985, pp. 83 to 85.

14 — See Dauses *Das Vorabentscheidungsverfahren nach Artikel 177 EWG-Vertrag*, Luxembourg 1985, p. 101; Everling *Das Vorabentscheidungsverfahren vor dem Gerichtshof der Europäischen Gemeinschaften*, Baden 1986, p. 63; in this connection, also with regard to superior courts, see Chevallier and Maidani *Guide pratique article 177 CEE*, Luxembourg 1981, p. 96.

the Community measure in question that it considers it necessary (after weighing all relevant interests) to suspend enforcement of the administrative measure, then it requires this decision so that it may either lift the suspension if its doubts are dispelled or, should its doubts be confirmed, maintain it.

54. If, pursuant to the rules of the courts in the Member State concerned, the case is removed from the court hearing the application for interim relief, with the result that that court can no longer give a decision, and if the court dealing with the substantive issues does not share its doubts, this is not an argument against the admissibility of the reference for a preliminary ruling. Such a situation is analogous to that where a lower court refers a question for a preliminary ruling which the higher court does not regard as necessary. The Court of Justice must, in this case too, also give a ruling if the request for it has not been withdrawn. The second paragraph of Article 177 of the EEC Treaty takes account of this possibility.

55. The obligation to seek a preliminary ruling is necessary for overriding reasons connected with the need to ensure the uniform validity and effectiveness of Community law. It strikes me as necessary once more to address the central question. What are the consequences for the Community legal order if a court in a Member State declares a measure of Community law to be invalid? It is necessary in this regard to proceed on the basis that the courts of a Member State constitute an autonomous and independent branch of the sovereign authority of that Member State and that for this reason a declaration by such a court that a measure of Community law is invalid is a serious matter and gives rise to consequences which are 'undesirable', 'improper' or liable to create 'grave problems'.[15]

56. Those consequences are that, although Community law is not rendered inoperative, its effect is held in abeyance and confidence in its validity is adversely affected. The latter effect increases according to the degree of superiority of the court, while the former is independent of this factor.

57. Advocate General Mancini goes on to cite four anomalies which argue against lower courts' being entitled to declare Community measures invalid: 'the first and perhaps the most striking of them is a paradox: according to the theory, inferior courts have a power — that of reviewing the validity of acts — which the third paragraph of Article 177 expressly removes from courts of last instance'.[16]

58. The main argument then put forward by Mr Mancini is dogmatic in nature, as it concerns the contradiction engendered by the recognition of such a power within the system which entrusts to the Court of Justice alone the task of reviewing the legality of Community acts. I have already dealt with this argument.

59. Thirdly, this view detracts from the principle laid down by Article 189, according to which measures adopted by the institutions must be applied uniformly throughout the territory of the Community. That principle, according to Advocate General Mancini, has a dual aim: that of securing legal certainty and — which is equally, if not more, important — of guaranteeing the legal cohesion of the Community.[16]

15 — Mancini, loc cit., at 4218, Mancini refers in that context to, inter alia, Brown and Jacobs, *The Court of Justice of the European Communities*, London 1983, p 154 et seq — see now Third Edition, p 173

16 — Loc. cit., at 4218.

60. I would concur with Advocate General Mancini on these three points.

61. It is of course also necessary to ask in this connection whether the same applies to questions of interpretation or at any event to some of them. Mr Mancini does not wish to extend the obligation to seek a preliminary ruling to questions of interpretation, in view of the fact that 'to interpret a rule invariably also assumes an intention to apply it'.

62. I am not sure that this view is valid in all cases.

63. An interpretation which, in the specific case in point, deprives a provision of its effectiveness is often tantamount in practice to contesting its validity: whether a court questions the validity of a provision or interprets it in such a way as to render it inapplicable to the case in hand, the practical consequences are identical. [17]

64. The argument that this may be remedied at a later stage in the proceedings is unconvincing. The proceedings may conclude without there being any subsequent judicial decision, as for instance in the present case, in which the plaintiff paid the levy demanded, since it considered this course of action to be preferable to having to pay interest for delay in the case of postponed payment. [18] In such a case, the decision dispelling doubts as to the validity of Community law would already be in existence. No one would be informed of the subsequent resolution of the dispute, which in any case could also result from grounds other than those derived from a change of opinion on the legal issue.

65. All these considerations argue in favour of the need to require courts hearing applications for interim relief, which intend to cast doubt on the validity or applicability of a provision of Community law, to refer a corresponding question to the Court of Justice.

66. However, even if it is possible to initiate further proceedings, it is not at all certain that the authorities of the Member State, who have been unsuccessful in the first instance, will lodge an appeal on grounds of Community law. [19]

67. Finally, even if this does happen, it is far from certain that the appeal court will be obliged to refer the matter (indeed, the view taken by the Court in *Hoffmann-La Roche* v *Centrafarm* is that this is definitely not the case) or that, even if it is so obliged, it will in fact make such a reference.

68. The plaintiff in the main proceedings has put forward two objections to compulsory reference to the Court of Justice.

69. The first of these concerns the summary nature of the documents relating to the case, which do not yet contain all the facts. Although this objection is basically correct, I believe that it constitutes rather an argument against raising questions concerning the validity of the Community measure at this stage in the proceedings.

17 — See Brown and Jacobs, loc. cit., p. 174.

18 — Another example is provided by disputes under the German Law against Unfair Competition, which are most often brought by way of proceedings for interim relief (see OLG Frankfurt, decision of 16 January 1990, AZ 6W 146/89 in EuZW 1/90, p. 39.

19 — See the Commission and the Advocate General in *Foto-Frost*, loc. cit., at 4205 and 4219.

However, if such questions are raised, the court concerned must in my opinion help to remove such doubts as soon as possible. This view does not impose a restriction on the national court's freedom of action, but it does limit the negative consequences which this may have for the legal order of the Community.

70. The second point made by the plaintiff in the main proceedings refers to the fact that the court hearing the application for interim relief may not be the one which deals with the substance of the case. While this consideration also is relevant, it does not support the conclusion drawn from it. If the court dealing with the substance of the case shares the doubts as to the validity of the Community measure, it is in the interests of procedural economy that the relevant question will already have been referred to the Court of Justice. If the proceedings are concluded without a decision having been taken on the substance of the case, the doubts already raised will not have been resolved. Although the actual dispute may have been settled, a decision by the Court of Justice is none the less necessary.

71. In any event, until such time as the decision to seek a preliminary ruling has been made by the court hearing the case in the later proceedings, there will be a period during which the court to which application was made for interim relief contests the validity of the measure of Community law. In the interest of ensuring the legal coherence of the Community, such a result cannot be tolerated.

72. I am well aware that in expounding these views I am at variance with the position taken by the Court and its Advocate General in *Hoffmann-La Roche* v *Centrafarm*. At that period, stress was laid on the summary character of the procedure and the provisional nature of the decision and from this the inference was drawn that 'its nature would prevent it from becoming a precedent endangering uniform compliance with Community law, even if it placed an erroneous interpretation on that law'. [20]

73. In my view, the decisive factor is the realization that the effectiveness of Community law is deferred and consequently diminished also by such proceedings and its validity or practical effectiveness thereby contested.

74. The great merit of the decision in *Foto-Frost* is that it brought this realization out into the open. The foregoing considerations are no more than an application of the principles set out in that judgment to the case which it now falls to the Court to decide. The obligation imposed on courts to seek a preliminary ruling is the necessary consequence of their right of judicial review. It is for that reason that the German Grundgesetz (Basic Law) imposes an obligation to refer a case to the Verfassungsgericht (Constitutional Court) where a court considers legislation, on the validity of which the decision in the case turns, to be unconstitutional. [21] In accordance with this, the Federal Government argued in the *Foto-Frost* case [22] in favour of the obligation to seek a preliminary ruling.

