required to provide an additional financing for that year.

4. The common organization of the markets in the sugar sector is based on the principle of full self-financing by producers. It was pursuant to that principle and in order to cope with an exceptional increase in expenditure, brought about by fluctuations on the world market, on which Community producers have to dispose of part of their production, and closely reflecting the high cost of export refunds, that the special elimination levy was introduced for the 1986/87 marketing year. As the counterpart of the advantages which that common organization entails, the levy did not result in unreasonable financial burdens for producers, since they were for the greater part entitled to require reimbursement from their suppliers of sugar beet and sugar cane. By virtue of its nature, the levy cannot be regarded as an infringement of the right to own property. Finally, both its purpose and its characteristics preclude it from being described as an unreasonable and intolerable interference which encroaches upon the substance of the right of the producers concerned freely to pursue their economic activities.

5. The purpose of the special elimination levy for the 1986/87 marketing year, introduced within the framework of the common organization of the markets in the sugar sector, was to eliminate the exceptional losses occasioned by the grant of high export refunds designed to promote the disposal of the Community's surpluses on the markets of non-member countries. The fact that this levy imposed burdens which were proportionately higher for sugar produced in excess of the A quota cannot be regarded as constituting discrimination prohibited under the second subparagraph of Article 40(3) of the Treaty. Any amount of sugar produced in excess of the A quota gives rise to surpluses. As the only normal means of disposal of such surpluses is by way of exportation to non-member countries, those surpluses entail the grant of refunds that are costly for the Community budget.

REPORT FOR THE HEARING
in Case 143/88 *

Summary

* Language of the case: German.

I — Facts and Procedure

A — *The Community legislation*

1. The basic regulation

The common organization of the markets in the sugar sector is governed by Council Regulation No 1785/81 of 30 June 1981 (OJ 1981 L 177, p. 4) (hereinafter referred to as 'the basic regulation').

There are structural sugar surpluses in the Community. In order to restrain sugar production, the basic regulation provides for production quotas to be allocated to sugar producers.

For that purpose, Article 24 of the basic regulation lays down for each of the production regions (which essentially coincide with the territory of each of the Member States) a basic 'A' quantity and a basic 'B' quantity.

Those basic quantities relate in each instance to a marketing year. The marketing year runs from 1 July in one year to 30 June in the next.

The basic A quantities and basic B quantities allocated to each of the different production regions are the result of 'political' negotiations.

The Member States divide their basic A quantities and their basic B quantities amongst their production undertakings in the form of A and B quotas respectively.

The total A quotas allocated for each marketing year correspond approximately to the human consumption of sugar in the Community during that period. To determine the A quota of a given undertaking, account is taken in particular of the annual average production which it achieved during certain earlier marketing years. The B quota allocated to undertakings is calculated on the basis of the highest average production which they achieved within the marketing years from 1975/76 to 1979/80 and may not be lower than 10% of the A quota (Article 24 of the basic regulation).

The sugar produced under the A quotas (A sugar) and the sugar produced under the B quotas (B sugar) constitute the same product. However, the legal conditions applicable thereto vary in certain respects depending on whether production is within the A quotas or within the B quotas.

A sugar and B sugar may be marketed freely within the Community. Both types then enjoy a price guarantee and a guarantee of disposal under an intervention system. They may also be exported. If the intervention price is higher than the price on the world market, the difference is covered by an export refund. For each kilogramme of sugar which they export, the producers thus receive a sum equal to the difference between the two prices. If the intervention price is lower than the price of sugar on the

world market, a levy is collected. For each kilogramme of sugar which they export, the producers must then pay a sum equal to the difference between the intervention price and the higher world market price.

Sugar produced by an undertaking in excess of its A and B quotas (known as C sugar) is not covered by the intervention system. It must therefore be exported from the Community and does not qualify for any export refund.

In practice, the intervention price is always higher than the price of sugar on the world market. Since it is possible to produce, within the limit of the B quotas, quantities of sugar in excess of Community consumption which benefit from export refunds, the Community has to bear substantial expenditure in respect of export refunds.

The export refunds are financed initially by appropriations in the Community budget. However, the basic regulation provides for a system of production levies, which must enable the Community's expenditure in respect of sugar exports to be passed on in its entirety to the sugar industry. In that respect, the 11th recital in the preamble to the basic regulation indicates that their purpose is 'to ensure, in a fair yet efficient way, that the producers themselves meet in full the cost of disposing of the surpluses of Community production over consumption'.

Article 28 of the basic regulation provides for the system of levies intended to achieve that objective. The levies are charged on the production of A sugar and that of B sugar to a different extent in each case.

Before the end of each marketing year, an estimate is made of the foreseeable total loss. This is equal to the foreseeable difference between the total amount of refunds to be paid and that of the levies to be collected in the course of the marketing year in question.

Two levies are collected from the sugar producers to cover the estimated total loss: a basic production levy and a B levy.

The basic production levy is collected in respect of the manufacture of both A sugar and B sugar. It is limited to 2% of the intervention price for white sugar.

If the basic production levy is not sufficient to cover the estimated overall loss, a B levy is collected, which is charged only on B sugar. In principle, that levy may not exceed 30% of the intervention price for white sugar. That percentage may be increased to a maximum of 37.5% where the basic production levy and the B levy — limited to 30% — do not enable the estimated overall loss to be covered.

The basic regulation provides for the two levies to be passed on, to a certain extent, to sugar-beet producers. This is done through the fixing of the basic price for beet, and by means of a reduction in the minimum price

which sugar producers must pay to the beet producers (Articles 4 and 5 of the basic regulation).

2. The regulation introducing the elimination levy

Under Article 23 of the basic regulation, the quota and levy system described above applied to the marketing years 1981/82 to 1985/86.

At the end of that period, it became apparent that the levies introduced by the basic regulation fell far short of what was needed to ensure that the sector was entirely self-financed. Although the levies were collected at the maximum rates authorized by the basic regulation, that is to say with the ceiling of 30% for the B levy being raised to 37.5%, there was found to be a deficit of ECU 400 million at the end of the period 1981/82 to 1985/86.

On 24 March 1986, the Council adopted Regulation No 934/86 amending Regulation No 1785/81 on the common organization of the markets in the sugar sector (OJ 1986 L 87, p. 1) (hereinafter referred to as 'the regulation introducing the elimination levy').

The regulation introducing the elimination levy extended the system of quotas and levies introduced by the basic regulation to the marketing years 1986/87 to 1990/91. The sugar producers must therefore pay the basic production levy and the B levy for those five additional marketing years.

Furthermore, the new regulation inserted a new Article 32a in the basic regulation which introduced, alongside the two existing levies, an additional levy known as the elimination levy. The latter is intended to cover, at the rate of ECU 80 million per marketing year over the period from 1986/87 to 1990/91, the deficit of ECU 400 million recorded at the end of the period from 1981/82 to 1985/86.

As is apparent from the eighth recital in the preamble to the regulation introducing the elimination levy, it was found materially impossible to differentiate the amount of the new levy on the basis of the extent to which the agricultural producers and processing undertakings contributed to the incurring of the deficit, in view of the changes which had occurred in the structure of production over the relevant five years (for example, the loss of certain producers through bankruptcy, death and so forth). The sole possibility available appeared to be differentiated application of the elimination levy according to production region.

