intervene. It is not possible to restrict the exercise of that right by any one of them without adversely affecting its institutional position as intended by the Treaty and in particular Article 4 (1).

The right to intervene which the institutions have is not subject to the condition that they have an interest in taking proceedings.

3. When the implementation by the Council of the agricultural policy of the Community involves the need to evaluate a complex economic situation the discretion which it has does not apply exclusively to the nature and scope of the measures to be taken but also to some extent to the finding of the basic facts inasmuch as, in particular, it is open to the Council to rely if necessary on general findings. In reviewing the exercise of such a power the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority in question did not clearly exceed the bounds of its discretion.

4. The consultation provided for in the third subparagraph of Article 43 (2) as in other similar provisions of the EEC Treaty, is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly.

Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void. Observance of that requirement implies that the Parliament has expressed its opinion. It is impossible to take the view that the requirement is satisfied by the Council's simply asking for the opinion, if no opinion is afterwards given by the Parliament.

In Case 138/79

SA ROQUETTE FRÈRES, whose registered office is at Lestrem (Pas-de-Calais Département), represented by its Deputy Managing Director, Gérard Rousseaux, assisted by Marcel Veroone, a partner in the firm Veroone, Freyria, Letartre, Paillusseau, Hoste, Dutat, of the Lille Bar, with an address for service in Luxembourg at the Chambers of Mr Loesch, Advocate, 2, Rue Goethe,

applicant,

supported by

EUROPEAN PARLIAMENT, represented by its Director-General, Francesco Pasetti Bombardella, assisted by Roland Bieber, Principal Administrator in its

Legal Department and Professor Pierre Henri Teitgen, with an address for service in Luxembourg at the General Secretariat of the European Parliament,

intervener,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Daniel Vignes, Director in the Legal Department, assisted by Arthur Brautigam and Hans-Joachim Glaesner, acting as Joint Agents, Hans-Jürgen Rabe, of the Hamburg Bar, Professor Jean Boulouis, Honorary Dean of the Université de Droit, d'Économie et de Sciences Sociales, Paris, with an address for service in Luxembourg at the office of Douglas Fontein, director in the Legal Department of the European Investment Bank, 100 Bd Konrad Adenauer, Kirchberg,

defendant,

supported by

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Peter Gilsdorf, acting as Agent, assisted by Jacques Delmoly, a member of the Legal Department, with an address for service in Luxembourg at the office of its Legal Adviser Mario Cervino, Jean Monnet Building, Kirchberg,

intervener,

APPLICATION for a declaration that Council Regulation No 1293/79 of 25 June 1979 (Official Journal L 162, p. 10) is void in so far as that regulation in amending Council Regulation No 1111/77 laying down common provisions for isoglucose fixes a basic quota for the applicant,

THE COURT

composed of: H. Kutscher, President, P. Pescatore and T. Koopmans, (Presidents of Chambers), J. Mertens de Wilmars, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco, A. Touffait and O. Due, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

I — Facts and procedure

A — History of the adoption of Council Regulation No 1293/79

By judgment of 25 October 1978 on the reference for a preliminary ruling in Joined Cases 103/77 and 145/77 *Royal Scholten-Honig (Holdings) Ltd* v *Intervention Board for Agricultural Produce; Tunnel Refineries Ltd* v *Intervention Board for Agricultural Produce* [1978] ECR 2037 the Court of Justice held that Council Regulation No 1111/77 of 17 May 1977 laying down common provisions for isoglucose (Official Journal L 134, p. 4) was invalid to the extent to which Articles 8 and 9 thereof imposed a production levy on isoglucose of 5 units of account per 100 kilograms of dry matter for the period corresponding to the sugar marketing year 1977/78. The Court found that the system established by the above-mentioned articles offended against the general principle of equality (in those cases between sugar and isoglucose manufacturers). The Court added nevertheless that its judgment left the Council free to take any necessary measures compatible with Community law for ensuring the proper functioning of the market in sweeteners.

Following that judgment the Commission laid before the Council on 7 March 1979 a proposal for a regulation amending the provisions of Regulation No 1111/77 which had been held to be invalid. On 13 March 1979 the Council decided to consult the European Parliament on that proposal.

Following that decision the Council on 19 March 1979 consulted the Parliament pursuant to Article 43 of the EEC Treaty. In its letter seeking an opinion the Council wrote:

"This proposal takes account of the position after the judgment of the Court of 25 October 1978 in anticipation of new arrangements for sweeteners which should enter into force on 1 July 1980. ... Since the regulation is intended to apply as from 1 July 1979, the Council would welcome it if the European Parliament could give an opinion on the proposal at its April session."

Pursuant to Articles 22 and 38 of the Rules of Procedure of the Parliament the President of the Parliament referred the matter to the Committee on Agriculture for consideration of the merits and to the Committee on Budgets for its opinion.

On 10 April 1979 the Committee on Budgets forwarded its opinion to the Committee on Agriculture which dispensed with the optional opinion of the Legal Affairs Committee and adopted the report of its Rapporteur Mr Tolman. In the motion for a resolution contained in that report the Committee on Agriculture approved the draft regulations subject to two amendments.

At the session of the Parliament on 10 May 1979 the Parliament considered the report by Mr Tolman and the draft resolution approved by the Committee on Agriculture. Both Mr Tolman and, on behalf of the Commission, Mr Gundelach intervened in the debate.

At the session on 11 May 1979 the draft resolution was put to the vote. On that occasion Mr Hughes, a Member of the Parliament, raised a question of procedure to which Mr Giolitti, a member of the Commission, answered that he had nothing to add to what Mr Gundelach had said the day before. On being put to the vote the motion for a resolution was rejected and pursuant to Article 22 of the Rules of Procedure of the Parliament was referred back to the Committee on Agriculture for reconsideration.

The May session was to be the last before the election of the Parliament by universal suffrage. The Parliament did not contemplate meeting again before 17 July 1979, the date provided for by the Act concerning the election of the representatives of the Assembly by direct universal suffrage in order to allow its members to take part in the electoral campaign for the purpose of the elections on 7 and 10 June 1979. At its meeting on 1 March 1979 the Bureau of the Parliament had decided not to provide for an additional session between the May session and the sitting of the Parliament elected by direct universal suffrage but nevertheless added the following provisos:

"The Enlarged Bureau . . .

— is nevertheless of the view that in so far as the Council or Commission considers it necessary to provide for an additional session they may, pursuant to Article 1 (4) of the Rules of Procedure, call for an extraordinary session of the Parliament; any such session would be for the purpose only of considering reports which had been adopted following urgent consultation."

That proposal by the Bureau of the Parliament was confirmed at its meeting on 10 May 1979 in the following words:

— "Confirms the position adopted at the above-mentioned meeting when it was decided not to provide for an additional session between the last session of the present Parliament and the session of the Parliament elected by direct universal suffrage, provided always that where the majority of the effective members of the Parliament, the Council or the Commission desire the holding of an additional session they may, pursuant to the provisions of Article 1 (4) of the Rules of Procedure, ask for the Parliament to be summoned;

— Decides further having regard to the provisions of Article 139 of the EEC

Treaty that where the President has such an application before him the Enlarged Bureau will meet to consider how it should be dealt with."

