JUDGMENT OF THE COURT (Second Chamber)

8 May 2008 *

In Joined Cases C-5/06 and C-23/06 to C-36/06,

REFERENCES for preliminary rulings under Article 234 EC, from the Finanzgericht Düsseldorf (Germany) (C-5/06) and from the Tribunal de grande instance de Nanterre (France) (C-23/06 to C-36/06), made by decisions of 2 and 5 January 2006 respectively, received at the Court on 9 and 20 January 2006, in the proceedings

Zuckerfabrik Jülich AG, formerly Jülich AG (C-5/06)

v

Hauptzollamt Aachen

and

Saint Louis Sucre SNC (C-23/06)**,**

Sucreries du Marquenterre SA (C-24/06),

SA des Sucreries de Fontaine Le Dun, Bolbec, Auffray (SAFBA) (C-25/06),

* Languages of the cases: German and French.

SA Lesaffre Frères (C-26/06),

Tereos, as successor in title to Sucreries, Distilleries des Hauts de France (C-27/06),

SA Sucreries & Distilleries de Souppes — Ouvré fils (C-28/06),

SA Sucreries de Toury et Usines Annexes (C-29/06),

Tereos (C-30/06),

Tereos, as successor in title to SAS Sucrerie du Littoral Groupe SDHF (C-31/06),

Cristal Union (C-32/06),

Sucrerie Bourdon (C-33/06),

SA Sucrerie de Bourgogne (C-34/06),

SAS Vermendoise Industries (C-35/06),

SA Sucreries et Raffineries d'Erstein (C-36/06)

v

Directeur général des douanes et droits indirects,

Receveur principal des douanes et droits indirects de Gennevilliers,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen (Rapporteur), K. Schiemann, J. Makarczyk and C. Toader, Judges,

Advocate General: E. Sharpston,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 15 March 2007,

after considering the observations submitted on behalf of:

— Zuckerfabrik Jülich AG (formerly Jülich AG), by H.-J. Prieß, Rechtsanwalt,

— Saint Louis Sucre SNC, by S. Le Roy, avocat,

— Sucreries du Marquenterre SA, SA des Sucreries de Fontaine Le Dun, Bolbec, Auffray (SAFBA), SA Lesaffre Frères, Tereos, as successor in title to Sucreries, Distilleries des Hauts de France, SA Sucreries & Distilleries de Souppes — Ouvré fils, SA Sucreries de Toury et Usines Annexes, Tereos, Tereos, as successor in title to SAS Sucrerie du Littoral Groupe SDHF, Cristal Union, Sucrerie Bourdon, SA Sucrerie de Bourgogne, SAS Vermendoise Industries and SA Sucreries et Raffineries d'Erstein, by N. Coutrelis, avocat,

— the German Government, by M. Lumma and U. Forsthoff, acting as Agents, and L. Harings, Rechtsanwalt,

— the French Government, by G. de Bergues, A. Colomb and A.-L. During, acting as Agents,

— the Greek Government, by V. Kontolaimos, E. Svolopoulou and S. Charitaki, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and G. Aiello, avvocato dello Stato,

— the Commission of the European Communities, by M. Nolin, F. Erlbacher and C. Cattabriga, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 June 2007,

gives the following

Judgment

1 These references for preliminary rulings concern the interpretation 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 (OJ 2001 L 178, p. 1), the validity of 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 (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), and the validity of Commission Regulations (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), (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 (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).

