domestic products as well as to imported products according to the same criteria can constitute a charge having an effect equivalent to a customs duty on imports only if it has the sole purpose of financing activities for the specific advantage of the taxed domestic product, if the taxed product and the domestic product benefiting from it are the same, and if the charges imposed on the domestic product are made good in full.

In Case 222/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Pretore of Reggio Emilia for a preliminary ruling in the proceedings pending before that court between

I.C.A.P., San Maurizio,

and

WALTER BENEVENTI, Reggio Emilia,

together with

FEDERGROSSISTI (Federazione Nazionale Commercianti Alimentari) [National Food Trade Federation], Rome, intervener,

on the interpretation of Articles 33 to 44 inclusive of Regulation (EEC) No 3330/74 of the Council of 19 December 1974 on the common organization of the market in sugar (Official Journal 1974 L 359, p. 1) and of Articles 12 and 40 (3) of the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), A. M. Donner, P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

On 18 December 1967 the Council adopted Regulation No 1009/67/EEC on the common organization of the market in sugar, which came into force on 1 July 1968; the regulation applied *inter alia* to white and raw beet sugar and cane sugar and also to sugar beet and sugar cane.

Under Article 34 the Italian Republic is, up to and including the 1974/75 marketing year, authorized to grant "adaptation subsidies to its beet growers and to its beet processing industry" — that is to say, the sugar industry. The subsidy may not exceed a specified sum per tonne of beet or per 100 kg of white sugar; it may only be granted in respect of a quantity which is within the basic quota. With reference to this, the fourteenth recital in the preamble to the said regulation states that "beet and sugar production in Italy is rendered difficult by climatic conditions and, in the case of beet production, by the additional problems presented by the application of modern production methods" and that "provision should be made for granting temporary subsidies to both these activities".

Under Article 38 of Regulation (EEC) No 3330/74 of the Council of 19 December 1974, which repeals Regulation No 1009/67/EEC, the Italian Republic is authorized to grant, during the 1975/76 to 1979/80 marketing years, adaptation aid which may not exceed a total of 5.9 units of account per tonne of beet with a 15% sugar content processed into sugar. This maximum of 5.9 units of account was, for the 1976/77 marketing year, raised to 9.9 units of account, a portion of which might be granted to the processing industry (Regulation (EEC) No 1487/76 of the Council of 22 June 1976, Official Journal L 167, p. 9).

Order No 1195 adopted on 22 June 1968 by the Comitato Interministeriale dei Prezzi [Interdepartmental Committee on Prices, hereinafter referred to as "the Price Committee" (Gazzetta Ufficiale No 162 of 27 June 1968, p. 4057) established on the Italian market the Cassa Conguaglio Zucchero [Sugar Equalization Fund] financed in particular by a sovrapprezzo [surcharge] on every quantity and type of white sugar, whether home-produced or imported.

Paragraph 6 of the operative part of that measure provided that the income of the Fund must be used to pay for:

— The subsidy to beet growers and the beet processing industry "pursuant to Article 34 of Regulation No 1009/67";

— The subsidy to the processing industry in the form of the refund of

tax paid on the proceeds of the purchase and transport of beet;

— The subsidy in respect of the storage costs of the surplus from the 1967/68 harvest and "in respect of losses in exporting it [surplus white sugar produced during the 1967/68 sugar year] ... which has to be exported before 1 July 1969 (Regulation No 457/68 of 11 April 1968)";

— The subsidy to sugar undertakings in order to offset payments made by the latter to beet growers in accordance with an earlier national measure;

— Aid towards a financial reorganization in respect of the cost of transactions carried out in the past by the Equalization Fund in respect of the price of imported sugar;

— A subsidy to exporters equivalent to the amount of the surcharge referred to above;

— Interest on debit balances for subsidy payments related to surplus output;

— Payment of the management expenses of the Fund.

The so-called ordinary *sovrapprezzo* was fixed at Lit. 56 per kg for the marketing year 1975/1976 (Price Committee Order No 14/1975 of 1 July 1975) and increased to Lit. 70 per kg for the 1976/1977 marketing year (Price Committee Order No 20/1976 of 1 July 1976), to Lit. 94 per kg for the 1977/1978 marketing year (Price Committee Order No 37/1977 of 26 July 1977) and to Lit. 113.50 per kg for the current marketing year (Price Committee Order No 15/1978 of 4 July 1978, Gazzetta Ufficiale No 187 of 6 July 1978, p. 4853).

