OPINION OF ADVOCATE GENERAL MISCHO

delivered on 16 May 2002 [1]

1. When they set themselves the objective of achieving a great internal market, the authors of the Treaties had absolutely no intention of denying the fact that there is considerable variation in the economic situation within the area covered by that market..

2. In fact, they did quite the opposite as, even in the preamble to the Treaty of Rome, the signatories to that Treaty declare themselves 'anxious to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less-favoured regions.'

3. That clearly stated intention not to leave certain regions behind on the road to economic growth was expressed, for example, in the system of State aid laid down by Article 92 of the EC Treaty (now, after amendment, Article 87 EC).

4. In addition to establishing the principle that such aid is to be prohibited in so far as it affects trade between Member States, that provision lists amongst items of aid which may be considered to be compatible with the common market 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment'.

5. It was likewise with that intention in mind that the European Regional Development Fund was established in 1975, [2] the function of which is defined as 'the correction of the main regional imbalances in the Community'. On adoption of the Single European Act in 1986, a new title, Title V, relating to economic and social cohesion, was added to Part Three of the EEC Treaty, which deals with Community policies, and contained an Article 130a, which provides that '[i]n order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion. In particular, the Community shall aim at reducing disparities between the various regions and the backwardness of the least-favoured regions'. Additions have since been made on two occasions to the second paragraph of that

1 — Original language: French.

2 — Regulation (EEC) No 724/75 of the Council of 18 March 1975 (OJ 1975 L 73, p. 1).

provision, first in 1992 in the form of a reference, in the Treaty of Maastricht, to rural areas and secondly in the version of that paragraph resulting from the Treaty of Amsterdam which reads: '[i]n particular, the Community shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas' (Article 130a of the EC Treaty (now, after amendment, Article 158 EC)).

Relevant legislation

6. However, the Community institutions did not wait for those amendments to the Treaty to be made before introducing specific programmes designed to enable certain very remote regions to overcome their handicaps and, at the same time, be fully integrated into the internal market. Thus, after Council Decision 89/687/EEC of 22 December 1989 establishing a programme of options specific to the remote and insular nature of the French overseas departments (POSEIDOM), [3] Council Decision 91/315/EEC of 26 June 1991 setting up a programme of options specific to the remote and insular nature of Madeira and the Azores (POSEIMA) [4] was adopted.

7. That measure was adopted as a follow-up to a joint declaration annexed to the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties, [5] in which the Member States called on the Community institutions to devote special attention to the development policies of the two archipelagos so that those islands might overcome the handicaps arising from their geographical situation, far away from the mainland of Europe, their physical geographical features, the serious deficiency of infrastructures and their economic backwardness.

8. The recitals in the preamble to Decision 91/315/EEC state that:

'... this programme must be based on the twofold principle that the Azores and Madeira form an integral part of the Community and that the regional reality deriving from their particular geographical situation must be recognised;

... the measures contained in the programme must accordingly take into account the special characteristics and constraints of the Azores and Madeira without undermining the integrity and coherence of the Community legal order;... the economic effects of specific measures must therefore remain limited to the territory of the Azores and Madeira without

3 — OJ 1989 L 399, p. 39.
4 — OJ 1991 L 171, p. 10.
5 — OJ 1985 L 302, p. 23.

affecting directly the functioning of the common market;

...

... the exceptional geographical situation of the Azores and Madeira in relation to sources of supply for products used as inputs in certain food sectors, which are essential for current consumption or processing in the two archipelagos, entails costs that are a severe handicap for these sectors;... there is a need, in this connection, to make special arrangements for the supply of these products within the limits of market needs for the two archipelagos in question and taking account of local production and traditional trade flows...'

9. Those guiding principles find expression in the annex to that decision, that is to say, in the Poseima programme *per se*, in the form of the following provisions:

'Title I

General principles

4. The measures and operations contained in Poseima should enable the specific nature and constraints of the Azores and Madeira to be taken into account without undermining the integrity and coherence of the Community legal order.

...

Title IV

Specific measures to mitigate the effects of the exceptional geographical situation

9.2 In the case of essential agricultural products for consumption or processing in the two regions, this Community action will, within the limits of market requirements of the Azores and Madeira and taking into account local production and traditional trade flows, and making sure that the proportion of Community supplies of the products concerned is maintained, consist in:

— [exempting] from levies and/or customs duties and the amounts specified in Article 240 of the Act of Accession products originating in third countries,

— permitting, on equivalent terms, without application of the amounts laid down in the aforementioned Article 240, the supply of Community products taken into intervention storage or available on the Community market.