2 The references have respectively been made, first, in the context of proceedings between Zuckerfabrik Jülich AG ('Jülich'), a sugar manufacturer, and the Hauptzollamt (Principal Customs Office) Aachen (Germany) concerning the amount of the production levy required for the marketing year 2003/04 in connection with the financing of the common organisation of the markets in the sugar sector and, second, in the context of proceedings between Saint Louis Sucre SNC ('Saint Louis Sucre') along with other sugar producers, namely the companies Sucreries du Marquenterre SA, SA des Sucreries de Fontaine Le Dun, Bolbec, Auffray (SAFBA), SA Lesaffre Frères, Tereos, as successor in title to Sucreries, Distilleries des Hauts de France, SA Sucreries & Distilleries de Souppes — Ouvré fils, SA Sucreries de Toury et Usines Annexes, Tereos, Tereos, as successor in title to SAS Sucrerie du Littoral Groupe SDHF, Cristal Union, Sucrerie Bourdon, SA Sucrerie de Bourgogne,

SAS Vermendoise Industries and SA Sucreries et Raffineries d'Erstein ('Sucreries du Marquenterre and Others'), on the one hand, and the Directeur général des douanes et droits indirects (Director-General of Customs and Indirect Taxation) and the Receveur principal des douanes et droits indirects de Gennevilliers (Chief Customs Revenue Officer, Gennevilliers) (France), on the other hand, concerning the amounts of levies paid in respect of the marketing years 2001/02, 2002/03 and 2003/04 in connection with the financing of the common organisation of the markets in the sugar sector.

Legal context

3 Recital 9 in the preamble to Regulation No 1260/2001 states:

'The reasons which have hitherto led the Community to adopt a production quota system for sugar, isoglucose and inulin 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 resulting from the Uruguay Round of multilateral trade negotiations, hereinafter referred to as "GATT" …'

4 Recitals 11 to 15 in the preamble to Regulation No 1260/2001 are worded as follows:

'(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 inulin 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 [on Agriculture concluded under the GATT agreements, "the Agreement"], 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 inulin 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 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 carry-over 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.'

5 Thus, Article 11(1) of Regulation No 1260/2001 provides that the Member States are to allocate an A and B quota to each undertaking producing sugar, each undertaking producing isoglucose and each undertaking producing inulin syrup established in its territory and provided with an A and B quota during the 2000/01 marketing year.

6 Pursuant to Article 11(2) of that regulation, those quotas are to be allocated by reference to the A and B basic quantities fixed for each production region.

7 It is apparent from, inter alia, Articles 7(1), 10(3) to (5), 13(1) and 27(1) of Regulation No 1260/2001 that the A and B sugar quotas are guaranteed quantities which may be disposed of on the Community market, delivered into intervention, or exported with the benefit of export refunds.

8 It follows from Article 15(3) and (4) of Regulation No 1260/2001, read in conjunction with recitals 11 and 13 in the preamble thereto, that 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 gives rise to production levies which are to be charged, in particular, to sugar manufacturers.

9 With regard to the calculation of those levies, Article 15 provides:

'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. Without prejudice to Article 18(1), 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.

…

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.

…

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,

…'

10 Article 16 of Regulation No 1260/2001 states:

'1. Where the overall loss recorded for a particular marketing year under Article 15(1) and (2) is not fully covered by the proceeds from the production levies for that marketing year after application of Article 15(3), (4) and (5), an additional levy shall be charged to manufacturers, without prejudice to Article 4, to cover the outstanding balance of the overall loss.

2. The additional levy shall be determined for each sugar-producing undertaking, each isoglucose-producing undertaking and each inulin syrup-producing undertaking by multiplying the total sum due from the undertaking by way of production levies for the marketing year concerned by a coefficient to be determined. That coefficient shall be the ratio for the entire Community, reduced by 1, between the overall loss recorded under Article 15(1) and (2) for the marketing year concerned and the proceeds from the basic production levies and B levies due from manufacturers of sugar, isoglucose and inulin syrup, respectively, for that marketing year.

…

5. Detailed rules for applying this Article, in particular the coefficient referred to in paragraph 2, shall be adopted in accordance with the procedure referred to in Article 42(2).'

11 Pursuant to, inter alia, Articles 15(8) and 16(5) of Regulation No 1260/2001, the Commission of the European Communities adopted Regulation No 314/2002.

