OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 14 June 2007 [1]

1. In the present cases the Court is asked whether the method of calculation applied by the Commission for setting the amount of production levies intended to finance the common organisation of the markets in the sugar sector is valid. Production levies are intended in particular to reflect the cost to the Community of export refunds, or payments which are made in certain circumstances to compensate sugar producers for the fact that world prices of sugar are, in general, lower than the supported Community price. A number of sugar producers challenge the lawfulness of two aspects of the calculation of production levies.

2. The first step of that calculation requires the overall loss for a given marketing year to be estimated before the end of that marketing year by multiplying the 'exportable surplus' by the estimated 'average loss' per tonne.

3. The 'exportable surplus' is defined, essentially, as the production of sugar minus sugar quantities 'disposed of for consumption within the Community'. The latter concept is defined, essentially, as the total of opening sugar stocks, sugar production and sugar imports, minus the total of closing sugar stocks and exported sugar. Exported sugar comprises sugar exported in the natural state and sugar 'contained in exported processed products'. The applicant sugar producers submit, first, that sugar which is contained in exported processed products and in respect of which no export refunds were paid should not be regarded as sugar 'contained in exported processed products' for the purpose of this calculation.

4. The 'average loss' per tonne is defined, essentially, as the total amount of refunds divided by the total tonnage of 'export obligations to be fulfilled' in the marketing year concerned. In the alternative, the applicant sugar producers submit that if (contrary to their principal submission) sugar 'contained in exported processed products' includes all such sugar, whether or not export refunds

1 — Original language: English.

were paid, 'export obligations to be fulfilled' should similarly include all exports of sugar, including those in respect of which no export refunds were paid.

5. It is common ground that (at least) the principal objective of production levies is to ensure that sugar producers finance the costs of disposing of excess Community production. The sugar producers submit that the Commission's method of calculating the levies results in their paying more than those costs.

Community legislation

The basic regulation

6. The common organisation of the markets in the sugar sector was at the material time regulated by Council Regulation (EC) No 1260/2001 [2] ('the basic regulation'), which applied for the 2001/02 to 2005/06 marketing years. [3]

7. The following recitals [4] in the preamble to the basic regulation are relevant:

'(9) The reasons which have hitherto led the Community to adopt a production quota system for sugar, isoglucose and insulin syrup currently remain valid. However, that system has been adjusted to take account of recent developments in production, 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* and to comply with the Community's obligations under the Agreements

2 — Of 19 June 2001 on the common organisation of the markets in the sugar sector (OJ 2001 L 178, p. 1).

3 — Article 51. The marketing year runs from 1 July to 30 June (Article 1(2)(m)). Subsequent marketing years are regulated by Council Regulation (EC) No 318/2006 of 20 February 2006 on the common organisation of the markets in the sugar sector (OJ 2006 L 58, p. 1), which repeals and replaces the basic regulation.

4 — I have italicised the phrases in the recitals which are of particular relevance.

resulting from the Uruguay Round of multilateral trade negotiations … .

…

(11) The common organisation of the markets in the sugar sector is based, firstly, on the principle that *producers should bear full financial responsibility for the losses incurred each marketing year from disposing of that part of Community production under quota which is surplus to the Community's internal consumption* and, secondly, on a differentiation of price guarantees for disposal reflecting the production quota allocated to each undertaking. A sugar production quota is allocated to each undertaking on the basis of its actual production during a particular reference period.

(12) Since commitments to reduce export support were implemented during the transitional period, the basic quantities of sugar and isoglucose and the quotas for insulin syrup should be kept at their present levels, but it must be possible for the relevant guarantees to be adjusted as necessary to enable the Community to comply with its commitments under the Agreement [5], while taking account of the fundamental factors affecting the situation of its sugar sector. *The sector's system of self-financing through production levies and the production quota regime should be maintained.*

(13) The producers should thus continue to assume financial responsibility by paying *a basic production levy charged on all production of A and B sugar*, which is however limited to 2% of the intervention price for white sugar, and *a B levy charged on the production of B sugar* up to a limit of 37.5% of that price. In certain circumstances, producers of isoglucose and insulin syrup also pay a proportion of those contributions. *Capping the levies in the manner described above means that in some marketing years sugar production is not fully self-financing. An additional levy should be charged in those cases.*

(14) In the interests of equal treatment, *the additional levy should be calculated for each undertaking on the basis of its*

5 — The Agreement on agriculture resulting from the Uruguay Round of multilateral trade negotiations.

share in the revenue generated by the production levies which it has paid for the marketing year in question. A coefficient should therefore be fixed for the Community as a whole representing the ratio for that marketing year between the total loss recorded and the total revenue generated by the production levies concerned. It is necessary to specify the conditions under which beet and cane sellers are to contribute to eliminating the outstanding loss for the marketing year concerned.

(15) In any given marketing year, the consumption, production, importation, stock and carryover levels, and the average loss likely to be borne under the self-financing scheme, may be such that the production quotas allocated to each undertaking in the sugar sector result in an export volume exceeding that set in the Agreement. The guarantees linked to the quotas should therefore be adjusted each marketing year so that the Community can meet its commitments.'

8. The legislation thus provides for the producers to meet the cost to the Community [6] of disposing of surplus production by way of a production levy, which is calculated in accordance with Article 15 of the basic regulation. Article 15 cannot be understood without the following information.

9. Article 11(2) of the basic regulation fixes a basic quantity A and a basic quantity B for each sugar-producing region of the Community. [7] Article 11(1) requires the Member States to allocate an A and a B quota to each undertaking producing sugar, isoglucose or inulin syrup [8] in its territory during the 2000/01 marketing year. The A and B quotas are subject to the production levy at

6 — The 'loss' and 'losses' (and indeed 'revenue') referred to in the recitals relate to Community funding of the market organisation, and not to the balance sheet of producers, exporters etc.