The principles underlying the application of this system will be as follows:

— the quantities covered by this supply system will be determined annually in supply estimates,

— in order to ensure that these measures have an impact on the level of production costs and consumer prices, a mechanism will have to be set up to monitor this impact up to the end user stage,

— with respect to raw sugar supplies for the Azores, the system will be applicable until such time as local production of sugar beet is sufficient to satisfy local market needs and as long as the total volume of sugar refined in the Azores does not exceed 10 000 tonnes,

...

Title V

Specific measures to support products of Madeira and the Azores

14.4 Other measures to help support local production in the Azores may take the form of:

— in the case of sugar beet:

— flat-rate aid per hectare for the development of local production, subject to a limit on quantities corresponding to production of 10 000 tonnes of sugar;

— specific aid for the processing of locally grown beet into white

sugar, with a view to stabilising supply costs;

...'.

... to avoid any deflection of trade, products covered by the specific supply arrangements may not be redispatched to other parts of the Community or re-exported to third countries;... however, an exception to this principle should be made for products traditionally processed in the islands and redispatched or re-exported, within the limits of usual trade flows;

10. Council Regulation (EEC) No 1600/92 of 15 June 1992 concerning specific measures for the Azores and Madeira relating to certain agricultural products [6] was adopted for the purpose of implementing the Poseima programme. The recitals in the preamble to that regulation state, *inter alia*, that:

...

'... the quantities of products benefiting from the specific supply arrangements must be determined within the framework of periodic forecast supply balances, which may be adjusted during the year on the basis of the essential requirements of the local market and taking account of local production and traditional trade flows;

... in order to help support local production and satisfy consumer habits, provision should be made for aid for certain crops and specific products;

...

... the arrangements in question are intended to reduce production costs and consumer prices;... their actual impact should therefore be monitored;

... in the case of the Azores, such measures must, in particular, help to improve the conditions in which sugarbeet is produced and the competitiveness of local sugar manufacturing, within the limit of determined quantities;...'.

6 — OJ 1992 L 173, p. 1.

11. Under Title I of Regulation (EEC) No 1600/92, headed 'Specific supply arrangements', Article 3 provides that:

'1. Levies and/or customs duties shall not apply to direct import into the Azores and Madeira from third countries of products covered by the specific supply arrangements, within the limit of the quantities determined in the supply balances.

2. To ensure coverage of the requirements referred to in Article 2 in terms of quantity, price and quality, with a view to ensure that the proportion of products supplied by the Community is preserved, supplies to these regions shall also be effected through the mobilisation of Community products held in intervention storage or available on the Community market, on terms equivalent, for the end user, to the advantage resulting from exemption from import duties on imports of products from third countries.

The terms of supply shall be fixed [with] reference to the costs [of] various sources of supply and the prices applied to exports to third countries.

3. The arrangements provided for in this Article shall be implemented in such a way as to take account, without prejudice to paragraph 4, in particular, of:

— the specific requirements of the regions concerned and, in the case of products intended for processing, the specific quality requirements,

— traditional trade flows with the rest of the Community.

4. In the case of the supply of raw sugar to the Azores, requirements shall be assessed taking account of the development of local sugarbeet production. The quantities covered by the supply arrangements shall be determined in such a way that the total annual volume of sugar refined in the Azores does not exceed 10 000 tonnes.

Article 9 of Regulation (EEC) No 1785/81 shall not apply to the Azores with regard to raw sugar.'

12. Also under that title, Article 8 specifies that:

'The products covered by the specific supply arrangements provided for in this Title may not be re-exported to third countries or redispatched to the rest of the Community.

Where the products in question are processed in the Azores and Madeira, the aforesaid prohibition shall not apply to traditional exports or shipments to the rest of the Community.'

13. Under Title II, headed 'Measures to support products of the Azores and Madeira', Article 25, which forms part of Section 3 under the heading 'Measures to support products of the Azores', provides that:

'1. Aid at a flat rate per hectare shall be granted for the development of sugarbeet production within the limit of an area corresponding to the production of 10 000 tonnes of white sugar per year.

The amount of the aid shall be ECU 500 per hectare sown and harvested.

2. Special aid shall be granted for the processing of sugarbeet harvested in the Azores into white sugar, within the limit of a total annual production of 10 000 tonnes of refined sugar.

The amount of the aid shall be ECU 10 per 100 kilograms of refined sugar. This amount may be adjusted in accordance with the procedure referred to in paragraph 3.

3. Detailed rules for the application of this Article shall be adopted in accordance with the procedure laid down in Article 41 of Regulation (EEC) No 1785/81.'