12 In its original version, Article 6(4) of that regulation stated that:

'The quantity to be determined under Article 15(1)(b) of Regulation … No 1260/2001 shall be established on the basis of the sum of the following quantities:

(a) the quantities of sugar, isoglucose and inulin syrup disposed of in the Community for direct consumption or for consumption after processing by the user industries;

(b) the quantities of denatured sugar;

(c) the quantities of sugar, isoglucose and inulin syrup imported from non-member countries as processed products.

There shall be subtracted from the sum referred to in the first subparagraph the sum of the quantities of sugar, isoglucose and inulin syrup exported to non-member countries as processed products and the quantities of basic products expressed as white sugar for which certificates for the production refunds referred to in Article 7(3) of Regulation … No 1260/2001 have been issued.'

13 That provision was amended by Regulation No 1140/2003 as follows:

'The quantities disposed of for consumption in the Community to be recorded under Article 15(1)(b) and (2)(a) of Regulation … 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 the quantities referred to in the first subparagraph, expressed as white sugar, of sugar, isoglucose and inulin syrup:

(a) exported in the natural state;

(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 … No 1260/2001 have been issued.

…'

14 Article 6(5) of Regulation No 314/2002 states:

'The following shall be regarded within the meaning of Article 15(1)(d) of Regulation … 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 … 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.'

15 The amounts of the production levies were fixed for the marketing years 2001/02, 2002/03 and 2003/04, respectively, by Regulations No 1837/2002, No 1762/2003 and No 1775/2004, pursuant to Regulations No 1260/2001 and No 314/2002, the latter, where appropriate, as amended by Regulation No 1140/2003.

The actions in the main proceedings and the questions referred for preliminary rulings

Case C-5/06

16 By decision of 22 October 2004, the Hauptzollamt Aachen calculated Jülich's production levy by applying, in respect of the basic production levy for A and B sugar, the amount per tonne laid down in Article 1(a) of Regulation No 1775/2004 and, in respect of the B levy relating to B sugar, the amount per tonne referred to in Article 1(b) of that regulation.

17 Upon the rejection of its complaint challenging that decision, Jülich brought an action before the Finanzgericht (Finance Court) Düsseldorf, claiming that Regulation No 1775/2004 was invalid on the ground that the Commission had erred in its calculation of the production levies. First, Jülich submitted, when calculating the exportable surplus the Commission had wrongly included the quantity of 504 205 tonnes of sugar exported from the Community in the form of processed goods, in respect of which no export refunds had been paid, since, moreover, the Community budget had suffered no loss in respect of that quantity. Second, it argued, in calculating the average loss, the Commission had failed to include that quantity. There was, Jülich submitted, no objective justification for using two different quantities for the purpose of calculating the exportable surplus and the average loss per tonne of sugar.

18 According to the national court, if the purpose of charging production levies were simply to require producers to meet the costs of disposing of surplus Community production, the act of setting levies without taking account of the fact that export refunds are paid only in respect of a portion of the sugar exported would go beyond what is necessary to achieve that aim. The Finanzgericht Düsseldorf decided, therefore, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 15 of [Regulation No 1260/2001] 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 [Regulation No 314/2002], as amended by [Regulation No 1140/2003], invalid?

(3) If Question 1 is to be answered in the negative: is Article 15 of [Regulation No 1260/2001] 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 [Regulation No 1775/2004] invalid?'

Cases C-23/06 to C-36/06

19 Saint Louis Sucre along with Sucreries du Marquenterre and Others are liable, as sugar manufacturing companies, to pay production levies on sugar.

20 Being of the opinion that the levies which they had paid for the marketing years 2001/02, 2002/03 and 2003/04 were too high, they applied for a partial refund of those levies by the Receveur principal des douanes et droits indirects de Gennevilliers, who was entrusted with their collection.

21 By decisions of the Receveur principal of 23 February 2005, the claims for reimbursement were rejected on the ground that the rates of the contested levies resulted from the application of Community legislation.

22 Accordingly, Saint Louis Sucre and Sucreries du Marquenterre and Others brought actions before the Tribunal de grande instance de Nanterre (Regional Court, Nanterre) (France) seeking orders annulling the decisions and ordering partial reimbursement of the contested levies together with payment of default interest.