Article 32a thus fixed, for each production region, amounts to be paid by the sugar manufacturers by way of elimination levy for the production of 100 kilogrammes of white sugar. No distinction in that respect was made between an undertaking's production within its A quota and its production within its B quota.

Article 32a provided that sugar producers could require the sellers of beet to reimburse 60% of the elimination levy.

3. The regulation introducing the special elimination levy

The 1986/1987 marketing year ended on 30 June 1987. For that marketing year alone, an additional deficit was recorded of ECU 227 million. The deficit recorded in that year was thus more than half the deficit for the previous five marketing years.

On 2 July 1987 the Council therefore adopted Regulation No 1914/87 introducing a special elimination levy in the sugar sector for the 1986/1987 marketing year (OJ 1987 L 183, p. 5) (hereinafter referred to as 'the regulation introducing the special elimination levy'). It is the validity of the regulation introducing the special elimination levy which is at issue in these preliminary-ruling proceedings.

Like the basic regulation and the regulation introducing the elimination levy, the regulation introducing the special elimination levy was adopted on the basis of Article 43 of the EEC Treaty. That article provides that the Council is to act by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

By contrast with the regulation introducing the elimination levy, the regulation introducing the special elimination levy does not amend the basic regulation. However, it contains many references to the basic regulation, both in the preamble and in the operative part.

The special elimination levy is intended to cover entirely the part of the overall loss in respect of the 1986/87 marketing year which is not covered by the receipts from the levies introduced by the basic regulation (the basic production levy and the B levy).

It is calculated, for each sugar producer, by applying a specified coefficient to the amount due from it for the marketing year 1986/1987 in respect of the levies introduced by the basic regulation. The coefficient is the same throughout the Community. It is determined in such a way that the outstanding balance of the loss for the marketing year in question is covered in its entirety. It was fixed as 0.38873 by Commission Regulation No 3061/87 of 13 October 1987 fixing the coefficient for the calculation of the special elimination levy in the sugar sector for the 1986/87 marketing year (OJ L 290, p. 10).

Like the regulation introducing the elimination levy, the regulation introducing the special elimination levy provides that sugar producers may require the sellers of beet to reimburse 60% of the levy introduced by it. That reimbursement may be obtained by means of a corresponding reduction in the price paid for the beet delivered in respect either of the 1986/87 marketing year or of the following marketing year.

It thus appears that the sugar producers had to bear levies of three types on their production for the 1986/87 marketing

year: the levies introduced by the basic regulation (basic production levy and B levy), the elimination levy intended to cover, at the rate of ECU 80 million, the cumulative loss for the period from 1981/82 to 1985/86, and finally the special elimination levy which was to cover a loss of ECU 227 million in respect of the 1986/87 marketing year, which had not been covered by the levies introduced by the basic regulation.

4. The later regulations

After the occurrence of the events to which the present proceedings relate, the Council adopted, likewise on the basis of Article 43 of the EEC Treaty, two further regulations on the system of levies for the production sector.

In one of those regulations (Regulation No 1108/88 of 25 April 1988 introducing a special elimination levy in the sugar sector for the 1987/1988 marketing year, OJ 1988 L 110, p. 25), the Council introduced for the 1987/88 marketing year a special elimination levy identical to that which it had imposed by means of the contested regulation for the 1986/87 marketing year.

In the other regulation (Regulation No 1107/88 amending Regulation No 1785/81 on the common organization of the markets in the sugar sector, OJ 1988 L 110, p. 20), the Council inserted in the basic regulation an Article 28a by means of which it introduced, for the 1988/89, 1989/90 and 1990/91 marketing years, a levy known as the additional levy. The latter is identical, as regards its aims and the machinery for its application, to the special elimination levy. It is thus intended to cover in their entirety, for the three marketing years concerned, the deficits not covered by the other levies introduced by the basic regulation (basic production levy and B levy).

B — *The facts and the procedure before the national court*

1. Facts and Procedure

By decision of 19 October 1987 the Hauptzollamt (Principal Customs Office) Itzehoe, the defendant in the main proceedings, required Zuckerfabrik Süderdithmarschen, the plaintiff in the main proceedings, to pay DM 1 982 942.66 in respect of the special elimination levy for the 1986/87 marketing year.

Zuckerfabrik Süderdithmarschen lodged an objection against that decision, which was rejected.

It then brought proceedings for suspension of enforcement of the Hauptzollamt's decision before the Finanzgericht Hamburg. It also brought an action for annulment of that decision before the same court. In support of its actions, Zuckerfabrik Süderdithmarschen claimed that the regulation introducing the special elimination levy, on which the Hauptzollamt's decision was based, was invalid.

By order of 31 March 1988 the Finanzgericht Hamburg granted the application for suspension of enforcement of the Hauptzollamt's decision and referred the questions set out below to the Court of Justice for a preliminary ruling. By a further order, the Finanzgericht stayed the proceedings on the substance of the case pending a preliminary ruling by the Court on the questions submitted.

2. The questions referred to the Court for a preliminary ruling

The questions submitted by the Finanzgericht Hamburg in the proceedings for suspension of the operation of the decision of the Hauptzollamt Itzehoe are as follows:

(1) (a) Is the second paragraph of Article 189 of the EEC Treaty to be interpreted as meaning that the general application of regulations in Member States does not preclude the powers of national courts to suspend, by way of an interim measure, the operation of an administrative measure based on a regulation until a decision is reached in the main action?

(b) If so, under what conditions may national courts adopt interim measures? Is there an applicable criterion of Community law and if so which? Or do interim measures depend on national law?

(2) Is Council Regulation (EEC) No 1914/87 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year invalid? In particular is it invalid because it infringes the principle that regulations imposing taxation must not be retroactive?

In its order for reference the Finanzgericht sets out the following considerations in order to explain the above questions.

(a) The power of national courts in proceedings for interim relief to order suspension of enforcement of a national administrative measure based on a Community regulation

With respect to the first part of the first question, the Finanzgericht states that it is required, under its own national law, to order suspension of enforcement of a national decision where it entertains serious doubts regarding its validity. It wonders, however, whether it is entitled to do so where it is the validity of a Community regulation, on which the measure is based, which appears dubious.

In favour of the view that such power exists, the Finanzgericht states that the suspension of enforcement does not affect the national decision as such but merely defers any application of it. Moreover, the adoption of interim measures does not call in question,

as regards its substance, the validity of the Community regulation.

Against the view that it has the power to suspend enforcement of a national measure based on a Community provision, the Finanzgericht notes however that such suspension might be incompatible with the direct applicability of regulations in all the Member States, as laid down in the second paragraph of Article 189 of the EEC Treaty. The Finanzgericht also draws attention to the fact that the grant of a suspension of application under Article 185 of the Treaty or interim measures under Article 186 is subject to rules other than those of German law.

(b) The conditions for granting suspension of enforcement of a national administrative measure based on a Community regulation

With respect to the second part of the first question, the Finanzgericht is of the opinion that reliance on the rules contained in the laws of the various Member States might be a source of discrimination between economic agents in different Member States. On the other hand, the application, by analogy, of Article 83 of the Rules of Procedure of the Court might provide a solution conducive to guaranteeing equality of treatment

(c) The validity of the regulation introducing the special elimination levy

To clarify the second question, the Finanzgericht analyses two of the grounds of invalidity raised before it by the plaintiff in the main proceedings.