The main proceedings and the questions referred for a preliminary ruling

14. Only one sugar refinery, Sociedade de Indústrias Agricolas Açoreanas SA (hereinafter 'Sinaga'), is established in the Azores and therefore, apart from the end consumer, it alone stands to gain from both

the specific supply arrangements for raw sugar and the special aid for processing sugarbeet harvested in the Azores into white sugar.

15. In 1998 Sinaga sold white sugar to an undertaking established in mainland Portugal.

16. Refinarias de Açúcar Reunidas SA (hereinafter 'RAR'), an undertaking established in mainland Portugal which itself produces white sugar, heard about that sale and took the view that Sinaga was not entitled to sell sugar produced under the Poseima programme in mainland Portugal. It consequently brought an action against Sinaga before the Tribunal Judicial da Comarca de Ponta Delgada (Ponta Delgada Local Court), Portugal.

17. RAR is asking that court to exercise its power to impose interim measures and order Sinaga 'to cease marketing in mainland Portugal refined sugar produced from raw sugarbeet which is imported by Sinaga free of levies under the Poseima programme or in respect of which it benefits from the aid granted for processing provided for in that programme'.

18. Taking the view that, in order to resolve the dispute in question, it is necessary to determine the precise meaning which the Community legislature intended to give to certain provisions of Regulation (EEC) No 1600/92, the national court, by order of 11 July 2000, referred the following questions to the Court of Justice for a preliminary ruling:

'1. Does the second paragraph of Article 8 of Council Regulation (EEC) No 1600/92 of 15 June 1992 apply to:

(a) sugar processed from raw sugar (sugar properly speaking, whether it comes from locally-grown sugarbeet or imported raw sugar), or

(b) only to sugar added to products which include it (such as cakes, soft drinks etc.)? (Essentially, what is meant by the expression "products... are processed" contained in that provision?)

2. Are the sales referred to in 3 (below) covered by the concepts "traditional trade flows", "traditional exports" and "traditional... shipments" to "the rest of the Community", contained in the second indent of Article 3(3) and the second paragraph of Article 8 of the abovementioned regulation?

3. Irrespective of the answers to the preceding questions, does the legal framework in force, from September 1998 to date, allow Sinaga to sell in mainland Portugal sugar produced by it from sugarbeet harvested in the Azores and for the production of which it obtains Community aid under the Poseima programme?

4. Again irrespective of the answers to the preceding questions, does the legal framework in force, from September 1998 to date, allow Sinaga to sell in mainland Portugal sugar produced by it from imported raw sugar which is exempt from levies under the Poseima programme?'

19. Before examining those questions in detail and setting out the answers which should, in my view, be given to them, I would like first of all to make two preliminary comments.

20. In the course of the written procedure, both Sinaga and the Portuguese Government were very insistent that, since Regulation (EEC) No 1600/92 is intended to implement the Poseima programme, the aim of which is to enable the Azores to overcome their various handicaps, of the various possible interpretations of that regulation, the interpretation which favours the Azores in general and Sinaga in particular should be preferred systematically in all matters concerning the production and marketing of sugar.

21. In my view, the Court must not in its reasoning be guided by such an approach, which amounts to reasoning from prejudice in the literal sense of a 'pre-judgment'.

22. Of course, there can be no question either of going to the other extreme and favouring an interpretation designed to limit as much as possible the effects of the Poseima programme.

23. After all, it cannot be denied that in adopting and implementing that programme the Community legislature sought to grant to the Azores, and therefore to the economic operators established in those islands, whether they be producers or consumers, a number of advantages which, in its view, are justified by the unfavourable specific conditions obtaining in the Azores with respect to their aspiration to economic development.

24. However, that does not necessarily mean that the Community legislature intended Regulation (EEC) No 1600/92 to

be interpreted in accordance with specific rules other than those which characterise the approach usually adopted by the Community judicature.

25. The specific rules adopted in respect of the Azores are no different from any other Community rules and must be considered without any form of preconception.

26. Application of the traditional rules of interpretation in examining the question as to what conditions attach to the advantages granted to the economic operators of the Azores and what limits the Community legislature sought to impose, is not the expression of a wish to frustrate the intention of that legislature.

27. In fact, legislative intent is, on the contrary, respected by keeping those advantages within the limits which the legislature itself defined after it had considered what it was possible to accord by way of the exception in order to promote development in that territory, without at the same time upsetting the delicate balance of the common agricultural policy.

28. The Poseima programme is not guided by the idea that the Azores would be best developed if they were placed outside the reach of Community law; on the contrary, it proceeds from the premiss that a lasting development can be achieved in the Azores, to the greater profit of their inhabitants, by making it possible, through certain transitional arrangements, for those islands to integrate into the internal market.