23 The applicants in the main proceedings claim that the relevant Community legislation laid down different accounting for sugar exported in the form of processed products not eligible for export refunds, first, by including it in the exportable surplus to be financed and, second, by excluding it from 'the export obligations in question' which enable 'the average loss' to be calculated in order to finance effectively the disposal of that surplus. Thus, they contend, the Commission overestimated the amount of the levies for the marketing years 2001/02, 2002/03 and 2003/04 and failed to comply with the self-financing objective imposed by the Council of the European Union.

24 Consequently, the applicants in the main proceedings challenge the validity of Article 6(4) of Regulation No 314/2002, which, they claim, in the version as amended by Regulation No 1140/2003, gives too wide a definition to the concept of exportable surplus, contrary to the principles of proportionality, the hierarchy of norms and the limitation of the Commission's implementing powers. As a secondary point and on the same grounds, they challenge the validity of the regulations fixing, pursuant to Regulation No 314/2002, the amounts of the production levies for the marketing years at issue in the main proceedings.

25 In the alternative, and should a wide definition of the concept of exportable surplus prevail, Saint Louis Sucre and Sucreries du Marquenterre and Others claim that the objective of strict self-financing laid down in Regulation No 1260/2001 has still not been complied with inasmuch as the Commission, which took into account in 2002 products exported without refunds in its annual calculations of the average loss, now overlooks in its calculations the fact that the constituent elements of the 'exportable surplus' and the calculation of the 'average loss' must be identical.

26 Against this background, the Tribunal de grande instance de Nanterre decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 6(4) of … Regulation … No 314/2002 and/or Regulations … No 1837/2002, No 1762/2003 and No 1775/2004 adopted to implement it invalid in the light of Article 15 of … Regulation … No 1260/2001 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 … No 1837/2002, No 1762/2003 and No 1775/2004 invalid in the light of … Regulation … No 314/2002 and Article 15 of … Regulation … No 1260/2001 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?'

The joining of Case C-5/06 and Cases C-23/06 to C-36/06

27 In view of the connections between Case C-5/06 and Cases C-23/06 to C-36/06, it is appropriate, in accordance with Article 43 of the Rules of Procedure, read in conjunction with Article 103 of those rules, to join those cases for the purpose of the judgment.

The questions referred for preliminary rulings

28 As the questions referred by the two national courts for preliminary rulings are essentially the same, it is appropriate to deal with them by reference to the manner in which they are formulated in Case C-5/06.

The question whether, pursuant to Article 15 of Regulation No 1260/2001, all the quantities of exported products which fall under that provision are, for the purpose of calculating the exportable surplus, to be subtracted from the consumption within the Community

29 It should be pointed out that the 11th recital in the preamble to 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) laid down, as provided for in recital 9 in the preamble to Regulation No 1260/2001, that changes were to be made to the system of production levies in order to take account of recent developments in production, in particular '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 …'.

30 Article 28(1) of Regulation No 1785/81, which laid down the criteria for calculating the production levies on the production of A and B sugar and on A and B isoglucose, provided as follows:

'Before the end of the 1981/82 to 1985/86 marketing years, there shall be recorded:

(a) estimates of the production of A and B sugar and [of] A and B isoglucose attributable to the marketing year in question;

(b) estimates of the quantities of sugar and isoglucose disposed of for consumption within the Community during the marketing year in question;

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

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

This average loss or average 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) estimates of the total loss or the total revenue obtained by multiplying the surplus referred to in (c) by the average loss or the average revenue referred to in (d).'

31 That provision, although successively replaced by Article 33(1) of Council Regulation (EC) No 2038/1999 of 13 September 1999 on the common organisation of the markets in the sugar sector (OJ 1999 L 252, p. 1) and by Article 15(1) of Regulation No 1260/2001, has remained essentially unchanged.