The special charge which forms the subject-matter of the action pending before the national court — levied *una tantum* on stocks existing at the time of the change-over from one marketing year to the next — was introduced by Order No 15/1978, cited above. The statement of the reasons on which that order was based points out the need:

"for the purposes of unification and equalization of prices in respect of sugar in stock at midnight on 5 July 1978 to order payment to the Cassa Conguaglio Zucchero of contributions calculated with regard to the differences between the new national prices and those applied previously, *subject to the amount of the increase in producer prices fixed at the Community level for the 1978/1979 marketing year*, excluding denatured sugar intended for the feeding of cattle as well as the working stocks of the consumer industries".

The amount of the special charge was fixed at:

(a) Lit. 19.50 per kg net of white sugar, and it is due if the *sovrapprezzo ordinario* [ordinary surcharge] of Lit. 94 laid down for the previous marketing year (1977/1978) has already been paid to the Cassa Conguaglio. This amount represents the difference between the amount of the ordinary *sovrapprezzo* laid down for the current marketing year (Lit. 113.50) and that of the previous marketing year (Lit. 94).

(b) — Lit. 21 per kg net of white sugar, payable by wholesalers and importers;

— Lit. 14 per kg net of white sugar, payable by retailers.

The Italian authorities levied these amounts on the proportion of the price corresponding to the gross profit resulting from the difference between the maximum selling price at the wholesale or import stage and

the maximum price at the retail stage in Italy in 1977/1978 and 1978/1979.

By a writ of 11 September 1978 I.C.A.P. Distribution s.r.l., San Maurizio, brought proceedings before the Pretore of Reggio Emilia against Walter Beneventi's undertaking Nuova Commissionaria Zuccheri, having its principal place of business in Reggio Emilia, claiming that it should be ordered to pay the sum of Lit. 252 000 by way of reimbursement of the charge of Lit. 21 per kg of sugar imposed by Price Committee Order No 15/78 on all stocks of sugar in Italy as from 5 July 1978.

As appears from the writ, I.C.A.P. had delivered 120 quintals of imported French sugar to the Walter Beneventi undertaking, the defendant, after the entry into force of Order No 15/78 and for this reason the special charge provided for by the order should have been applied to that quantity. Since, however, the goods had been bought by Beneventi before the entry into force of the order, I.C.A.P. sought payment of an amount corresponding to the charge due on the stocks as the storage on its premises had been carried out on behalf of Beneventi, the defendant undertaking.

After entering an appearance, Beneventi, the defendant undertaking, did not dispute the facts alleged by the plaintiff, but submitted that it could make no payment of an amount of Lit. 252 000 with reference to the special charge provided for by Order No 15/78 since that claim was based on a provision which was illegal under Community law. Consequently the defendant submitted that Order No 15/78 was to be regarded as illegal on the basis of the case-law of the Court of Justice as laid down in the judgments in Cases 23/75 *Rey Soda* and 77/76 *Cucchi* v *Avez*.

By an order of 14 September 1978 lodged at the Court Registry on 2 October 1978, the Pretore of Reggio Emilia asked the Court of Justice for a preliminary ruling on the following questions:

1. In the light of the judgments of the Court of Justice in Case 23/75 *(Rey Soda)* and in Case 77/76 *(Cucchi* v *Avez)*, must the provisions contained in Articles 33 to 44 of Regulation (EEC) No 3330/74 concerning sugar be interpreted in such a way that the imposition by the government of a Member State on sugar held in stock on its territory on 5 July 1978 of a pecuniary charge according to the following criteria:

   (a) it is imposed by a measure of the national government although it was not authorized by the Community institutions;

   (b) it is imposed with immediate effect upon sugar held in stock by commercial undertakings and consequently has retroactive effect in that it does not allow the undertakings to choose between buying sugar with the consequent imposition of the charge and not buying sugar with the consequent exemption from the charge;

   (c) it is imposed at the change-over from one marketing year to the

next, in the absence of the grounds mentioned in Article 33 of Regulation No 3330/74 which justify recourse to the provisions to be adopted in accordance with the procedure laid down in Article 36 of that regulation,

must be regarded as improper and prohibited and that it must be held that the Community institutions alone are competent with regard to sugar?