29. By way of a second preliminary comment I would like to mention that the discussion, to which the written procedure gave rise, of how, specifically, Regulation (EEC) No 1600/92 fits in with the common organisation of the markets in the sugar sector, and therefore with Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector,[7] is not, in my view, central to the debate called for by the questions referred by the national court.

30. Since no one is maintaining that the Azores are quite simply excluded from the scope of the rules governing the common organisation of the markets, it seems to me unnecessary, in the light of the precise questions to be answered by the Court, to consider whether Regulation (EEC) No 1600/92 introduces derogating rules applying to the Azores or merely lays down specific rules which apply exclusively within that territory.

31. My concern is to determine the interpretation that should be given to particular

7 — OJ 1981 L 177, p. 4.

provisions of Regulation (EEC) No 1600/92 which apply to the production and marketing of sugar in the Azores, provisions which are, as no one will deny, special in that they do not coincide with the rules laid down by Regulation (EEC) No 1785/81. Whether they are defined as derogating or as special provisions makes no difference in my view to the interpretation dictated by their wording and by their relationship with the other provisions which go to making up the Poseima programme.

32. In my view, the choice of one of those definitions in preference to the other would appear to rest on an essentially subjective assessment. It is reasonable to conclude from the considerable difference between the rules governing the common organisation of the markets which apply in the rest of the Community and the rules applying in the Azores (here I am referring in particular to the fact that the intervention mechanism provided in Article 3(4) of Regulation (EEC) No 1660/92 does not apply to the Azores) that a derogating arrangement applies to the Azores. However, an equally valid argument is that the application of a few specific rules, however important they may be, must on no account obscure the fact that Regulation (EEC) No 1785/81, as such and in so far as it does not conflict with any provision of Regulation (EEC) No 1600/92, applies to the Azores in the same way as it applies in the rest of the Community.

The first question

33. As regards the first question, RAR alone maintains that, for the purposes of the application of Article 8 of Regulation (EEC) No 1600/92, refined sugar cannot be regarded as a product obtained through processing and, therefore, that the second paragraph of Article 8, which provides that '[w]here the products in question are processed in the Azores and Madeira, the aforesaid prohibition shall not apply to traditional exports or shipments to the rest of the Community', does not cover white sugar produced in the Azores from the raw sugar covered by the specific supply arrangements laid down in Article 3 of that regulation.

34. It argues that refined sugar can be regarded as having been processed for the purposes of the second paragraph of Article 8 only where it is added to products such as soft drinks, cakes, chocolates and confectionery.

35. In support of its argument RAR claims that since, in all its forms, sugar is regarded as an agricultural product for the purposes of application of the EC Treaty and since the specific supply arrangements apply to agricultural products, white sugar must be regarded as a product which is covered by those arrangements and may not be re-exported or redispatched in accordance with the first paragraph of Article 8.

36. I do not believe that approach can seriously be adopted.

37. It can be refuted, without there even being any need to go into the detail of the arguments raised by Sinaga, the Portuguese Government and the Commission, by the following two considerations. First, under the first paragraph of Article 8, it is the actual products that have benefited from the specific supply arrangements that may not be re-exported or redispatched; however, white sugar is not raw sugar. Secondly, white sugar is the product obtained from the actual processing of raw sugar, which undoubtedly makes it a processed product as opposed to the product covered by the abovementioned arrangements.

38. The fact that some products of first-stage processing, such as white sugar, are regarded as agricultural products for the purposes of the Treaty is entirely irrelevant as regards the implementation of the Poseima programme which, in terms of the specific supply arrangements and the prohibitions associated with them, relates only to specified products, not to all agricultural products.

39. Moreover, there is no risk that the undertakings which have benefited from the specific supply arrangements will take advantage of them in order to strengthen their competitive position on the market in the rest of the Community or in terms of export since, even after raw sugar has been processed into white sugar, exports and shipments are still prohibited unless they are effected in the context of traditional trade flows.

40. It may be noted for that matter that the legislature ensured that there would be no distortion of competition, even with regard to those sales forming part of traditional trade, as Article 9 of Regulation (EEC) No 1600/92 provides that a product which has been processed and subsequently exported is not eligible for any refund on exportation.

41. It is true that, when redispatched to another location in the Community, white sugar produced from raw sugar which has benefited from the specific supply arrangements may find itself in a favourable competitive position, although it may be doubted whether this would be so on account of the not insignificant transport costs, but such redispatch has in any event to remain confined to traditional trade. However, it is difficult to imagine how the introduction of the Poseima programme, the aim of which, it will be recalled, is to enable the Azores to integrate in favourable circumstances into the internal market, could have been coupled with the abolition of traditional trade.