— The ground of objection relating to breach of the procedure laid down in Article 201 of the EEC Treaty

The plaintiff claimed in the first place that the regulation introducing the special elimination levy should have been based on Article 201 of the Treaty and not on Article 43 thereof. The special elimination levy is in reality a financing levy and therefore comes under the heading of own resources within the meaning of Article 201 of the Treaty. According to the latter provision, the introduction of measures to raise own resources requires a decision of the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, together with action on the part of the Member States taken in accordance with their respective constitutional rules.

The Finanzgericht does not consider that argument well founded. In its view the special elimination levy relates to the common organization of the markets in the sugar sector and was therefore validly introduced on the basis of Article 43 of the Treaty. The procedure under Article 201 of the Treaty should be followed only where it is proposed to include a financial contribution as an own resource in the budget of the European Communities. By contrast, even the introduction of a levy intended to regularize an agricultural market does not require recourse to Article 201 of the Treaty.

— The ground of objection relating to breach of the principle of non-retroactivity

In the second place, the plaintiff maintained before the Finanzgericht that the regulation introducing the special elimination levy infringed the principle of non-retroactivity. The Finanzgericht shares that opinion and

accordingly entertains serious doubts as to the validity of the regulation in question.

In that regard, it states first that the regulation introducing the special elimination levy was adopted after the end of the marketing year of which it is intended to cover the losses. Moreover, the regulation relates payment of the levy to past events, namely the production of sugar during that marketing year. In that respect it differs from Regulation No 934/86 of 24 March 1986 which introduced the elimination levy. The latter regulation related payment of the elimination levy to future events, namely sugar production in the 1986/87 to 1990/91 marketing years. By contrast, the regulation introducing the special elimination levy was genuinely retroactive in effect.

The Finanzgericht then states that according to previous decisions of the Court, a Community measure may not take effect from a point in time before its publication, except where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected (in particular judgment in Case 108/81 *Amylum* v *Council* [1982] ECR 3107, at paragraph 4).

The Finanzgericht does not think it necessary to consider whether the first of those conditions is fulfilled, namely whether the aim of achieving total financing of the sugar sector called for the imposition of the special elimination levy with retroactive effect. It considers that the second condition, concerning the legitimate expectations of the persons concerned, is not satisfied in any event in the present case. That assessment is based on two considerations.

Firstly, the basic regulation placed a ceiling, in the form of specified maximum percentages of the intervention price for sugar, on the financial contribution to be made by sugar producers to cover the losses. The persons concerned could legitimately expect that those percentages would not be exceeded.

Moreover, the basic regulation established levies which, although payable by the sugar producers, could be passed on in their entirety to the beet producers by means of a corresponding reduction in the minimum price for beet (Article 5(2) of the basic regulation). By contrast, the regulation introducing the special elimination levy authorized reimbursement of the new levy by beet growers only to the extent of 60% (Article 1(3) of that regulation). Having regard to the basic regulation, the sugar producers were entitled to expect that they would only have to pay levies which could be passed on to the beet growers in their entirety.

C — The procedure before the Court

The order of the Finanzgericht Hamburg was received at the Court Registry on 20 May 1989.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 2 September 1988 by the Council of the

European Communities, represented by A. Bräutigam, a member of its Legal Department, acting as Agent; on 6 September 1988 by the Commission of the European Communities, represented by its Legal Adviser, D. Booß, acting as Agent; on 7 September 1988 by Zuckerfabrik Süderdithmarschen, the plaintiff in the main proceedings, represented by Messrs. Ehle, Schiller and Associates, Rechtsanwälte, Cologne, on 15 September 1988 by the Government of the Italian Republic, represented by L. Ferrari Bravo, Head of the Contentious Diplomatic Affairs Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato dello Stato, and on 15 September 1988 by the United Kingdom, represented by J. A. Gensmantel, of the Treasury Solicitor's Department, acting as Agent.

Upon 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.

III — Written Observations Submitted to the Court

A — *The first part of the first question (power of the national courts, in proceedings for interim relief, to order suspension of enforcement of a national administrative measure based on a Community regulation)*

1. Position of the plaintiff in the main proceedings

Zuckerfabrik Süderdithmarschen maintains that the national authorities may order suspension of enforcement of a national administrative measure based on a Community regulation.

In the first place, a measure suspending a national administrative measure based on a Community regulation has only limited effects. Such a measure does not undermine the validity of either the Community regulation or the national administrative measure. It merely has the effect of suspending for the time being the payability of the amount due under the national administrative measure.

Secondly, the power of the German courts to order suspension of enforcement of a national administrative measure is covered by the guarantees of judicial protection enshrined in Article 19(4) of the German Basic Law. The concern to ensure the general scope and direct applicability of a Community regulation on which a national administrative measure is based cannot justify any limitation of that protection.

Moreover, the powers of the national courts to order suspension of enforcement of a national administrative measure based on a Community regulation derives from the system of judicial protection embodied in the Community legal order itself. Within that system, judicial protection is assured either by the Court of Justice or by the national courts, depending on whether the measure attacked was adopted by a Community institution or by a national authority. It is consonant with that division of powers that the national courts should be able to order suspension of enforcement of a national administrative measure based on

a Community regulation whose validity appears dubious to them.

Finally, it is already apparent from the judgment of the Court in Case 314/85 *Foto-Frost* [1987] ECR 4199, at paragraph 19, that in certain circumstances in proceedings for interim relief national courts may themselves declare a Community measure invalid. The Court has thus conceded that they may suspend enforcement of a national measure based on a Community act which they consider unlawful.

2. Position of the Italian Government

The *Italian Government* also defends the view that a national court may, by way of interim measure, suspend an administrative measure based on a Community regulation, even if the latter has not yet been declared invalid by the Court.

It refers in that connection to the division of powers between the Court of Justice and the national courts. The powers of the national courts certainly include authority to order provisional suspension of enforcement of a national administrative measure with a view to ensuring that the persons concerned do not suffer serious and irreparable harm. The suspension of a national measure should therefore be possible even if it is based on a Community regulation: the suspension does not undermine the validity of the regulation but merely delays any application of it until conclusion of the proceedings on the substantive issues.

The Italian Government also states that if the national courts were unable to order suspension of enforcement of a national measure based on a Community regulation, private individuals would be deprived of any judicial protection by means of interim measures. In principle, they cannot challenge the Community regulation before the Court of Justice or, therefore, ask the latter to suspend the application of the regulation or grant other interim relief.

3. Position of the United Kingdom

The *United Kingdom* considers that the national courts do not have the power, by way of interim measure, to suspend the operation of a national administrative measure based on a Community regulation.

It points out that in its judgment in Case 314/85 *Foto-Frost*, supra, at paragraph 15, the Court reserved its own powers to declare measures of Community institutions to be void on the ground that 'divergences between courts in Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty'.

Those same considerations should also be seen as denying the national courts power to declare acts of Community institutions invalid in proceedings for interim relief. The rules governing the jurisdiction of national courts regarding the grant of interim relief vary from one Member State to another. Divergent assessments of the validity of one and the same Community measure would therefore be liable to emerge if the national

courts had jurisdiction themselves to declare Community measures invalid in proceedings for interim relief.