7 — These are not necessarily coterminous with the Member States. Thus, there are separate quotas for metropolitan France on the one hand and the French overseas departments on the other hand; similarly for mainland Portugal and the autonomous region of the Azores. Belgium and Luxembourg share quotas (nominally attributed to the Belgium/Luxembourg Economic Union).

8 — The original version of the basic regulation incorrectly referred to 'insulin' rather than 'inulin' syrup. This was corrected by a corrigendum published in OJ 2001 L 233, p. 58. Isoglucose and inulin syrup are liquid substitutes for sugar: see recital 1 in the preamble to the basic regulation. More detailed definitions may be found in Article 1(2)(c) and (d) of the basic regulation.

a different rate. [9] Since the cases before the Court concern sugar only, I shall henceforth consider the legislation only in so far as it concerns that product.

10. Sugar produced in a given marketing year in excess of the total of the A and B quotas of the undertaking concerned, or by an undertaking which has no quota, is referred to as 'C sugar'. As a general rule, [10] C sugar may not be disposed of within the Community and must be exported without further processing and without export aid before 1 January following the end of the marketing year concerned. [11]

11. The present cases concern A and B sugar which has not been disposed of for consumption within the Community and which is hence disposed of by export.

12. The basic regulation sets an intervention price [12] and essentially requires the intervention agency designated by each sugar-producing Member State to buy in, at the intervention price, any sugar offered to it which has been produced under quota from Community beet and cane. [13]

13. In addition, production refunds are granted on sugar originating in Member States or coming from third countries and in free circulation in Member States which is used to manufacture certain products of the chemical industry. The amount of the refund is to be fixed 'taking account in particular of the costs arising from the use of imported sugar which the chemical industry would have to bear in the event of supply on the world market'. [14]

14. The basic regulation also provides that, to the extent necessary to enable sugar to be exported either without further processing or in the form of the processed products listed in Annex V on the basis of world prices, the difference between such prices and prices in the Community may be covered by export refunds. [15] Export refunds are thus neither

9 — The A and B quotas were originally introduced by Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector (OJ 1981 L 177, p. 4). The A quota represents consumption within the Community where its disposal is guaranteed by an intervention price (see point 12 below). The B quota is the quantity produced in excess of the A quota without exceeding the maximum quota (A quota multiplied by a coefficient); it may be freely marketed in the Community but without an intervention price guarantee, or exported with export aid in the form of export refunds.

10 — Subject to exceptions set out in Articles 13(2) and 14(1), which are not relevant to the present case.

11 — Article 13(1).

12 — Article 2.

13 — Article 7(1).

14 — Article 7(3).

15 — Article 27(1). Conversely, Article 33(1) provides for an export levy where the world price of sugar is higher than the intervention price. In practice world prices are normally below supported Community prices.

mandatory nor automatic. They are granted on application and on presentation of the relevant export licence. [16]

15. With regard to the method of calculation of the production levy, at issue in the present cases, Article 15 [17] essentially provides as follows:

— First, the overall loss or revenue for the marketing year concerned is estimated before the end of that marketing year by multiplying the 'exportable surplus' (forecast production of A and B sugar minus forecast sugar quantities disposed of for consumption within the Community) by the estimated 'average loss or revenue' per tonne (the difference between the total amount of refunds and the total amount of levies [18] divided by the total tonnage of export obligations to be fulfilled in that marketing year) (Article 15(1)). [19]

— That estimate of overall loss is then adjusted before the end of the 2005/06 marketing year by the difference between the actual cumulative overall loss (actual cumulative exportable surplus multiplied by average loss, calculated as in the previous indent) for the 2001/02 to 2005/06 marketing years and the sum total of the basic production levies and the B levies charged (Article 15(2)).

— If the above calculation results in a foreseeable overall loss, that loss is divided by the estimated production of A and B sugar for the current marketing year and the result is charged to manufacturers as a basic production levy, capped at a figure ascertainable by reference to the intervention price for white sugar, on their A and B sugar (Article 15(3)).

— If that basic production levy does not cover the foreseeable overall loss (as a result of the capping), the balance is divided by the estimated production of B sugar for the marketing year in question and the resulting amount is charged as a B levy, again subject to a cap, on producers of B sugar (Article 15(4)).

16 — Article 27(7).

17 — The text of Article 15 is, so far as relevant, set out in the Annex to this Opinion.

18 — See footnote 15.

19 — The legislation refers to 'overall loss or revenue'. Since, however, world prices are normally less than the Community intervention price, this figure is normally a loss rather than revenue. On that basis and in order to simplify the analysis as much as possible, I shall refer only to losses when describing the calculation.

— If the effect of the two caps is that the foreseeable overall loss for the current marketing year is still unlikely to be covered by the levies, then the second cap is increased (Article 15(5)).

— All the losses resulting from the grant of production refunds under Article 7(3) [20] are to be taken into account when calculating the overall loss referred to in paragraph 1 (Article 15(6)).

16. It will be seen therefore that, since (i) the *overall loss* determines the rate of the production levy, (ii) the overall loss is the product of the *exportable surplus* and the *average loss*, (iii) the exportable surplus is calculated on the basis of, inter alia, *sugar quantities disposed of for consumption within the Community*, and (iv) the average loss is affected by the *total levies on export obligations to be fulfilled*, the way in which both the sugar quantities disposed of for consumption within the Community and the total levies on export obligations to be fulfilled are calculated has a direct impact on the amount of the levy.

17. The two issues in the present cases concern the interpretation of two of those concepts: first, whether the calculation of the 'exportable surplus' should take account of sugar exported in the form of processed goods in respect of which no export refunds were paid, and, second, whether 'export obligations' should include all exports, including those in respect of which no export refunds were paid.