3. Conclusions

75. As a result, I consider that the courts of the Member States are under an obligation, both in the case of summary proceedings and questions of interpretation which cast doubt on the effectiveness of execution, to refer such questions to the Court of Justice.

20 — Advocate General Capotorti, loc. cit. [1977] ECR 957, at 983.

21 — See Leibholz/Rinck, *Grundgesetz Kommentar*, 6th Edition, Cologne 1989, Article 100, note 1.

22 — Loc. cit., at p. 4205.

76. It is still necessary to consider briefly the question of the extent to which the Court hearing an application for interim relief is bound by the legal measure, the validity of which it calls in question. The present case does not cast any light on this issue since the national court has suspended enforcement of the decision imposing the levy on condition of the lodging of security in an amount equal to that of the special elimination levy imposed. In so doing, the national court has taken account, within the limits of the possibilities open to it, of the will of the Community legislature which, by requiring payment to be made by 15 December 1987 at the latest, expressed its desire that the charge be imposed on the undertakings concerned as nearly as possible at the same time.

77. Counsel for the plaintiff, however, produced at the hearing an order of the Bundesfinanzhof (Federal Finance Court) of 11 July 1989 (Reference No VII B 183/88), according to which the decision of another court, namely the Finanzgericht (Finance Court) Baden-Württemberg, suspending implementation of Regulation No 1914/87 *without* the lodging of a security, is unobjectionable in law. The competent Principal Customs Office also had not contested that decision.

78. For the reasons set out above, that view cannot be accepted. On the contrary, it is necessary even in proceedings for interim relief to proceed on the basis of the supremacy of Community law and to protect the Community's interest as expressed therein.

79. It finally remains for me to express a view on the question whether the restrictions cited also apply if implementation is suspended for reasons which do not call in question the validity of the legal order of the Community. The implementation of an administrative measure may be suspended in German law 'if implementation would result in unreasonable hardship, not justified by any overriding public interest, for the person concerned'.[23] The representative of the Italian Republic also addressed this problem at the hearing.

80. Since the validity of Community law is not here called in question, a reference to the Court of Justice is unnecessary. Due regard for the interest of the Community, which in my view is called for by Community law, is here in any event prescribed by national law. When considering whether the time-limit of 15 December 1987 must be complied with or whether the undertaking must be protected against failure ('fallimento'), it may be quite permissible, also from the point of view of Community law, to suspend enforcement of the administrative measure in order to avoid unreasonable hardship not justified by an overriding interest of the Community.

81. This solution complies with the requirements of effective interim legal protection since it does not place any obstacles in its way.

82. It ensures the precedence of Community law, in so far as it requires the courts of the Member States, in this context also, to have due regard for the objectives of Community law.

83. It guarantees the independence of the courts of the Member States and their freedom of decision, since they can give free expression to any doubts they may have as

23 — Finanzgerichtsordnung (Rules of the Finance Courts), second alternative in the second sentence of Paragraph 69(2).

to the validity of Community law or to the ineffectiveness of its provisions.

84. It ensures, within this framework, legal certainty and the legal cohesion of the Communities by requiring, in pursuance of Article 5, courts which have such questions to refer them to the Court of Justice and thereby contribute to the removal of the doubts which they themselves have expressed.

85. All things considered, this solution appears to me to satisfy the legitimate interests of all parties.

86. I would therefore suggest that the Court reply to the first question as follows:

87. Article 189 of the EEC Treaty must be interpreted as meaning that a national court which wishes to suspend the effects of an administrative act based on a measure of Community law, on the ground that it has doubts as to the validity of the measure of Community law on which the national administrative act is based or wishes to interpret it in a way which would deprive the Community law of its practical effectiveness, is obliged to refer the question of validity and effectiveness to the Court of Justice.

88. The national court is bound by Community law with regard to the nature and extent of the suspension.

89. The court dealing with the substance of the case must base its own decision on that of the Court of Justice regarding the validity of the Community measure.

II — *The second question*

90. The second question in the preliminary reference seeks a review of the validity of Regulation No 1914/87 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year. The special elimination levy is a levy imposed on the production of sugar and designed primarily to make good the budgetary deficits within the sector resulting from the grant of export refunds. The special elimination levy is payable in addition to a basic production levy amounting to 2% of the intervention price for sugar, a B-levy on the production of B-quota sugar of up to 37.5% of the intervention price [24] and an elimination levy. [25] The regulation on the special elimination levy entered into force on 2 July 1987 in respect of the 1986/87 marketing year, which had ended on 30 June 1987.

91. The plaintiff in the main proceedings has submitted a number of arguments which it believes point to the invalidity of the disputed regulation. Those arguments are essentially as follows:

(i) the regulation is founded on an incorrect legal basis. It should not have been based on Article 43 of the EEC Treaty, but on Article 201 of the EEC Treaty in view of its character as a financing levy;

24 — See Article 28(3) and (4) of the basic Council Regulation No 1785/81 of 30 June 1981, OJ L 177, p. 4

25 — See Article 32a of Regulation No 1785/81, as amended by Council Regulation No 934/86 of 24 March 1986, OJ L 87, p. 1.

(ii) the regulation is incompatible with the basic regulation inasmuch as it breaches the legal limits of the principle that the sugar sector should be self-financing and the principle of legal certainty.

(iii) the regulation infringes the prohibition of burdening a branch of the economy with extraneous risks which may place an unreasonable charge on sugar producers;

(iv) the regulation infringes the prohibition of retroactivity inasmuch as it was adopted with respect to a situation which had already ceased to exist and breaches the legitimate expectations of the persons subject to the levy;

(v) the regulation breaches the prohibition of discrimination since different charges are imposed on the production of A and B sugar. This also has the result that undertakings in the German sugar industry, which are subject to comparatively high B levies, are burdened to a greater extent than are undertakings in other Member States;

(vi) the regulation infringes the fundamental principles of the protection of property and freedom to pursue economic activities, since the amount of the levy constitutes an interference in the very substance of the undertakings;

(vii) the regulation is vitiated by misuse of powers, since the special elimination levy is in reality a financing levy which is strangulatory in its effect;

(viii) finally, the regulation infringes general principles of law inasmuch as the organization of the levy, and in particular the rules by which the levy may be passed on to sugar-beet producers, is incompatible with constitutional principles of German revenue law.

92. The national court addresses two of the arguments submitted, namely the question as to the correct legal basis and the problem concerning retroactivity. It does not appear in this regard to have any serious doubts as to the legal basis chosen by the Council. However, it takes a different view as to a possible infringement of the principle of non-retroactivity. The national court believes that the adoption of Regulation No 1914/87 does have a truly retroactive effect, entailing in any event a failure to take proper account of the legitimate expectations of the persons concerned, and that is why it has referred the question of validity to the Court of Justice.

1. Is Article 43 or Article 201 of the EEC Treaty the legal basis for Regulation No 1914/87?

93. Objection is taken to the introduction of the special elimination levy under Article 43 of the EEC Treaty on the ground that this does not constitute a measure regulating the sugar market, but is rather exclusively a financing levy. A measure designed to regulate the market can relate only to the present or to the future, but not to the past. Furthermore, the third recital in the preamble to the contested regulation refers expressly to 'severe budgetary constraints on the Community'.

