OPINION OF ADVOCATE GENERAL BOT
delivered on 17 March 2011 [1]

1. By a series of measures adopted in 2006, the common organisation of the markets in the sugar sector was reformed with a view to the restructuring of the sugar industry in the European Union. These various measures had the following effects:

— the start of the marketing year was put back from 1 July to 1 October as from 2007, with the result that the marketing year 2006/2007 exceptionally comprised 15 months;

— in order to take account of this exceptional situation, additional transitional quotas were allocated to undertakings for that marketing year;

— any quantities produced in excess of the quotas allocated were subject to a levy;

— undertakings were encouraged to restructure by renouncing (a part of) their basic quotas and by dismantling their facilities, in return for which they were granted restructuring aid;

— in cases of non-compliance with the restructuring commitments, first, the corresponding aid was to be recovered and, secondly, a financial penalty was to be imposed, equal to 30 % of the amount to be recovered if the non-compliance had been committed intentionally or as a result of grave negligence.

2. Beneo-Orafti SA ('Beneo-Orafti'), a Belgian company, was allocated a basic quota and a transitional quota in respect of the marketing year 2006/2007. It undertook to renounce the basic quota and partially to dismantle the facilities concerned in return for restructuring aid, which was paid to it. However, because it considered that its transitional quota was not affected by that renunciation, it produced a quantity of inulin syrup [2] slightly smaller than the transitional quota.

1 — Original language: French.

2 — Inulin is a fibre (made of a chain of fructose molecules) present in a number of plants. It is extracted from chicory root. Hydrolysis of the inulin is a way to obtain fructose and the result of this process, a sweetener called inulin syrup, included in the sugar common market organisation, is used, inter alia, in the food industry.

3. The Bureau d'intervention et de restitution belge (Belgian Intervention and Refund Board, 'the BIRB') is now seeking, first, to recover the amount of the restructuring aid, equal to EUR 454.425 per tonne produced, secondly, to impose a financial penalty equal to 30% of the amount to be recovered and, thirdly, to collect a levy of EUR 500 per tonne produced as surplus production. This is opposed by Beneo-Orafti.

4. The Tribunal de première instance de Bruxelles (Court of First Instance, Brussels, Belgium), before which the case has been brought, has referred seven questions to the Court for a preliminary ruling, essentially asking:

— Could Beneo-Orafti consider its transitional quota to be independent of its basic quota and as such not affected by its renunciation of the basic quota or by the payment of the corresponding restructuring aid?

— At what precise point in time do the restructuring commitments entered into by Beneo-Orafti become binding on it?

— Is it permissible both to recover the aid granted, together with an additional financial penalty, and to collect a levy on surplus production in respect of the same quantities produced?

— On what basis should any amounts to be recovered be calculated?

I — The reform of the sugar market [3]

5. The common organisation of the markets in sugar was set up in 1967 to ensure a fair income to producers and to stabilise the market. Under that organisation, sugar benefited from guaranteed intervention prices which, in the period 1996-2006, were significantly higher than the world market price. Over time, the European Union has become the third largest producer in the world, with annual production in excess of 20 million tonnes, and has come under pressure to cease exporting surpluses at subsidised rates. In 2005, a World Trade Organisation (WTO) ruling obliged the Union to include, inter alia, out-of-quota sugar exports in its sugar export limit. Thus, from 2006 onwards, the Union cannot export more than 1.37 million tonnes

3 — See the introduction to Special Report No 6 of the Court of Auditors of the European Union entitled 'Has the reform of the sugar market achieved its main objectives?', available at http://eca.europa.eu/portal/pls/portal/docs/1/5986725.PDF

of subsidised white sugar, instead of the previous annual average of 6.5 million tonnes.

6. A reform was therefore considered necessary in order to align the common organisation of the market with the principles of the new common agricultural policy and to maintain market balance, while complying with the obligation to limit subsidised exports. The principal objectives were to ensure the competitiveness of the sugar industry by a reduction of unprofitable production capacity, to stabilise the markets whilst guaranteeing the availability of supplies, and to contribute to providing a fair standard of living for the agricultural community by mitigating the social and economic impact on the agricultural community in the regions affected.