18. Both those concepts are dealt with in further detail in the regulation implementing the basic regulation, to which I now turn.

The implementing regulation

19. Article 15(8) of the basic regulation provided for the detailed rules for applying Article 15 to be adopted by implementing legislation, to cover in particular the amounts of the levies to be collected. On the basis of (inter alia) that provision, the Commission adopted Regulation No 314/2002 laying down detailed rules for the application of the quota system in the sugar sector [21] ('the implementing regulation').

20 — Sugar used in the chemical industry: see point 13 above.

21 — Commission Regulation (EC) No 314/2002 of 20 February 2002 (OJ 2002 L 50, p. 40), as amended by Commission Regulation (EC) No 1140/2003 of 27 June 2003 (OJ 2003 L 160, p. 33).

20. The implementing regulation provides for (among other things) the determination of the forecast sugar quantities disposed of for consumption in the Community within the meaning of Article 15(1)(b) and (2)(a) of the basic regulation and the definition of export obligations to be fulfilled during the current marketing year within the meaning of Article 15(1)(d) of the basic regulation.

21. Article 6(4) of the implementing regulation as amended provides that the forecast quantities disposed of for consumption in the Community are (i) total quantities of sugar stored at the beginning of the marketing year, sugar produced under quotas A and B, sugar imported in the natural state and sugar contained in imported processed products, minus (ii) total quantities of sugar exported in the natural state, sugar contained in exported processed products, sugar stored at the end of the marketing year and (essentially) sugar used in the chemical industry. [22] That wording appears to require the quantities in (ii) to include all sugar contained in exported processed products, whether or not export refunds were paid on the sugar.

22. Article 6(5) of the implementing regulation defines 'export obligations to be fulfilled during the current marketing year' as, essentially, all sugar to be exported in the natural state with export refunds or levies fixed by tenders opened in respect of that marketing year or on the basis of export licences issued during that marketing year and all foreseeable exports of sugar in the form of processed products with export refunds or levies fixed for that purpose during that marketing year, such quantities being spread evenly over the marketing year. [23] It appears that the Commission has, at least since 2003, interpreted 'export obligations' within the meaning of Article 6(5) as comprising sugar to be exported with export refunds *fixed and in fact paid*, to the exclusion of sugar to be exported with export refunds *fixed and not in fact paid*.

23. The result of including all sugar contained in exported processed products for the purposes of the second element of the calculation prescribed by Article 6(4) of the implementing regulation is that the 'forecast quantities disposed of for consumption in the Community' are less than they would be if all sugar to be exported in processed products were not included. This in turn increases the 'exportable surplus' and, ultimately, the amount of the production levy.

22 — With regard to sugar used in the chemical industry, see point 13 above. The full text of Article 6(4) as amended is in the Annex to this Opinion.

23 — The full text of Article 6(5) is in the Annex to this Opinion.

24. It appears that the effect of that increase is significant. It is common ground in the present cases that in many instances [24] sugar producers do not claim export refunds in respect of sugar incorporated in exported processed products. That is apparently for two principal reasons. First, the quantities involved on any particular occasion will often mean that it is not worth the producer's while to complete and submit the necessary paperwork. Second, even where the quantities may in principle give rise to entitlement to a worthwhile export refund, the producer may still find that providing proof of the precise amount of sugar used in the product, on which the amount of the export refund depends, is disproportionately difficult.

Background to the main proceedings

26. The cases before the referring courts are challenges by sugar producers to the setting of production levies for, variously, the 2001/02, 2002/03 and 2003/04 marketing years.

Case C-5/06 Jülich

25. The production levies for the 2001/02, 2002/03 and 2003/04 marketing years were set by Regulations No 1837/2002, 1762/2003 and 1775/2004 [25] respectively.

27. In Case C-5/06 *Jülich*, the producer complains essentially that the Commission, in determining the quantities of sugar disposed of for consumption within the Community used when calculating the exportable surplus, should not have included, sugar exported from the Community in the form of processed goods in respect of which no export refunds were paid, since no loss resulted to the Community budget from those exports. Alternatively, in determining the average loss per tonne of sugar, the Commission should also have included the quantity in respect of which no refunds were paid. There was no objective justification for taking into account different quantities when determining the exportable surplus

24 — The applicant in Case C-5/06 states, without being contradicted and on the basis of published figures, that the proportion is about 60%.

25 — Commission Regulation (EC) No 1837/2002 of 15 October 2002 fixing the production levies and the coefficient for the additional levy in the sugar sector for the marketing year 2001/02 (OJ 2002 L 278, p. 13); Commission Regulation (EC) No 1762/2003 of 7 October 2003 fixing the production levies in the sugar sector for the 2002/03 marketing year (OJ 2003 L 254, p. 4) and Commission Regulation (EC) No 1775/2004 of 14 October 2004 setting the production levies in the sugar sector for the 2003/04 marketing year (OJ 2004 L 316, p. 64).

and the average loss per tonne of sugar. The effect was that the levies exceeded the actual costs of covering the losses associated with exports.

28. On the basis of the production levies so calculated, Jülich was charged EUR 7.3 million for the marketing year 2003/04. It considers that the correct figure is EUR 3.7 million. It accordingly challenged the assessment before the Finanzgericht (Finance Court), Düsseldorf.

29. That court has doubts as to whether the determination made by the Commission concerning the rates of levy set under Regulation No 1775/2004 is compatible with Article 15 of the basic regulation, to the extent that the quantities of sugar which were exported in the form of processed products and in respect of which no export refunds were paid were included in the calculation of the exportable surplus.