2. Must the provision contained in the second subparagraph of Article 40 (3) of the Treaty of Rome concerning the prohibition on discrimination be interpreted in such a way that a national charge on sugar imposed according to the criteria set out above in Question 1 is to be considered improper and prohibited in that it is *not* imposed solely when the sugar is held by national industrial producers, which enjoy a complete and exclusive exemption from payment thereof (whilst all other traders are liable to the said charge, albeit to varying degrees)?

3. Must the provision contained in Article 12 of that Treaty, concerning the prohibition on the introduction of charges having an effect equivalent to customs duties, be interpreted in such a way that the charge described above in Questions 1 and 2 is to be considered improper and prohibited in that, with regard to the origin of the sugar, it is imposed exclusively on sugar produced in the Community which is present in Italy on 5 July 1978 and on the other hand is not imposed on home-produced sugar held in stock by national industrial producers on that date?

4. Have the Community provisions mentioned above in Questions 1, 2 and 3 conferred upon the undertakings liable — under national legislation — to pay the pecuniary charge mentioned above the individual right not to pay such charge on stocks of sugar whether home-produced or imported, which are in their hands (and to claim the reimbursement of any payment made) or is such individual right not to pay (and to claim the reimbursement of any payment made) limited to quantities of sugar imported from Member States of the EEC and stocked by the directly importing undertakings or by other undertakings which have purchased it from the latter?

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the defendant and the intervener in the main action, by the Italian Government and by the Commission of the European Communities.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court

(a) Observations of the defendant and the intervener in the main action

First of all it is pointed out that in 1978 the Italian Government asked the Commission for application of Article 33 of Regulation No 3330/74 relating to the measures to be adopted in the event of disturbances on the sugar market. The Commission replied with a reasoned refusal, but the Italian Government adopted Price Committee Order No 15/78 in spite of the protests of the classes of persons affected.

Question 1

As to Question 1, the defendant and the intervener allege that after the judgment

in Case 77/76 *Cucchi* v *Avez* [1977] ECR 987, for 1977 the Italian Government considered it expedient formally to amend the statements of the reasons on which the measures for *disposal* of stocks were based with the aim of giving the impression that the provisions in question exclusively concerned the national components of Price Committee price formation without however affecting the increases established at Community level. However, the very fact that the Italian Government considered it necessary to ask the Commission to apply Article 33 of Regulation No 3330/74 shows in itself that the Italian Government does not possess any legal power from the Community point of view to apply a charge to stocks of sugar in the absence of express authorization by the Commission.

Comparison of the price components for 1977 with those of 1978 shows that in 1978 no increase occurred as regards the national components (except an imperceptible increase in costs, for example for paper bags). The only increase was that which was established at Community level, and was due to the devaluation of the green lira. It is a question of an upwards difference of Lit. 45.35 per kg net of sugar which the Community allowed any Italian trader who on 30 June 1978 held quantities of sugar in stock in his warehouse. Consequently, Italy has no power to limit that increase by allocating part to other persons, for example the Sugar Equalization Fund.

Since now the "subsequent charge" (which in the *Cucchi* v *Avez* case was referred to as the *"sovrapprezzo straordinario"* or "special surcharge") is fixed at Lit. 21 per kg as regards importation of sugar from EEC countries (see Article 7 of Order No 15/78), it is clear that that sum must be deducted from the increase laid down by the Community provisions thus limiting the amount of the latter.

The charge provided for by Order No 15/78 seriously affected, to the extent of 50%, the increase laid down at Community level.

The sugar importer cannot be identified with the normal wholesaler operating at the stage of the sale of the product to a retailer. He is rather the *alter ego* of the Community producer, and thus he is on the same level of competitive equality as other Italian industrialists manufacturing the same product.

Since he has the same clientèle as Italian sugar producers, that is to say above all sugar-consuming undertakings and national sugar wholesalers spread throughout Italy, it is clear that the importer will have to charge his customers at least the same prices as those which are charged by his industrial competitor, the Italian sugar producer. It would be absurd to imagine that an Italian sugar consumer or a normal wholesaler could obtain his supplies of sugar from an Italian importer if he had to pay the producer price plus the gross profit margin (Lit. 21.30).

In conclusion, the defendant and the intervener refer to paragraphs 33 and 34 of the decision in Case 77/76 *Cucchi* v *Avez* [1977] ECR at p. 1009.