The Act concerning direct elections provided that the mandate of the members of the former Parliament would expire upon the opening of the first sitting of the Parliament elected by universal suffrage, namely 17 July 1979 (Article 10 (4)).

On the basis of the proposal for a regulation by the Commission on which the Parliament had been consulted on 19 March 1979 but had not given its formal opinion the Council adopted on 25 June 1979 Regulation No 1293/79 (Official Journal L 162, p. 10 with corrigendum in Official Journal L 176, p. 37) amending Regulation No 1111/77. However the preamble to Regulation No 1293/79 contains the words "having regard to the fact that the European Parliament has been consulted". Pursuant to Article 5 thereof the regulation entered into force on 1 July 1979.

B — Regulation No 1293/79

The regulation amended Regulation No 1111/77 in the light of the judgment of the Court of 25 October 1978. Taking the view that the most appropriate means for avoiding any inequality of treatment between sugar and isoglucose manufacturers was to subject isoglucose production to rules analogous to those applying to sugar production until 30 June 1980 Regulation No 1293/79 introduced as a transitional measure till that date a *temporary system of production quotas for isoglucose* (cf. the sixth recital). The reasons for imposing quotas and for the terms thereof are set out in the seventh recital. The eighth recital deals with the need to fix the specific amount of the production levy applicable to isoglucose production.

Those various considerations feature in the system provided for in Article 3 of Regulation No 1293/79 which inserts after Article 7 of Regulation No 1111/77 the following title:

"TITLE II

Quota arrangements

Article 8

1. Article 9 shall apply for the period 1 July 1979 to 30 June 1980.

2. The arrangements applicable from 1 July 1980 shall be adopted by the Council before 1 January 1980 in accordance with the procedure laid down in Article 43 (2) of the Treaty.

Article 9

1. A basic quota shall be allotted to each isoglucose-producing undertaking established in the Community for the period referred to in Article 8 (1).

Without prejudice to implementation of paragraph (3), the basic quota for each such undertaking shall be equal to twice its production as determined, under this regulation, during the period 1 November 1978 to 30 April 1979.

2. To each undertaking having a basic quota, there shall also be allotted a maximum quota equal to its basic quota multiplied by a coefficient. This coefficient shall be that fixed by virtue of the second subparagraph of Article 25 (2) of Regulation (EEC) No 3330/74 for the period 1 July 1979 to 30 June 1980.

3. The basic quota referred to in paragraph (1) shall, if necessary, be corrected so that the maximum quota determined in accordance with paragraph (2):

— does not exceed 85 %,

— is not less than 65 %

of the technical production capacity per annum of the undertaking in question.

4. The basic quotas established pursuant to paragraphs (1) and (3) are fixed for each undertaking as set out in Annex II.

5. Isoglucose-producing undertakings which have not produced any during the reference period referred to in the second subparagraph of paragraph (1) and which can be shown to have resumed systematic production during the period referred to in Article 8 (1) shall be allotted a basic quota equal to the highest volume of their production attained during one of the following periods:

— 1 August 1976 to 31 July 1977,

— 1 July 1977 to 30 June 1978.

A maximum quota shall be allotted to such undertakings, determined in accordance with the provisions of paragraph (2).

6. A basic quota shall be allotted to undertakings starting systematic production of isoglucose during the period referred to in Article 8 (1) within the limits of a Community reserve quantity equal to 5 % of the total of basic quotas established pursuant to paragraph (1).

7. The quantity of isoglucose produced during the period referred to in Article 8 (1) which:

— exceeds the maximum quota of the undertakings,

or

— was produced by an undertaking not having a basic quota

may not be disposed of on the Community's internal market and must be exported in the natural state to third countries without the application of Article 4.

8. For the quantity of isoglucose production which exceeds the basic quota without exceeding the maximum quota Member States shall charge a production levy on the isoglucose producer concerned.

For the period referred to in Article 8 (1), the amount of the isoglucose production levy shall be equal to the share of the sugar production levy, as fixed for the 1979/80 sugar year by virtue of Article 28 of Regulation (EEC) No 3330/74, borne by the sugar manufacturers.

9. The Council, acting by a qualified majority on a proposal from the Commission, shall allocate the quotas referred to in paragraphs (5) and (8) and shall adopt any general rules necessary for the application of this article.

10. Detailed rules for the application of this article, which shall in particular provide for the levying of a charge on the quantity of isoglucose referred to in paragraph (7) which has not been exported in the natural state during the period referred to in Article 8 (1) and fix the amount of the production levy referred to in paragraph (8), shall be adopted in accordance with the procedure laid down in Article 12."

Article 4 of the regulation provides that Annex II hereunder shall be added to Regulation (EEC) No 1111/77:

"ANNEX II

Undertaking	Address of registered office	Basic quota in tonnes expressed as dry matter
Maizena GmbH	2000 Hamburg 1, Postfach 1000	28 000
Amylum SA	49, Rue de l'Intendant, 1020 Bruxelles	56 667
Roquette Frères SA	17, Boulevard Vauban, 59000 Lille	15 887
SPAD	15063 Cassano Spinola, Alessandria, Casella Postale 1	5 863
Fabbriche Riunite Amido Glucosio Destrina, SpA	Piazza Erculea 9, Milano	10 706
Tunnel Refineries Ltd	Thames Bank House, Greenwich, London SE10 0PA	21 696"

C — *The course of the procedure and the events relating thereto*

By application registered at the Court Registry on 31 August 1979 the French company Roquette Frères, which manufactures *inter alia* isoglucose products at its factory at Lestrem (Pas-de-Calais) asked the Court to declare the fixing of the production quota resulting for it from Annex II to Regulation No 1111/77 as amended to be invalid.

On 17 August 1979 the President elected by the directly-elected Parliament wrote to the President of the Council a letter in which it was said:

"In spite of the fact that consultation of the European Parliament on this matter was compulsory the Council has acted before the European Parliament gave its opinion.

Having regard to the aforementioned matters I should be glad if you would let me know the attitude of your institution on this issue; the Bureau of the European Parliament obviously reserves its right of action to enforce respect for the provisions of the Treaties."

The President of the Council answered that letter by a letter dated 23 October 1979 in which he defended the adoption of Regulation No 1293/79 before the opinion of the Parliament had been received and referred to the "legal need to implement before too long the judgment of the Court of Justice... given on 25 October 1978" and "to the extreme importance for the public that the isoglucose arrangements be adopted before the beginning of the sugar marketing year on 1 July 1979 pursuant to the basic regulation on the common organization of the market in sugar". Those considerations were set out in the fourth recital in the preamble to the regulation.