32 Article 5(5) of Commission Regulation (EEC) No 1443/82 of 8 June 1982 laying down detailed rules for the application of the quota system in the sugar sector (OJ 1982 L 158, p. 17) provided that the quantities of sugar and isoglucose exported as processed products to non-member countries were to be subtracted from the quantities of sugar and isoglucose included in the account of consumption within the Community.

33 It is, in particular, clear from the Court file relating to Cases C-23/06 to C-36/06 that, with regard to the exportable surplus, the Commission has consistently contended that this corresponds to production less disposals of sugar, since exports of sugar as processed products, regardless of whether or not they benefit from a refund, are included not in the consumption within the Community, but in the surplus.

34 Article 15 of Regulation No 1260/2001, which lays down the criteria for calculating the production levies on the production of A and B sugar, A and B isoglucose and A and B inulin syrup, lays down, in Article 15(1)(a) to (c), that the exportable surplus is obtained by subtracting the forecast of the quantities of sugar, isoglucose and inulin syrup disposed of for consumption within the Community during the marketing year concerned from the 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.

35 Pursuant to Article 15(1)(d) of that regulation, the estimate of average loss is 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.

36 The estimate of overall loss is, according to Article 15(1)(e) of Regulation No 1260/2001, obtained by multiplying the exportable surplus by the average loss.

37 As the exportable surplus is the difference between Community production under quotas A and B and consumption within the Community, the latter is not intended to include the quantities of exported products, regardless of whether they have or have not benefited from export refunds.

38 The quantities of exported products cannot be considered to have been disposed of for consumption within the Community, within the meaning of Article 15(1)(b) of Regulation No 1260/2001.

39 The exportable surplus includes quantities of products for the disposal of which Community support measures have been laid down. Thus, for example, the quantities of products which may be in stock at the end of the marketing year must be entered in the accounts as unconsumed quantities for the purpose of establishing the exportable surplus even though, by definition, they have not, at that stage, benefited from disposal support measures.

40 The exportable surplus is not to be confused with the quantities of exported products. Those products, despite giving rise to refunds, do not always lead to financial costs for producers. That is particularly the case where the quantity resulting, by definition, from the difference between initial stocks and Community production, on the one hand, and final stocks, on the other hand, is greater than the Community production and where the quantities of products giving entitlement to refunds do not exceed the difference between the Community production and that quantity.

41 As the Commission essentially contends, if the objective of Regulation No 1260/2001 had been to base the calculation of production levies on the budgetary costs of refunds, it would have sufficed to calculate those levies from the total loss based on export and production refunds.

42 It should be pointed out that the estimate of the total loss, as defined in Article 15(1) (e) of Regulation No 1260/2001, is not identical to the total amount of refunds for the marketing year concerned, but is made up of the product of the exportable surplus and the estimate of the average loss per tonne of sugar for export obligations to be fulfilled during the current marketing year.

43 It follows that the method for calculating the estimated total loss is designed, in any event, to establish, in a forward-looking and conventional way, the losses caused by disposing of surplus Community production.

44 If quantities exported without refunds were included in the account of consumption within the Community, that account would be overvalued. As a consequence, the exportable surplus would be underestimated. Thus, there is a risk that the objective pursued by the system of the self-financing of the costs of disposing of surpluses — which, from the introduction of that system by Regulation No 1785/81, has been to ensure, in a fair yet efficient way, that the producers themselves meet those costs in full, and the application of which by the Commission has always been based on a definition of exportable surplus which includes sugar exports regardless of whether they benefit from a refund — would not be achieved. There is therefore a risk that the maintenance of the system would be liable to be undermined, contrary to recital 12 in the preamble to Regulation No 1260/2001.

45 In the light of the foregoing, Article 15(1)(c) of Regulation No 1260/2001 must be interpreted as meaning that, for the purpose of calculating the exportable surplus, all the quantities of exported products which fall under that article, regardless of whether or not refunds have actually been paid, are to be subtracted from consumption.

