JUDGMENT OF THE COURT
4 JULY 1973 [1]

Westzucker GmbH v Einfuhr- und Vorratsstelle für Zucker (preliminary ruling requested by the Hessisch Finanzgericht)

'Transitional law: advance fixing certificates'

Case 1/73

Summary

1. *Acts of an institution — Amendment of a former provision — Situation arising under the latter provision — Future consequences — Application of the amending rule*
2. *Agriculture — Common organization of the market — Sugar — Export refunds — Article 12 of Regulation No 766/68 — Amendment — Sphere of application (Regulation No 1048/71 of the Council)*

1. The laws amending a legislative provision apply, unless otherwise provided, to the future consequences of situations which arose under the former law.
2. The amendment to Article 12 of Regulation No 766/68 of the Council of 18 June 1968, effected by Regulation No 1048/71 of the Council of 25 May 1971, applies not only to advance fixing certificates issued after its entry into force, but also to those issued before such date if exportation had not yet taken place and an adjustment of the intervention price had not been made.

In Case 1/73

Reference to the Court of Justice under Article 177 of the EEC Treaty by the Hessisches Finanzgericht, VIIth Senate, for a preliminary ruling in the action pending before that court between

WESTZUCKER GMBH, of Dortmund,

and

EINFUHR- UND VORRATSSTELLE FÜR ZUCKER, of Frankfurt,

1 — Language of the Case: German.

on the interpretation of Regulation No 766/68 of the Council of 18 June 1968 (OJ L 143, 25. 6. 1968, p. 6) and Regulation No 1048/71 of the Council of 25 May 1971 (OJ L 114, 26. 5. 1971, p. 10),

THE COURT

composed of: R. Lecourt, President, R. Monaco and P. Pescatore, Presidents of Chambers, A. M. Donner (Rapporteur), J. Mertens de Wilmars, H. Kutscher, C. Ó Dálaigh, M. Sørensen and A. J. Mackenzie Stuart, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

By the combined provisions of Article 17 (1) and Article 1 (1) (a) of Regulation No 1009/67 of the Council of 18 December 1967, on the common organization of the market in sugar (OJ 308, 18. 12. 1967, p. 1), refunds may be granted on the export of white sugar from the Community to cover the difference between the prices on the world market and those within the Community.

Article 12 of Regulation No 766/68 of the Council of 18 June 1968 (OJ L 143, 25. 6. 1968, p. 6), laying down general rules for granting export refunds on sugar, provides in its original wording that if, during the period between the time the refund is fixed by virtue of an invitation to tender and exportation is carried out, there has been an alteration in the intervention price for white sugar in the Community area with the largest surplus, the refund shall be adjusted on the basis of such alteration. By Article 1 of Regulation No 1048/71 of the Council of 25 May 1971 (OJ L 114, 26. 5. 1971, p. 10) amending Article 12 of Regulation No 766/68/EEC, the adjustment of the amount of refund is no longer obligatory, but *may* be provided. Article 2 of Regulation No 1048/71/EEC provides that this provision shall enter into force on 27 May 1971.

Under Regulation No 1061/71 of the Council of 25 May 1971 (OJ L 115, 27. 5. 1971, p. 17), fixing the prices for sugar for the 1971/72 marketing year, as well as the standard qualities for white sugar and sugar beet, and the coefficient referred to in Article 24 of Regulation No 1009/67 (OJ 308, 18. 12. 1967, p. 1), the price of sugar was raised from 1 July 1971.

The plaintiff in the main action had obtained from Einfuhr- und Vorratsstelle (hereinafter called EVSt) three export licences for white sugar valid variously until 30 July and 31 August 1971. In respect of permanent tenders Nos 6/1970 and 4/1971, these export licences contained an advance fixing of the refunds on the export of white sugar at either 37·14 DM or 39·34 DM per 100 kgs. The licences contained the phrase 'subject to Article 12 of Regulation No 766/68'.

Relying on this phrase, the plaintiff in the main action requested an increase in the refunds corresponding to the increase in the intervention prices, as provided by Regulation No 1061/71 (abovementioned) for exports made after 1 July 1971. EVSt (the defendant in the main action) rejected this claim on two grounds:

(a) it was not empowered to grant such an increase;

(b) from 27 May 1971 the new wording of Article 12 of Regulation No 766/68/EEC was to be applied, which meant that the increase was no longer obligatory.