At its sitting on 14 December 1979 the Parliament adopted a motion for a resolution contained in a report made by the Legal Affairs Committee of which Mr Ferri was the Rapporteur and President. The said resolution provided that the Parliament "decides ... to intervene in Cases 138/79 and 139/79 before the Court of Justice of the European Communities so that the Council's adoption of Regulation No 1293/79 before receiving the compulsory opinion from the European Parliament can be censured".

By order of the Court of 6 January 1980 the Parliament was allowed to intervene in the present case in support of the claims of the applicant alleging infringement of essential procedural requirements.

By order of 13 February 1980 the Court allowed the Commission to intervene in support of the contentions of the Council.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. It nevertheless invited the applicant to lodge any written observations it might have on the comparative table of costs annexed to the application to intervene.

II — Conclusions of the parties

The *applicant* claims that the Court should:

— Declare its application admissible and well founded;

— Declare the fixing of the production quota resulting for the applicant from Annex II to Council Regulation No 1111/77 as amended to be invalid.

The *Council* contends that the application should be dismissed as inadmissible or alternatively as unfounded and that the applicant should be ordered to pay the costs.

The *European Parliament*, as *intervener*, claims that the Court should allow the application for annulment for infringement of an essential procedural requirement and breach of the Treaty.

The *Commission*, as *intervener*, supports the contentions of the Council that the applicant's claim should be dismissed.

III — Submissions and arguments of the parties

A — Admissibility of the application

The *applicant* claims in its originating application that the determination of its basic quota in Annex II inserted into Regulation No 1111/77 by Regulation No 1293/79 constitutes a decision within the meaning of Articles 173 and 189 of the Treaty. The quotas so determined concern only the applicant, take account of the applicant's special situation and are on the basis of information specifically asked of it and supplied to the Community authorities.

Under the new Article 9 (2) of Regulation No 1111/77 the quota of each undertaking is determined according to its production during a previous period. The adjustment of the production quota for an undertaking requires separate consideration and is the basis of an individual decision.

The Council does not name the present six manufacturers by way of example; it lays down the quota for each one determined after separate consideration.

Paragraph (9) of the new Article 9 is moreover confirmation that determination of the quota is not a simple arithmetical calculation but the result of consideration and a corporate decision by the Council acting by a qualified majority.

In the applicant company's view the determination of its quota is a decision according to the criteria contained in the case-law of the Court in the matter. It is of *direct* concern to the applicant since the Council itself determined the quota and of *individual* concern since the applicant's name is contained in the wording of the regulation and the applicant is among the restricted group of present manufacturers for whom quotas have been determined in a special way different, for example, from that for any future manufacturers.

In its defence the *Council* contends that the applicant is challenging the very principle of limitation of production achieved by any system of quotas claiming that it is contrary to various basic rules of the Community system and in particular the liberal philosophy of the Treaty and the system of competition.

The Council however admits that the question is complicated by the fact that the regulation contains on the one hand general provisions not applying individually and aimed at all isoglucose manufacturers and on the other hand provisions in the annex referring to the quota of each manufacturer. The applicant however considers the regulation in conjunction with its annex as constituting in fact a disguised special decision of direct and individual concern to it and challenges all its provisions especially those of a general and impersonal nature.

Accordingly, without referring to Article 91 of the Rules of Procedure, the Council contends that the *application is inadmissible.*

As regards the legislative nature of the regulation the Council maintains that care must be taken to avoid being misled by what is in the annex which lists the present isoglucose manufacturing undertakings and determines the basic quota for each of them. It is necessary to bear in mind that the regulation determines the amount to which each undertaking is entitled generally and impersonally on the basis of its production during the reference period which applies to all and is also determined impersonally. The annex with its appearance of a decision must be placed in its context as a regulation, that is to say in the context of the insertion of Article 9 into Regulation No 1111/77 effected by Regulation No 1293/79. That provision establishes a system of quotas almost identical to that of the basic quotas established for sugar by Article 24 (2) of Regulation No 3330/74 and no-one has ever challenged the nature of that instrument as a regulation. The only important difference is that whereas as in the sugar sector the quota is set by the Member States according to the very precise criteria laid down in Regulation No 3330/74, under Regulation No 1293/79 it is the Council which, on the basis of the criteria which it has itself fixed, has set out the corresponding basic quota for each undertaking.

The annex is therefore not of individual or direct concern to the applicant. It is not of individual concern because the measure in question is of concern to all isoglucose manufacturing undertakings, a description which could apply to undertakings other than those listed in the annex (cf. paragraphs (5) and (6) of Article 9). It is not of direct concern because the measure in question is only a

means by way of regulation to apply in a general and equitable manner in relation to the sugar sector the system of production levies to which all isoglucose manufacturers are subject.

The *applicant* replies that in criticizing the quota laid down for it by the annex to Regulation No 1293/79 it is open to it pursuant to Article 184 of the Treaty to make objections to the provisions of a legislative nature in the said regulation.

In its rejoinder the *Council* admits that at first sight certain aspects may incline to give Annex II the character of a decision. It contends however that the annex must be considered with regard to Article 9 (1) to (3) without which it would be incomprehensible. The table published as Annex II is confined to setting out once again what already follows, in figures, from the rules contained in Article 9 (1) to (3) which have an abstract general nature. In other words the table provides particularly clear and comprehensive information on the content of the regulation and thus acts simply as a reference and as a purely informal declaratory notice from the Council.

The Council admits that the completion of a Community regulation by annexing thereto a notice of a purely informative nature such as Annex II is not a common practice. That in no way changes the fact that the annex represents only the result of a purely mathematical calculation on the basis of the criteria set out in Article 9 (1) to (3). The specification of basic quotas in Annex II does not therefore constitute an independent rule and cannot be regarded as a disguised decision.

Neither the *Parliament* nor the *Commission* addresses any argument to the question of the admissibility of the application. On the other hand the Commission considers that there is a major interest in having the *substantive questions* settled once and for all by the Court. If there were no judgment on the merits the issue would return in the form of references for preliminary rulings by the national courts.

B — The merits of the application

The *applicant* maintains that the terms upon which its quota was fixed were particularly unfavourable. As to the principle itself criticism may be levied both from the point of view of the facts and the principles of the Treaty and the case-law of the Court and in particular its judgment of 25 October 1978.

However before entering upon a discussion of the substance the applicant, by way of preliminary observations, queries on the one hand whether the new system for isoglucose will be really "transitional" and on the other hand whether having regard to the lack of an opinion from the Assembly the conditions of Article 43 (2) of the Treaty which speaks of "consulting the Assembly" have been satisfied.

After recalling the origin of the quota system for the sugar industry and the introduction by the Council in 1967 of a production quota system for sugar, which is a unique system in the Community, the applicant challenges the grounds set out in the sixth recital in the preamble to Regulation No 1293/79 justifying the extension of the quota system to isoglucose by the need to implement the judgment of the Court of 25 October 1978 and to submit the

isoglucose production to rules analogous to those applying to the sugar production until 30 June 1980. In the applicant's view the extension of the quota system to isoglucose cannot be represented as a necessary and unavoidable consequence of the aforementioned judgment. It points out that in the judgment the Court expressly left it to the Council to take all necessary measures to ensure the proper functioning of the market in sweeteners.