The question whether, pursuant to Article 15 of Regulation No 1260/2001, all the quantities of exported products which fall under that provision are to be taken into account for the purpose of calculating the estimated average loss per tonne of sugar

46 Pursuant to Article 15(1)(d) of Regulation No 1260/2001, the average loss is 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 to be fulfilled during the marketing year concerned.

47 The estimate of the total loss is, according to Article 15(1)(e) of that regulation, calculated by multiplying the exportable surplus by the average loss.

48 Pursuant to Article 22(1) of that regulation, exports from the Community of sugar, isoglucose and inulin syrup are subject to the presentation of an export licence, the issue of which is conditional on the provision of a guarantee that the obligation to export during the term of validity of the licence will be fulfilled.

49 In the context of the exports referred to in Regulation No 1260/2001, it is necessary, in the absence of specific reasons to the contrary, to interpret the concept of 'export obligations to be fulfilled during the current marketing year' which appears in Article 15(1)(d) of that regulation in a manner which is consistent with Article 22(1) of that regulation, which refers to the export obligation.

50 Thus, in the present context, that concept has the effect of covering any quantity of products falling under Article 15 of Regulation No 1260/2001 which is intended for export from the Community.

51 In that regard, it should be pointed out that, contrary to the contentions of the numerous interested parties which submitted observations in the proceedings, the question whether or not the quantities of products for export attract export refunds is not relevant in the light of the concept of 'export obligations to be fulfilled during the current marketing year'. That concept covers only the quantities of products for which export licences have been issued.

52 Such an interpretation of Article 15(1)(d) of Regulation No 1260/2001 is consistent with the concept of 'exportable surplus' which appears in Article 15(1)(c), as identified at paragraph 45 of the present judgment, and makes it possible, moreover, to calculate in a coherent manner the estimated total loss as defined in Article 15(1)(e).

53 As the applicants in the main proceedings and the German and French Governments have in essence argued, the estimated total loss — obtained by multiplying the exportable surplus by the average loss — will be excessive if a product may be considered to have been exported for the purpose of calculating the exportable surplus but was not correspondingly taken into account for the purpose of the calculation of the average loss, the denominator of which, as specified in the second subparagraph of Article 15(1)(d) of Regulation No 1260/2001, is the total tonnage of export obligations to be fulfilled during the current marketing year.

54 It is apparent from the Court file and, more specifically, from Commission working document D/32013/04 on the method for calculating levies in respect of 'sugar production' submitted to the Management Committee for the Sugar Sector on 30 September 2004 that certain Member States have expressed the wish for sugar exported without refunds to be included in the calculation of the average loss. According to that document, the total loss, as calculated by the Commission, inter alia in application of Article 6(5) of Regulation No 314/2002, namely in particular by excluding from export obligations the quantities exported without refunds, is equal to or greater than the cost of the sugar refunds.

55 The Commission, however, contends that such a method of calculation makes it possible to discourage the creation of surpluses which would exert downward pressure on market prices, would destabilise the common organisation of markets in the sugar sector and might give rise to costs, particularly intervention purchase costs.

56 That argument cannot be accepted.

57 It follows from recitals 9, 11 and 12 in the preamble to Regulation No 1260/2001 that the system introduced by that regulation seeks to make producers meet in full, in a fair yet efficient way, the cost of disposing of the surpluses of Community production in accordance with the principle of self-financing.

58 As the Court has ruled, the system for financing the costs of disposal 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 (see Case 250/84 *Eridania zuccherifici nazionali and Others* [1986] ECR 117, paragraph 19).

59 The dissuasive effect which, according to the ruling of the Court in *Eridania zuccherifici nazionali and Others*, the system for financing the costs of disposal is liable to have on producers derives, as the Advocate General has noted at point 60 of her Opinion, from the very fact that the production levy imposes on producers the burden of financing the costs of disposing of Community production surpluses.