94. It is argued that since the special elimination levy was introduced outside the framework of the organization of the market in sugar, it does not constitute own resources within the meaning of subparagraph (a) of the first paragraph of Article 2 of the Council Decision of 7 May 1985 on the Communities' system of own resources.[26] According to that provision, own resources are constituted only by 'contributions and other duties provided for within the framework of a common organization of the markets in sugar'. Since the special elimination levy is not a levy designed to regulate the market and does not constitute own resources within the meaning of the above decision, it ought to have been adopted on the basis of Article 201 of the EEC Treaty. As the procedure outlined in that provision was not complied with, the regulation, so it is contended, is invalid.

95. Finally, the plaintiff in the main proceedings states that it is exclusively sugar producers who have to bear the burden of the special elimination levy, even though the organization of the market in sugar was created for the general benefit of sugar-beet growers. This follows from the third recital in the preamble to the basic regulation which recommends that provision should be made for measures to stabilize the market in sugar in order 'to ensure that the necessary guarantees in respect of employment and standards of living are maintained for Community growers of sugar beet . . . '

96. In determining the correct legal basis for the adoption of the special elimination levy, it is necessary to decide whether it has the character of a charge for the regulation of the market or whether, as submitted, it is exclusively designed to finance a budgetary deficit and is suitable for that purpose. If it was intended to be a regulatory charge, the objectives of Articles 39 and 40 of the EEC Treaty must to some degree have been determinant when the measure was adopted.

97. The levy ought also to contain a reference of this nature to the regulation of the market in sweeteners in order for it to be capable of being described as Community own resources under subparagraph (a) of the first paragraph of Article 2 of the Decision on own resources, the adoption of which does not require the complicated procedure set out in Article 201 of the EEC Treaty.

98. It has been argued against the applicability of the above provision of the Decision on own resources basically that it could not apply precisely because it relates only to charges which already existed when the decision was adopted. All other charges, the argument runs, must come under the second paragraph of Article 2. So far as concerns the matters here at issue, Article 2 of the Decision on own resources is worded as follows:

'Revenue from:

(a) . . . duties *established* or *to be established* . . . in respect of trade with non-member countries within the framework of the common agricultural policy, and also contributions and other duties *provided for* within the framework of the common organization of the markets in sugar;[27]

26 — Decision on own resources (OJ 1985, L 128, p 15).

27 — My emphasis.

(b) . . . shall constitute own resources entered in the budget of the Communities.

In addition, revenue accruing from other charges introduced within the framework of a common policy in accordance with the Treaty establishing the European Economic Community . . . shall constitute own resources entered in the budget of the Communities, subject to the procedure laid down in Article 201 of the Treaty establishing the European Economic Community . . . having been followed.'

99. A literal interpretation of that provision does not lead to any clear conclusion. While the past and future forms were expressly chosen with regard to duties in respect of trade within the framework of the Common Agricultural Policy, it is the present tense which has been used with regard to the imposition of duties within the common organization of the market in sugar.[28] This formulation renders a further interpretation possible.

100. The wording and objective of the provision would suggest that it covers not only charges introduced in the past, since there would otherwise be a danger that charges which are in fact identical would be included automatically among own resources solely on the basis of the date on which they were adopted, whereas others would require compliance with the complicated procedure under Article 201 of the EEC Treaty followed by ratification under the legal systems of the Member States. Thus, in the case of a simple alteration in the modalities of a charge, the question could arise as to whether the charge was still one which had previously been introduced or whether it had to be regarded, in view of the change in its legal nature, as a newly introduced charge.

101. These considerations find confirmation in the case-law of the Court [29] in regard to subparagraph (a) of the first paragraph of Article 2 of the Council Decision of 21 April 1970 on the Communities' own resources, a provision which is identical in content to that of subparagraph (a) of the first paragraph of Article 2 of the Decision on own resources and its relevant amendments:[30] 'in view of the developments which were inevitably to take place in Community production and marketing of sugar and, consequently, the need to adapt contributions, levies, refunds and price support measures to those developments in the requirements of the Community markets in sugar, it was not conceivable that the scope of application of the decision of 21 April 1970 could have been limited merely to the levies which were provided for when it was adopted, that is to say to the levies laid down at that time by Regulation No 1069/67 . . . establishing a common organization of the market in sugar'.[31]

102. The legislative procedure under Article 201 of the EEC Treaty, which requires consultation with the Parliament, unanimity on the part of the Council and adoption by the Member States in accordance with their respective constitutional requirements, as referred to in the second paragraph of Article 2 of the Decision on own resources,

28 — *Translator's note:* This observation is based on the German text of the provision.

29 — Judgments in Case 108/81 *Amylum* v *Council* [1982] ECR 3107, at paragraph 33, and in Case 110/81 *Roquette Frères* v *Council* [1982] ECR 3159, at paragraph 39.

30 — Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ, English Special Edition 1970 (I), p. 224): 'contributions and other duties provided for within the framework of the organization of the markets in sugar'.

31 — Case 108/81, loc. cit., at paragraph 33 of the judgment.

finds its justification in the fact that sovereignty in matters of taxation must first be transferred to the Community. However, the sovereign power to levy duties within the common organization of the market in sugar has very clearly been conferred on the Community by way of subparagraph (a) of the first paragraph of Article 2 of the Decision on own resources. Consequently, in so far as the disputed levy comes within the common organization of the market in sugar, it is not necessary, for the purpose of introducing new levy provisions, to have recourse to the second paragraph of Article 2 of the Decision on own resources and thus to Article 201 of the EEC Treaty.

103. With regard to the identical provision contained in the second paragraph of Article 2 of the Council Decision of 21 April 1970, the Court has held that the only purpose of that provision is to allow new own resources to be created within the framework of a common policy, provided that the procedure laid down in Article 201 is followed. 'However, that provision cannot be interpreted, contrary to its wording, as making the procedure laid down in Article 201 compulsory for the adoption of a measure which is part of a common policy merely because the measure entails the collection of revenue'. [32]

104. The only thing that would not be permissible would be for the levy to be attached to the organization of the market in sugar purely in a formal manner, while in reality pursuing a completely different objective, in order to circumvent the procedure set out in Article 201 of the EEC Treaty.

105. It does not matter if, apart from its function of regulating the agricultural market, the levy also has a financial aspect in so far as, for instance, it contributes to limiting expenditure connected with the organization of the market in the agricultural sector. Indeed, as the Court has stated, Article 201 does not concern agricultural charges which apply in a specific agricultural sector and are allocated to the financing of costs in that sector alone. [33]

106. In the event that the special elimination levy falls to be treated as a levy within the context of the common organization of the market in sugar and therefore comes under subparagraph (a) of the first paragraph of Article 2 of the Decision on own resources, this cannot in any way justify the conclusion that the Council had no power to adopt that measure, on the ground that it relates by definition to 'own resources'. The Court has held on numerous occasions with regard to the Decision on own resources and the legislation preceding it 'that its purpose is to define own resources allocated to the Community budget and not to stipulate the Community institutions which are competent to impose duties, taxes, charges, levies or other forms of revenue'. [34] The power of the Council to create a levy has its basis in the provisions of the Treaty relating to the Common Agricultural Policy. [35]

107. In considering whether Article 43 of the EEC Treaty was properly selected as the

32 — Judgment in Case 265/87 *Schrader* v *Hauptzollamt Gronau* [1989] ECR 2237, at paragraph 11.

33 — Case 265/87, loc. cit., at paragraph 10 of the judgment; see also the judgment in Case 179/84 *Bozzetti* v *Invernizzi SpA* [1985] ECR 2301, at paragraphs 19 and 20.