4. Position of the Council

The *Council* merely states that in its view the question should be resolved in the light of the principle of the primacy of Community law consistently upheld by the Court, in particular in Case 249/85 *Albako* [1987] ECR 2345. However, it gives no further indication as to how the question from the national court should be answered.

5. Position of the Commission

The *Commission* is of the opinion that the national courts should be recognized as having the power to suspend enforcement of a national administrative measure based on a Community regulation pending a decision on the substantive question of the validity of the national measure in question.

When they order suspension of enforcement of a national administrative measure based on a Community regulation, the national courts are not giving a decision as to the validity of the regulation. They are merely considering whether, in the circumstances of the case, particular interests deserving of protection justify deferment of enforcement of the national administrative measure until a decision is given on the substance of the case.

Furthermore, it is desirable for national courts to be recognized as having the power to suspend a national administrative measure based on a Community regulation so that they are in a position to grant, as a matter of urgency, basic effective judicial protection for private individuals.

B — *The second part of the first question (conditions for granting suspension of enforcement of a national administrative measure based on a Community regulation)*

1. Position of the plaintiff in the main proceedings

Zuckerfabrik Süderdithmarschen observes that there is no harmonization of national procedural rules at Community level. Moreover, the separation of national judicial systems from the Community judicial system precludes the Court from harmonizing, on its own initiative, the national rules of procedure. Any suspension of enforcement of a national administrative measure, even one based on a Community regulation, is therefore a matter governed exclusively by national law.

2. Position of the Italian Government

The *Italian Government* also considers that the power of national courts to order suspension of enforcement of a national administrative measure based on a Community regulation is governed by national law. It states that, by virtue of the division of powers as between the Court of Justice and the national courts, only the latter have authority to order suspension of enforcement of national administrative measures. In the absence of harmonization of national rules of procedure, it must be conceded that the exercise of that authority

by the national courts is governed by national law. However, Community law prohibits the Member States from making protection of situations safeguarded by it more difficult than the protection of situations safeguarded by national law.

3. Position of the Commission

The *Commission* also considers that national law governs the powers of national courts to order suspension of enforcement of a national administrative measure based on a Community regulation.

It observes that the Court has held that 'the system of legal protection established by the Treaty, as set out in Article 177 in particular, implies that it must be possible for every type of action provided for by national law to be available for the purpose of ensuring the observance of Community provisions having direct effect, on the same conditions concerning admissibility and procedure as would apply were it a question of ensuring observance of national law' (judgment in Case 158/80 *REWE* v *Hauptzollamt Kiel* [1981] ECR 1805, at paragraph 44).

It is apparent from that decision that the concern to ensure compliance with Community law does not justify requiring any amendment of national rules of procedure. It is not therefore possible to require the national courts to apply by analogy the conditions laid down in Article 83 of the Rules of Procedure of the Court of Justice regarding the grant of orders suspending the operation of measures or of other interim relief by the Court.

The Commission suggests, however, that action taken by national courts should be subject to certain conditions which, in its view, make no change to national rules of procedure but are such as to reduce as much as possible any undermining of the exclusive jurisdiction of the Court of Justice to declare Community acts invalid. There are three such conditions.

First, the national court should take full account of the Community interest when considering whether serious doubts exist as to the legality of the Community measure which served as a basis for the national administrative measure.

Secondly, when the national court orders suspension of enforcement of a national administrative measure based on a Community act it should, at the same time, seek a preliminary ruling from the Court of Justice as to the validity of that Community act. The exclusive jurisdiction of the Court to declare Community measures invalid would thus be fully respected. The obligation to refer to the Court for a preliminary ruling as from the stage at which interim relief is applied for would also enable the period of uncertainty as to the validity of the Community measure to be reduced. Finally, that obligation would enable the proceedings on the substantive issues to be accelerated, in so far as a reference for a preliminary ruling would no longer be necessary in those proceedings.

In the third place, the national court should stay the main proceedings on the validity of the national administrative measure pending a preliminary ruling from the Court on the validity of the Community measure as a step in the proceedings on the application for interim measures. That condition is necessary to ensure that the request for a

preliminary ruling at the interim-relief stage serves a useful purpose.

Those various conditions could be imposed without any resultant encroachment upon the national rules of procedure. Indeed, they would merely 'render specifically applicable to a particular case' the preliminary-ruling procedure which is in any event provided for by Community law.

The Commission therefore proposes the reply that 'the national courts have the power to suspend, by way of interim relief as provided for by the procedural rules of internal law, the effects of an administrative act adopted under national law on the basis of a Community law measure, provided that the Community interest is taken fully into account; provided that the national courts simultaneously submit to the Court under Article 177 of the EEC Treaty a request for a preliminary ruling on the validity of the Community measure, and provided that, in the main proceedings before them, they give no decision as to such validity before the Court of Justice has given the requested preliminary ruling'.

C — *The second question (the validity of the regulation introducing the special elimination levy)*

1. The position of the plaintiff in the main proceedings

In view of the fact that, in its second question, the Finanzgericht deals in wholly general terms with the question of the validity of the regulation introducing the special elimination levy, Zuckerfabrik Süderdithmarschen sets out eight reasons for which it considers that regulation invalid.

(a) Ground of objection relating to breach of the procedure laid down in Article 201 of the EEC Treaty

In the first place, Zuckerfabrik Süderdithmarschen maintains that the proper legal basis for the adoption of the contested regulation was not Article 43 of the EEC Treaty but Article 201 thereof. The special elimination levy is in fact a financing levy and not a measure for regulation of the market in sugar.

Zuckerfabrik Süderdithmarschen states first that a measure for regulation of an agricultural market may relate only to the present or to the future, but not to the past. It then observes that, in the third recital in the preamble thereto, the regulation at issue refers expressly to the 'severe budgetary restraints on the Community'. Finally, it states that only the sugar producers are under a legal obligation to pay the special elimination levy whereas the common organization of the market in sugar was set up exclusively in the interests of the beet growers. On the latter point, it refers to the third recital in the preamble to the basic regulation, which states that 'to ensure that the necessary guarantees are maintained in respect of employment and standards of living for Community growers of sugar beet . . . provision should be made for measures to stabilize the market in sugar'.

Since the special elimination levy was introduced outside the framework of the common organization of the market in sugar, it is not one of the sources of revenue for own resources referred to in Article 2(a)

of the Council Decision of 7 May 1985 on the Communities' system of own resources (OJ 1985 L 128, p. 15) (hereinafter referred to as 'the decision on own resources'). Under that provision, own resources are constituted by 'contributions and other duties provided for within the framework of the common organization of the markets in sugar'.

Since it is not a measure regulating an agricultural market and does not come under the heading of own resources as defined by the decision on own resources, the only valid basis for the adoption of the special elimination levy was Article 201 of the Treaty. As the procedure prescribed by that provision was not followed, the regulation introducing the special elimination levy is invalid.

(b) Ground of objection relating to the compatibility of Regulation No 1914/87 with the basic regulation

Secondly, Zuckerfabrik Süderdithmarschen claims that the regulation introducing the special elimination levy is incompatible with the basic regulation. It maintains that, because of that incompatibility, the regulation in question is contrary to the legal conditions for self-financing and the principle of legal certainty.

Zuckerfabrik Süderdithmarschen states first that Article 28 of the basic regulation limits the basic production levy to 2% of the intervention price for sugar and the B levy to 30% or, if necessary, 37.5% of that price. That ceiling was confirmed for the marketing year in question by Regulation No 934/86, which introduced the elimination levy.