In the applicant's view it is obvious that there is no comparison in the positions of sugar and isoglucose with regard to production or the market.

In 1967 the sugar industry had already existed for more than 150 years. The Community authorities inheriting from national laws therefore had to regulate an industrial sector enjoying a long history during which developments had taken place allowing the industrialists concerned to take economic decisions which seemed to them the most appropriate. Moreover the strictly regulated market was stable.

The isoglucose industry is in its infancy. From the time it had come into being it had been attacked to prevent it from disturbing the sugar market. Only six factories manufacture isoglucose whereas there are some 200 sugar refineries. Production is weak and the market is developing.

Moreover because of the various measures (high intervention price, adjusted prices for beet and so forth) which accompany the quota system in the sugar sector that system does not lead to a limitation on production whereas all the measures adopted in the isoglucose sector are intended, and do in fact, act as a brake upon production.

Whilst not denying that the manufacturer of isoglucose, which is a new product and a substitute for liquid sugar, may attempt at the launching stage to obtain a price just below the guaranteed price for liquid sugar, the applicant claims that the manufacturer can pursue such a policy only if the same new product is not manufactured by others or if at least the quantities available are not too abundant.

In order not to allow isoglucose to continue to benefit from the alleged artificially high price of sugar the Council is establishing quotas which by limiting production to a low level upon the terms set out below by the applicant will eliminate all competition in the present case and therefore the opportunity for a price reduction.

As regards the *Roquette quota* the applicant points out that it began production of isoglucose in February 1975. It annexes to its statement a table of the production per season and per annum which corresponds to a table of actual sales for, unlike certain other manufacturers, it has no means of storage.

Contrary to appearances the reference period chosen by the Council for establishing quotas which is the period of the largest production and most sales is unfair especially for the following reasons:

(a) The relatively seasonal nature of sales;

(b) The brake upon production and the development in capacity;

(c) The impossibility of satisfying the new markets opened up.

As regards the last point the applicant points out that during the reference period the use of isoglucose was banned in France. By order published in the *Journal Officiel* of 9 August 1979 the Ministry of Agriculture allowed syrups obtained from the hydrolysis of glucose solutions by means of an enzyme used by the applicant to be used as ingredients in foodstuffs and drinks intended for human consumption. Thus at the very moment when the applicant sees its efforts recognized and rewarded by the French Government the Council by imposing upon it a fixed quota in the circumstances referred to above in fact stops it from taking advantage of the new market which is thus opened to it.

The applicant states that the quota corresponds to the sales made previously, the present outlets absorb the permissible production and that in order to observe Regulation No 1293/79 it is forced to refuse new orders which it might obtain under the order of the French Ministry of Agriculture.

The answer of the *Council* in its defence to the various arguments of the applicant may be summarized as follows:

The Council answers first of all the argument of the applicant to the effect that on the one hand the quota system for which there were particular historical reasons as regards sugar was in no way necessary for isoglucose and on the other hand that there is no obligation under the judgment of 25 October 1978 for the Council to set up such a system in view of the fact that there is no comparison in the positions of sugar and isoglucose. In the Council's view the latter claim is incorrect for the products are substitutes for one another and the markets are closely linked.

The Council understands the applicant's argument to mean that by establishing a quota system the Council breached the basic principles of the Treaty and adopted a stricter measure than was necessary but the Council points out that in the sugar sector the Court found in its judgment of 27 September 1979 in Case 230/78 *Eridiana* [1979] ECR 2749 that quotas are not a system for limiting production by a system guaranteeing prices (A quota) for certain quantities of the product, it being understood that for any additional production (B quota) there is a similar system but less advantageous (because of the imposition of a levy).

As regards the problem of laying down quotas for isoglucose based on the same principles the Council stresses on the one hand the inadmissibility of an application challenging a legislative part of Regulation No 1293/79 and on the other hand, when it is a question of implementing a complex economic system under the common agricultural policy, the need to recognize the Council's discretion.

The Council then considers the applicant's argument to the effect that the quota system, by limiting production, risks working against price reduction and thus abolishing all competition. In the Council's view that argument challenges the motives for the Council's system which was set up as a transitional measure for one year. To say straight away that it prevents any opportunity for development and competition is to attack it before it has been in operation.

As regards the criticism made by the applicant against the reference period used to determine the quotas the Council considers the Court did not require the two systems in question to be absolutely identical but indicated that by applying a similar system to the two products obvious discrimination would be avoided.

It is clear that the complicated system of reference periods adopted in order to avoid any negative influence, which the levy declared illegal may have had, to a large extent avoids that difficulty in fixing the basic quota for isoglucose. It is also clear that the correction resulting from taking into account the production capacity (the 65 % in paragraph (3)) avoids the last traces of any negative influence of the levy.

As to the comparison with the sugar sector the Council states that that sector has always been subject to quotas aimed at limiting production whereas isoglucose, at least after the judgment of the Court, was able to develop without restrictions imposed by the Community and certain manufacturers were able to take advantage thereof.

The Council considers that it had found a just solution to the matter which would in no way be censured by the Court even if it decided to investigate thoroughly the extent of the Council's discretion, a matter which, according to the consistent case-law of the Court, is out of the question.

The *applicant* stresses that the Council's discretion is subject to review by the Court and that review extends to the facts on which the measures of the Council are based; the applicant then goes on to challenge various statements by the Council regarding the basic figures, the nature and aim of the quotas and the transitional nature of the quota system. It adds some brief observations on a certain number of special issues in the defence. In its rejoinder the *Council* answers the criticisms and observations of the applicant.

The *Commission*, as *intervener*, submits very detailed observations intended to supplement the Council's defence, as appears in particular in the Council's rejoinder, regarding the merits of the application from the point of view of economic law.

C — Infringement of essential procedural requirements

As a preliminary observation the *applicant* queries in its originating application whether having regard to the fact that Regulation No 1293/79 was adopted without the opinion of the Assembly the conditions of Article 43 (2) of the Treaty, which speaks of "consulting the Assembly", have been complied with.

After referring to the reasons why it did not consider it possible to wait beyond 1 July 1979, the beginning of the sugar marketing year, to adopt Regulation No 1293/79 (the need to implement the judgment of the Court; the extreme importance for the public of the adoption simultaneously of the sugar and isoglucose systems; the temporary nature of the matter) the *Council* nevertheless admits that consultation of the Assembly constitutes an "essential procedural requirement" within the meaning of Article 173 of the Treaty. Nevertheless the Court is not without any discretion in that respect. According to the case-law of certain countries since a consultative system cannot paralyse the procedure of which it has to form part the incorrect nature of the consultation does not therefore necessarily involve a fundamental defect. Although the articles of the EEC Treaty provide for consultation of the Assembly there is no mention of the need for the opinion of the Assembly to have been given. Of

course, the Assembly must have been given an opportunity (in particular as regards time) to give its opinion, but that is not in question in the present case.