34 — Case 110/81, loc. cit., at paragraph 38 of the judgment, and Case 108/81, loc. cit., at paragraph 32 of the judgment

35 — Cases 108/81 and 110/81, loc. cit.

legal basis for Regulation No 1914/87, it is necessary to proceed on the basis that Article 43 must be interpreted in the light of Articles 39 and 40 of the EEC Treaty.[36] This means that in order to attain the objectives set out in Article 39 a common organization of agricultural markets must be established under Article 40 and 'this organization may include all measures required to attain the said objectives'.[37] In considering whether a measure adopted on this basis is lawful, it is necessary, according to the case-law of the Court, to recognize that the Council carries the political responsibility and must be accorded a corresponding discretion.[38] By seeking to restrain production in the face of surpluses that have been found to exist, the imposition of a levy contributes to the attainment of the objective of stabilizing markets.[39] The principle of self-financing for the sugar sector was introduced by way of the basic regulation[40] in force at the time of the adoption of the special elimination levy. Express reference is made in the recitals in the preamble to the basic regulation to the desire 'to provide the Community with the instruments necessary to ensure, in a fair yet efficient way, *that the producers themselves meet in full the cost* of disposing of the surpluses of Community production over consumption'.[41] The specific legal particulars of the measures for attaining that objective are set out in Article 28 of the regulation and have hitherto been subject on numerous occasions to amendments in view of the fact that the provisions in force were in each case sufficient only to cover a part of the costs.

108. The measures designed to rectify the consequences of surplus production,[42] which were originally intended to be for a limited period only, may be described in terms of an evolutionary period during which legal rules were created to deal with events on the market and if necessary to direct them. These measures comprise, on the one hand, the rules governing production quotas and, on the other, those relating to the imposition of production levies designed to finance export refunds. When it became apparent that the basic production levy and the B levy were inadequate to cover the deficits which were being created, it was decided to levy a charge spread over the marketing years 1986/87 to 1990/91 for the actual expenditure incurred in respect of exports during the 1981/82 to 1985/86 marketing years. This was done through the insertion into the basic regulation of provisions relating to an elimination levy.

109. Market developments soon revealed that there would also be considerable deficits in respect of the marketing years succeeding those from 1981/82 to 1985/86 and that the existing legal instruments would be insufficient to enable those deficits to be made up. In order to counter this emerging trend as quickly as possible, the disputed special elimination levy for the 1986/87 marketing year was introduced by way of a separate regulation.[43]

110. Although the basic regulation was not formally amended by Regulation No 1914/87, the latter does fit substantially into the framework established by the basic regulation. Regulation No 1914/87 is inseparable from the basic regulation, both with regard to the method of collecting the

36 — Judgment in Case 138/78 *Stölting* v *Hauptzollamt Hamburg-Jonas* [1979] ECR 713, at paragraph 4.

37 — Case 138/78, loc. cit.

38 — Case 138/78, at paragraph 7 of the judgment.

39 — Case 138/78, loc. cit.

40 — Council Regulation No 1785/81 of 30 June 1981 (OJ 1981, L 177, p. 4).

41 — 11th recital in the preamble to the basic regulation, my emphasis.

42 — See the 11th recital in the preamble to the basic regulation.

43 — Regulation No 1914/87.

special elimination levy and to the grounds on which it is based. The common organization of the market in sugar, as introduced by the basic regulation, constitutes the only basis which is put forward in the preamble to Regulation No 1914/87. With regard to the anticipated losses, reference is made to the forecasts in Article 28 of the basic regulation and the provisions of Article 28 are also referred to as constituting the basis for calculating the special elimination levy. Reference is even made to the procedure provided for in the basic regulation for the purpose of adopting detailed rules of application. [44]

111. Finally, it should be pointed out that the introduction of the special elimination levy is regarded as being an alternative to the amendment of existing rules on production quotas which might otherwise have become necessary, [45] and is consequently inextricably associated with the rules relating to the existing organization of the market. The argument that Regulation No 1914/87 was adopted outside the framework of the common organization of the market in sugar and for that reason cannot be regarded as a regulatory measure ultimately emerges as the expression of a purely formalistic point of view. In truth, the special elimination levy must, if we consider both its intention and purpose, be regarded as complementing existing provisions on the organization of the market. The choice of Article 43 of the EEC Treaty as the legal basis for the regulation cannot therefore be questioned.

112. To finish with the question of proper legal basis, it is still necessary to address the argument to the effect that, unlawfully, sugar-producing undertakings alone are made subject to the levy, a situation contrary to the objectives of the organization of the market in sugar which was expressly adopted only for the benefit of sugar-beet growers.

113. It is of no account whether the sugar-producing undertakings are to be regarded as producers or as consumers within the meaning of Articles 39 and 40 of the EEC Treaty. It is in any event beyond doubt that they benefit from the Community's price guarantees through the common organization of the market in sugar at least to the same extent as the sugar-beet growers. Reference is made to this fact in the recitals in the preamble to the basic regulation, which state that:

'it is necessary that these regulatory measures [price guarantees] should provide guarantees which are fair both to manufacturers and to producers of the basic product'. [46]

114. The entire price-regulation mechanism applies not only to basic products but also to *sugar*. Title I of the basic regulation provides that a target price for white *sugar* is to be fixed for each marketing year. Likewise, an intervention price is to be fixed both for raw *sugar* and white *sugar* (Articles 2 and 3 of the basic regulation). The pricing arrangements governing trade with non-member countries therefore also apply to *sugar* (Title II of the basic regulation). Under the conditions there specified, *sugar producers* can thus qualify for export refunds when they export their products outside the Community. The Community quota rules, one element in the price guarantees, also

44 — Article 1(4) of Regulation No 1914/87, with reference to Article 41 of the basic regulation.

45 — Fourth recital in the preamble to Regulation No 1914/87

46 — Fourth recital in the preamble to the basic regulation.

apply to the production of *sugar* (Article 19).

115. It is on the basis of the allocation of quotas that contracts of supply are concluded between sugar producers and sugar-beet growers.[47] Moreover, since the introduction of production levies on sugar, it is primarily the sugar producers who are liable for the levy, although it is possible to pass this on in part to the sugar-beet growers.[48] The method for charging the special elimination levy is based on the existing system. Finally, in its method of imposition and in its effects the special elimination levy is derived from the method for calculating production levies. It follows that the apportionment of the financial charges relating to the special elimination levy corresponds to that of production levies under the basic regulation. Regulation No 1914/87 is therefore not invalid on the ground that it introduced a levy which runs counter to the system, something which, in law, would only have been possible on a different legal basis.

2. The legal limits of the principles of self-financing, legal certainty and the prohibition of retroactivity

116. In order to be in a position to decide whether Regulation No 1914/87 is invalid by reason of retroactivity, it is first necessary to address the issue of whether and to what extent it must be regarded as retroactive in its effect. In so far as Regulation No 1914/87 entered into force on the day of its publication, 2 July 1987, and introduced a special elimination levy for the 1986/87 marketing year, which ran from 1 July 1986 to 30 June 1987,[49] its effects were attached to a specific period in the past. The determining factor for the computation of this special elimination levy was the sugar production during the marketing year which had just ended. The amount of the special elimination levy due was quite simply to be calculated by multiplying the production levy owed by the undertaking in question by a coefficient to be determined.[50] Undertakings subject to the levy were therefore not in a position to modify their business arrangements in any way so as to have any influence on the amount due in respect of the levy.