42. The answer to the first question referred by the national court must clearly

be that for the purposes of the second paragraph of Article 8 of Regulation (EEC) No 1660/92 white sugar is to be regarded as a product obtained through processing.

The second question

43. I thus come to the second question in which the national court is seeking to ascertain whether, in the light of a table of statistics contained in its order for reference, the view must be taken that, in the case of white sugar, it is possible to speak of traditional trade flows within the meaning of the second indent of Article 3(3) of Regulation No 1600/92, or of traditional exports or shipments to the rest of the Community within the meaning of the second paragraph of Article 8 of that regulation.

44. I should point out at once that the table concerned provides information merely about sales to mainland Portugal and Madeira and that I do not see, therefore, how I could express a view on the existence of traditional exports, understood as meaning sales to third countries, which are, moreover, wholly unrelated to the dispute which gave rise to the questions put by the national court.

45. That having been made clear, what does that table tell us?

46. Let me say at once that it is not easy to use. Although it goes back to 1907 and covers the year 1992, it provides no information on some years, for instance from 1948 to 1961, from 1970 to 1974, 1982 and 1983 or from 1986 to 1989.

47. However, even in respect of the years included in it, the table lacks clarity in so far as it comprises three columns headed 'Madeira', 'Mainland Portugal' and 'Madeira/Mainland Portugal' respectively, but it does not specify to what the 'Madeira/Mainland Portugal' column relates.

48. It might be assumed that, for each year, that column contains the total of the amounts entered in the other two columns. However, that clearly is not the case because, whilst figures are shown in the Mainland Portugal column from 1907 to 1947, there are no entries for those years in the third column.

49. Perhaps, then, it must be considered that the Madeira/Mainland Portugal column provides information about sales intended either for Madeira or for mainland Portugal, but that the precise desti-

nation of those sales could not be established. As there are no entries in the other two columns for the years against which sales are recorded in that column, one might be led to conclude that the authorities responsible for compiling the trade statistics for the Azores for quite some time merely made a record of the shipments but did not concern themselves with their destination, which is a rather puzzling state of affairs all the same. However, even interpreted in that way, that column cannot really be used for determining whether there were traditional shipments to the rest of the Community within the meaning of the second paragraph of Article 8 of the regulation and, if so, the volume of those shipments.

50. Be that as it may, it must be observed that although the Mainland Portugal column records regular sales between 1907 and 1947, albeit very variable in terms of volume, there are no further entries in that column for subsequent years, except for 1984 and 1985 during which sales came to 3 024 000 kg and 6 175 250 kg respectively, which is not an inconsiderable volume in view of the 10 000 tonnes production limit imposed on Sinaga under Regulation (EEC) No 1600/92.

51. As regards the Madeira column, there are no entries before 1981. Sales in respect of 2 236 850 kg are recorded for that year. There are entries of 184 660 kg for 1990, 258 700 kg for 1991 and finally 30 000 kg for 1992.

52. The Madeira/Mainland Portugal column lists sales figures which vary from 300 000 kg to 6 081 440 kg between 1962 and 1970 as well as figures of 1 500 kg per year between 1975 and 1979, denoted by the national court as corresponding, in reality, to Christmas promotions.

53. During the written procedure RAR and the Commission submitted that the sudden reappearance in 1984 and 1985 of the figures representing sales to mainland Portugal following an interruption in those sales since 1948 was in response to the lifting of the prohibition against sales of the Azores sugar on the market of mainland Portugal which had previously been imposed under Portuguese law.

54. At the hearing Sinaga denied that such a prohibition ever existed and contended that, as far as the years at issue were concerned, what was involved was not the lifting of a prohibition but the abolition of charges on importation.

55. However, whatever the cause of the interruption in sales between 1948 and 1983 may have been, that interruption is not disputed, any more than is the absence of any sales to mainland Portugal as from 1986.

56. Whilst, as the Commission pertinently suggests, the term 'tradition' must be construed as meaning actions repeated over

time or in the past and incorporating an idea of continuity and regularity over time, I find great difficulty in accepting that traditional trade flows can be identified on the basis of the table presented by the national court.

57. Two years of clearly identified shipments to mainland Portugal out of the entire period from 1948 to 1992 can scarcely be regarded as the expression of a tradition. The same is true as regards the shipments which were indisputably intended for Madeira where, over the period from 1907 to 1992, records for exports exist in respect of four years, only three of which are consecutive (their volumes ranging from 30 000 kg to 258 700 kg).