By laying down exhaustive rules governing the system of self-financing, in Article 28 of the basic regulation, the Council committed itself to refraining from introducing subsequently, outside the framework of the market in question, any special elimination levy of which the collection would cause the ceilings determined in the basic regulation to be exceeded.

The Community legislative system precludes the adoption by the Council, on the basis of the general enabling rule of Article 43 of the Treaty, regulations laying down specific measures which are incompatible with the general regulation governing the matter. Zuckerfabrik Süderdithmarschen refers in that respect to the judgment in Case 133/77 *NTN Toyo Bearing Company* v *Council* [1979] ECR 1185, at paragraph 21, in which the Court stated: 'The Council, having adopted a general regulation with a view to implementing one of the general objectives laid down in Article 113 of the Treaty, cannot derogate from the rules thus laid down in applying those rules to specific cases without interfering with the legislative system of the Community and destroying the equality before the law of those to whom that law applies.'

The self-financing of the sugar sector could therefore be assured only to the extent provided for in Article 28 of the basic regulation. The principle of self-financing in that sector has no other legal basis than the basic regulation and its application must be kept within the limits laid down in that regulation.

Zuckerfabrik Süderdithmarschen also observes that the adoption of a special rule that is incompatible with the relevant general rule undermines legal certainty and frustrates the legitimate expectations of the persons concerned.

The regulation introducing the special elimination levy is therefore invalid because it is incompatible with the Community legislative system and thereby undermines legal certainty and frustrates the legitimate expectations of the persons concerned.

(c) Ground of objection relating to the rule prohibiting the imposition on a sector of the economy of risks extraneous to the organization of the market applicable to it or unreasonable financial burdens

In the third place, Zuckerfabrik Süderdithmarschen maintains that the regulation introducing the special elimination levy infringes the principle that no sector of the economy should have imposed on it risks which are alien to it and unreasonable financial burdens.

The causes of the deficit which the contested levy was intended to eliminate are unrelated to the conduct of the economic agents operating in the sugar market. Those causes are essentially the persistence of a rather low price on the world market and a fall in the parity of the dollar. Those two factors forced the Community to pay large sums in respect of export refunds during the 1986/87 marketing year.

Zuckerfabrik Süderdithmarschen maintains that the emergence of a deficit deriving from external factors of that kind constitutes a risk inherent in the very system of organized markets. Such a deficit must therefore be borne by the Community budget, at least to the extent to which it exceeds the usual level. Moreover, in other common organizations of the markets funding for the risks in question is provided entirely by the EAGGF.

Furthermore, the concern to ensure self-financing in an agricultural sector cannot be used as a basis for imposing unreasonable financial burdens on the economic agents operating in that sector. The special elimination levy subjects sugar producers to burdens which are unreasonable because of their amount and the fact that they are additional to the existing levies.

(d) Ground of objection relating to breach of principle of non-retroactivity

Fourthly, Zuckerfabrik Süderdithmarschen claims that the regulation introducing the special elimination levy infringes the principle of non-retroactivity. The Court has held that a Community act may not take effect from a point in time before its publication, except where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. Neither of those two conditions is satisfied in the present case.

As far as the purpose to be achieved is concerned, Zuckerfabrik Süderdithmarschen maintains that the Council conceded, by implication, that no general interest of a higher order justified the introduction of an additional levy intended to cover the losses incurred in the 1986/87 marketing year. Indeed, it refrained from taking measures to that end when, on 24 March 1986, it adopted Regulation No 934/86 which introduced the special elimination levy, even though it was foreseeable, in view of the deficit which had accumulated during the

previous marketing years, that further losses would be incurred in respect of the 1986/87 marketing year.

The legitimate expectations of the sugar producers were frustrated by the retroactive introduction of the special elimination levy. The basic regulation fixed ceilings for the basic production levy and the B levy. Regulation No 934/86, which introduced the elimination levy, confirmed those ceilings for the 1986/87 marketing year. There was nothing to indicate that a levy which breached those ceilings might be collected in respect of the production for that year. Admittedly, the Commission's proposal for the introduction of such a levy was presented in February 1987 (OJ 1987 C 89, p. 18) but by that time it was already too late for the sugar producers to adjust their conduct accordingly. Under the outline provisions governing contracts for the purchase of beet, the purchase contracts between sugar producers and beet growers for the 1986/87 marketing year had to be concluded before 1 May 1986 (Regulation No 206/68 of the Council of 20 February 1968 laying down outline provisions for contracts and inter-trade agreements for the purchase of beet — OJ, English Special Edition 1968 (I, p. 19).

(e) Ground of objection relating to discrimination

Fifthly, Zuckerfabrik Süderdithmarschen claims that the regulation introducing the special elimination levy infringes the principle of non-discrimination.

It points out that the incidence of the special elimination levy on the production of B sugar is much greater than on A sugar. That is because the levy is calculated by applying a specified coefficient to the levies due from the producers under the basic regulation (the basic production levy and the B levy) and that the latter themselves have a much greater incidence on the production of B sugar than on that of A sugar.

In order to determine whether the regulation introducing the special elimination levy involves unlawful discrimination to the detriment of the producers of B sugar, it is necessary to consider whether the situations of sugar producers that produce A sugar and those that produce B sugar are comparable. If they are, then it is necessary to consider whether the difference of treatment is objectively justified.

According to Zuckerfabrik Süderdithmarschen, the producers that produce A sugar and those that produce B sugar are in comparable circumstances. The sugar produced within quota A is the same product as that produced within quota B. Moreover, both A sugar and B sugar may be sold within the Community or exported to non-member countries.

Furthermore, there are no objective grounds for the greater incidence of the special elimination levy on the production of B sugar than on that of A sugar.

In the first place, it cannot be contended that it is the production of B sugar rather than of A sugar that is giving rise to the

surplus on the market in question, since they are the same product. The expenses which the Community must bear in paying the export refunds thus derive from the production of both A and B sugar without distinction.

In addition, the special elimination levy constitutes a financing levy which was introduced outside the context of the common organization of the market in sugar. Accordingly, it is unacceptable for the different treatment accorded to A sugar and B sugar for the purposes of the levies under the basic regulation to be incorporated also in the special elimination levy. To ensure fairness, the special elimination levy should have the same impact on A sugar as on B sugar.

Zuckerfabrik Süderdithmarschen also observes that, if it were assumed that exceptional circumstances existed, justifying different treatment as between A sugar and B sugar, those circumstances should have been mentioned in the preamble to the regulation introducing the special elimination levy. However, it is merely stated in the fifth recital that the special elimination levy due from each undertaking is calculated according to the basic production levy and the B levy payable by it, without indicating why that method of calculation was adopted.

Zuckerfabrik Süderdithmarschen also states that the German sugar producers are on average liable to a special elimination levy equal to 4.2% of the intervention price for sugar, whereas producers in the other Member States only have to pay, on average, a levy equal to 3.3% of that intervention price. This situation is due to the fact that the German undertakings have larger B quotas than their competitors in the other Member States. But the basic A and B quantities allocated to the Member States (which the latter then allocate amongst the sugar producers in the form of A and B quotas) are not determined in accordance with objective criteria but on the basis of political considerations. There is thus no objective justification for the difference of treatment between German sugar producers and those in the other Member States.