The Finanzgericht of Hesse, considering that the outcome of the dispute depended on the interpretation of the abovementioned provisions of Community law, decided, by order dated 18 December 1972, to refer the following preliminary questions to the Court:

1. Must Articles 1 and 2 of Regulation No 1048/71/EEC of the Council of 25 May 1971 (OJ L 114, 26. 5. 1971, p. 10) be interpreted as meaning that Article 12 of Regulation No 766/68 of the Council of 18 June 1968 (OJ L 143, 25. 6. 1968, p. 6), as it is to be applied from 27 May 1971, must be applied in the same manner where the Einfuhr- und Vorratsstelle für Zucker issued before 27 May 1971 a declaration of increase and an export licence and where the sugar was exported after 1 July 1971?

   If question 1 is answered in the affirmative:

2. If the above interpretation is to be followed, do Articles 1 and 2 of Regulation No 1048/71/EEC of the Council of 25 May 1971 infringe the principle of legal certainty, a general principle which applies equally in Community law, as well as the principle deriving from it which prescribes that the confidence of persons concerned deserves protection ('Vertrauensschutz')?

   In the event that question 1 is answered in the negative or that questions 1 and 2 are answered in the affirmative:

3. Does the adjustment of the amount of refund, as provided in the original text of Article 12 of the Regulation No 766/68/EEC, following the alteration in the intervention price for sugar, require a prior decision by the Commission?

The order of the Finanzgericht of Hesse was received at the Court Registry on 2 January 1973.

Westzucker, represented by Gabrielle Rauschning of the Hamburg bar and the Commission of the European Communities, represented by its legal adviser Peter Gilsdorf submitted their written observations in accordance with the provisions of Article 20 of the Protocol on the Statute of the Court of Justice.

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

The oral observations of Westzucker and the Commission were made at the hearing on 15 May 1973.

The Advocate-General presented his opinion at the hearing on 6 June 1973.

II — Observations submitted under Article 20 of the Statute

The observations presented under Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities may be summerized as follows:

Westzucker (the plaintiff in the main action) submits that the first question should be answered in the negative. The amendment to Article 12 of Regulation No 766/68, providing that the adjustment shall no longer be obligatory but merely optional, has weakened the legal position of individuals in relation to the administration because they no longer have a right to the increase of refunds. The application of this provision, amended as regards uncompleted transactions, has a materially retroactive effect on the legal position acquired by the individuals concerned under the former rules. Such a retroactive effect should be explicitly provided for in the wording of Regulation No 1048/71. The plaintiff refers to the Court's Judgment of 28 October in Case 16/70 (Necomout v Hoofdproduktschap voor Akkerbouwproducten, Rec. 1970, p. 921) dealing with the interpretation of Article 7, first paragraph, of Regulation No 1134/68 which stated specifically that 'this Regulation shall apply to all transactions carried out from the date of its entry into force'. In order to avoid the unfair treatment of those who previously obtained advance fixing, the second paragraph of the said Article 7 allowed them to obtain cancellation of such advance fixing. The Court admitted that such a transitional provision was inspired 'by essentially legal considerations relating to the effects of a change of legislation on contracts already subsisting'.

Since provisions such as those of Article 7 of Regulation No 1134/68 are not found in Regulation No 1048/71/EEC, it must be concluded that the latter Regulation only applies to transactions for which export licences were issued after the date of its entry into force.

One might further question whether the objectives of Regulation No 1048/71 necessitated a wide interpretation by which the Community interest required the application of the amended rules in cases where export licences were issued under the old rules. It can be seen from the recitals in the Preamble to Regulation No 1048/71 that the attainment of its objectives did not depend on its application to transactions begun under the old rules: 'such a provision (Article 12 of Regulation No 766/68) proves to be too rigid; consequently there are grounds for amending the provisions of Article 12 to allow for an appropriate adjustment where necessary'.

If the Court does not agree with the plaintiff on the reply to be given to the first question, the latter submits that the second question requires a reply in the affirmative.