58. The truth is that what is concerned here is occasional trade rather than traditional trade flows, since there is neither continuity nor regularity. The same conclusion would be reached if one were to espouse the view held by RAR that, for it to be possible to speak of traditional trade flows within the meaning of Regulation (EEC) No 1600/92, it would be necessary to determine that trade had been conducted over the five or, possibly, three years preceding the entry into force of that regulation.

59. Those are the periods, according to RAR, that are customarily taken into consideration in the context of the common agricultural policy when quotas are allocated to operators, it being sought to ensure that the access of those operators to the market is not affected as a result of their being subject to Community rules which did not apply to them previously.

60. It is, in particular, on such bases, according to RAR, that on the accession of new Member States the quotas for sugar production were allocated.

61. I consider that approach to be reasonable in the sense that when the Community legislature sought to maintain traditional trade flows it was not for the purpose of acknowledging historical rights which might be evidenced by shipments spanning the period from 1907 to 1947 but, much more prosaically, as the Commission points out, in order to avoid taking away with one hand from the producers in the Azores what was given to them with the other hand, or, if one prefers, to prevent the introduction of the specific supply arrangements, designed in the interest of the islands, from backfiring on them owing to the loss of markets on which their products were regularly sold before the Poseima programme was put into effect; however, nor were the specific supply arrangements intended to disrupt the functioning of the Community market by opening up to Azores producers markets that they would enter with an undeniable competitive advantage.

62. What Regulation (EEC) No 1600/92 is aimed at is the maintenance of the status quo, which, in the light of the table under consideration, clearly does not cover any traditional shipment of white sugar to mainland Portugal.

63. That absence of traditional trade flows with the rest of the Community in the particular case of white sugar does not conflict with the acknowledgement, set out in the second indent of Article 3(3) of Regulation (EEC) No 1600/92, of the requirement to take account of such trade flows.

64. That provision applies to all products covered by the specific supply arrangements, not just to sugar, so that the conclusion I have reached with regard to sugar does not have the effect of rendering that provision wholly ineffective.

65. It may apply to other products in respect of which traditional trade flows could in fact be found to exist.

66. However, I consider it worth mentioning, even if it is of no practical consequence for the outcome of the case before the national court, that I cannot accept RAR's argument that Article 3(3) does not apply to sugar, which, it maintains, falls solely within the scope of Article 3(4).

67. When Article 3(3) specifies measures to be taken 'without prejudice to paragraph 4', there is not the slightest intention to exclude sugar from its application. It merely means to show that, as far as sugar is concerned, the supply requirements must, on the one hand, be assessed not only in the light of the requirements of the regions concerned and the traditional trade flows but also in the light of local sugarbeet production, and, on the other hand, be determined in such a way that the annual volume of sugar refined in the Azores does not exceed 10 000 tonnes.

68. RAR's interpretation fails to take full account of either the ordinary meaning of 'without prejudice' or the underlying reasoning that links the provisions of Article 3(3) and (4).

69. In the case of the supply of raw sugar, requirements cannot be assessed exclusively on the basis of local sugarbeet production because in that way — bizarrely — demand would effectively be assessed in terms of supply. In assessing those requirements, it is mandatory, as provided in Article 3(3), to take account of the specific requirements of the regions concerned as regards consumption; sugarbeet produced locally is also taken into account because it contributes to satisfying those requirements.

70. Imported raw sugar is intended to make it possible to make up white sugar deficit which is evident from a comparison of consumption with the supply obtained through the refining of sugarbeet harvested locally.

71. For all those reasons, I propose that the Court should answer the second question in the negative.

The fourth question

72. I will now move on at once to considering the fourth question because, although it is raised '[i]rrespective of the answers to the preceding questions', the answer to this question lies in the conclusions I have just reached in respect of the second question.

73. It will be recalled that Article 8 of Regulation (EEC) No 1600/92 first lays down, in its first paragraph, an absolute ban on the redispatch or re-exportation of the products imported into the Azores pursuant to the specific supply arrangements. It next provides, in the second paragraph, that '[w]here the products in question are processed in the Azores and Madeira, the aforesaid prohibition shall not apply to traditional exports or shipments to the rest of the Community'. Therefore, it logically follows from the conclusion I reached a little earlier as regards the absence of traditional trade flows in white sugar to mainland Portugal that Sinaga may not sell in mainland Portugal sugar which it has produced from imported raw sugar which is exempt from levies under the Poseima programme.

74. There is not the slightest ambiguity in Article 8 capable of casting doubt on the absolute nature of the prohibitions imposed by that provision.