117. The same holds true for sellers of sugar beet, from whom sugar producers were to be entitled to demand reimbursement of up to 60% of the special elimination levy under the provisions of Article 1(3) of Regulation No 1914/87. Since Regulation No 1914/87 thus has an impact on a factual situation in the past, in respect of which it imposes charges a posteriori, it can truly be said to be retroactive in its effect.

118. So far as the possible retroactive effect of legal consequences is concerned, it can be said that there is indeed such an effect. Although the date from which the regulation is operative is not shifted to a point in time prior to its entry into force, all the facts to which it relates predate, as has already been seen, its entry into force. The legal consequence of the regulation, that is to say, the creation of the liability to pay the

47 — Article 5 of the basic regulation; see also Regulation No 206/68 of 20 February 1968 on provisions governing contracts and group agreements relating to the purchase of sugar beet, Journal Officiel 1968, L 47, p. 1.

48 — Articles 28 and 5 of the basic regulation.

49 — See Article 2(1) of the basic regulation.

50 — See Article 1(2) and (4) of Regulation No 1914/87 and Commission Regulation No 3061/87 of 13 October 1987 (OJ 1987, L 290, p. 10).

levy, had already ended at that date. It is of no account in this regard that the final amount due from the undertaking concerned in respect of the levy remained to be determined. That is a purely administrative procedure for the completion of which all factual elements were already present.

119. This is also true of the date on which the levy is due. The regulation provides that the special elimination levy must be paid before 15 December 1987. However, liability to pay the levy as such is quite independent of the date by which it must be paid. Consequently, Regulation No 1914/87 can be valid only if the objective which it pursued necessitated its adoption and the legitimate expectations of parties concerned were properly respected.

(a) Objective of Regulation No 1914/87

120. The objective of Regulation No 1914/87 is to reinforce the principle that the sugar sector should be self-financing, a principle anchored in the common organization of the market in sugar since the beginning of the 1980s. The initial introduction of production levies and the subsequent imposition of the solidarity levy were designed to realize that objective.

121. The legislature has in principle a wide discretion with regard to defining in concrete terms the detailed rules for the organization of agricultural markets and the selection of objectives to be pursued therein, subject to the condition that such objectives must not constitute a misuse of powers. It is indisputable that the market in sweeteners is the only Community agricultural sector so far to which the principle of 'full financing of costs by producers themselves' [51] has expressly applied.

122. The detailed legal rules for the attainment of an objective also come in principle within the discretion of the legislature. Nevertheless, it must for reasons of legal certainty respect the limits which it itself has defined and it may not make arbitrary alterations. Account must be taken of the legitimate expectation on the part of persons to whom those rules are directed that they continue to be in existence, particularly if those persons arrange their affairs on the basis of the legal position in force, and they must be given the opportunity to adapt their conduct in accordance with changes in the law.

(b) Was there a legitimate expectation on the part of sugar producers that their obligation to make up losses would be limited?

123. This question must be examined in the light of the existing legislation.

124. Regulation No 1785/81 [52] lays down the principle that producers themselves should meet costs in full, although this system should apply for a limited period only and should be regarded as transitional. Article 28, however, sets out maximum amounts for the levies necessary to cover costs, and these maximum amounts may not be exceeded. [53]

51 — See the preamble to basic Regulation No 1785/81

52 — 11th recital in the preamble.

53 — See paragraphs 3 and 5 of Article 28 of Regulation No 1785/81

125. These texts do not answer the question of what happens if the full financing of the costs by the producers is not achieved by means of the maximum amounts specified. I do not believe that this is sufficient to give rise to a legitimate expectation that the maximum amounts will not be exceeded.

126. The frame established by Regulation No 1785/81 was given detailed content by Regulation No 1738/85,[54] under which the maximum amount for B sugar was raised from 30% to 37%. This regulation also provided that losses resulting from the obligation to export surpluses of Community sugar were to be covered within *certain limits.*[55]

127. The principle of limitation is clearly expressed in this regulation.

128. Regulation No 934/86[56] reiterates 'the principle that producers are financially liable for all . . . losses' and, in addition to changes in the system of financing, introduces an elimination levy for this sector. The regulation also contains a provision to the effect that at the end of the 1987/88 marketing year there is to be recorded cumulatively for the two marketing years 1986/87 and 1987/88 inter alia the total sum of the basic production levies and the B levies charged.

129. This regulation does not alter the maximum limits for existing contributions, but it does introduce a new elimination levy 'designed to eliminate the ECU 400 million deficit recorded following application of the quota arrangements in the period 1981/82 to 1985/86'.[57]

130. Although the regulation does refer to specific limits, it goes beyond the limits hitherto defined through its introduction of the elimination levy and it stresses the principle that 'producers are financially liable for all . . . losses'.[58] Every sugar producer was thereby made aware of the Council's determination to make producers liable for all losses.

131. This however was the situation when the contested Regulation No 1914/87 was adopted. A legislative measure which is self-contradictory cannot give rise to any legally protected expectation. This is particularly the case where public authorities are required to shoulder the costs of their own economic activities. In the absence of a clear, unambiguous and legally binding consent on the part of the person who bears the costs, there can be no legally protected expectation.

132. There could therefore be no justified expectation on the part of producers that the Council would adhere to certain limits and depart from the principle that producers should be fully responsible for all losses. The Council was therefore not precluded by the principle of legitimate expectation from imposing on producers the charges resulting

54 — OJ 1985 L 167, p. 2.
55 — First recital in the preamble.
56 — OJ 1986 L 87, p. 1.
57 — See Article 32a.
58 — Second recital in the preamble.

from the principle that producers should be financially liable for all losses.

133. An attempt has also been made to derive from Council Regulation No 1107/88 [59] (concerning the introduction of an additional levy) arguments in support of the existence of a pre-existing legitimate expectation or of the contention that the Council had previously bound itself in the matter. The first observation to be made on this is that the interpretation of earlier legal measures in the light of subsequent measures is, as a method, questionable. In addition, the point that it was not guaranteed in the past that the objective of self-financing could be attained and that, accordingly, it was foreseeable that the mechanism for self-financing would be reinforced is not an effective argument against Regulation No 1914/87.

134. It is quite clear and not open to dispute that the original mechanisms for the self-financing of the sector were inadequate and resulted in deficits which had to be made good. The objective of the additional levy is to prevent such deficits from arising and to ensure 'that all future losses resulting from the disposal of the Community's surplus production are covered, in respect of each marketing year, by the producers' financial contributions'. [60] One cannot conclude from this that it would be unlawful also to pass the losses which arose in the past on to the persons responsible for them.

135. Furthermore, it should be pointed out that the Community had to choose at that time between introducing a special elimination levy and reducing production quotas. The latter would have hit sugar producers harder than a financial levy.

136. In addition, this solution would have been impossible for the 1986/87 marketing year, since the overall loss only became known after the quotas had already been used up. Moreover, the special elimination levy only affected those economic operators who had been responsible for the deficit to be eliminated. The appropriate solution therefore (and in this I must agree with the defenders of the contested regulation) was not to reduce quotas, but rather to introduce the special elimination levy.

137. If the view is not accepted that sugar producers could not have acquired, on the basis of the existing tests, a legitimate expectation that the Community would cover the deficits for which they were responsible, or in any event that they could not have continued to nurture such an expectation, account must be taken of the matters which the United Kingdom, the Council and the Commission have put into consideration. These are that the Commission published on 9 September 1986 an estimate which clearly indicated the likelihood of a deficit in respect of the 1986/87 marketing year. The Commission submitted in February 1987 the proposal for the introduction of the special elimination levy. On 7 March, the Commission representative explained the proposal before the Advisory Committee on Sugar, and the proposal was finally published in the Official Journal on 3 April 1987. All this information was available to sugar producers through the specialized press, and for that reason they could not have been surprised by the introduction of the special elimination levy. These arguments would also suggest that the Council acted quite properly in adopting Regulation No 1914/87 and did not infringe the principle of the protection of legitimate expectations.