7. The main features of the reform, which was progressively implemented, were:

— maintenance of reduced production quotas, supplemented by additional quotas for purchase by producers that considered themselves to be competitive in the new market environment;

— gradual reductions in the price per tonne of white sugar;

— gradual reductions in the minimum price per tonne of quota sugar beet paid to growers, cushioned by a partial compensation mechanism;

— suspension of the export refunds mechanism for quota sugar exports;

— a temporary restructuring fund, financed via a contribution paid by producers on their quota and intended largely to fund the different aid payments for voluntary production quota renunciations:

— restructuring aid to producers that abandon quota production and renounce the quotas concerned;

— diversification aid to encourage the development of alternatives in regions affected by the restructuring of the sugar industry;

— transitional aid to refiners so as to allow them to adapt to the restructuring.

II — Legislative framework

A — *Regulation (EC) No 318/2006*

8. Regulation (EC) No 318/2006 [4] introduced a fundamental reform of the common organisation of the markets in the sugar sector, repealing and replacing the preceding basic regulation. [5]

9. Article 1 (2) of Regulation No 318/2006 provides that the marketing year for the products covered by the common organisation of the markets in the sugar sector begins on 1 October and ends on 30 September of the following year, with the exception of the marketing year 2006/2007, which begins on 1 July 2006 and ends on 30 September 2007. [6]

10. Article 7 of that regulation (in Chapter 2, entitled 'Quota production', of Title II on 'Internal market') states, in paragraph 1, that the quotas for the production of sugar, isoglucose and inulin syrup at national or regional level are fixed in Annex III to the regulation and provides, in the first subparagraph of paragraph 2, that the Member States must allocate a quota to each approved undertaking producing sugar, isoglucose or inulin syrup established in its territory.

11. In the same chapter, Article 10 of Regulation No 318/2006, entitled 'Quota management', provides for adjustments to the quotas set out in Annex III to the regulation for each marketing year, with a common reduction percentage from 2010/2011.

12. Chapter 3 of Title II of Regulation No 318/2006 is entitled 'Out-of-quota production' and comprises Articles 12 to 15. Under Article 15(1), a surplus amount is to be levied on quantities of sugar, isoglucose and inulin syrup produced during any marketing year, which are surplus to the quotas allocated and which are not subject to one of the mechanisms provided for in Articles 12 to 14

4 — Council Regulation (EC) No 318/2006 of 20 February 2006 on the common organisation of the markets in the sugar sector (OJ 2006 L 58, p. 1). That regulation was repealed, after the material period for the main proceedings, by Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ 2007 L 299, p. 1), which nevertheless incorporates many provisions (see the correlation table at Annex XXII to that regulation, point 40).

5 — Namely Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector (OJ 2001 L 178, p. 1), under which the marketing year began on 1 July and ended on 30 June of the following year (Article 1(2)(m)) (see the second and third recitals in the preamble to Regulation No 318/2006).

6 — According to the Explanatory Memorandum for the Proposal for a Regulation submitted to the Council of the European Union by the European Commission (COM(2005) 263 final), the aim of putting back the start date of the sugar campaign from 1 July to 1 October was 'to ease the implementation of the price cuts' (see point 2.2).

(essentially use for the processing of certain industrial products, carrying forward to the next marketing year, supply to the outermost regions or export within certain quantitative limits). According to recital 18 in the preamble to the regulation, the aim of the levy is to avoid, for quantities not meeting the applicable conditions for those mechanisms, 'the accumulation of these quantities threatening the market situation'.

13. Article 15(2) of Regulation No 318/2006 states that the surplus amount is to be fixed 'at a sufficiently high level in order to avoid the accumulation of quantities referred to in paragraph 1'.

14. Under Article 15 (3) of the regulation, the surplus amount is to be charged by the Member State. Even though there does not appear to be a provision comparable to Article 11 (3) of Regulation (EC) No 320/2006 [7] (see point 27 of this Opinion), which provides for the repayment of the sums levied, the levy in question forms part of the Union's own resources. [8]

15. Article 44 of Regulation No 318/2006 (foreshadowed in recital 43 in the preamble to the regulation) authorises the Commission to adopt transitional measures, inter alia, in order to facilitate the transition from the market situation in the marketing year 2005/2006 to the market situation in the marketing year 2006/2007 and, more generally, the transition from the previous scheme to the new scheme.

16. Lastly, Article 46 of the regulation provides, inter alia, that Title II of the regulation applies until the end of marketing year 2014/2015.

B — *Regulation No 320/2006*

17. The recitals in the preamble to Regulation No 320/2006 include the following explanations:

'(1) ... To bring the Community system of sugar production and trading in line with

7 — Council Regulation (EC) No 320/2006 of 20 February 2006 establishing a temporary scheme for the restructuring of the sugar industry in the Community and amending Regulation (EC) No 1290/2005 on the financing of the common agricultural policy (OJ 2006 L 58, p. 42).