The legal argument put forward by the *European Parliament*, as *intervener*, takes the following form:

1. Time-limit

The European Parliament observes that Article 43 of the Treaty constitutes the basis of Regulation No 1293/79 and that that article provides that the Council may act upon a proposal from the Commission *after consulting* the European Parliament; the present case is one in which the Treaty requires the Council to receive the opinion of the Parliament before acting upon a proposal from the Commission. Further the Treaty did not impose any time-limit on the Parliament in the present case.

The Parliament maintains however that it did everything to give its opinion within a reasonable time. It adds that neither in the May session when it rejected the proposed resolution nor subsequently did either the Commission or the Council inform it that they considered the adoption of the regulation in question before 30 June as urgent. The Parliament had not intended to hold further sessions before 17 July 1979, but *nevertheless left it to the Council and the Commission to summon it if need be.*

2. The nature of the consultation

Consultation of the Parliament is the form, peculiar to the EEC Treaty, of participation of the Parliament in the legislative process of the Community. Consultation forms a large part of the parliamentary business. It is, at least where the Treaty expressly provides for it, a necessary condition (theory of the composite measure) of the validity of the legal measures of the Community. The institutions therefore have no discretion regarding consultation. It follows that any failure to consult the Parliament constitutes an infringement of an essential procedural requirement within the meaning of Article 173 of the Treaty.

Complete respect for the authority of the institutions is one of the fundamental principles of constitutional law of the Member States. Any disregard of those principles must be treated as infringement of an essential requirement.

3. The procedure of consultation

The procedure for consultation of the Parliament involves several stages none of which must be omitted if it is intended that the procedure should be fully carried out as understood in a legal sense. In the present case when the Council adopted the regulation consultation of the Parliament was not finished, and therefore legally incomplete, in the absence of an essential part of that procedure, namely the expression of the will of the plenary Assembly.

If the Treaty requires a consultation of the Assembly before the adoption of a provision that means that the Council before adopting the provision must have knowledge of the opinion of the Assembly.

In rejecting the motion for a resolution contained in the Tolman report the Parliament had not given an opinion on the proposal for a regulation which was the subject of the report. So long as the Parliament does not adopt a resolution its will cannot be determined with certainty.

In meeting the obligation, incumbent upon all the institutions, to fulfil the tasks defined by the Treaties the Parliament must be its own judge of how

and for how long it considers draft legislation.

The Parliament admits that there are problems of coordination with the Council and points out that it has established a special procedure involving inviting the Council to take part in the work of the Bureau of the Parliament and its committees. In the present case the Council did not make use of that procedure to obtain the opinion of the Parliament in due time.

In adopting Regulation 1293/79 before the Parliament gave an opinion the Council therefore disregarded the essential procedural requirement laid down in Article 43 of the Treaty which provides for consultation of the Assembly.

4. The position of the Council

Refering to the position of the Council as it appears from the defence the Parliament recalls that the Council has in Article 139 of the Treaty, which authorizes it to request the meeting of the Parliament in extraordinary session, a means of action enabling it to deal with emergency cases. So long as it fails to make use of that means it cannot rely on any ground in support of conduct contrary to the Treaty.

It is therefore in the alternative that the Parliament considers and challenges the various arguments put forward by the Council.

It points out in the first place that after the rejection of the motive for a resolution from the Committee on Agriculture the Council did not have recourse to the procedure in Article 139 (2) so that it cannot allege slowness on the part of the Parliament on reaching a decision.

The other ground put forward by the Council to the effect that the judgment of the Court had to be complied with is also invalid. The measure adopted by the Council in the form of Regulation No 1293/79 was not the only conceivable way of solving the hypothetical problems of the market in sweeteners. If a measure had been absolutely indispensable from the point of view of time and if all efforts to obtain an opinion from the Parliament in due time had failed, the Council could have taken measures only of an undoubtedly transitional nature.

As regards the primordial "public" interest in the adoption of rules before 1 July 1979, a ground which conjures up the plea of "state of emergency", the Parliament maintains that it is not for the Council unilaterally to determine the appropriate procedure to serve the public interest. Since Article 137 of the Treaty made the Parliament responsible for representing the peoples of the Community, it is the Parliament which constitutes the forum to which the Treaties entrust the definition of the European "public interest". So long as the institution appointed for that purpose has not expressed its view it cannot be maintained that there is a public interest without going counter to the tasks entrusted to the various institutions.

The Parliament claims that by adopting Regulation No 1293/79 the Council infringed a procedural requirement thus depriving the Parliament of its right to express its opinion on a measure adopted pursuant to Article 43 of the Treaty and so committing a breach of the Treaty. It stresses that the regulation might have

been different if the Council had been aware of the opinion of the Parliament.

In its rejoinder the *Council* answers the arguments put forward by the Parliament and stresses that it is through *consultation* that the parliamentary institution participates in the Community's legislative process. Logically it is possible to distinguish three kinds of consultation namely *optional, compulsory* where the *opinion* is not binding and *compulsory with* an opinion having a binding effect. Only the latter involves true sharing of the power of decision between the authority which formally has that power and the authority whose opinion must be followed.

The three Treaties mention *only compulsory consultation* as the consultative function of the Assembly. This requires the authority having the power of decision to consult the appropriate authority for an opinion. That is what is meant by "after consulting the Assembly".

On the other hand it is accepted in the public law of various Member States that the authority having power of decision may in certain circumstances be relieved of the obligation to enter into consultation.

Further a defect affecting a measure taken without consultation is censured as an infringement of an essential procedural requirement and not as being *ultra vires* as would be the case if consultation had to be regarded as involving true sharing of the power of decision.

It follows that having complied with the obligation to enter into consultation by way of giving information and allowing a period sufficient for the body being consulted to express its opinion the authority having the power of decision is not only bound to follow that opinion but normally does not even have the right to consider itself legally bound by the opinion for if it did it would legally mean alienating a power which that authority had to exercise but had no right to delegate.

In turn the body consulted must consider and give its opinion. That obligation arises from the power which it has been given and constitutes an effective condition of its exercise.

Although as regards consultation of the Economic and Social Committee Article 198 of the Treaty allows action in the absence of an opinion, there is no similar provision regarding the Parliament. Nevertheless in reliance upon the logic of the system of the Treaty and guidelines from national case-law the Council alleges that in certain circumstances it is entitled and even obliged to act without the opinion of the Parliament.

It is in the light of the above considerations that the Council discusses *the existence of the complaint of infringement of essential procedural requirements.* In the Council's view that question means in the present case whether the absence of a *formal* opinion may in itself be regarded as constituting such an infringement. The Council discusses this problem from the following three aspects:

(a) Is there in fact, otherwise than formally, an absence of an opinion?

In answer to that question the Council points out that the procedure was followed almost until the final stage; discussion was terminated, the general debate closed, the substance of what could have become the opinion (namely the motion for a resolution drafted by the Committee on Agriculture) was adopted since further amendment to the proposal was admissible and the only reason for its rejection was a legal scruple raised at the last minute by a member of the Assembly. There had effectively thus been consultation.