59 — Council Regulation No 1107/88 (OJ 1988 L 110, p. 20).

60 — Sixth recital in the preamble to Regulation No 1107/88, loc. cit.

138. My examination of the issues raised has not, up to now, brought to light any factor of such a kind as to affect the validity of the regulation.

3. *Prohibition on burdening of an economic sector with extraneous risks and the disproportionate nature of the levies*

(a) Burdening of an economic sector with extraneous risks

139. In the reservations which it expresses regarding the validity of Regulation No 1914/87, the national court is obviously proceeding on the assumption that there exists in Community law a prohibition on burdening an agricultural sector with extraneous risks. That court understands an extraneous risk as consisting of factors which give rise to or increase costs which do not have their immediate origin in the common organization of the market and in the conditions existing in the Common Market. It sees such an extraneous risk in the price level of sugar on the international market, a level which is essentially determined by sugar production in non-member countries and the fall in the value of the US dollar. The low price level of sugar on the world market caused substantial export refunds to be paid and these in turn were responsible for the budgetary deficit which had to be offset by the special elimination levy.

140. It is unclear what legal basis exists for the principle that price- forming factors within a common organization of the market, such as in this instance the world market price or the fall in the value of the dollar, may not be passed on to operators within the relevant agricultural sector in the form of financial charges. The description of such factors as 'extraneous risks' itself appears questionable. Admittedly, we are dealing here with circumstances which lie outside the sphere of influence of producers within the internal market as well as outside that of the Community institutions invested with public powers, which can only react to such developments, but cannot in any way direct them. None the less, these factors must be regarded as influential factors inherent in the system of the common organization of the market. Both the price regulation mechanism with its system of refunds and levies and the rules which apply to trade with non-member countries constitute an integral part of the common organization of the market in sugar. [61]

141. Despite their effect of increasing costs, export refunds benefit the Community market in sugar in so far as they form part of the price guarantees. Conditions on the internal market cannot be considered separately from developments on the world market. The common organization of the market in sugar is itself based on the interdependencies which exist between those two markets.

142. Given these conditions, the question arises as to how a limit might be placed on the large volume of export refunds. If we proceed in this regard on the basis that price guarantees must be retained, the only appropriate method for consideration will be a reduction in the guaranteed quantities, that is to say, the A and B quotas. This once again demonstrates the mutual dependency and interconnection between regulatory mechanisms in the common organization of

61 — See Titles I and II of the basic regulation.

the market and developments outside the internal market. It is for that reason not correct to speak of 'extraneous risks', which by definition cannot influence the financial burdens of economic operators within a common organization of the market.

(b) Observance of the principle of proportionality

143. It is possible to discern a submission alleging a breach of the principle of proportionality only in so far as it is claimed that the financial charges resulting from the special elimination levy are unreasonable because of the amounts involved and the fact that they are in addition to earlier levies. In order to decide the question whether the special elimination levy is disproportionate and consequently invalid it has to be considered whether and to what extent the principle of self-financing in the sector in question was properly introduced and to what degree the special elimination levy is necessary and suitable for the attainment of that objective.

144. The administration of an agricultural sector within the framework of a common organization of the market comes in principle within the discretion of the Community legislature. No criticism can be levelled at the objective that a market sector should be self-financing. It is immaterial that this objective does not expressly apply to all aspects of the Common Agricultural Policy. In any event, such an objective would be unobjectionable in law. The conception in the Treaty of the common organization of agricultural markets does not require that it must permanently be 'a subsidized undertaking' as is de facto the case. The fact that the principle of self-financing was introduced for one market sector and not for others does not in itself present any problems, since economic operators in the different market sectors are not in comparable situations vis-à-vis one another. The implementation of the principle of self-financing, in circumstances which are otherwise legally correct, must therefore be regarded as permissible.

145. If we start from this premiss, it is however essential that the financial charges arising from the system of price and sales guarantees should in some form fall also on those market participants who, as subjects of the common organization of the market, benefit from the regulation of that market. The level of charges deriving from the system cannot be criticized so long as there is an economic correlation between benefits and burdens. At most, one might criticize, on grounds of material justice and the prohibition of discrimination, a requirement to make contributions with respect to budgetary deficits not caused by the production of the undertaking subjected to that requirement.

146. However, the special elimination levy presents no problem in this regard, since it imposes obligations on those economic operators who engaged in the production giving rise to the costs in question. The submissions based on the unlawful burdening of an economic sector with extraneous risks and the disproportionate nature of the levy must therefore be rejected.

4. *Breach of the prohibition of discrimination*

147. The plaintiff in the main proceedings disputes the validity of Regulation No 1914/87. That regulation, it argues,

infringes the prohibition of discrimination under Article 40(3) of the EEC Treaty, in the first place because it imposes different charges on the production of A and B sugar, and secondly because a heavier burden is imposed on the German sugar industry, which has a comparably high B quota, than is imposed on the sugar industry of other Member States. Apart from the fact that comparable situations are involved, differences in the treatment of which cannot be justified on any objective grounds, the discrepancies in the charges imposed on A and B sugar are in particular unlawful because the special elimination levy does not represent a charge for the regulation of the market, but is rather a financing charge, in respect of which the principle that persons subject to a charge should be treated equally must a fortiori be observed. As early as the fixing of the elimination levy under Regulation No 934/86, referred to as a solidarity levy, the objective was to impose an equitable charge on all aspects of sugar production and this ought a fortiori to have been prescribed in the case of the special elimination levy.

148. Before I examine whether the special elimination levy constitutes discrimination, I would point out that, according to the views expressed here, the special elimination levy is a measure designed to regulate the market, which requires to be examined in the context of the common organization of the market in sugar, and is not a purely financial charge.

(a) The heavier charge imposed on the production of B sugar

149. The special elimination levy is calculated on the basis of the different production levies imposed on A and B sugar under Article 28 of the basic regulation. Since the amount of the special elimination levy is determined simply by applying a coefficient to the production levies due, the special elimination levy is imposed on the production of A and B sugar in the same ratio as are the production levies under Article 28 of the basic regulation.

150. In so far as the discrepancy in the charges imposed on A and B sugar does not constitute unlawful discrimination, it is permissible to conclude that the special elimination levy is equally non-discriminatory in its effect. While it has to be admitted, when deciding whether the production of A sugar and that of B sugar represent comparable situations, that both cases concern sugar and consequently the same product, the same observation must also apply to C sugar. It is thus necessary to have regard not only to the product itself, but also to its function within the common organization of the market. In this connection, it should be noted that the difference between A sugar and B sugar has a historical basis. As early as the first common organization of the market introduced by Regulation No 1009/67,[62] a distinction was drawn between a 'basic quota' and a 'maximum quota' for each undertaking and each marketing year. The recitals in the preamble to that regulation state that:

'This aim [limitation of production] could be achieved by allocating to each factory or undertaking . . . a basic quota for which a price and sales guarantee would be given by the Community and by limiting or withdrawing this guarantee for quantities manufactured over and above the basic quota,

62 — Regulation No 1009/67 of the Council of 18 December 1967 on the common organization of the market in sugar (OJ, English Special Edition 1967, p. 304).

depending on whether or not they exceed a certain ceiling'. [63]