Question 2

Price Committee Order No 15/78 contains a complicated network of different treatments for various classes of

persons. Sugar-manufacturing undertakings do not pay any tax on sugar stored in their warehouses. On the other hand, importers of sugar originating in other countries of the Community and wholesalers pay a tax of Lit. 21 and retailers a tax of Lit. 14 per kg.

However, the respective basic situations are strictly comparable from the point of view of the remuneration for their activities. This is true both of sugar which Italian producers buy from Community producers and themselves distribute in Italy and of sugar produced and marketed by one and the same Italian undertaking.

The rule in Article 40 (3) of the Treaty is of particular relevance to the present case. It is a matter of discrimination between Italian producers holding stocks of sugar of Italian origin and Italian dealers holding stocks of sugar also of Italian origin.

Question 3

In certain respects the present case presents similarities to and in other respects specific differences from Case 77/76 *Cucchi* v *Avez*, cited above.

The resemblance lies in the nature of the charge to tax; the specific new factor lies in the fact that an interpretation of Article 9 of the Treaty has been sought in relation to a particular characteristic of the charge, namely that it applies to all imported sugar whereas on the other hand it applies only to a part of home-produced sugar (sugar held in stock by producers is excluded).

After a critical examination of the case-law of the Court (Case 77/72 *Capolongo* [1973] ECR 611; Case 94/74 *IGAV* [1975] ECR 699; Case 77/76 *Cucchi* v *Avez*, cited above) the defendant and the intervener submit that that case-law should be followed.

Question 4

The answer to the Pretore's fourth question should be adapted to the seriousness of the breach committed by the adoption of Order No 15/78.

Whatever provision the Court of Justice finds to have been breached, it is clear that the Community rules give individuals the right to oppose the Italian Government's unlawful claim to levy the disputed charge imposed by Order No 15/78.

Consequently if, in reply to the Pretore's first question, the Court were to hold that Regulation No 3330/74 had been infringed, as was the case in *Cucchi* v *Avez*, it is clear that the national measure would have to be declared illegal in its entirety with the consequence that the traders affected could refuse to pay the contribution or could claim reimbursement if it had already been paid.

On the other hand, in the event of infringement of Article 12 of the Treaty, the charge would be a charge having equivalent effect and would therefore have to be abolished by reference to the taxation imposed by the other Member States.

If on the other hand it were held that the principle of non-discrimination referred to in the second subparagraph of Article 40 (3) of the Treaty had been breached, the appropriate solution might be different again, according to the Court's judgment in Joined Cases 124/76 and

20/77 *Moulins et Huileries de Pont-à-Mousson* [1977] ECR 1795.

(b) Observations of the Italian Government

Question 1

The present case concerns only the charges within the meaning of Article 7 (b) of Price Committee Order No 15/78. In this connexion the Italian Government refers to paragraphs 27 to 35 inclusive of the judgment in Case 77/76 *Cucchi* v *Avez.*

First of all, in this context no account should be taken of the fact that the charge imposed on retailers and importing wholesalers by the order comprises "... an intervention in the machinery for the formation of prices ..." in the Community.

As is expressly stated in the preamble to the order, the amount of the charge was established "... on the basis of the differences between the new national prices and those previously in force, whilst respecting the amount of the increase in producer prices laid down at Community level for the 1978/1979 marketing year ...".

The charge is therefore intended to effect an equalization *in the frame-work of the gross profit margins* allowed to wholesalers (or importers) and retailers and *in no wise limits the effects of changes occurring in Community prices or in the rate of exchange of the lira in relation to the unit of account.*

By the provision referred to in Article 7, Order No 15/78 has influence exclusively over the national — and not Community — components of the maximum imposed price: *the increase in the ordinary surcharge,* in relation to which national jurisdiction was confirmed by the Court in the aforementioned paragraph 26 of the judgment in Case 77/76; the *profit margins for the marketing of the product,* in relation to which national jurisdiction was acknowledged by the Court in its judgment of 29 June 1978 in Case 154/77 *Dechmann* [1978] ECR 1573.

Consequently authorization by Community institutions to apply that charge is not necessary.