(b) Was the power of the Council fettered? In other words the question arises whether the Council risked allowing a discriminatory lacuna in the law *to the detriment of sugar* had it not adopted the contested regulation without delay. In the Council's view the answer to that question must be in the affirmative.

The Council contends that in acting in the absence of a formal opinion from the Assembly when its power of decision was fettered by the obligation to deal with the situation created by the judgment of 25 October 1978 and a reasonable period had elapsed since the matter had been put before the parliamentary institution it did not adopt a measure vitiated by infringement of an essential procedural requirement.

(c) Lastly the Council queries whether even if it was entitled to act in the absence of the formal opinion from the Assembly for the reasons set out at (a) and (b) it had the means of *causing a formal opinion to be issued.*

(i) In that respect the Council observes that whereas in the present case the Council was able effectively to have recourse to the provisions of Article 198 of the Treaty as regards the Economic and Social Committee as part of consultation which was moreover voluntary, paradoxically as regards the Assembly, the consultation of which was compulsory, there is no express provision allowing it similar recourse.

(ii) As regards the possibility for the Council, in the absence of appropriate rules, of using the parliamentary procedure itself, the Council refers first of all to the emergency procedure (internal regulation, Article 14). It is only the Assembly which can classify a matter as of an emergency nature and although the Assembly was properly informed, that did not prevent it from rejecting the motion for a resolution from the Committee on Agriculture in the circumstances described above. As to the possibility of an extraordinary session which the Ferri report charges the Council with not having requested, the Council contends that, contrary to its wishes, the Assembly did not consider such a session appropriate. Since the attention of the Parliament was drawn to the urgency and to the discrimination arising from the lacuna in the law, the vote of 12 May constituted a refusal to treat the matter as an emergency or at least a refusal by the Parliament to consider in due time the proposals submitted to it for an opinion and, as far

as the Council was concerned, exhausted the Council's efforts to obtain the opinion sought in sufficient time.

Finally the Council rejects the Parliament's claim to the effect that "the Parliament must ... be its own judge of how and for how long it considers draft legislation". Unless it is accepted that the Assembly has a true power to block the legislative body constituted by the Council acting on a proposal from the Commission, which would be contrary to the Treaties and to the division of powers between the four institutions, it must be held that once a reasonable period has elapsed the Council must, in certain exceptional circumstances of an emergency nature such as those of the present case, be entitled to act in the absence of a formal opinion.

The Council concludes its discussion by querying the admissibility of the Parliaments' intervention in the present case and in Case 139/79 *Maizena* v *Council.* It is of the view that in reality that intervention is neither ancillary nor even essential and that it constitutes in truth a supplemental action by the misuse of the process of intervention because the Parliament is not included among those who have a right under Article 173 to bring an action for a declaration that a measure is void.

The *Commission* considers that the Council could in the present case act in the absence of an opinion from the Parliament since the Parliament had a reasonable time to inquire fully into the matter.

It stresses that the Parliament's attention had been drawn both by the Council in its letter of 19 March 1979 and by the Commission in a telex from Mr Gundelach of 11 April 1979 to the President of the Parliament and to the President of the Committee on Agriculture pointing out the relationship between the proposed isoglucose regulation and all the agricultural price proposals for 1979/80 and consequently of the imperative need that the opinion be given during the May session.

Nevertheless if the Court has to declare Regulation No 1293/79 void for infringement of the essential procedural requirements of the Treaty the Commission suggests that the provisions of the said regulation be treated as provisionally applicable until a new measure by the Council be validly adopted after an opinion from the Parliament. Such a possibility seems open to the Court under the second paragraph of Article 174 of the Treaty which provides that "in the case of a regulation, however; the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive".

The possibility of a decision temporarily applying an unlawful measure moreover exists under certain national legal systems, for example in the Federal Republic of Germany where the Constitutional Court has made use thereof in revenue matters.

IV — Oral procedure

At the hearing on 9 July 1980 the *applicant* represented by M. Veroone, of the Lille Bar, the *Council,* represented by Daniel Vignes, Director in the Legal Department, assisted by Arthur Brautigam and Hans-Joachim Glaesner,

acting as Joint Agents, and Professor Jean Boulouis and Hans-Jürgen Rabe, of the Hamburg Bar, the *European Parliament*, represented by its Director-General, Francesco Pasetti Bombardella, assisted by Roland Bieber, Principal Administrator in its Legal Department, and Professor Pierre Henri Teitgen, and the *Commission*, represented by its Legal Adviser, Peter Gilsdorf, acting as Agent, assisted by Jacques Delmoly, a member of the Legal Department, presented oral argument.

The Advocate General delivered his opinion on 18 September 1980.

Decision

1 By application registered at the Court Registry on 31 August 1971 the applicant French company manufacturing *inter alia* insoglucose asked the Court to declare the fixing of the production quota resulting for the applicant from Annex II to Council Regulation No 1293/79 of 25 June 1979 amending Regulation No 1111/77 laying down common provisions for isoglucose (Official Journal L 162, p. 10 with corrigendum in Official Journal L 176, p. 37) to be invalid. It is apparent from consideration of the application that it is an application for a declaration that Regulation No 1293/79 is void in so far as it fixes a production quota for isoglucose in respect of the applicant.

2 In support of its application, the applicant, apart from various substantive submissions, makes a formal submission that its production quota fixed by the said regulation be declared void on the ground that the Council adopted that regulation without having received the opinion of the European Parliament as required by Article 43 (2) of the EEC Treaty which action constitutes an infringement of an essential procedural requirement within the meaning of Article 173 of the said Treaty.

3 By order of 16 January 1980 the Court allowed the Parliament to intervene in support of the applicant's claims of infringement of essential procedural requirements. By order of 13 February 1980 it also allowed the Commission to intervene in support of the Council.

4 The Council contended that both the application and the intervention in favour of the applicant were inadmissible. Alternatively it contended that the application should be rejected as unfounded.

5 Before considering the questions of admissibility raised by the Council and the claims made by the applicant it is well to recall briefly the history of the adoption of the contested regulation and the provisions thereof.

6 By judgment of 25 October 1978 in Joined Cases 103 and 145/77 *Royal Scholten Honig (Holdings) Ltd* v *Intervention Board for Agricultural Produce; Tunnel Refineries Ltd* v *Intervention Board for Agricultural Produce* [1978] ECR 2037 the Court held that Council Regulation No 1111/77 of 17 May 1977 laying down common provisions for isoglucose (Official Journal L 134, p. 4) was invalid to the extent to which Articles 8 and 9 thereof imposed a production levy on isoglucose of 5 units of account per 100 kilograms of dry matter for the period corresponding to the sugar marketing year 1977/78. The Court found that the system established by the above-mentioned articles offended against the general principle of equality (in those cases between sugar and isoglucose manufacturers) of which the prohibition on discrimination as set out in Article 40 (3) of the Treaty was a specific expression. The Court however added that its judgment left the Council free to take any necessary measures compatible with Community law for ensuring the proper functioning of the market in sweeteners.