This objective is implemented in Article 22 et seq. of the regulation. This system, the period of application of which had originally been limited to July 1975, was extended with a number of amendments through Regulations No 3330/74 [64] and No 1592/80. [65]

151. During the period of validity of Regulation No 3330/74, the Court described as follows the quota system within the organization of the market in sugar:

'(a) In accordance with Article 24 each undertaking is allotted a basic quota, called "Quota A" and may sell the sugar produced within that quota directly on the Community market at the intervention price;

(b) Pursuant to Article 25 each undertaking may in addition be allotted a quota, called "Quota B", equal to its Quota A multiplied by a coefficient and may also sell on the Community market the sugar produced within these limits on payment of a production levy (Article 27);

(c) The sugar produced over and above the Quotas A and B, called "Sugar C" may not be disposed of on the internal market and must be exported in the natural state on the world market before 1 January following the end of the sugar marketing year during which it has been produced (Article 26).' [66]

152. That system was replaced, with effect from 1 June 1981, by Regulation No 1785/81, which is here referred to as the basic regulation. The terms 'A, B and C sugar', 'A quota' and 'B quota', were also incorporated, from the point of view of terminology, the basic regulation. That regulation basically retained the system under which both A and B sugar could be marketed in the common market with the aid of price guarantees, although from the outset there was a possibility that an appreciably higher production levy would be charged in respect of B sugar. A consequence of the production levies is a reduction in the guaranteed prices. [67] In contrast to a simple reduction in the intervention price, the system of production levies has the advantage that it takes account of Community interests, such as the principle of regional specialization.

153. With regard to the quantities of quota sugar produced, it should be pointed out that the sugar produced within the A quota corresponds approximately in volume to sugar consumption within the Community. Although the marketing of B sugar is not attached to any specific objective, the Court

63 — 10th recital in the preamble to Regulation No 1009/67

64 — Regulation of the Council of 19 December 1974 on the common organization of the market in sugar (OJ 1974 L 359, p. 1).

65 — Council Regulation of 24 June 1980 on the application of the system of production quotas in the sugar and isoglucose sectors during the period 1 July 1980 to 30 June 1981 (OJ 1980 L 160, p. 12).

66 — Judgment in Joined Cases 103 and 145/77 *Royal Scholten-Honig and Tunnel Refineries Limited* v *Intervention Board for Agricultural Produce* [1978] ECR 2037, at paragraph 39.

67 — With regard to the system of quotas and sugar production levies, see also the judgment in Case 250/84 *Eridania Zuccherifici Nazionali SpA and Others* v *Cassa Conguaglio Zucchero and the Italian Ministry of Finance and Treasury* [1986] ECR 117.

has stated, against the background of a sugar market characterized by surplus production and in view of the function of production quotas, that 'all undertakings which exceed their A quota therefore produce, by definition, surpluses for export'.[68] This analysis explains the considerably heavier charges imposed on B-sugar production and the resultant restrictions placed on the special rules applying to its disposal within the common organization of the market in sugar.

154. The above considerations justify the conclusion that A sugar and B sugar do not constitute the same product within the common organization of the market, with the result that it is not possible to speak of comparable situations when examining the problem of equal treatment. However, if one none the less were to proceed on the basis that they are comparable, the grounds already outlined are sufficient to justify the different levels of charges imposed within the common organization of the market. As already mentioned, this reasoning, in so far as it justifies a higher production levy in the case of B sugar, justifies in like degree the imposition of the special elimination levy.

(b) Misuse of powers

155. This appears to be a suitable point at which to examine the objection that the special elimination levy is vitiated by misuse of powers. It is claimed that the true objective of the regulation is not to compensate for losses incurred during the 1986/87 marketing year, but rather to dissuade sugar producers from all production of B-quota sugar. It was for this reason that a strangulatory levy was imposed on the production of B sugar.

156. It should first be pointed out that the recitals in the preamble to Regulation No 1914/87, and the general conception of that regulation, indicate very clearly that it was intended to cover the budgetary losses arising in the 1986/87 marketing year by means of the special elimination levy. The only question possible is therefore whether this was the only objective pursued and, if relevant, whether other objectives were legally permissible.

157. It is not disputed that the practical effect of the production levy is similar to that of a reduction in price guarantees.[69] In so far as a heavier charge is imposed on B sugar, the surplus production which cannot be sold within the Community is charged in a purely theoretical manner. The surplus lawfully produced under production quotas is thus the essential cause of the high budgetary deficit, since export refunds must be paid when it is exported from the Community. The fact that it is much less attractive from an economic point of view to produce B-quota sugar than to produce A-quota sugar, in view of the higher charges imposed on surplus production, which may be theoretically defined as B sugar, is a lawful consequence of the method by which deficits are apportioned, which is intended to affect surplus production to a greater degree than sugar which can be disposed of in the common market.

158. This reasoning cannot be countered by the argument that ultimately both A sugar and B sugar contribute to surplus production, that both benefit from the

68 — See Case 250/84, loc. cit., at paragraph 32 of the judgment.

69 — See Case 138/78, loc. cit., at paragraph 6 of the judgment.

advantages of the intervention system and that both attract export refunds when they are exported. The difference between A sugar and B sugar lies in their legal status. The distinction drawn at the time of the first organization of the market in sugar justifies a factual difference in treatment, with the result that the imposition of additional charges on production of B sugar does not amount to a misuse of powers.

(c) Discrimination in the treatment of the sugar industry from one Member State to another

159. Finally, the plaintiff in the main proceedings argues that the special elimination levy is discriminatory and consequently invalid on the ground that it imposes on the sugar industry a charge which varies in amount from one Member State to another. The discrepancy in the average charge imposed is due solely to the unequal apportionment of A and B quotas among Member States. Heavier charges are accordingly necessarily imposed on the sugar industry in Member States which have a comparably higher B quota. If the inequality in treatment objected to is not in fact based on the method of imposing the special elimination levy, but rather on the allocation of production quotas determined according to differing criteria, it cannot merely for that reason be declared invalid.

160. The complaint of discrimination is ultimately an attack on the allocation of quotas, if it is accepted that the imposition of a higher charge on B sugar is permissible in law. However, as the plaintiff in the main proceedings itself stated, the allocation of quotas is in large measure the result of political negotiations. Any assessment of the results of negotiations conducted in the context of legislative activity must assume a priori a wide measure of discretion on the part of the legislature. Furthermore, the pursuit of objectives which are mandatory or at least permissible under Community law may also have an effect on the final outcome. Thus the allocation of quotas, apart from having the objective of stabilizing markets, also expressly pursues that of regional specialization. Moreover, the Court has already held that this procedure, which results in differences in the treatment of national economies, does not constitute prohibited discrimination.[70] In conclusion, therefore, the objection of discrimination must also be rejected.

(d) Method of charging only in accordance with the example of the 'solidarity levy'

161. It remains in this connection to examine the objection that the special elimination levy ought, if at all, to have been charged in the form of the imposition of the solidarity levy under Regulation No 934/86, that is to say, imposed in equal measure on A sugar and B sugar. Against this it should be pointed out that even if one regards the charges as being equivalent within the common organization of the market in sugar, their situations are still not identical. Whereas the solidarity levy, as is already evident from its title, was designed to make good, on the basis of solidarity, a deficit built up over several years, the special elimination levy placed more emphasis on individual responsibility in so far as it was linked to production in the marketing year during which the deficit had arisen. There was therefore no obligation in law to choose

70 — Judgment in Case 230/78 *Eridania-Zuccherifici Nazionali and Societa Italiana per l'Industria degli Zuccheri* v *Minister of Agriculture and Forestry and Others* [1979] ECR 2749, at paragraph 17 et seq; also see Case 250/84, at paragraph 11 et seq of the judgment.

the system for collecting the solidarity levy for the purposes of the special elimination levy.