The charge in question is usually imposed at the change-over from one marketing year to the next, because as a general rule that change-over brings about an increase in the national maximum price. However, there are exceptions to this rule, as emerges from Price Committee Order No 7/77 of 16 February 1977 *(Gazzetta Ufficiale della Repubblica Italiana* No 46 of 18 February 1977), which was adopted during the 1976/1977 marketing year and which (Article 4) imposed a charge of the same kind as the one in question, although in an amount limited to the increase in the ordinary surcharge.

As regards the charge imposed by Order No 15/78, the Italian Government considers that it is not possible really to speak of a tax. In fact that charge in no way aggravates the position of wholesalers (or importers, who are treated in like manner) and of retailers, in relation to their position during the preceding marketing year.

Wholesalers and retailers who bought sugar at the maximum price applying before the entry into force of Order No 15/78 and who resell it at the maximum price laid down in the said order do not bear any tax: their gross profit margin is in no way reduced. Therefore the effect of the charge in question is to effect an equalization of the excessive profit which

they would otherwise have obtained owing to the increase in national prices.

In these circumstances, any discussion relating to possible vested rights and to the principle of legitimate expectation becomes purposeless.

Question 2

The Italian Government considers that the prohibition referred to in the second subparagraph of Article 40 (3) of the Treaty does not concern possibly discriminatory measures adopted by a Member State outside the common agricultural policy.

Thus there is no discrimination between producer-processors on the one hand and wholesalers and retailers on the other.

By reselling the sugar produced during the preceding marketing year (that is to say produced with the sugar-beet costs of the preceding marketing year) at the new maximum price laid down by Order No 15/78, the producer-processors obtain a higher amount corresponding to the increase in the intervention price, having regard to the devaluation of the green lira, that is to say approximately Lit. 46 per kg. Of this amount, 60% has to be paid to the sugar-beet producers under the inter-trade agreement concluded in accordance with the requirements of Article 8a of Regulation No 206/68 of 20 February 1968 (Official Journal, English Special Edition 1968 (I), p. 19), in the version introduced by Regulation No 225/72 of 31 January 1972 (Official Journal, English Special Edition 1972 (I), p. 69). Out of the increase of approximately Lit. 46 per kg, approximately Lit. 28 goes to the sugar-beet producers, whereas the producer-processors retain approximately Lit. 18, that is to say an amount less than either that which remains for wholesalers after sale of stocks at the new price (Lit. 49.10 per kg) or that which remains for retailers (Lit. 50.46 per kg).

Question 3

According to the Italian Government, in the judgment in Case 77/76 *Cucchi* v *Avez,* cited above, the Court in essence ruled out the possibility that a charge such as the one in question in this case should be caught by the prohibition on charges having equivalent effect (paragraph 15 of the decision).

Since the charge does not represent a tax, it cannot be considered as a charge having equivalent effect. Furthermore, stocks of sugar imported from other Member States and stocks of home-produced sugar are treated identically.

Imported or home-produced sugar held in stock by producer-processors is not subject to the charge referred to in Article 7 (b) of the order (home-produced or imported sugar held in stock by producer-processors is also subject to the charge referred to in Article 7 (a) amounting to Lit. 19.50 per kg). On the other hand sugar, whether imported or home-produced, held in stock by wholesaler-importers or retailers is subject to the charge to the same extent and under the same conditions.

Question 4

It follows from these observations that Question 4 is purposeless.

(c) Observations of the Commission

Question 1

Referring to the case-law of the Court (Case 23/75 *Rey Soda* v *Cassa Conguaglio Zucchero* [1975] ECR 1279 and Case 77/76 *Cucchi* v *Avez* cited above), the Commission takes the view that the special charge at issue falls outside the "alterations in price levels at the change-over from one marketing year to the next" which form the subject-

matter of Article 33 of Regulation No 3330/74. The main reason for this is that the charge does not affect:

— The new Community intervention price applicable in Italy, expressed in units of account, which on 1 July 1978 changed from 35.36 units of account, per 100 kg (preceding marketing year) to 35.09 units of account per 100 kg; or

— The said price expressed in green lire having regard to the increase in the conversion rate for the green lira which changed from 1 unit of account = Lit. 1 030 to 1 unit of account = Lit. 1 154.

In fact without prejudice to the Community price increase the Italian authorities wished to charge, on sugar held in stock by wholesalers, importers and retailers on 5 July 1978, part of the gross profit margin resulting from the difference between the maximum selling prices applicable in Italy in respect of these different categories at the changeover from one marketing year to the next.