75. However, that has not prevented Sinaga from contending that 'the existing legal framework, whether considered from the point of view of the wording of the applicable provisions or from that of its structure, is compatible only with an interpretation which supports Sinaga's right to sell in mainland Portugal the sugar it has produced from raw sugar imported under the specific supply arrangements, since those marketing activities may fall under the provision which applies "to traditional... shipments to the rest of the Community"' (point 82 of Sinaga's observations).

76. Sinaga even goes as far as to maintain that 'the mere fact that sugar from the

Azores was sold in the past in mainland Portugal must be regarded as a sufficient basis for invoking the derogation from the prohibition against marketing outside the Azores' (point 72 of its observations). This, unless I am mistaken, implies, first, that sales of sugar to mainland Portugal are a sufficient basis for proving the existence of traditional trade flows and, secondly, that the reference made by the Community legislature to the existence of such flows has no consequences in terms of limiting the volumes which may be dispatched. Such reasoning clearly cannot be accepted because it deprives the word 'traditional' of any specific meaning.

77. It may be noted, for that matter, that the Portuguese Government, which shares Sinaga's views on the other questions, confines itself to stating, with regard to the fourth question, that 'the Portuguese Republic takes the view that the sugar industry of the Azores is entitled to sell in mainland Portugal sugar produced from imported raw sugar which is exempt from levies, under the conditions laid down in the second paragraph of Article 8 of Regulation (EEC) No 1600/92' (point 57 of its observations).

78. For my part, let me say it again, I consider that the derogation provided for by the Community legislature in favour of the traditional trade flows is intended to maintain the status quo and nothing more; accordingly, if such flows did exist, the quantities of white sugar which were produced from raw sugar acquired under the specific supply arrangements and which it was permissible to export or dispatch to mainland Portugal could under no circumstances have exceeded the quantities corresponding to those trade flows.

79. Since in my reply to the second question I considered that the existence of such flows cannot be established in the case of white sugar, I can only find that the shipment to mainland Portugal of white sugar produced by Sinaga in the Azores from raw sugar imported under the specific supply arrangements is the subject of an absolute prohibition.

The third question

80. It remains for me to consider the third question, which is not without its difficulties. As Sinaga, the Portuguese Government and the Commission point out, under Article 25 of Regulation (EEC) No 1600/92 the grant of aid at a flat rate per hectare for sugarbeet crops and of special aid for the processing of sugarbeet harvested in the Azores into white sugar is not coupled with any prohibition against the export or shipment to mainland Portugal of white sugar produced in the Azores from local sugarbeet.

81. Furthermore, since Article 25 appears under Title II headed 'Measures to support products of the Azores and Madeira', it cannot be maintained that the prohibition laid down in Article 8, which itself appears under Title I headed 'Specific supply arrangements', *ipso facto* also applies to sugar which has benefited from the measures laid down in Article 25.

82. Nor are there any grounds for maintaining that, as a general rule, in the context of the common agricultural policy, the fact that aid has been granted in respect of a product entails a prohibition on marketing it outside its production area.

83. It is, admittedly, true that the principle of the free movement of goods constitutes one of the pillars of the common market. Is it necessary, then, in the light of those convergent factors, to agree with Sinaga, the Portuguese Government and the Commission that white sugar in respect of which the aid specified in Article 25 of Regulation (EEC) No 1600/92 has been obtained, may be shipped without any restriction to mainland Portugal?

84. I do not think so. I share the view of RAR that such freedom to market the products in question in mainland Portugal would destroy the coherence of the Poseima programme.

85. Although it is true that Regulation (EEC) No 1600/92 does not contain any provision specifying that white sugar for which aid is granted under Article 25 of that regulation may not be marketed outside the Azores, such a prohibition may none the less be inferred from Decision 91/315/EEC, that is to say from the Poseima programme itself, and more specifically from paragraph 9.2 of the annex thereto.

86. That provision specifies that, with respect to the supply of raw sugar to the Azores, the system of specific supply arrangements 'will be applicable until such time as local production of sugar beet is sufficient to satisfy local market needs and as long as the total volume of sugar refined in the Azores does not exceed 10 000 tonnes'.

87. That very clearly signifies that the specific supply arrangements are, from the outset, intended to be temporary and are designed to offset the feebleness of sugar-beet production in the Azores in relation to local needs, production which is specifically intended to increase as a result of the aid for production and for processing into white sugar, for which provision is made in paragraph 14.4 of that annex.

88. In actual fact, the Poseima programme is intended to ensure first and foremost that the Azores are self-sufficient, even if this depends on a certain degree of aid from the Community budget, aid operating in the long term to the benefit of local agricultural production rather than aid for imports from the rest of the Community of processed or partially processed products.