30. The referring court notes that, as is apparent from the preamble to the basic regulation, the purpose of charging production levies is to place on the producers the burden of costs incurred from disposing of that part of Community production which is surplus to the Community's internal consumption. That principle of self-financing of disposal costs has also been recognised by the Court of Justice in its case-law to date. [26] That could argue in favour of interpreting 'exportable surplus' within the meaning of Article 15 of the basic regulation as requiring the inclusion in the export quantities used in determining the 'quantities disposed of for consumption in the Community' only of those export quantities in respect of which export refunds have actually been paid in the relevant marketing year.

31. Moreover, the calculation of the production levies to be set, as performed by the Commission, could also breach the principle of proportionality. That principle requires that measures implemented through Community provisions be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it. If the aim of charging production levies is simply to require producers to meet the costs of disposing of the surplus Community production, then to set levies without taking into account the fact that export refunds were paid only for a portion of the sugar exported would go beyond what is necessary to achieve this aim.

32. If Article 15 of the basic regulation requires that, in the calculation of the exportable surplus, only those export quantities of sugar in respect of which export refunds have in fact been paid should be taken into

26 — The referring court cites Case 250/84 *Eridania* [1986] ECR 117, paragraph 19, and Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen* [1991] ECR I-415, paragraph 62.

account, Article 6(4) of the implementing regulation and Regulation No 1775/2004 [27] would be invalid.

33. If, however, Article 15 of the basic regulation requires that, when calculating the exportable surplus, all the export quantities of sugar are to be taken into account — regardless of the fact that no export refunds have been paid in respect of a portion of those quantities — the question would arise whether that must also be the case when calculating the average loss per tonne of sugar. If the Court of Justice were to take the view that the Commission's calculation of the average loss per tonne is not consistent with Article 15 of the basic regulation, Regulation No 1775/2004 [28] would be invalid on that ground.

34. The Finanzgericht Düsseldorf has accordingly referred the following questions for a preliminary ruling:

'(1) Is Article 15 of [the basic regulation] to be interpreted as meaning that, when determining the exportable surplus, account should be taken only of those export quantities of sugar, isoglucose and inulin syrup in respect of which export refunds have actually been paid?

(2) If Question 1 is to be answered in the affirmative: is Article 6(4) of [the implementing regulation as amended] invalid?

(3) If Question 1 is to be answered in the negative: is Article 15 of [the basic regulation] to be interpreted as meaning that, when determining both the exportable surplus and the average loss per tonne of sugar, all exports are to be taken into account, even where no export refunds were paid in respect of a portion of those exports in the relevant marketing year?

(4) If Questions 1, 2 or 3 are to be answered in the affirmative: is Commission Regulation (EC) No 1775/2004 of 14 October 2004 setting the production levies in the sugar sector for the 2003/04 marketing year invalid?'

27 — Cited in footnote 25.
28 — Cited in footnote 25.

Joined Cases C-23/06 to C-36/06 Saint-Louis Sucre and Others

35. In Joined Cases C-23/06 to C-36/06 *Saint-Louis Sucre and Others* ('*Saint-Louis Sucre*'), the producers believed that they had paid too much production levy in respect of the marketing years 2001/02, 2002/03 and 2003/04. They made a request for partial reimbursement on the ground that, since 2002, the levy has generated more revenue than is envisaged by the correct application of the relevant legislation, which provides for a simple system of self-financing by producers. That is principally because part of the sugar incorporated in processed exported products does not in practice give rise to export refunds and does not therefore give rise to any costs. The implementing regulation however includes in the calculation of the exportable surplus transactions which do not generate any refunds, or therefore any expenditure. The producers consider that by accounting differently for sugar which is exported in the form of processed products which has not given rise to any export refunds, by integrating it on the one hand into the exportable surplus to be financed, but by excluding it on the other hand from the 'export obligations' in question which allow calculation of the 'average loss', the Commission overestimated the amount of the levy for the three marketing years 2001/02, 2002/03 and 2003/04, disregarding the objective of self-financing laid down by the Council.

36. In the alternative, if the Court upholds the Commission's interpretation of the exportable surplus, the producers submit that the objective of self-financing would require the Commission to include in 'export commitments in question' sugar which is exported in the form of processed products on which export refunds have not been paid.

37. The Tribunal de Grande Instance de Nanterre (Regional Court, Nanterre) states that it is bound to make a reference to the Court for a preliminary ruling since the validity of Community legislation is at issue. It notes also that the parties are in agreement on the need for that referral as the disputed question has also been raised in other Member States several of which, including France, have made known their disagreement with the method of calculation used by the management committee to evaluate the total loss to be financed by the production levy.

38. It has accordingly referred the following questions:

'(1) Is Article 6(4) of the implementing regulation and/or Regulations (EC) Nos 1837/2002, 1762/2003 and 1775/2004 adopted to implement it invalid in the light of Article 15 of [the basic regulation] and in the light of the principle of proportionality, in that, with regard to calculation of the production levy, they

do not provide for the exclusion from the "exportable surplus" of the sugar contained in processed products which are exported without export refunds?

If the answer to this question is in the negative:

(2) Are Regulations (EC) Nos 1837/2002, 1762/2003 and 1775/2004 invalid in the light of [the implementing regulation] and Article 15 of [the basic regulation] and of the principles of equality and proportionality, in that they lay down a production levy for sugar which is calculated on the basis of the "average loss" per tonne exported, which does not take account of the quantities exported without refund, although these quantities are included in the total used to evaluate the total loss to be financed?'

39. Written observations have been submitted, and oral observations made at the hearing, by the applicants, the French, German and Greek Governments and the Commission in both *Jülich* and *Saint Louis Sucre*. The Italian Government submitted written observations in *Saint Louis Sucre*.

Assessment

Determination of the exportable surplus

40. The first question in both *Jülich* and *Saint Louis Sucre* asks essentially whether Article 15 of the basic regulation requires account to be taken, when determining the exportable surplus, only of those export quantities in respect of which export refunds have in fact been paid.