5. *Protection of the right to own property and the freedom to pursue an economic activity*

(a) Infringement of the right to own property

162. The plaintiff in the main proceedings disputes the validity of Regulation No 1914/87 on the ground that it infringes the fundamental right to own property and the freedom to pursue economic activities. It claims that the special elimination levy is strangulatory in nature, since it is imposed on top of other financial charges. The total burden placed on the plaintiff constitutes a serious financial interference with the intrinsic value of the business established and pursued by it. The real-asset loss is at the same time an interference with the undertaking's competitive capacity.

163. The plaintiff claims that the amounts of the levies imposed on the B quota will result in sugar-beet growers growing very little sugar beet, if indeed any at all, under their B quota. The resultant fall in supplies will prevent the proper utilization of the undertaking's capacity and inhibit its economic recovery.

164. The Court has consistently held that fundamental rights form an integral part of the general principles of law whose observance is ensured by the Court.[71] Quite recently the Court confirmed that it is bound, when safeguarding such rights, to draw inspiration from constitutional traditions common to the Member States, and that it cannot therefore uphold Community measures which are incompatible with fundamental rights recognized by the constitutions of those States.[72] It has been recognized that the right to own property and the freedom to pursue a trade or profession rank among the general principles of Community law.[73] As in the constitutional systems of the Member States, those principles do not constitute an unfettered prerogative, 'but must be viewed in the light of [their] social function'.[74]

165. The Court outlined as follows the criteria to be used when determining whether there has been an unlawful infringement of protected rights or whether there has been a legitimate restriction on the exercise of personal rights: rights of this nature 'are protected by law subject always to the limitations laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched'.[75]

166. The Court has also stated elsewhere that:

'Consequently, the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context

71 — Judgment in Case 4/73 *Nold* v *Commission* [1974] ECR 491; judgment in Case 44/79 *Hauer* v *Land Rheinland-Pfalz* [1979] ECR 3727; and judgment in Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237.

72 — Case 265/87, loc. cit. at paragraph 14 of the judgment.

73 — Case 44/79, loc. cit., and Case 265/87, loc. cit.

74 — Case 265/87, loc. cit., at paragraph 15, and Case 4/73, loc. cit., at paragraph 14.

75 — Case 4/73, at paragraph 14 of the judgment.

of a common organization of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed'. [76]

167. If we apply those criteria to the facts of the present case, the question to be answered amounts to asking whether the special elimination levy can be justified by an objective pursued by the Community in the common interest, and in particular whether it serves the recognized objectives of the common organization of the market, is not disproportionate to the objective pursued and does not encroach upon the very substance of the freedoms protected.

168. I have already drawn attention to the fact that the special elimination levy was designed as a measure to implement the principle of self-financing within the common organization of the market in sugar. It has also already been ascertained that the relatively high charge imposed on the production of B sugar is not disproportionate to the objective pursued, particularly in view of the fact that it is difficult to envisage a less drastic method for achieving that objective.

169. Although production limitation is not one of the declared objectives of the special elimination levy, it may none the less be described as a regulatory measure within the common organization of the market. If a diminution in B-sugar production was indeed intended as a side effect of the special elimination levy, that would still not mean that the measure was disproportionate. Measures for the regulation of the market — which include, considered in their broadest sense, the special elimination levy — must be considered in the light of the whole context of the legislation.

170. It was originally intended that the problem of surplus production should not be resolved by restrictions on production, i. e. a reduction in quotas. It was decided to introduce the special elimination levy in order to avoid, at least temporarily, the need to adopt such a drastic measure. Even if the amount of that levy rendered the production of B sugar uneconomical and consequently resulted indirectly in a limitation on production, such a consequence would still not constitute an encroachment upon the substance of the right to own property. Even a reduction in production quotas imposed for reasons of market policy would be permissible, given that an undertaking 'cannot claim a vested right to the maintenance of an advantage which it obtained from an organization of the market in the form in which it existed at a given time'. [77]

(b) Interference with the freedom to pursue an economic activity

171. Finally, the foregoing arguments also preclude acceptance of the view that there has been an interference — in breach of fundamental rights — with the undertaking's freedom to pursue an economic activity. The economic activity of the undertaking as such is not restricted. On the

76 — Case 265/87, at paragraph 15 of the judgment

77 — Judgment in Joined Cases 133 to 136/85 *Walter Rau Lebensmittelwerke and Others* v *Bundesanstalt fur landwirtschaftliche Marktordnung* [1987] ECR 2289, at paragraph 18; see also Case 230/78, loc. cit., at paragraph 21 of the judgment.

contrary, the production quotas remain the same as before and as a result the marketing guarantee for the finished product, sugar, continues to apply as previously. The only ascertainable restriction lies in the resultant limits imposed on the preferential regimes. Such interference, however, still remains within the bounds of a lawful regulation of the exercise of a trade or business. Although the reduction in advantages may have serious consequences for the operators affected, it cannot be considered as constituting an infringement of the fundamental right to pursue an economic activity.[78]

6. Breach of the principles governing the levying of taxes in the German legal system

172. The plaintiff has submitted that the levy system and in particular the system whereby charges are passed on are at variance with principles of German administrative and constitutional law which, as general principles of law, are also protected under Community law. It argues that the legal principles in the light of which the levy system falls to be examined are also recognized in Community law and that consequently the results of such an examination must also apply within the Community legal order, which is not yet so highly developed in this area.

173. It must be pointed out with regard to this submission that the fact that Community legislation is allegedly or effectively at variance with the principles applicable in Member States regarding the levying of taxes may result in the invalidity of such legislation only if the national constitutional principles in question also constitute general principles of law in the Community legal order. Only in that case can they be used as a test of validity. In so far as the plaintiff submits that the relevant principles of constitutional and administrative law, such as for example the principle of proportionality, the prohibition of discrimination and the prohibition of retroactivity, are recognized as such in Community law, it is necessary to point out that those legal principles, as formulated in Community law, have already been used as criteria for testing the regulation at issue.

174. However, no other constitutional principles in the nature of fundamental rights, which ought to be recognized as general principles within the Community legal order and which would result in the invalidity of Regulation No 1914/87, have been put forward in argument. Consequently, the special elimination levy is not invalid on the ground that it infringes national principles governing the levying of taxes.

175. Consideration of the question referred to the Court for a preliminary ruling has therefore revealed no factors of such a kind as to affect the validity of Council Regulation No 1914/87.

Costs

176. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs should be a matter for that court. The costs incurred by the United Kingdom, the Italian Government, the Council and the Commission are not recoverable.

78 — See also Case 230/78, at paragraph 22 of the judgment.

C — Conclusions

On the basis of the foregoing considerations, I propose that the Court reply as follows to the questions referred to it by the national court:

(1) The second paragraph of Article 189 of the EEC Treaty must be interpreted as meaning that a court in a Member State which wishes to suspend by way of interim relief the effects of an administrative act based on a measure of Community law, on the ground that it has doubts as to the validity or the effectiveness of the measure of Community law on which the administrative act is based, is under an obligation to refer the question of the validity and effectiveness of the measure of Community law concerned to the Court of Justice.

The national court is bound by Community law with regard to the nature and scope of the suspension.

The court dealing with the substance of the case must baes its decision on that of the Court of Justice regarding the validity and effectiveness of the measure of Community law.

(2) Consideration of the question referred has revealed no factor of such a kind as to affect the validity of Council Regulation No 1914/87.