In conclusion, Zuckerfabrik Süderdithmarschen claims that the regulation introducing the special elimination levy infringes the principle of non-discrimination in two ways: first, the production of B sugar is subjected to a much greater burden than A sugar and, secondly, German sugar producers have to pay, on average, a considerably higher levy than their competitors in other Member States.

(f) Ground of objection relating to interference with the right to own property and with the freedom to pursue an economic activity

Sixthly, Zuckerfabrik Süderdithmarschen claims that the regulation introducing the special elimination levy infringes the fundamental rights of protection of the right to own property and freedom to pursue an economic activity.

It observes that in its judgments in Case 4/73 *Nold* [1974] ECR 491, and Case 44/79 *Hauer* [1979] ECR 3727, the Court

stated that the right to own property and the freedom to pursue economic activities are among the fundamental rights of which it ensures the protection. Zuckerfabrik Süderdithmarschen asks the Court to find that a levy like the one at issue, which is added retroactively to other levies and which, moreover, is excessive in amount and cannot be paid out of the profits for the marketing year in question, undermines those fundamental rights. It observes that a levy which the sugar producers cannot pay out of their profits has the effect of making them reduce their production, in particular that of B sugar, which is subject to particularly heavy taxation. Moreover, since the sugar producers are compelled to draw on their reserves, the damage caused by such a levy goes to the very heart of the undertakings.

Zuckerfabrik Süderdithmarschen also points out that the fact that sugar producers are able to pass the special elimination levy on to the beet growers, as to 60%, cannot be invoked in defence of the view that the contested regulation is compatible with the fundamental rights at issue. The sugar producers are legally bound to pay the levy in its entirety. They can only obtain part reimbursement of them from the beet growers by recourse to procedures under private law in which the outcome is always uncertain.

(g) Ground of objection relating to misuse of powers

Seventhly, Zuckerfabrik Süderdithmarschen maintains that the regulation introducing the special elimination levy is vitiated by misuse of powers. The true purpose of the regulation is not to offset the losses of the 1986/87 marketing year but rather to persuade the sugar producers to abandon all sugar production within the B quotas. It is to that end that the regulation imposes a levy on the production of B sugar which has a strangulatory effect.

(h) Ground of objection relating to fundamental principles of German law concerning the imposition of taxation

Eighthly, Zuckerfabrik Süderdithmarschen claims that the machinery for collecting the special elimination levy infringes the fundamental principles of German public law relating to the collection of taxes.

By virtue of those principles, it is not permissible to render certain persons (in this case the sugar producers) liable for the totality of a tax, whereas part of it (60%) must ultimately be borne by other persons (the beet growers). It is apparent from a study by Professor Arndt, annexed to Zuckerfabrik Süderdithmarschen's observations, that such tax-collection procedures are contrary to German constitutional law.

The fundamental principles of German public law also require taxable persons to be in a position to establish in advance precisely what amount of tax they will ultimately have to bear. The tax must also be collected in such a manner as to guarantee equality of treatment for taxpayers. Those two requirements are not fulfilled in this

case because it may be impossible, wholly or in part, to obtain reimbursement of the special elimination levy from the beet growers within the authorized limit of 60%.

Since Community law ensures that the fundamental principles embodied in national law are upheld, the grounds of incompatibility with German public law outlined above detract from the validity of the regulation introducing the special elimination levy.

2. Position of the United Kingdom

The *United Kingdom* examines the two grounds of invalidity analysed in the order for reference and comes to the conclusion that the regulation introducing the special elimination levy is valid.

(a) Ground of objection relating to breach of the procedure laid down in Article 201 of the EEC Treaty

As regards, in the first place, the appropriate legal basis for the adoption of that regulation, the United Kingdom refers to the criteria which the Court laid down for assessing whether a given levy could be validly adopted on the basis of the provisions governing the common agricultural policy. In its judgment in Case 138/78 *Stolting* [1979] ECR 713, at paragraph 7, the Court emphasized that the co-responsibility levy was directed towards restraining production in the face of the surpluses observed. It considered that that levy therefore contributed to the attainment of the objective of stabilizing markets, contained in Article 39 of the Treaty. In its judgment in *Amylum*, supra, at paragraph 30, the Court held that the isoglucose production levy had been validly introduced within the framework of the common organization of the agricultural markets because it made the isoglucose producers bear by way of levies the losses incurred by the Community as a result of the disposal of the quantity produced which exceeded human consumption.

According to the United Kingdom, the special elimination levy meets the above criteria because it is intended to ensure that those operating in the sugar sector themselves bear in full the cost of disposing of surpluses. The regulation introducing the special elimination levy was therefore validly adopted on the basis of Article 43 of the Treaty.

Since the special elimination levy could be validly introduced on the basis of Article 43 of the Treaty, recourse to Article 201 was unnecessary. In any event, the levy at issue comes within own resources under Article 2(a) of the decision on own resources, which expressly includes levies under the Common Agricultural Policy.

(b) Ground of objection relating to breach of the principle of non-retroactivity

As regards, secondly, the problem of retroactivity, the United Kingdom considers that

the objective to be achieved required the contested regulation to be applied with retroactive effect, and it also considers that the legitimate expectations of the persons concerned were properly respected.

The objective pursued was that of stabilizing the market in sugar by making those operating in the market bear in full the losses in respect of the 1986/87 marketing year which had not already been covered by other levies. That objective was sufficiently important to justify a derogation from the principle of non-retroactivity. It could be attained only by means of a levy with retroactive effect since it is only at the end of a marketing year that it is possible to determine the total losses deriving from that marketing year.

Moreover, the legitimate expectations of the persons concerned were duly respected.

In the first place, the persons concerned had to expect, by reason of a number of factors, that they would be required to pay a levy in excess of the ceiling fixed in the basic regulation. Thus, on 9 September 1986 the Commission had published an estimate which clearly showed a probable deficit for the 1986/87 marketing year. Since the sugar sector had been governed, since the introduction of the basic regulation, by the principle of self-financing, those operating in the market should have been aware that the deficit would have to be financed by them. In February 1987 the Commission proposed a special elimination levy. The trade press immediately took note of the proposal. The sugar producers could not therefore claim that the adoption of the regulation introducing the special elimination levy took them by surprise.

In addition, the special elimination levy had been introduced in accordance with procedures which reduced as far as possible any frustration of the legitimate expectations of those concerned. The United Kingdom emphasises in that connection that the levy at issue entered into force only three days after the end of the marketing year to which it related. Moreover, the special elimination levy affected only those producers that had been responsible for the deficit which it was intended to cover, since it was calculated by applying a given coefficient to the basic production levy and the B levy due from them for the marketing year in question.

Finally, the United Kingdom rejects the Finanzgericht's criticism of the fact that the special elimination levy can only be passed on to the beet growers as to 60% of its amount. The Finanzgericht sees that limitation as undermining the legitimate expectations of the sugar growers because the basic regulation provided only for charges which could be passed on in their entirety to the beet producers. The sugar producers thus had no reason to believe that a levy of which they would have to bear part might be imposed on them.