41. It appears to be common ground that the effect of an affirmative answer to that question [29] will be that Article 6(4) of the implementing regulation is invalid, since the effect of that provision is that account will be taken, when determining the exportable surplus, of all export quantities regardless of whether export refunds have in fact been paid. The invalidity of Article 6(4) is raised as the second question in *Jülich* and as part of the first question in *Saint Louis Sucre*.

29 — The terms of the first question in *Saint-Louis Sucre* are in fact such that a negative answer is to the same effect as an affirmative answer to the first question in *Jülich*. Since it makes sense to consider both questions together, I rephrase them as one.

42. Similarly, if the first question in both *Jülich* and *Saint Louis Sucre* (as rephrased above) is answered in the affirmative, the effect will be that Regulations Nos 1837/2002, 1762/2003 and 1775/2004, which lay down the amount of the production levy calculated in accordance with, inter alia, Article 6(4) of the implementing regulation, are to that extent invalid. The invalidity of Regulations Nos 1837/2002, 1762/2003 and 1775/2004 is raised (as regards Regulation No 1775/2004) as the fourth question in *Jülich* and (as regards all three regulations) as part of the first question in *Saint Louis Sucre*.

43. It will be recalled that in accordance with Article 15 of the basic regulation the overall loss, which determines the rate of the production levy, is the product of the exportable surplus and the average loss. The exportable surplus is calculated on the basis of sugar quantities disposed of for consumption within the Community. Article 6(4) of the implementing regulation as amended provides that the quantities disposed of for consumption in the Community are (i) total quantities of sugar stored at the beginning of the marketing year, sugar produced under quotas A and B, sugar imported in the natural state and sugar contained in imported processed products, minus (ii) sugar exported in the natural state, sugar contained in exported processed products, sugar stored at the end of the marketing year and (essentially) sugar used in the chemical industry.

44. It is common ground that the notion of sugar 'contained in exported processed products' within the meaning of Article 6(4) as amended includes all sugar contained in exported processed products, even sugar in respect of which no export refunds have been paid. The question is whether that interpretation is consistent with Article 15 of the basic regulation.

45. The applicants and the French, Greek and Italian Governments submit, in essence, that in accordance with Article 15 of the basic regulation account should be taken, when determining the exportable surplus, only of those exports of sugar in respect of which export refunds have actually been paid. Those parties variously invoke in support of their view, first, the wording, scheme, history, objective, and interpretation by the Court of the basic regulation and, second, the principle of proportionality.

46. The German Government and the Commission take the contrary view.

47. The German Government bases its view on the wording of both Article 15 of the basic regulation and Article 6(4) of the implementing regulation and on the objectives

of the production levy, which include influencing sugar production and stabilising the market. [30]

48. The Commission submits that the basic regulation gives it no choice but to take into account when calculating the exportable surplus all exports, including those which have not benefited from export refunds. That approach is logical since the exportable surplus must include all quantities, whether or not in fact exported, the disposal of which is provided for by Community measures. Moreover, Community consumption would be over-estimated if certain exported quantities were not taken into account.

49. It seems to me that, essentially, the question comes down to whether one takes a broader approach, looking at the ultimate objective of the calculation, or a narrower approach, looking at the individual components of the calculation. In the former case, the objective of self-financing would seem to support the view that only sugar exported in processed products in respect of which export refunds have been claimed and paid should be taken into account. Otherwise the knock-on effect is that the 'overall loss' is artificially inflated and the production levies are therefore higher. In the latter case, the clear wording of the provisions would lead to the opposite conclusion: at this stage of the calculation, all that is being done is determining what was exported.

50. To my mind it would be disingenuous to take the second view. The calculation is not included in the legislation as an exercise in linguistics. It is there as a step in determining whether there is an *overall loss*. As Jülich submits, the term 'overall loss' in Article 15(1)(e) is hierarchically superior to the subordinate terms 'exportable surplus' and 'average loss' and must therefore colour the interpretation of the latter terms. If there is an overall loss, the production levy is calculated by direct and immediate reference to it and is charged to sugar producers at such a rate that they bear the entirety of the loss (subject to a cap).

51. The principle of producer responsibility was introduced by Regulation No 1785/1981. [31] The Court explained in *Eridania* [32] that before that regulation was adopted provision was made for a Community system for financing the costs of disposing of surpluses. Under that earlier system, such costs were borne within certain limits by producers as a whole by means of a production levy whilst the remainder was

30 — The German Government refers to *Eridania*, cited in footnote 26, paragraph 19.

31 — Cited in footnote 9.

32 — Cited in footnote 26.

borne by the Community budget. Regulation No 1785/1981 introduced the system which underlies the present arrangements. Indeed, the wording of the 11th recital in the preamble to Regulation No 1785/1981 is in its essentials identical to that of recital 9 in the preamble to the basic regulation.

52. That recital, together with the other recitals set out in point 7 above, makes it clear in my view that the overriding aim of the production levy under the post-1981 system is to ensure that producers bear the costs of disposing of surplus production.

53. Recital 11 in the preamble to the basic regulation moreover refers to the principle that producers should bear full financial responsibility for the *losses incurred each marketing year*. That tends to emphasise that actual losses are at issue.

54. In *Eridania* the Court was asked whether the production levy was contrary to the prohibition of discrimination on the basis that the total of the charges connected with the financing of the quota system was calculated on the basis of consumption within the Community, whereas the charges to be borne by the individual undertakings were calculated on the basis of their actual production during the reference period.