In the case in question the persons concerned have acquired by the issue of an export licence a legal position by which they have the right to an adjustment of the refunds fixed in advance corresponding to the movement of the intervention prices for white sugar.

The principle of the protection of confidence of persons concerned can only admit of an infringement of those rights already acquired where the Community interest renders an alteration in their existing legal position indispensable. It follows from its observations on the first question that such a situation did not exist.

With regard to the third question, the plaintiff in the main action makes the observation that the old wording of Regulation No 766/68/CEE does not only contain the obligation to adjust refunds, but also the criteria for putting this operation into effect. A prior decision by the Commission is consequently superfluous.

The *Commission* begins its observations with an outline of the economic grounds for the rules in question. Given that the intervention price for white sugar is altered on the basis of changes in the economic conditions applying to its production, it is unwarranted that stocks produced or acquired before this alteration at a time when other economic conditions existed should profit by it. The amendment of the original wording of Article 12 of Regulation No 766/68 is due to the practical difficulties of application of Article 37, paragraph 2, which was originally intended to prevent the raising of the intervention price resulting in economically unjustifiable profits for operators.

As to the first and second questions, the Commission maintains that it follows from the wording of Regulation No 1048/71 that from 27 May 1971 the new wording of Article 12 of Regulation No 766/68 replaced the original text. In other words from that date the new text must by applied in calculating export refunds.

The Commission does not agree with the plaintiff in the main action on the question whether the new rules apply to uncompleted transactions. In the Commission's opinion there is no question in this case of any 'indirect retroactive effect'. Such a concept applies to situations where a provision infringes the principle of the 'protection of confidence', by attaching to transactions, whether accomplished or in progress, consequences which differ from and are more unfavourable than those for which the person concerned had made his arrangements. The new rules must therefore apply to an already existing legal position. But the rules in question in no way affect any such legal position of the plaintiff in the main action. At the date of the entry into force of Regulation No 1048/71, Westzucker had only acquired a sole legally enforceable right before the administrative courts: that is, the right to the payment of export refunds fixed in advance in the export licences. The prospect of the plaintiff in the main action being able to profit from an adjustment of the fixed in advance refund was not yet a reality at the time Regulation No 1048/71 was adopted, but only on the entry into force of Regulation No 1061/71 on 16 June 1971 did a possible *right* of expectation arise with regard to an adjustment of the refund. Previously, there was only a vague prospect of additional benefit.

The fact that the export licences contained the phrase 'Subject to Article 12 of Regulation No 766/68' cannot further be the basis of a right of expectation to an adjustment of the refund, as the sole object of this phrase is to draw the attention of the holder to the fact that he could not consider it certain that the refund fixed in advance would not be reduced in pursuance of Article 12 of Regulation No 766/68/EEC. This interpretation is in line with the spirit of any 'reservation' usually found in national administrative measures.

Thus, if the amendment made by Regulation No 1048/71 has affected neither an already existing right nor an expectation to the increase of the refunds fixed in advance, there cannot either be an 'indirect (or material) retroactive effect'.

This interpretation corresponds to the economic considerations outlined above. The refund must enable sugar to be exported from the Community in spite of the differences between the level of domestic prices in the Community and those on the world market. In this respect the decisive price level was the old intervention price for which the plaintiff in the main action was able to obtain the sugar. If the calculation of the refunds was made on the basis of a higher intervention price than that at which the plaintiff had actually obtained the sugar, it would have made an unjustifiable profit from the economic point of view.

The first question therefore requires an affirmative reply, and the second a reply in the negative. As to the third question, the Commission observes as an alternative point that under the original system of Article 12 of Regulation No 766/68/EEC, there was no margin of assessment for the adjustment of the refund. Consequently uniformity of application could be ensured by the competent national bodies without any prior intervention on the part of the Commission.

However, under the new system the Commission is given a real power of assessment. Its prior intervention is required in order to guarantee the uniform application of the rules in question.

Grounds of judgment

1 By order dated 18 December 1972, received at the Court Registry on 2 January 1973, the Finanzgericht of Hesse referred to the Court of Justice, under Article 177 of the Treaty, for a preliminary ruling on three questions relating to the interpretation of Article 12 of Regulation No 766/68 of the Council of 18 June 1968, laying down general rules for granting export refunds on sugar (OJ L 143, 25. 6. 1968, p. 6) and to the interpretation of Regulation No 1048/71 of the Council of 25 May 1971 (OJ L 114, 26. 5. 1971, p. 10), amending the abovementioned Regulation and especially Article 12.