7 On 7 March 1979 following that judgment the Commission submitted a proposal for an amendment of Regulation No 1111/77 to the Council. By letter of 19 March 1979 received by the Parliament on 22 March the Council asked the Parliament for its opinion pursuant to the third subparagraph of Article 43 (2) of the Treaty. In its letter seeking an opinion it wrote that:

"This proposal takes account of the position after the judgment of the Court of 25 October 1978 in anticipation of new arrangements for sweeteners which should enter into force on 1 July 1980. ... Since the regulation is intended to apply as from 1 July 1979, the Council would welcome it if the European Parliament could give an opinion on the proposal at its April session."

8 The urgency of the consultation requested in the Council's letter related to the fact that in order to avoid inequality of treatment between sugar manufacturers and isoglucose manufacturers the proposed regulation was basically intended to subject isoglucose production to rules similar to those applying to sugar manufacture until 30 June 1980 pursuant to the common organization of the market in sugar etstablished by Council Regulation No 3330/74 of 19 December 1974 (Official Journal L 369, p. 1). In particular it was a question of making transitional arrangements until then for production quotas for isoglucose which were to apply from 1 July 1979 which was the beginning of the new sugar marketing year.

9 The President of the Parliament immediately referred the matter to the Committee on Agriculture for further consideration and to the Committee on Budgets for its opinion. The Committee on Budgets forwarded its opinion to the Committee on Agriculture on 10 April 1979. On 9 May 1979 the Committee on Agriculture adopted the motion for a resolution of its Rapporteur. The report and draft resolution adopted by the Committee on Agriculture were debated by the Parliament at its session on 10 May 1979. At its session on 11 May the Parliament rejected the motion for a resolution and referred it back to the Committee on Agriculture for reconsideration.

10 The parliamentary session from 7 to 11 May 1979 was to be the last before the sitting of the Parliament elected by direct universal suffrage as provided for by the Act concerning the election of the representatives of the Assembly by direct universal suffrage and fixed for 17 July 1979. At its meeting on 1 March 1979 the Bureau of the Parliament had decided not to provide for an additional session between those of May and July. It had however stated:

"The Enlarged Bureau . . .

— is nevertheless of the view that in so far as the Council or Commission consider it necessary to provide for an additional session they may, pursuant to Article 1 (4) of the Rules of Procedure, call for an extraordinary session of the Parliament; any such session would be for the purpose only of considering reports which had been adopted following urgent consultation."

At its meeting on 10 May 1979 the Bureau was to confirm its position in the following words:

— "Confirms the position adopted at the above-mentioned meeting when it was decided not to provide for an additional session between the last session of the present Parliament and the session of the Parliament elected by direct universal suffrage, provided always that where the majority of the effective members of the Parliament, the Council or the Commission desire the holding of an additional session they may, pursuant to the provisions of Article 1 (4) of the Rules of Procedure, ask for the Parliament to be summoned;

— Decides further having regard to the provisions of Article 139 of the EEC Treaty that where the President has such an application before him the Enlarged Bureau will meet to consider how it should be dealt with."

11 On 25 June 1979 the Council without obtaining the opinion requested adopted the regulation proposed by the Commission which thus became Regulation No 1293/79 amending Regulation No 1111/77. The third reference in the preamble to Regulation No 1293/79 refers to consultation of the Parliament. The Council nevertheless took account of the absence of an opinion from the Parliament by observing in the third recital in the preamble to the regulation that "the European Parliament which was consulted on 19 March 1979 on the Commission proposal did not deliver its opinion at its May part-session; whereas it had referred the matter to the Assembly for its opinion".

12 The Court is asked to declare Regulation No 1293/79 void in so far as it amends Regulation No 1111/77.

Admissibility of the application

13 In the Council's view the application is inadmissible for it is directed against a regulation and the conditions provided for in the second paragraph of Article 173 of the Treaty are not satisfied. The contested measure is claimed not to constitute a decision in the form of a regulation and not to be of direct and individual concern to the applicant. The applicant maintains on the other hand that the contested regulation is a set of individual decisions one of which is taken in respect of the applicant and is of direct and individual concern to it.

14 Article 9 (1), (2) and (3) of Regulation No 1111/77 as amended by Article 3 of Regulation No 1293/79 provides:

"1. A basic quota shall be allotted to each isoglucose producing undertaking established in the Community, for the period referred to in Article 8 (1).

Without prejudice to implementation of paragraph (3), the basic quota of each such undertaking shall be equal to twice its production as determined, under this regulation, during the period 1 November 1978 to 30 April 1979.

2. To each undertaking having a basic quota, there shall also be allotted a maximum quota equal to its basic quota multiplied by a coefficient. This coefficient shall be that fixed by virtue of the second subparagraph of Article 25 (2) of Regulation (EEC) No 3330/74 for the period 1 July 1979 to 30 June 1980.

3. The basic quota referred to in paragraph (1) shall, if necessary, be corrected so that the maximum quota determined in accordance with paragraph (2):

— does not exceed 85 %,

— is not less than 65 %

of the technical production capacity per annum of the undertaking in question."

15 Article 9 (4) provides that the basic quotas established pursuant to paragraphs (1) and (3) are fixed for each undertaking as set out in Annex II. That annex, which is an integral part of Article 9, provides that the applicant's basic quota is 15 887 tonnes.

16 It follows that Article 9 (4) of Regulation No 1111/77 (as amended by Article 3 of Regulation No 1293/79) in conjunction with Annex II, itself applies the criteria laid down in Article 9 (1) to (3) to each of the undertakings in question who are the addressees and thus directly and individually concerned. Regulation No 1293/79 therefore is a measure against which the undertakings concerned manufacturing isoglucose may bring proceedings for a declaration that it is void pursuant to the second paragraph of Article 173 of the Treaty.

Admissibility of the Parliament's intervention

17 The Council queries the possibility of the Parliament's intervening voluntarily in the proceedings pending before the Court. In the Council's view a power to intervene of this kind is to be equated with a right of action which the Parliament does not have under the Treaty. In that respect it observes that Article 173 of the Treaty does not mention the Parliament among the institutions entitled to seek a declaration that a measure is void and that Article 20 of the Statute of the Court does not mention it among the institutions invited to lodge observations pursuant to the procedure under Article 177 for a preliminary ruling.

18 Article 37 of the Statute of the Court provides:

"Member States and institutions of the Community may intervene in cases before the Court.

The same right shall be open to any other person establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institutions of the Community or between Member States and institutions of the Community.

Submissions made in an application to intervene shall be limited to supporting the submissions of one of the parties."

19 The first paragraph of that article provides that all the institutions of the Community have the right to intervene. It is not possible to restrict the exercise of that right by one of them without adversely affecting its institutional position as intended by the Treaty and in particular Article 4 (1).