60 With the exception of the largely theoretical case in which all exports benefit from refunds, the system introduced by the Commission, inasmuch as it resulted, in practice, in fixing a priori the total loss at an amount greater than that of the costs linked to refunds, goes beyond the objective of Regulation No 1260/2001, and in particular beyond that of the equitable financing of the costs of disposing of Community production surpluses, noted at paragraph 57 of the present judgment.

61 In the light of the foregoing, the answer to the question referred must be that Article 15(1)(d) of Regulation No 1260/2001 is to be interpreted as meaning that all the quantities of exported products which fall under that article, regardless of whether or not refunds have actually been paid, are to be taken into account for the purpose of calculating the estimated average loss per tonne of product.

The validity of Regulations No 1837/2002, No 1762/2003 and No 1775/2004

62 Regulations No 1837/2002, No 1762/2003 and No 1775/2004 fixed, for the marketing years 2001/02, 2002/03 and 2003/04, the amount of the production levies in the sugar sector.

63 It is common ground that the Commission, pursuant to Article 6(5) of Regulation No 314/2002, took into account, for the purpose of calculating the average loss per tonne of sugar, only those exports which had attracted refunds. However, it is evident from the Court file that that method of calculation has been applied only from 2003. As regards the marketing year 2001/02, to which Regulation No 1837/2002 relates, it is not contested that, for the purpose of fixing the production levies, the Commission calculated the average loss by basing itself on the total quantities of sugar exported in the form of processed products, regardless of whether or not those exports had actually benefited from refunds. The following year, the Commission proceeded to correct the calculation of the average loss by taking into consideration only the quantities of exported products which had actually given rise to the payment of refunds. This led to an increase in the average loss, the amount of which was carried over into the total loss for the marketing year 2002/03.

64 It follows from the answer given at paragraph 61 of the present judgment that such a method of calculating the average loss does not comply with Article 15 of Regulation No 1260/2001.

65 Consequently, Regulations No 1762/2003 and No 1775/2004, which apply that method, are invalid.

66 In the light of the foregoing, examination of Regulation No 1837/2002 has not disclosed the existence of any factors such as to affect its validity.

67 That notwithstanding, it follows from the arguments set out above that the correction of the calculation of the average loss noted at paragraph 63 of the present judgment, inasmuch as it was based on the method of calculation noted in that paragraph, does not comply with Article 15 of Regulation No 1260/2001.

68 Having regard to all the foregoing considerations, the answer to the questions referred must be that:

— pursuant to Article 15(1)(c) of Regulation No 1260/2001, for the purpose of calculating the exportable surplus, all the quantities of exported products which fall under that article must, regardless of whether or not refunds have actually been paid, be subtracted from consumption;

— Article 15(1)(d) of that regulation is to be interpreted as meaning that all the quantities of exported products which fall under that article must, regardless of whether or not refunds have actually been paid, be taken into account for the purpose of calculating both the exportable surplus and the average loss per tonne of product;

— Regulations No 1762/2003 and No 1775/2004 are invalid; and

— examination of Regulation No 1837/2002 has not disclosed the existence of any factors such as to affect its validity.

Costs

69 Since these proceedings are, for the parties to the main proceedings, a step in the respective actions pending before the national courts, the decisions on costs are a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Pursuant to Article 15(1)(c) of Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector, for the purpose of calculating the exportable surplus, all the quantities of exported products which fall under that article must, regardless of whether or not refunds have actually been paid, be subtracted from consumption.

Article 15(1)(d) of that regulation is to be interpreted as meaning that all the quantities of exported products which fall under that article must, regardless of whether or not refunds have actually been paid, be taken into account for the purpose of calculating both the exportable surplus and the average loss per tonne of product.

Commission Regulations (EC) No 1762/2003 of 7 October 2003 fixing the production levies in the sugar sector for the 2002/03 marketing year and (EC) No 1775/2004 of 14 October 2004 setting the production levies in the sugar sector for the 2003/04 marketing year are invalid.

Examination of 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 has not disclosed the existence of any factors such as to affect its validity.

[Signatures]