In brief, the compatibility of the special charge with Community law must be assessed solely on the basis of Article 95 of the Treaty.

It is possible to raise the question of the compatibility — and the limits of compatibility — of national measures unilaterally adopted by Member States imposing special charges of a fiscal or similar nature on specific agricultural products covered by a common organization of the market, with the machinery provided for by the common organizations of the market, in relation particularly to the application of a common price policy.

Stating that the problem is very complicated, the Commission refers in this connexion to the opinion of Mr Advocate General Trabucchi in Case 2/73 *Geddo* v *Ente Nazionale Risi* [1973] ECR at p. 887.

The Commission cites in particular paragraph 6 of the decision in the aforesaid Case 2/73 [1973] ECR 865, at pp. 878 and 879.

"Such does not appear to apply in the case of an internal tax affecting domestic products alone on completion of a contract covering them and designed to build up a fund to promote national production. Nor, on the other hand, could such a tax be contrary to the provisions of the regulation providing for export refunds *unless it appeared to be a method of reducing the amount of such refunds*";

and it states that these general considerations should be applied in the present case.

Having regard to the characteristics of the charge in question, in particular the fact that the said charge has no effect on the prices of products laid down by the Community authorities, the Commission takes the view that it falls outside the ambit of the rules relating to the common organization of the market in sugar. A charge of this kind belongs to a general system of national taxation applying to domestic products as well as to imported products according to the same criteria, and in conclusion constitutes a pecuniary charge whose compatibility with Community law must be assessed on the basis of Article 95 of the Treaty.

Question 2

The reference to the second subparagraph of Article 40 (3) is not valid. The principle of non-discrimination applies to measures adopted by the Community itself or by a Member State within the framework of the common organization of markets, but not to measures which are within the powers of the Member

States acting outside the organization of the market. Measures of this latter kind are to be assessed in relation to the specific provisions of the Treaty directed to the Member States, which also prohibit discrimination (Articles 12 *et seq.*, 30 *et seq.* and 95).

Question 3

A charge cannot fall simultaneously under the prohibition laid down in Articles 9 and 13 on the one hand and under the prohibition laid down in Article 95 on the other.

Having regard to its answer to Question 1, the Commission proposes that this question should be answered in the negative.

Question 4

Hence this question is purposeless.

III — Oral procedure

At the hearing on 6 March 1979, the defendant and the intervener in the main action, represented by G. M. Ubertazzi and F. Capelli, the Government of the Italian Republic, represented by I. M. Braguglia, Avvocato dello Stato, and the Commission of the European Communities, represented by its Agent, C. Maestripieri, submitted oral argument.

The Advocate General delivered his opinion at the hearing on 13 March 1979.

Decision

1 By an order of 14 September 1978 which was received at the Court on 2 October 1978, the Pretore of Reggio Emilia referred to the Court of Justice under Article 177 of the EEC Treaty four preliminary questions concerning the interpretation of certain Community provisions.

2 These questions are raised in the context of a dispute over the legality of contributions to the Cassa Conguaglio Zucchero [Sugar Equalization Fund] imposed under Order No 15/1978 of the Comitato Interministeriale dei Prezzi [Interdepartmental Committee on Prices, hereinafter referred to as "the Price Committee"] of 4 July 1978 (Gazzetta Ufficiale No 187, p. 4853).

3 The Pretore wondered whether in the light of the case-law of the Court certain provisions of that decision were compatible with Community law, in particular with Regulation No 3330/74 of the Council of 19 November 1974 on the common organization of the market in sugar (Official Journal 1974 L 359, p. 1), with the second subparagraph of Article 40 (3) and with Article 12 of the EEC Treaty.

4 In order to decide the question of the compatibility of the Price Committee order with Community law, the Pretore asked the following questions:

"1. In the light of the judgments of the Court of Justice in Case 23/75 *(Rey Soda)* and in Case 77/76 *(Cucchi* v *Avez),* must the provisions contained in Articles 33 to 44 of Regulation (EEC) No 3330/74 concerning sugar be interpreted in such a way that the imposition by the government of a Member State on sugar held in stock on its territory on 5 July 1978 of a pecuniary charge according to the following criteria:

(a) it is imposed by a measure of the national government although it was not authorized by the Community institutions;

(b) it is imposed with immediate effect upon sugar held in stock by commercial undertakings and consequently has retroactive effect in that it does not allow the undertakings to choose between buying sugar with the consequent imposition of the charge and not buying sugar with the consequent exemption from the charge;

(c) it is imposed at the change-over from one marketing year to the next, in the absence of the grounds mentioned in Article 33 of Regulation No 3330/74 which justify recourse to the provisions to be adopted in accordance with the procedure laid down in Article 36 of that regulation,

must be regarded as improper and prohibited and that it must be held that the Community institutions alone are competent with regard to sugar?