20 Alternatively the Council alleges that even if the Parliament's right to intervene has to be accepted such right would depend upon the existence of a legal interest. Such an interest may no doubt be presumed but it does not prevent the Court from checking, if necessary, that it exists. In the present case, in the Council's view, if the Court were to consider the matter it would be led to find that the Parliament had no interest in the outcome of the proceedings.

21 That submission must be rejected as incompatible with Article 37 of the Statute of the Court. Although the second paragraph of Article 37 of the Statute of the Court provides that persons other than States and the institutions may intervene in cases before the Court only if they establish an interest in the result, the right to intervene which institutions, and thus the Parliament, have under the first paragraph of Article 37 is not subject to that condition.

Breach of the principle of equality of treatment

22 As mentioned above, the Court in its aforementioned judgment given in Joined Cases 103 and 145/77 held that Regulation No 1111/77 offended against the general principle of equality. The Court found that whereas the position of the sugar and isuglucose manufacturers was comparable, an obviously unequal charge was levied on the isoglucose manufacturers. Following the judgment of the Court the Council, by Regulation No 1293/79, amended Regulation No 1111/77 so as to introduce a system of quotas for isoglucose directly inspired by the system applying to sugar.

23 The applicant maintains that that new regulation also offends against the principle of equality. In its view the regulation both applies similar rules to different situations and maintains between the two systems differences involving the unequal treatment of identical situations.

24 The fact that the applicant considers it possible to put forward both arguments simultaneously shows the complexity of a situation in which the isoglucose and sugar markets are comparable without being truly identical.

25 When the implementation by the Council of the agricultural policy of the Community involves the need to evaluate a complex economic situation, the discretion which it has does not apply exclusively to the nature and scope of the measures to be taken but also to some extent to the finding of the basic facts inasmuch as, in particular, it is open to the Council to rely if necessary on general findings. In reviewing the exercise of such a power the Court must confine itself to examining whether it contains a manifest error or

constitutes a misuse of power or whether the authority in question did not clearly exceed the bounds of its discretion.

26 Having regard to the fact that the production of isoglucose was playing a part in increasing sugar surpluses and that it was permissible for the Council to impose restrictive measures on such production, it was for the Council to take pursuant to the agricultural policy such measures as it considered useful having regard to the similarity and interdependence of the two markets and also the specific nature of the isoglucose market.

27 That is all the more true in that, faced with the delicate problem raised by the consequences of isoglucose production upon the sugar policy of the Community, the Council had to draw up in a short space of time transitional rules for a new market in full development. In those circumstances it has not been shown that by adopting Regulation No 1293/79 the Council exceeded the bounds of its discretion.

Breach of the principle of proportionality

28 In the applicant's view the quota set for it in Annex II to Regulation No 1111/77 is clearly inadequate. The fixing of the quota in relation to the production achieved between 1 November 1978 and 30 April 1979 takes no account of seasonal variations or of the fact that during the period in question production was limited because of the state of uncertainty in which the applicant was placed as regards the system which would be applied by the Community after the judgment of the Court in the aforementioned cases and because of the position of the French authorities who in the event did not accept the use of isoglucose until the Order of 9 August 1979. The possible correction of the quotas in relation to the annual technical capacity is to the disadvantage of undertakings such as the applicant which have postponed all new investment pending clarification of the position. Those quotas make all competition illusory.

29 In that respect it is necessary to point out that the laying down of quotas based on a reference period is a customary procedure in Community law and it is appropriate when it is necessary to check production in a particular sector. Further the applicant has in no way adduced evidence in support of

its claim that it has limited its production. It must also be observed that after the aforementioned judgment was given the levy as originally provided for was in any event no longer capable of being applied.

30 In any event the Council cannot be expected to have regard to the reasons, commercial choices and internal policy of each individual undertaking when it adopts measures of a general interest to prevent the uncontrolled isoglucose production from jeopardizing the sugar policy of the Community.

31 Finally since the applicant has not used the whole of the quota allowed it for the period corresponding to the sugar marketing year it cannot complain of a limitation on its opportunity to compete by the quota which was allowed it.

Infringement of essential procedural requirements

32 The applicant and the Parliament in its intervention maintain that since Regulation No 1111/77 as amended was adopted by the Council without regard to the consultation procedure provided for in the second paragraph of Article 43 of the Treaty it must be treated as void for infringement of essential procedural requirements.

33 The consultation provided for in the third subparagraph of Article 43 (2), as in other similar provisions of the Treaty, is the means which allows the Parliament to play an actual part in the legislative process of the Community, Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an esential formality disregard of which means that the measure concerned is void.

34 In that respect it is pertinent to point out that observance of that requirement implies that the Parliament has expressed its opinion. It is impossible to take the view that the requirement is satisfied by the Council's simply asking for

the opinion. The Council is, therefore, wrong to include in the references in the preamble to Regulation No 1293/79 a statement to the effect that the Parliament has been consulted.

35 The Council has not denied that consultation of the Parliament was in the nature of an essential procedural requirement. It maintains however that in the circumstances of the present case the Parliament, by its own conduct, made observance of that requirement impossible and that it is therefore not proper to rely on the infringement thereof.

36 Without prejudice to the questions of principle raised by that argument of the Council it suffices to observe that in the present case on 25 June 1979 when the Council adopted Regulation No 1293/79 amending Regulation No 1111/77 without the opinion of the Assembly the Council had not exhausted all the possibilities of obtaining the preliminary opinion of the Parliament. In the first place the Council did not request the application of the emergency procedure provided for by the internal regulation of the Parliament although in other sectors and as regards other draft regulations it availed itself of that power at the same time. Further the Council could have made use of the possibility it had under Article 139 of the Treaty to ask for an extraordinary session of the Assembly especially as the Bureau of the Parliament on 1 March and 10 May 1979 drew its attention to that possibility.

37 It follows that in the absence of the opinion of the Parliament required by Article 43 of the Treaty Regulation No 1293/79 amending Council Regulation No 1111/77 must be declared void without prejudice to the Council's power following the present judgment to take all appropriate measures pursuant to the first paragraph of Article 176 of the Treaty.

Costs

38 Pursuant to Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs if they have been asked for in the pleadings.

39 Neither the applicant nor the interveners have asked for the Council to be ordered to pay the costs. It follows that although the Council has been unsuccessful, the parties must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

1. **Declares Regulation No 1293/79 (Official Journal L 162, p. 10, with corrigendum in Official Journal L 176, p. 37) amending Regulation No 1111/77 (Official Journal L 134, p. 4) to be void;**

2. **Orders the parties to bear their own costs.**

Kutscher Pescatore Koopmans Mertens de Wilmars Mackenzie Stuart

O'Keeffe Bosco Touffait Due

Delivered in open court in Luxembourg on 29 October 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 18 SEPTEMBER 1980 [1]

Mr President,
Members of the Court,

In the two cases on which I am giving my opinion today, a combined one because of the obviously related nature of their facts, it is a question once again of the new sweetener isoglucose which is already well-known from a number of other cases.

1 — Translated from the German.