The United Kingdom considers that the Finanzgericht starts from a false premise in taking the view that the basic regulation

provides only for charges which can be passed on to the beet growers in their entirety. It is true that, under Article 5(2) and Article 28(5) of the basic regulation, the minimum price which the sugar producers have to pay the beet growers is only 98% of the basic price for A beet (beet intended for the production of A sugar) and 68% or 60.5% of the basic price for B beet (beet intended for the production of B sugar), depending on whether the B levy is fixed at 30% or 37.5% of the intervention price for sugar. In order to pay the basic production levy, the sugar producers thus deduct from the price which they pay to the beet growers a percentage equal to that of the levies imposed on A sugar (2%) and B sugar (2% + 30% or, as the case may be, 2% + 37.5%).

However, the basic price of beet represents only 60% of the intervention price for sugar. That percentage does not stem from an express provision of the basic regulation but is determined each year when the basic price for beet is fixed. Thus, for the 1986/87 marketing year Council Regulation No 1452/86 of 13 May 1986 fixing, for the 1986/87 marketing year, certain sugar prices and the standard quality of beet (OJ 1986 L 133, p. 4) fixed the basic price for beet (expressed by reference to a corresponding quantity of sugar) as 58% of the intervention price for sugar.

The remaining 40% or so of the intervention price covers the costs of processing, transport, and so on, which are borne by the sugar producers. From that portion of the intervention price which they receive, the sugar producers must deduct 2% for the production of A sugar and 32% (2% + 30%) or 39.5% (2% + 37.5%) for the production of B sugar.

The basic regulation thus apportions the burden of the levies which it introduces between the beet growers and the sugar producers in the approximate ratio of 60% to 40%. The contested regulation provided for similar apportionment of the burden represented by the special elimination levy. The Finanzgericht's criticism in that respect is thus unfounded.

3. Position of the Council

The *Council* considers only the allegation of invalidity which the Finanzgericht regards as well founded, namely that of breach of the principle of non-retroactivity. Unlike the Finanzgericht, the Council considers that the contested regulation is in conformity with the principle of non-retroactivity and is valid.

It points out in the first place that there may be some question as to whether the regulation introducing the special elimination levy is genuinely retroactive. It was adopted only a few days after the end of the marketing year in question. The levy which it introduced affects only those economic agents that brought about the deficit for that marketing year and it affects them according to their contribution to the creation of that deficit. It is thus similar to the normal mechanism for the collection of levies in the sugar sector since the levies introduced by the basic regulation are likewise not calculated until the end of the marketing year to which they relate.

In any event, although the regulation introducing the special elimination levy relates the levy to the production of a past marketing year, it is fairer than Regulation No 934/86, that introduced the elimination levy, by reference to which the Finanzgericht criticises the regulation introducing the special elimination levy. The Council points out that, according to the Finanzgericht, the regulation introducing the special elimination levy should, like Regulation No 934/86, have related payment of the levy introduced by it to the production of future marketing years. In response to that criticism, the Council states that Regulation No 934/86 related the elimination of the deficit of ECU 400 million to the production of five future marketing years only because it was no longer materially possible to determine which undertakings were responsible for creation of the deficit in question. By contrast, it was possible to make the regulation introducing the special elimination levy impose the levy on the undertakings according to their contribution to the deficit because it was adopted only two days after the end of the marketing year concerned. The fact that the contested regulation related payment of the special elimination levy to the production of a marketing year which had just ended was not therefore open to any criticism — on the contrary, that procedure enabled the burden imposed by the contested regulation to be apportioned fairly.

The Council then states that, according to previous decisions of the Court, a Community act may take effect retroactively where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. Those two requirements are satisfied in this case.

The purpose sought to be achieved by the special elimination levy was twofold.

In the first place, it was necessary to obviate the Community's having to pre-finance substantial sums in respect of export refunds over a long period, or even outright.

In the second place, the introduction of the contested levy avoided the need for recourse to a more radical measure to restore the financial equilibrium of the sugar market, namely a reduction of production quotas. The latter solution would have been contrary to the interests of those operating in the sugar market since it would have resulted in a reduction in their shares of the world market. It would also have run counter to the interests of the Community since it would have led to a reduction of the areas devoted to beet growing and a corresponding increase in the areas used for other agricultural activities the financing of which might weigh heavily on Community finances.

The importance of the twofold aim pursued by the regulation introducing the special elimination levy, namely that of ensuring self-financing of the sugar sector whilst at the same time keeping the quota levels unchanged, justified the retroactive application of the special elimination levy.

As regards respect for the legitimate expectations of the persons concerned, the Council maintains in the first place that those persons should have expected an exceeding of the ceiling fixed in the basic

regulation, and it considers that the Finanzgericht is wrong in its view that the basic regulation established only levies which could be passed on in their entirety to the beet growers. The Council's arguments on these points coincide with those put forward by the United Kingdom on that subject.

4. Position of the Commission

The *Commission* also considers only the allegation of breach of the principle of non-retroactivity. It considers the allegation unfounded and expresses the view that the regulation introducing the special elimination levy is valid.

The aim pursued by the introduction of the special elimination levy was that of ensuring self-financing in the sugar sector. The Community budget could not cover the deficit of more than ECU 200 million which had been recorded during the 1986/87 marketing year. In view of the size of that deficit, which for one marketing year amounted to more than half the cumulative deficit for the previous five marketing years, rapid measures were called for.

As indicated by the fourth recital in the preamble to the contested regulation, the available options were either to introduce a special elimination levy or to reduce the production quotas. The latter solution was not appropriate. Firstly, it would have brought about a reduction in the Community sugar producers' world market shares. Secondly, that solution would have affected economic agents to a greater extent than a financial levy. Finally, a reduction in production quotas would not have been a feasible way of eliminating the deficit for the 1986/87 marketing year because by the time that deficit was determined the quotas allocated for that marketing year had already been used up. According to the Commission, the proper solution was therefore not to reduce the quotas but rather to introduce the contested levy.

Moreover, the legitimate expectations of the economic agents concerned had been respected.

The Commission points out in that connection that regulation of the market in sugar is subject to constant adjustments, which depend on the production and selling conditions prevailing in that market. In general, economic agents cannot therefore claim any legitimate expectation that the situation prevailing at a particular time will be maintained.

As regards more particularly the introduction of the special elimination levy, the economic agents concerned were alerted by a number of factors indicating that such a levy was to be introduced: the principle of self-financing of the sugar sector had been embodied in the basic regulation since 1981; the introduction of the elimination levy by Regulation No 934/86 of 24 March 1986 had shown that the ceilings fixed in the basic regulation could be exceeded; the Commission proposal for the introduction of the special elimination levy had been made public in February 1987 by a notice issued by the Commission spokesman's

office; the trade press immediately reported the proposal widely; on 7 March a Commission representative explained the proposal at a meeting of the Sugar Advisory Committee; and on 3 April 1987 the proposal was finally published in the Official Journal.

All that information had placed the beet growers and sugar producers in a position to take the appropriate measures in due time, particularly with regard to the quantities to produce and the prices to charge during the marketing year in question.

Finally, the Commission states that the Finanzgericht is wrong to consider that the basic regulation imposed on sugar producers only levies for which full reimbursement could be obtained from the beet growers. In that respect it sets out the same arguments as the Council and the United Kingdom.

III — Replies to the questions put by the Court

A — *Questions put to Zuckerfabrik Süderdithmarschen*

Question 1: Is there not a material error in paragraph 13 of Zuckerfabrik Süderdithmarschen's observations, in so far as the reply which it suggests to Question 1(a) is affirmative and not negative as indicated in that paragraph?