2. Must the provision contained in the second subparagraph of Article 40 (3) of the Treaty of Rome concerning the prohibition on discrimination be interpreted in such a way that a national charge on sugar imposed according to the criteria set out above in Question 1 is to be considered improper and prohibited in that it is *not* imposed solely when the sugar is held by national industrial producers, which enjoy a complete and exclusive exemption from payment thereof (whilst all other traders are liable to the said charge, albeit to varying degrees)?

3. Must the provision contained in Article 12 of that Treaty, concerning the prohibition on the introduction of charges having an effect equivalent to customs duties, be interpreted in such a way that the charge described

above in Questions 1 and 2 is to be considered improper and prohibited in that, with regard to the origin of the sugar, it is imposed exclusively on sugar produced in the Community which is present in Italy on 5 July 1978 and on the other hand is not imposed on home-produced sugar held in stock by national industrial producers on that date?

4. Have the Community provisions mentioned above in Questions 1, 2 and 3 conferred upon the undertakings liable — under national legislation — to pay the pecuniary charge mentioned above the individual right not to pay such charge on stocks of sugar whether home-produced or imported, which are in their hands (and to claim the reimbursement of any payment made) or is such individual right not to pay (and to claim the reimbursement of any payment made) limited to quantities of sugar imported from Member States of the EEC and stocked by the directly importing undertakings or by other undertakings which have purchased it from the latter?"

5 As to Question 1, in its judgment of 25 May 1977 in Case 77/76 *Cucchi* v *Avez* [1977] ECR 987 at pp. 1010 and 1011, reference for a preliminary ruling, the Court ruled:

"2. Under Regulation (EEC) No 3330/74 the Community is, in the absence of express derogation, alone competent to adopt specific measures involving intervention in the machinery of price formation, in particular by limiting the effects of an alteration in the level of Community prices, whether as regards intervention prices or the rate of exchange of the national currency in relation to the unit of account; an infringement in this respect of Regulation (EEC) No 3330/74 may be the subject of proceedings before the national courts brought by any natural or legal person whose stocks have been subject to the national measure."

6 It emerges from the observations of the defendant and the intervener in the main action on the one hand, and those of the Italian Government and the Commission on the other, that they are in disagreement over the question whether the Price Committee order at issue is to be regarded as "a specific measure involving intervention in the machinery of price formation" as envisaged by the judgment cited.

7 According to the Italian Government and the Commission, the order only provided for a charge to be paid on stocks on 5 July 1978 and calculated exclusively on the basis of the differences between the new national prices and those previously in force "with the exception of the amount of the increase in producer prices laid down at Community level for the 1978/1979 marketing year".

8 It was also submitted that the order was restricted to the distribution and consumption stages and avoided reference to sugar held in stock by producers precisely so as not to affect in any way the machinery of price formation resulting from the operation of Community rules.

9 On the other hand, according to the defendant and the intervener in the main action, the increases in national prices referred to in the order are closely connected with the increases in Community prices, so that in fact the charge imposed constitutes a measure involving intervention.

10 Within the frame-work of the procedure under Article 177, it is not for the Court to apply the Community rules which it has interpreted to national measures or situations.

11 On the other hand it is incumbent upon the national courts to decide whether or not the Community rule as interpreted by the Court under Article 177 applies to the facts and measures which are brought before them for their assessment.

12 A dispute such as the one outlined above is therefore a matter to be assessed by the national court.

13 Moreover, neither the question raised nor the observations submitted in the course of these proceedings raise any new issues giving grounds for clarifying or supplementing the operative part of the judgment of 25 May 1977.