55. The Court rejected that argument. In its judgment it stated that 'the quota system … provides for the disposal at guaranteed prices of qualifying quantities by means of a system for financing the costs of disposal, which are borne jointly by all the producers. That financing system is designed in such a way that the A quota, which represents internal consumption, attracts only a minimal levy whereas the B quota, which is mainly for export, is subject to a much higher levy in order to finance the necessary refunds *whilst discouraging production*'. [33]

56. That statement is cited by the referring court in *Jülich* and by the German Government in both cases in support of the view that the aim of the production levy is not simply for producers to bear the cost of disposal but also to discourage production.

33 — Paragraph 19 (emphasis added).

57. It seems clear to me, however, that the formulation used by the Court is consistent with the view that the principal aim is for self-financing by producers.

58. It is also apparent from the scheme of Article 15 of the basic regulation that the principal aim is self-financing. Article 15(3) provides that the basic production levy is to be determined by dividing the foreseeable overall loss by the estimated production of A and B sugar attributable to the current marketing year, subject to a cap. [34] If however the production levy so calculated does 'not fully cover the overall loss', Article 15(4) provides for the calculation of a further levy on the production of B sugar, again subject to a cap. [35] Again, should it appear that the foreseeable overall loss 'is unlikely to be covered by the expected proceeds from the levies' because of the two caps, Article 15(5) provides for further adjustment, subject to a further cap. [36]

59. That interpretation is furthermore borne out by the treatment in the basic regulation of production refunds on sugar used in the chemical industry. [37] Article 15(6) requires all *losses resulting from the grant of such production refunds* to be taken into account when calculating the overall loss referred to in paragraph 1(e). Production refunds therefore enter the equation only where they have in fact been granted.

60. Moreover the very fact that the production levy imposes on producers the burden of financing the cost of subsidising exports of excess production would seem to me to discourage production. The mere fact, if such it be, that production levies discourage production in excess of Community consumption is in no way inconsistent with the principal objective of such levies being to finance export refunds, and hence with the proposition that such levies must be calculated so that producers do not pay more than is necessary for that purpose.

61. It seems to me that the only convincing argument against the interpretation I am proposing is that it amounts to regarding sugar exported in processed products in respect of which no export refunds have been

34 — For sugar, 2% of the intervention price for white sugar.

35 — 30% of the intervention price for white sugar.

36 — 37.5% of the intervention price for white sugar.

37 — In accordance with Article 7(3): see point 13 above.

paid as sugar 'disposed of for consumption within the Community' within the meaning of Article 15(1)(b) of the basic regulation. That is clearly not a natural meaning of the phrase.

62. However, it must be borne in mind that the notion of 'sugar … disposed of for consumption within the Community' has no independent significance. It is merely a label attached to an intermediate step in calculating the 'exportable surplus'. The meaning that might normally be given to that label in other contexts is therefore not particularly important.

63. If it were none the less regarded as essential to arrive at an interpretation of 'sugar … disposed of for consumption within the Community' which is reconcilable with its broader context, I consider that that can be done. The solution, in my view, is to regard sugar exported at no cost to the Community — including sugar exported in processed products in respect of which no export refunds have been paid — as tantamount to sugar disposed of for consumption within the Community. That interpretation, while somewhat contrived, seems to me to be required in order more generally to interpret the legislation so as to reflect its objectives. [38]

64. The Commission has referred in *Saint Louis Sucre* to case-law holding that the Community legislature enjoys a wide discretionary power in matters concerning the common agricultural policy, corresponding to the political responsibilities given to it by Articles 34 to 37 EC. Consequently, judicial review must be limited to verifying that the measure in question is not vitiated by any manifest error or misuse of powers and that the authority concerned has not manifestly exceeded the limits of its power of assessment. [39]

65. The Court has indeed ruled to that effect. That does not however give the Community legislature *carte blanche* in the agricultural sector. The Court has not excluded judicial review of the institutions' exercise of their wide discretionary powers. If such review is to be of any value, it must be possible for the Court to intervene when, as in the present cases, the method of calculation of a produc-

38 — An alternative would be to regard the original processing of sugar into processed products as amounting to disposal of that sugar within the Community but then to qualify that interpretation so that where export refunds were paid on the sugar used in the processing, that processing was not after all disposal within the Community. That interpretation appears to me to be more artificial, and hence less attractive, than the interpretation I suggest.

39 — Case C-189/01 *Jippes* [2001] ECR I-5689, paragraph 80.

tion levy intended to be a means by which producers bear the cost to the Community of disposing of surplus production manifestly leads to overcharging, thereby placing a disproportionate burden on the producers.

66. I am accordingly of the view that, when determining the exportable surplus, account should be taken only of those export quantities of sugar in respect of which export refunds have actually been paid.

67. It is common ground that Article 6(4) of the implementing regulation does not reflect that interpretation. It follows that that provision, together with Regulations Nos 1837/2002, 1762/2003 and 1775/2004, is to that extent invalid.

Determination of the average loss

68. The third question in *Jülich* and the second question in *Saint Louis Sucre* asks essentially whether Article 15 of the basic regulation requires that, when determining the average loss per tonne of sugar, all exports, including those in respect of which no export refunds were paid, are to be taken into account, or whether on the contrary exports in respect of which no export refunds were paid should be left out of the calculation.

69. It will be recalled that in accordance with Article 15 of the basic regulation the overall loss, which determines the rate of the production levy, is the product of the exportable surplus and the average loss per tonne. The average loss per tonne is the difference between the total amount of refunds and the total amount of levies divided by the total tonnage of export obligations to be fulfilled that marketing year. Article 6(5) of the implementing regulation defines export obligations to be fulfilled during the current marketing year as, essentially, all sugar to be exported in the natural state with export refunds [40] fixed by tenders opened in respect of that marketing year or on the basis of export licences issued during that marketing year and *all foreseeable exports of sugar in the form of processed products with export refunds* [41] *fixed for that purpose* during that marketing year, such quantities being spread evenly over the marketing year.