2 The rules on the common organization of the market in sugar provide for the grant of export refunds for white sugar to cover the difference between the prices on the world market and those within the Community, and the advance fixing, for a specified period, of the refund to be paid equal to that valid on the day of the application for advance fixing.

In its original wording, Article 12 provided that, if an alteration in the intervention price occured during the interval between the fixing of the refund under a tender and the actual exportation, the amount fixed for the refund was to be adjusted on the basis of that alteration.

The said Regulation No 1048/71, which entered into force on 27 May 1971, amended the said Article 12 to the extent that, if during the said period the prices for sugar or molasses were altered, 'an adjustment of the amount of the refund may be made'.

3 It can be seen from the file that the plaintiff in the main action obtained on 1 February and 5 May 1971 three advance fixing certificates for the exportation

of white sugar, valid variously until 31 July and 31 August 1971 and containing the phrase 'subject to Article 12 of Regulation No 766/68', and requested that the refund fixed in advance be increased on the basis of the increase in the intervention price brought in on 1 July 1971 under Regulation No 1061/71 of the Council of 25 May 1971 (OJ L 115, 27. 5. 1971, p. 17).

On this action being brought before it, the Finanzgericht drew up the three questions which it has referred.

As to the first and second questions

4 It is asked whether Regulation No 1048/71 must be interpreted as meaning that the new Article 12 of Regulation 766/68 applies to the case where an export licence has been issued before 27 May 1971 (the date of the entry into force of the new wording), and also where exportation has been carried out after 1 July (the date of the entry into force of the increase in the intervention prices).

5 According to a generally accepted principle, the laws amending a legislative provision apply, unless otherwise provided, to the future consequences of situations which arose under the former law.

Consequently the amendment to Article 12 of Regulation No 766/68 applies not only to advance fixing certificates issued after its entry into force, but also to those certificates issued before such date inasmuch as the intended exportation had not yet taken place and an adjustment of the intervention price had not been made.

6 It is asked in the second question whether Regulation No 1048/71, thus interpreted, infringes a principle of legal certainty by which the confidence of persons concerned deserves to be protected (Vertrauensschutz).

7 It can be seen from the recitals in the Preamble to the Regulation that the Council, considering the provision for a strict adjustment of the export refund fixed in advance to be too rigid, replaced the obligatory provision of the old Article 12 by an optional provision permitting the fixing of an appropriate adjustment.

In fact the old Article 12, by providing for an automatic adjustment of the refund fixed in advance to accord with possible increases or reductions, involved the risk as much of inflicting an unjustifiable loss on exporters, when there was a reduction in the intervention price, as of granting them equally unjustifiable advantages when there was an increase in the intervention price.

Subject to certain exceptions, it can be presumed that tenders and applications for export licences are based, in the first instance, on the goods available to the exporter and the state of the Community market at the time of the tender and the application.

An automatic adjustment as provided for in the old Article 12 was thus liable to upset both the forecasts which governed the advance fixing of the refund and the calculations of the exporters who were holders of an export licence.

8 Consequently, if it is true that in the case of an alteration of the intervention price between the time when the refund is fixed and exportation is carried out adjustments may be necessary, it is no less true that the optional provision of the new Article 12 has more regard for the need for stability in trade and in the functioning of the market.

It seems difficult to consider the amendment of a provision, which was capable, because of its inflexibility, of causing losses or gains for those concerned, as adversely affecting any established position which they hold.

9 Moreover, in the case particularly of an increase in the intervention price, one cannot claim, as does the plaintiff in the main action, that the old Article 12 conferred on the persons concerned the certainty of profiting from such increase.

That Article did not exclude a possible application of Article 37 (2) of Regulation No 1009/67 of the Council, on the common organization of the market in sugar, which allows the adoption of the requisite provisions to prevent the sugar market being disturbed as a result of an alteration in the price levels at the change-over from one marketing year to the next.