8 — See, for the period in question, Article 2(1)(a) of, respectively, Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources (OJ 2000 L 253, p. 42), and Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17).

international requirements and ensure its competitiveness in the future it is necessary to launch a profound restructuring process leading to a significant reduction of unprofitable production capacity in the Community. To this end, as a precondition for the implementation of a functioning new common market organisation for sugar a separate and autonomous temporary scheme for the restructuring of the sugar industry in the Community should be established. Under this scheme quotas should be reduced in a manner that takes account of the legitimate interests of the sugar industry, sugar beet, cane and chicory growers and consumers in the Community.

(2) A temporary restructuring fund should be set up in order to finance the restructuring measures for the Community sugar industry....

...

(4) The restructuring measures provided for by this Regulation should be financed by raising temporary amounts from those sugar, isoglucose and inulin syrup producers which will eventually benefit from the restructuring process....

(5) An important economic incentive for sugar undertakings with the lowest productivity to give up their quota production in the form of an adequate restructuring aid should be introduced. To this effect, a restructuring aid should be set up that creates an incentive to abandon sugar quota production and renounce the quotas concerned, at the same time allowing to take into due account the respect of social and environmental commitments linked to the abandoning of production. The aid should be available during four marketing years with the aim to reduce production to the extent necessary to reach a balanced market situation in the Community.

...'

18. Under Article 2(6) of Regulation No 320/2006, '"quota" means any quota for the production of sugar, isoglucose and inulin syrup' allocated to an undertaking, inter alia, in accordance with Article 7(2) of Regulation No 318/2006.

19. Article 3(1) of Regulation No 320/2006 provides that any undertaking producing

sugar, isoglucose or inulin syrup to which a quota has been allocated by 1 July 2006 is entitled to a restructuring aid per tonne of quota renounced, provided that during one of the marketing years between 2006/2007 and 2009/2010 it renounces its quota or a part of its quota in one of three situations mentioned in points (a) to (c). The condition in point (b), which is relevant to the main proceedings, is that the undertaking renounces the quota assigned by it to one or more of its factories, partially dismantles the production facilities of the factories concerned and does not use the remaining production facilities of the factories concerned for the production of products covered by the common market organisation for sugar (the condition in point (a) is that it renounces such a quota and fully dismantles the facilities concerned, and the condition in point (c) is that it renounces a part of such a quota and does not use the facilities concerned for refining raw sugar, a condition which does not therefore require the facilities to be dismantled).

20. Article 3(2) of Regulation No 320/2006 provides, inter alia, that restructuring aid must be granted in respect of the marketing year for which the quotas are renounced in accordance with paragraph 1 of that regulation and only for the quantity of quota renounced and not reallocated.

21. Under Article 3(4) of the regulation, partial dismantling of production facilities requires, inter alia, the definitive and total cessation of the production of sugar, isoglucose and inulin syrup by the production facilities concerned and the dismantling of the production facilities that will not be used for the new production and were destined and used for the production of those products.

22. Lastly, Article 3(5) of Regulation No 320/2006 states that the amount of restructuring aid per tonne of renounced quota is, in the case referred to in point (b) of paragraph 1, EUR 547.50 for the marketing years 2006/2007 or 2007/2008 (in the case referred to in point (a) of paragraph 1, that amount is EUR 730 and, in the case referred to in point (c) of paragraph 1, EUR 255.50, for the same marketing years. For the next two marketing years, the amounts are progressively reduced).

23. Under Article 5(1) of Regulation No 320/2006, Member States must adopt the decision on the granting of the restructuring aid for the marketing year 2006/2007 by 30 September 2006 (the general rule for the subsequent marketing years is that Member States must decide by the end of February preceding the marketing year).

24. Article 5(2) of the regulation provides that the aid must be granted if the Member State has established after thorough verification

that the application and the restructuring plan contain the required elements, that the measures and actions described in the restructuring plan are in conformity with the relevant Community and national legislation, and that the necessary financial resources are available in the restructuring fund, on the basis of information obtained from the Commission.

25. Under Article 11(1) of the regulation, a temporary restructuring amount is to be paid per marketing year per tonne of quota by those undertakings to which a quota has been allocated. However, quotas that have been renounced by an undertaking as from a given marketing year in accordance with Article 3(1) of Regulation No 320/2006 are not subject to the payment of that amount for that marketing year and subsequent marketing years.

26. Article 11(2) of the regulation provides that that amount for sugar and inulin syrup is set at EUR 126.40 per tonne of quota for the marketing year 2006/2007.