40 — See footnote 15.
41 — Ibid.

70. The applicants and the French Government repeat that, in calculating the overall loss, sugar which has caused no loss to the Community should be excluded from the exportable surplus, one of the elements in that calculation. If the Commission worked on that basis, it would be logical for it to exclude such sugar also when calculating the average loss, the other element. The Commission presently does this. This question has been raised in the alternative, namely in the event that the Court rules that, in calculating the overall loss, all sugar exported in processed products should be taken into account. In that case, if the Commission does not also take into account, in calculating the average loss, all sugar exported in processed products, whether or not export refunds have been paid, the calculation will be distorted since the figure for exports used to calculate the exportable surplus will be higher than that used to calculate the average loss. That would be contrary to the principle of proportionality, since the average loss would be artificially inflated and thus not reflect the actual average cost of all the exports taken into account in calculating the overall loss.

71. The Greek and Italian Governments make no submissions on the interpretation of average loss.

72. The German Government submits that, if the exportable surplus is determined on the basis of all exports whereas the average loss is calculated on the basis only of those exports in respect of which export refunds have been paid, that may result in the production levy exceeding the actual losses, which would be contrary to the principle of self-financing.

73. The Commission notes that the Council expressly used the term 'export obligations' and not 'quantities exported' in Article 15(1) (d) of the basic regulation. The term 'obligations' assumes that exports have the support of Community measures, namely in the present case export refunds. Moreover, since the objective of calculating the average loss is to determine the cost per unit of surplus sugar available on the market, in determining that cost only the quantities in respect of which a genuine disposal cost has been borne should be included.

74. Article 15(1)(d) defines the average loss or revenue as the difference between the total amount of refunds and the total amount of levies divided by the total tonnage of export obligations to be fulfilled during the current

marketing year. In practice that difference normally leads to an average loss, since world prices are normally below supported Community prices. That average loss is then multiplied by the exportable surplus in order to obtain an estimate of overall loss. That loss in turn is divided by estimated sugar production and the resulting amount charged to producers as the basic production levy.

75. I have already explained why I consider that, when calculating the exportable surplus, sugar contained in exported processed products should be taken into account only when it has benefited from export refunds. It is common ground that logic dictates that, if that is so, the other element in determining the estimated overall loss, namely the average loss, should similarly take into account sugar exported in processed products only when it has benefited from export refunds.

Conclusion

76. For the reasons given above, I am of the view that the questions referred by the Finanzgericht Düsseldorf in Case C-5/06 should be answered as follows:

'— Article 15 of Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector requires that, when determining the exportable surplus, account should be taken only of those export quantities of sugar, isoglucose and inulin syrup in respect of which export refunds have actually been paid.

— Article 6(4) of Commission Regulation (EC) No 314/2002 of 20 February 2002 laying down detailed rules for the application of the quota system in the sugar sector, as

amended by Commission Regulation (EC) No 1140/2003 of 27 June 2003, is invalid in so far as it does not reflect that interpretation of Article 15 of Regulation No 1260/2001.

— Commission Regulation (EC) No 1775/2004 of 14 October 2004 setting the production levies in the sugar sector for the 2003/04 marketing year is invalid in so far as those production levies are fixed on the basis of an incorrect interpretation of Article 15 of Regulation No 1260/2001.'

77. For the same reasons, I consider that the first question referred by the Tribunal de Grande Instance de Nanterre in Joined Cases C-23/06 to C-36/06 should be answered as follows:

'— Article 6(4) of Commission Regulation (EC) No 314/2002 of 20 February 2002 laying down detailed rules for the application of the quota system in the sugar sector, as amended by Commission Regulation (EC) No 1140/2003 of 27 June 2003, together with Commission Regulation (EC) No 1837/2002 of 15 October 2002 fixing the production levies and the coefficient for the additional levy in the sugar sector for the marketing year 2001/02, Commission Regulation (EC) No 1762/2003 of 7 October 2003 fixing the production levies in the sugar sector for the 2002/03 marketing year and Commission Regulation (EC) No 1775/2004 of 14 October 2004 setting the production levies in the sugar sector for the 2003/04 marketing year are invalid in the light of Article 15 of Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector in so far as, with regard to calculation of the production levy, they do not provide for the exclusion from the 'exportable surplus' of the sugar contained in processed products which are exported without export refunds.'

Annex

Regulation No 1260/2001 (the basic regulation)

Article 15 of the basic regulation provides, in so far as is relevant:

'1. Before the end of each marketing year, the following shall be recorded:

(a) a forecast of the production of A and B sugar, A and B isoglucose and A and B inulin syrup attributable to the marketing year concerned;

(b) a forecast of the quantities of sugar, isoglucose and inulin syrup disposed of for consumption within the Community during the marketing year concerned;

(c) the exportable surplus obtained by subtracting the quantity referred to in (b) from the quantity referred to in (a);

(d) an estimate of the average loss or revenue per tonne of sugar for export obligations to be fulfilled during the current marketing year.

This average loss or revenue shall be equal to the difference between the total amount of refunds and the total amount of levies on the total tonnage of export obligations in question;

(e) an estimate of overall loss or revenue, obtained by multiplying the surplus referred to in (c) by the average loss or revenue referred to in (d).

2. Before the end of the 2005/06 marketing year and without prejudice to Article 10(3), (4), (5) and (6), the following shall be recorded cumulatively for the 2001/02 to 2005/06 marketing years:

(a) the exportable surplus established on the basis of the definitive production of A and B sugar, A and B isoglucose and A and B inulin syrup and the definitive quantity of sugar, isoglucose and inulin syrup disposed of for consumption within the Community;

(b) the average loss or revenue per tonne of sugar resulting from the total export obligations concerned, calculated using the method described in the second subparagraph of paragraph 1(d) above;

(c) the overall loss or revenue, obtained by multiplying the surplus referred to in (a) by the average loss or revenue referred to in (b);

(d) the sum total of the basic production levies and the B levies charged.