14 Therefore the answer to Question 1 should be in terms identical to those of the operative part of that judgment.

15 As to Question 2, it presupposes an answer in the affirmative to Question 1.

16 If it were established that the measure referred to does not come within the machinery of price formation covered by the Community rules and does not constitute an intervention in that machinery, it would follow that Article 40 of the Treaty, which applies only to the areas covered by Community law, would not be applicable.

17 Even if it were within the ambit of Article 40, a measure which, as regards price formation, distinguished between the production stage and subsequent stages of marketing would not by virtue of that fact alone be discriminatory within the meaning of that article.

18 The position might be different if it were established that imported sugar was or was not subject to charges according only to whether it was held in stock by producers or on the other hand by other traders.

19 However, the question does not contain any information on this point, whilst the wording of Question 3 indicates that that is not the situation referred to.

20 The question is therefore too general to lend itself to a suitable reply.

21 As to Question 3, it seeks to obtain clarification of the ruling which the Court laid down in its aforesaid judgment of 25 May 1977.

22 Paragraph 1 of the operative part of that judgment is in the following terms:

"A duty falling within a general system of internal taxation applying to domestic products as well as to imported products according to the same criteria can constitute a charge having an effect equivalent to a customs duty on imports only if it has the sole purpose of financing activities for the specific advantage of the taxed domestic product, if the taxed product and the domestic product benefiting from it are the same, and if the charges imposed on the domestic product are made good in full."

23 The national court obviously wondered whether the fact that a measure "is imposed exclusively on sugar produced in the Community which is in Italy on 5 July 1978" and not "on home-produced sugar held in stock by national industrial producers on that date" is such as to bring that measure within Article 12 of the Treaty.

24 In this connexion it must again be pointed out that the fact that a measure applies to a product, not at the production stage but only at different stages of its marketing, does not necessarily make the measure discriminatory within the meaning of the judgment cited.

25 In principle sugar produced in the Community which is held in Italy will be at the stage of marketing of the product, whereas home-produced sugar held in stock by a producer may be regarded as still being at the production stage.

26 Since this question has not raised any issues giving grounds for clarifying or supplementing the operative part of the judgment cited, it should be answered in identical terms.

27 As to Question 4, the answer depends primarily upon a consideration of the wording and the rules for the implementation of the measure at issue and upon an assessment of those two factors within the framework of the national legal system.

28 The question therefore raises a problem of the application rather than a question of the interpretation of Community law.

29 In these circumstances, the answer must be confined to mere repetition of the last sentence of paragraph 2, of the operative part of the judgment of 25 May 1977 cited above.

Costs

30 The costs incurred by the Government of the Italian Republic and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

31 Since these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings before the national court, costs are a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Pretore of Reggio Emilia by an order of 14 September 1978, hereby rules:

1. **Under Regulation (EEC) No 3330/74 the Community is, in the absence of express derogation, alone competent to adopt specific measures involving intervention in the machinery of price formation, in particular by limiting the effects of an alteration in the level of Community prices, whether as regards intervention prices or the rate of exchange of the national currency in relation to the unit of account; an infringement in this respect of Regulation (EEC) No 3330/74 may be the subject of proceedings before the national courts brought by any natural or legal person whose stocks have been subject to the national measure.**

2. A duty falling within a general system of internal taxation applying to domestic products as well as to imported products according to the same criteria can constitute a charge having an effect equivalent to a customs duty on imports only if it has the sole purpose of financing activities for the specific advantage of the taxed domestic product, if the taxed product and the domestic product benefiting from it are the same, and if the charges imposed on the domestic product are made good in full.

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 28 March 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 13 MARCH 1979 [1]

Mr President,
Members of the Court,

I — This reference for a preliminary ruling originates in the following facts:

On 19 June 1978 the undertaking Nuova Commissionaria Zuccheri di Walter Beneventi, Reggio Emilia, ordered from the undertaking I.C.A.P. Distribution, San Maurizio (Reggio Emilia), 430 quintals of French granulated sugar in paper bags of 50 kg net, at the current price fixed by the Comitato Interministeriale dei Prezzi [Interdepartmental Committee on Prices, hereinafter referred to as "the Price Committee"]. Approximately 300 quintals were to be delivered before 1 July and the remainder in the course of August owing to shortage of available warehousing space on the buyer's premises. The sugar was to be of standard quality (second category) for which Community legislation lays down the target price and the intervention price.

After despatching 250 quintals of this sugar to Beneventi on 28 June, then 60

1 — Translated from the French.