27. Under the first subparagraph of Article 11(3) of the regulation, Member States are liable to the Union for the temporary restructuring amount to be collected on their territory.

C — *Regulation (EC) No 493/2006*

28. Recital 10 in the preamble to Regulation (EC) No 493/2006 [9] explains that, because the 2006/2007 marketing year begins on 1 July 2006 and ends on 30 September 2007, and thus extends over 15 months, provision should be made for an increase in the quotas, by taking the extra three months into account so as to ensure an allocation which corresponds to that of the preceding and subsequent marketing years, these transitional quotas covering sugar production from the start of the 2006/2007 marketing year, from sugar beet sown before 1 January 2006.

29. Under Article 9 (3) [10] of Regulation No 493/2006, for the 2006/2007 marketing year, a transitional inulin syrup quota of 80 180 tonnes of dry matter, expressed as white sugar/isoglucose equivalent, is to be allocated to the Member States in accordance with the breakdown in part C of Annex II to that regulation.

30. Article 9(4)(a) and (b) of the regulation provides that this transitional quota is not

9 — Commission Regulation (EC) No 493/2006 of 27 March 2006 laying down transitional measures within the framework of the reform of the common organisation of the markets in the sugar sector, and amending Regulations (EC) No 1265/2001 and (EC) No 314/2002 (OJ 2006 L 89, p. 11).

10 — Paragraphs 1 and 2 of that article provide respectively for transitional quotas for sugar produced from beet sown before 1 January 2006 and for isoglucose.

subject to the payment of the temporary restructuring amount provided for in Article 11(2) of Regulation No 320/2006 and may not benefit from the payment of the aid provided for in that regulation.

31. Under Article 9(5) of Regulation No 493/2006, the Member States must allocate transitional quotas, on the basis of objective criteria and in a manner ensuring equal treatment of producers and to avoid market and competition distortion, to approved undertakings producing sugar, isoglucose and inulin syrup established in their territory.

D — *Regulation (EC) No 967/2006*

32. Under Article 1 of Regulation (EC) No 967/2006,[11] the regulation lays down the conditions for the use or carry-forward of quantities of sugar, isoglucose and inulin syrup produced in excess of the quota and the rules on the levy charged on the surplus in accordance with Chapter 3 of Title II of Regulation No 318/2006.[12]

33. Article 3(1) of Regulation No 967/2006 fixes the levy provided for in Article 15 of Regulation No 318/2006 at EUR 500 per tonne. That level is explained in the third recital in the preamble to Regulation No 967/2006 as follows:

'The levy should be fixed at a high level in order to avoid the accumulation of quantities produced in excess of the quota and likely to disrupt the market. A fixed amount, equal to the level of full import duties on white sugar, would appear appropriate to this end.'

34. Article 4 (1) of the regulation provides that the levy must be charged to manufacturers in respect of the surplus produced in excess of their quota for a given marketing year, subject to certain exceptions essentially corresponding to those set out in Article 15 of Regulation No 318/2006[13] which, however, as the parties agree, do not apply to the present case.

E — *Regulation (EC) No 968/2006*

35. Under Article 1 (1) of Regulation (EC) No 968/2006,[14] the regulation lays down detailed rules for the implementation of the measures provided for in Articles 3

11 — Commission Regulation (EC) No 967/2006 of 29 June 2006 laying down detailed rules for the application of Council Regulation (EC) No 318/2006 as regards sugar production in excess of the quota (OJ 2006 L 176, p. 22).

12 — See point 12 of this Opinion.

13 — Idem.

14 — Commission Regulation (EC) No 968/2006 of 27 June 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 320/2006 (OJ 2006 L 176, p. 32).

and 6 to 9 of Regulation No 320/2006. The first paragraph of Article 1 (2) of Regulation No 968/2006 provides that the definitions provided for in Article 2 of Regulation No 320/2006 apply.

36. Under Article 3 of Regulation No 968/2006, as from the marketing year for which the quota is renounced in accordance with Article 3 of Regulation No 320/2006, no production of sugar, isoglucose or inulin syrup may be deemed as a production under that quota as regards the factories concerned.

37. Article 10 of Regulation No 968/2006 specifies the procedure for the granting of the restructuring aid, stating, inter alia, that the Commission must determine the estimated availability of the financial resources and that the Member States must notify the applicants of the outcome of their application by the deadline provided for in Article 5(1) of Regulation No 320/2006, i.e. for the marketing year 2006/2007 by 30 September 2006.