The estimate of overall loss or revenue referred to in paragraph 1(e) shall be adjusted by the difference between the amounts referred to in (c) and (d).

3. … should the figures recorded under paragraph 1 and adjusted under paragraph 2 result in a foreseeable overall loss, then that loss shall be divided by the estimated production of A and B sugar, A and B isoglucose and A and B inulin syrup attributable to the current marketing year. The resulting amount shall be charged to manufacturers as a basic production levy on their production of A and B sugar, A and B isoglucose and A and B inulin syrup.

However, this levy shall not exceed:

— for sugar, 2% of the intervention price for white sugar,

— for inulin syrup, expressed as sugar/isoglucose equivalent by applying a coefficient of 1.9, the maximum amount payable on white sugar, and

— for isoglucose, the share of the basic production levy borne by sugar manufacturers.

4. Should the maximum permitted basic production levy not fully cover the overall loss referred to in the first subparagraph of paragraph 3, the balance not covered shall be divided by the estimated production of B sugar, B isoglucose and B inulin syrup attributable to the marketing year in question. The resulting amount shall be charged to manufacturers as a B levy on their production of B sugar, B isoglucose and B inulin syrup.

However, subject to paragraph 5, this levy shall not exceed:

— for B sugar, 30% of the intervention price for white sugar,

— for B inulin syrup, expressed as sugar/isoglucose equivalent by applying a coefficient of 1.9, the maximum amount payable on B white sugar, and

— for B isoglucose, the share of the B levy borne by sugar manufacturers.

5. Where the figures recorded under paragraph 1 suggest that the foreseeable overall loss for the current marketing year is unlikely to be covered by the expected proceeds from the levies because of the ceilings on the basic production levy and the B levy fixed in paragraphs 3 and 4, then the maximum percentage referred to in the first indent of paragraph 4 shall be adjusted to the extent necessary to cover the overall loss, without exceeding 37.5%.

The revised maximum percentage for the B levy shall be fixed for the current marketing year before 15 September. The minimum price for B beet referred to in Article 4(1)(b) shall be adjusted accordingly.

6. All the losses resulting from the grant of production refunds under Article 7(3) shall be taken into account when calculating the overall loss referred to in paragraph 1(e).

7. The levies referred to in this Article shall be collected by the Member States.

8. Detailed rules for applying this Article shall be adopted in accordance with the procedure referred to in Article 42(2), and shall cover in particular:

— the amounts of the levies to be collected,

— the revised maximum percentage for the B levy,

— the adjusted minimum price for B beet corresponding to the revised maximum percentage for the B levy.'

Regulation No 314/2002 (the implementing regulation)

Article 6(4) and (5) of the implementing regulation as amended provide:

'4. The quantities disposed of for consumption in the Community to be recorded under Article 15(1)(b) and (2)(a) of Regulation (EC) No 1260/2001 shall be established by totalling the quantities, expressed as white sugar, of the sugars and syrups indicated in Article 1(1)(a), (b), (c), and (d) and of isoglucose and inulin syrup:

(a) stored at the beginning of the marketing year;

(b) produced under quotas A and B;

(c) imported in the natural state;

(d) contained in imported processed products;

subtracting [from] the quantities referred to in the first subparagraph, [the quantities [42]] expressed as white sugar, of sugar, isoglucose and inulin syrup:

(a) exported in the natural state;

42 — It is clear from other language versions (and indeed common sense) that the English text is wrong. The correct meaning is arrived at by including the words in square brackets.

(b) contained in exported processed products;

(c) stored at the end of the marketing year;

(d) for which certificates for production refunds as indicated in Article 7(3) of Regulation (EC) No 1260/2001 have been issued. [43]

Quantities as indicated in points (c) and (d) of the first subparagraph and in points (a) and (b) of the second subparagraph shall be extracted from the Eurostat databases and shall, if the figures for a marketing year are incomplete, cover the most recent 12 months available. Quantities produced under inward processing arrangements shall not be counted.

Quantities as indicated in point (c) of the first subparagraph and point (a) of the second subparagraph shall include those consigned to the Canary Islands, Madeira and the Azores covered by Article 1(1a) of Regulation (EEC) No 2670/81.

The quantities of sugar, isoglucose and inulin syrup in the products indicated in point (d) of the first subparagraph and point (b) of the second subparagraph shall be established on the basis of the average sugar contents established for the products concerned and of Eurostat figures.

43 — Article 7(3) concerns sugar used in the chemical industry.

Quantities as indicated in point (a) of the second subparagraph shall exclude C sugar, C isoglucose, C inulin syrup and food aid.

5. The following shall be regarded within the meaning of Article 15(1)(d) of Regulation (EC) No 1260/2001 as export obligations to be fulfilled during the current marketing year:

(a) all quantities of sugar to be exported in the natural state with export refunds or levies fixed by means of tenders opened in respect of that marketing year;

(b) all quantities of sugar, isoglucose and inulin syrup to be exported in the natural state with export refunds or levies fixed periodically on the basis of export licences issued during that marketing year;

(c) all foreseeable exports of sugar, isoglucose and inulin syrup in the form of processed products with export refunds or levies fixed for that purpose during that marketing year, such quantities being spread evenly over the marketing year.

For the calculation of the foreseeable average loss referred to in Article 15(1)(d) of Regulation (EC) No 1260/2001, the production refunds for the quantities of basic products expressed as white sugar for which certificates for the production refunds referred to in Article 7(3) of that Regulation have been issued during the course of the marketing year in question shall also be taken into account.'