It can be seen from the outline given by the Commission that on the adoption of Regulation No 766/68 it was provided that this provision should be applied where necessary to the owners of stock left over from the previous marketing year in order to deduct in advance the profit resulting from the increase.

The holders of advance fixing certificates had therefore to take into account the possibility that under Article 37 of Regulation No 1009/67 the anticipated benefits under the old Article 12 would be taken away from them.

10 It must be concluded from this that the Council, by amending Article 12 instead of resorting to the more complex remedy of an application of the said Article 37, did not change intrinsically the position of the persons concerned and there is no reason to consider that Regulation No 1048/71 infringes the protection of confidence of persons concerned.

11 These conclusions are further confirmed by the circumstances of the case.

In fact, according to the plaintiff in the main action, the export licences which it obtained related to stocks of the Einfuhr- und Vorratsstelle, i.e. to so-called intervention sugar, subject to the old intervention price, and that, as the plaintiff could not dispose of this sugar within the prescribed time because of the Einfuhr- und Vorratsstelle, it had to obtain supplies from elsewhere under more disadvantageous conditions, including the obligation to pay for the sugar delivered after 1 July 1971 on the basis of the new intervention price.

12 If these facts are correct, it follows that the loss claimed to have been suffered was not caused by reliance on the old Article 12, but by other circumstances.

13 Examination of the second question has therefore revealed no factors leading one to conclude that, by amending Article 12 of Regulation No 766/68, Regulation No 1048/71 has failed to recognize a principle of legal certainty by which the confidence of persons concerned deserves protection (Vertrauensschutz).

As to the third question

14 There is no need to deal with this question as it is only to be considered in the case of either a reply in the negative to the first question or a reply in the affirmative to questions 1 and 2, neither of which is the case.

Costs

15 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable, and as these proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the plaintiff in the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to Regulation No 1009/67 of the Council of 18 December 1967, especially Article 37;
Having regard to Regulation No 766/68 of the Council of 18 June 1968, especially Article 12;
Having regard to Regulation No 1048/71 of the Council of 25 May 1971;
Having regard to Regulation No 1061/71 of the Council of 25 May 1971;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Finanzgericht of Hesse, by order of that Court dated 27 December 1972, hereby rules:

1. **The amendment of Article 12 of Regulation No 766/68 of the Council of 18 June 1968 by Regulation No 1048/71 of the Council of 25 May 1971 applies not only to advance fixing certificates issued after its entry into force, but also to those issued before that date to the extent that the exportation in question had not yet taken place.**

2. **Examination of the second question posed has not revealed any factors leading one to conclude that, in so doing, Regulation No**

1048/71 has failed to recognize a principle of legal certainty by which the confidence of persons concerned deserves protection.

Lecourt	Monaco	Pescatore
Donner	Mertens de Wilmars	Kutscher
Ó Dálaigh	Sørensen	Mackenzie Stuart

Delivered in open court in Luxembourg on 4 July 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 6 JUNE 1973 [1]

Mr President,
Members of the Court,

In the reference for a preliminary ruling case, on which I shall comment today, we are dealing with the question of grant of refunds on exports of white sugar to third countries.

It will help in understanding the case if I make the following preliminary remarks:

As is known, Article 17 of Regulation No 1009/67 on the common organization of the market in sugar (OJ 308, 18. 12. 1967, p. 1) provides that in order to facilitate the export of '*inter alia*' white sugar on the basis of the world market prices, the difference between these prices and prices within this Community may be covered by a refund. The general rules for refunds on exports in the field of sugar are laid down in Regulation No 766/68 of the Council (OJ L 143, 25. 6. 1968, p. 6). Of these Article 4 must be first mentioned. It provides that the refund may be fixed by a *tender*. Such a *tender* is invited by the competent authorities of the Member States in accordance with an instrument binding in law in all Member States which lays down all relevant terms *(inter alia* time limits for the submission of tenders). On the basis of the tenders filed, the maximum amount of the refund is fixed by the Management committee procedure already known to us from other cases. If the refund indicated in the tender does not exceed the maximum, then the refund fixed (pursuant to Article 4 of Regulation 766/68) shall be equal to the refund indicated in the tender in question.

1 — Translated from the German.