Answer: There is in fact an error in paragraph 13 of Zuckerfabrik Süderdithmarschen AG's observations. The reply which it suggests to Question 1(a) is in the affirmative.

Question 2: On what precise provision does Zuckerfabrik Süderdithmarschen rely for its contention that the contracts for growing sugar beet for the 1986/87 marketing year should be concluded before 1 May 1986 (paragraph 92 of its observations)?

Answer: In the contracts for the delivery of sugar beet, a distinction is drawn depending on whether the quantities of sugar manufactured from the sugar beet are A sugar, B sugar or other sugars (Article 30(1) of Regulation (EEC) No 1785/81). Any sugar manufacturer who has not concluded, *before sowing*, delivery contracts for a quantity of sugar beet corresponding to Quota A at the minimum price for a sugar beet is obliged to pay, for each quantity of sugar beet processed into sugar in the undertaking concerned, at least that minimum price (for A sugar beet) (Article 30(2) of Regulation (EEC) No 1785/81).

According to Article 3 of Regulation (EEC) No 246/88 (OJ 1988 L 53, p. 37) the contracts deemed to be concluded before sowing are, in Germany, only those concluded before 1 May. No derogation was provided for by way of agreement within the trade in that country (Article 30(3) of Regulation (EEC) No 1785/81).

Question 3: Zuckerfabrik Süderdithmarschen is requested to comment on the statement, contained in page 19 of the Council's observations, that the introduction of the special elimination levy was the only way of ensuring self-financing in the sugar industry without reducing production quotas.

Answer: If the principle of self-financing as conceived by the Council (but not by the applicant) is taken as a starting point, the collection of a levy was — apart from a reduction of production quotas — the only possibility of ensuring self-financing, without prejudice to the questions of the legal basis, the nature, method of calculation of the levy and the date on which it is to be paid, as discussed in our written observations.

B — *Question put to the United Kingdom*

Question: The United Kingdom is requested to give the reference for the estimate published by the Commission on 9 September 1986, mentioned in paragraph 22 of its observations.

Answer: The United Kingdom replied that the reference was:
VI PC2-408.

C — *Questions put to the Council*

Question 1: Why is the sugar industry the only industry to which the principle of self-financing is applied?

Answer: Full financing — incumbent upon the producers (sugar beet growers) and the processing industry (sugar manufacturers) — of the charges associated with exports to non-member countries of sugar surpluses is based essentially on the following reasons.

In the first place, it should be recalled that the common organization of the market in sugar has included since 1968 (application of the first regulation, No 1009/67/EEC on the common organization of the market in sugar, OJ, English Special Edition 1967, p. 304) measures designed to ensure that producers and the processing industry contribute to the costs of financing the common organization of the market (see Article 27 of that regulation). Those measures were — and still are — closely linked with the rules on quotas, the relatively high price which the Community guarantees to producers and the processing industry for production not exceeding the overall quotas (A quotas plus B quotas), and with the fact that, for many years now, production within the overall quotas exceeds consumption in the Community. In that respect it is wholly conceivable that the level of prices in the Community would be 15-20% lower if there were no quota rules. The sugar industry is thus characterized on the one hand by relatively high prices and, on the other, by structural overproduction. In those circumstances, it was not in the long term possible to maintain price guarantees and the level of quotas granted other than by full self-financing so that surpluses do not represent an excessive burden for the Community market and do not weigh excessively upon the finances of the Community. As is well known, such self-financing derives in principle from the fact that producers and

the processing industry contribute, within the A quotas, to the self-financing only to a minimal extent (2% of the intervention price) and their contribution represents, within the B quotas, a significantly higher amount (up to a maximum of 39.5% of that price).

Certainly, it would be difficult to impose such a system of self-financing in other agricultural sectors where producers' income, with less substantial price guarantees, does not allow such financial charges. Against that background, it should be emphasized that the growing of sugar beet is more attractive for producers from the point of view of prices than other vegetable products such as cereals, for example.

Question 2: Does any specific provision of a regulation provide that the aggregate of the A quotas allocated for a marketing year is to correspond approximately to the human consumption of sugar in the Community during that year and, if so, what is that provision?

Answer: No.

Whilst it is true that the aggregate of A quotas is close to the consumption of sugar in the Community, there is nevertheless no mathematical relationship between the A quotas and sugar consumption. A specific provision in that respect is therefore lacking.

Moreover, it should be borne in mind that, at the inception of the common organization of the market in sugar (Regulation No 1009/67/EEC), the A quotas were fixed for the various sugar manufacturers by reference to their average production between 1961 and 1965 (see Article 23 of Regulation No 1009/67/EEC). That explains why for certain Member States, such as Italy, the aggregate of the A quotas of the sugar manufacturers and, for that reason, likewise the national A quota, do not correspond to national consumption: the A quotas for Italy were lower than sugar consumption in that country.

D — *Question put to the Commission*

Question: The Commission is requested to explain further what it understands by the need for national courts to take full account of the Community interest in suspending the operation of a national administrative measure adopted on the basis of a Community measure (paragraphs 8 and 9 of its observations).

Answer: (a) The Court of Justice has asked the Commission to state what it understands by the obligation incumbent upon national courts to take full account of the Community interest when suspending the operation of a national administrative measure based on a Community measure.

(b) In paragraph 8 of part II of its submissions, in section (II), the Commission explains that the national court must take full account of the Community interest both when assessing the gravity of its doubts (as to the validity of a Community measure) and when it decides whether, exceptionally,

in view of those doubts, it is appropriate to order suspension of the operation of the national administrative measure based on that Community measure.

In accordance with the observations submitted by the Commission in paragraph 7 of part II, when making any such assessment and in exercising its discretion, the court must not attribute less importance to the interests of the Community than to those of the Member State and, moreover, must give its decision primarily according to the circumstances of the particular case.

(c) Below, merely by way of example, are a number of criteria which show the extent to which the national court must endeavour to take full account of the Community interest.

As regards the gravity of its doubts as to the validity of a Community measure, the court must not rely on the statements of the parties to the proceedings but must itself establish, by reference to decided cases and legal literature, whether its doubts are well founded.

When exercising its discretionary power, the court must act in such a way as to ensure as far as possible the effectiveness of Community law (in that connection see in particular the explanations — concerning a wholly different situation — given by the Commission in its submissions of 25 October 1989 in Case 213/89 *Factortame* [1990] ECR I-2433, part III, paragraph 1), its 'useful effect'. Thus, where money is payable to public authorities, a suspension of enforcement must in general be envisaged only if the tax-payer's solvency still seems to be assured after the main proceedings or if the latter has furnished security.

On the other hand, in order to ensure the effectiveness of Community law it may be necessary to require immediate enforcement of administrative measures which do not provide for payments. In that regard, mention may be made, as a typical example, of the compulsory distillation of table wine provided for by Article 39 of Regulation (EEC) No 822/87 (the subject of the dispute between the Commission and the Federal Republic of Germany in Case 217/88), a provision of which the operation cannot be suspended without frustrating attainment of the desired objective, namely that of immediately easing the situation on the wine market by eliminating surpluses. Another case might be measures intended to remedy situations which threaten public health, such as the slaughter of contaminated livestock or the prohibition of marketing of products harmful to health.

R. Joliet
Judge-Rapporteur