89. Where local consumption remains constant, the quantities of raw sugar which may benefit from the specific supply arrangements should therefore decrease as production of sugar from sugarbeet harvested in the Azores grows. That decrease is at the very centre of the entire system introduced as regards the supply of sugar to the Azores.

90. To permit sugar produced from sugarbeet harvested locally to be taken out of the local market in the Azores would amount to rendering the desired diminution of the quantities of raw sugar benefiting from the specific supply arrangements into a Sisyphean task, that is to say one doomed to failure from the start.

91. It is clear that if it were open to Sinaga to dispatch beyond the Azores, with a definite competitive advantage, sugar for which aid had been granted under Article 25, it would not fail to do so. This would mean that, when drawing up the annual supply balance, the competent authorities would be forced to conclude that it is essential to maintain, or even increase, the quantities of sugar benefiting from the specific supply arrangements in order to supply the local market in the Azores under the conditions intended by the Poseima programme for the benefit of local consumers.

92. In fact, the inescapable result would be nothing less than a perversion of the system, an outcome which, it seems to me, must be firmly precluded.

93. It remains to be ascertained how this can be achieved, that is to say how it can be ensured that Sinaga has to observe, in accordance with the provisions of Community law governing its activities, a prohibition against exporting or shipping sugar for which aid has been obtained under Article 25 of Regulation (EEC) No 1600/92.

94. For my part, I can see only two possibilities. The first is for the Court to take the view that although there is no express mention of such a prohibition anywhere in Regulation (EEC) No 1600/92, the interpretation of that regulation in the light of the provisions of Decision 91/315/EEC, which forms its legal

basis, none the less leads to the conclusion that the regulation necessarily embodies that prohibition, even if only by implication.

95. That approach — there can be no hiding the fact — would have the disadvantage of obliging the Court to embark upon an interpretation which would be exposed to criticism that it probably would not wish to incur.

96. Such criticism would go to the fact that, whilst the Court had always asserted the fundamental nature of the principle of the free movement of goods and held that derogations from that principle must be construed narrowly, it would suddenly break new ground by bringing to light implicit, or in any event unwritten, restrictions of that principle.

97. However, I do not consider that the possibility, if not the probability, of such criticism arising has to be an insurmountable problem inasmuch as, although the prohibition is not laid down in Regulation (EEC) No 1600/92, it is none the less to be inferred, without any manipulation of the wording, from the annex to Decision 91/315/EEC.

98. The second possibility is for the Court, instead of interpreting the regulation in such a way that it does not appear to be inconsistent with the decision, to take formal note of the inconsistency constituted by the absence in the regulation of any prohibition on marketing sugar in respect of which aid has been granted under Article 25 of that regulation elsewhere than in the Azores, and, shifting to the terrain of validity, to hold that the absence of a prohibition constitutes an infringement of paragraph 9.2 of the annex to Decision 91/315/EEC.

99. For that transition from interpretation to assessment of validity, to which attention was drawn at the hearing, authority may be found in the case-law of the Court. [8] Apart from avoiding the disadvantage mentioned above, such a transition would hold the advantage of falling within the very clear line of authority which requires of an implementing provision observance of the limits defined in the legislation constituting its legal basis.

100. Whichever approach the Court adopts, I do not see how it could avoid finding that white sugar which has benefited from aid for the processing of sugarbeet harvested in the Azores cannot be marketed outside the local market of the Azores.

8 — See, in particular, Case 16/65 *Schwarze* [1965] ECR 877 and Case 145/79 *Roquette Frères* [1980] ECR 2917.

Conclusion

101. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the national court as follows:

(1) For the purposes of the application of the second paragraph of Article 8 of Council Regulation (EEC) No 1600/92 of 15 June 1992 concerning specific measures for the Azores and Madeira relating to certain agricultural products, white sugar obtained from imported raw sugar is to be regarded as a product obtained through processing.

(2) The information submitted by the referring court does not disclose the existence of traditional trade flows or traditional shipments to the rest of the Community within the meaning of the second indent of Article 3(3) or the second paragraph of Article 8 of Regulation (EEC) No 1600/92.

(3) White sugar produced in the Azores from sugarbeet harvested locally and for the production of which aid is granted in accordance with Article 25 of Regulation (EEC) No 1600/92 may not be marketed outside the local Azores market.

(4) White sugar produced in the Azores from raw sugar imported under the specific supply arrangements introduced in Title I of Regulation (EEC) No 1600/92 may not be dispatched to mainland Portugal in the absence of traditional shipments within the meaning of the second paragraph of Article 8 of that regulation.