38. Article 11(1) of Regulation No 968/2006 provides:

'As soon as the restructuring aid is granted, the beneficiary shall carry out all measures detailed in the approved restructuring plan and respect the commitments included in its application for restructuring aid.'

39. Article 26(1) of the regulation provides that if a beneficiary does not comply with one or more of his commitments under the restructuring plan, the business plan or a national restructuring programme, as appropriate, the part of the aid granted in respect of the commitment(s) concerned is to be recovered except in the case of *force majeure*.

40. Under Article 27 of that regulation:

'1. If a beneficiary does not comply with one or more of his commitments under the restructuring plan, the business plan or the national restructuring programme, as appropriate, it shall be required to pay an amount equal to 10% of the amount to be recovered under Article 26.

2. The penalties to be imposed pursuant to paragraph 1 shall not be imposed if the undertaking can demonstrate, to the satisfaction of the competent authority, that the non-compliance is due to *force majeure*...

3. If the non-compliance has been committed intentionally or as a result of grave negligence, the beneficiary shall be required to pay an amount equal to 30% of the amount to be recovered under Article 26.'

III — The main proceedings and the questions referred for a preliminary ruling

41. On 27 July 2006, the competent Belgian authorities granted Beneo-Orafti, for the marketing year 2006/2007, a basic quota of 131 330 tonnes and a transitional quota of 32 833 tonnes of inulin syrup. [15] The letter notifying it of the allocation of these two quotas stated, among other things, that the transitional quota was equal to 3/12ths of the basic quota and served as 'compensation' for the three-month extension of the marketing year 2006/2007. [16]

42. On the same date, Beneo-Orafti submitted to those authorities an application for restructuring aid, in return for renouncing its basic quota (but not, it claims, its transitional quota). On 18 August 2006, the Belgian authorities replied that the application was regarded as complete. On 18 September 2006, they informed Beneo-Orafti that its application was admissible and notified the Commission.

43. On 29 September 2006, the Commission informed the Member States that the estimated financial resources available in the temporary restructuring fund were sufficient to grant restructuring aid for all the applications submitted in respect of the 2006/2007 marketing year and found eligible by them. [17]

44. According to Beneo-Orafti's submissions to the Tribunal de première instance de Bruxelles, discussions took place on 20 October 2006 between Beneo-Orafti and the Belgian authorities, in the course of which Beneo-Orafti informed the authorities of its 'firm intention to use its transitional quota, without taking into account its application for restructuring aid in connection with its normal basic quota', and the Belgian authorities highlighted the existence of 'unspecified' risks if that intention was realised.

45. Beneo-Orafti commenced production of inulin syrup on 21 November 2006.

46. By letter of 23 November 2006, the competent Belgian minister informed Beneo-Orafti that he was not in a position to give

15 — In both cases the figure represents around 61 % of either the basic quota or the transitional quota for inulin syrup allocated to the Kingdom of Belgium under, respectively, Annex III to Regulation No 318/2006 (i.e. 215 247 tonnes) and part C of Annex II to Regulation No 493/2006 (53 812 tonnes). The transitional quota, whether the quota allocated to the Kingdom of Belgium or the quota allocated by Belgium to Beneo-Orafti, represents 25 % of the relevant basic quota, thus corresponding to the 25 % extension of the marketing year 2006/2007 compared with preceding and subsequent marketing years.

16 — See Annex 8 to the observations submitted by Beneo-Orafti (p. 2).

17 — OJ C 234, p. 9. It may be of interest to note that, according to the report of the Court of Auditors cited in footnote 3, *all* the basic quotas for inulin syrup initially allocated in the European Union for the marketing year 2006/2007 (which actually concerned only the Kingdom of Belgium and, to a lesser extent, the Kingdom of the Netherlands and the French Republic) were renounced as from that same marketing year, with the result that no inulin syrup quotas existed or were allocated for any of the subsequent marketing years (see Annex II, point B).

an unchallengeable legal assessment as to the compatibility of such production with the conditions for obtaining restructuring aid. He proposed contacting the Commission in order to clarify the question or supporting Beneo-Orafti in making contact, informing it that if it did not wish to question the Commission on that point, it would be considered as not having the intention to produce the transitional quota volume. By the same letter, the minister warned Beneo-Orafti of the risk that it might be required to repay the amounts wrongly paid if it nevertheless produced that volume without first having obtained a favourable opinion from the Commission.

47. Between 21 November and 13 December 2006, Beneo-Orafti produced 27 756.986 tonnes of inulin syrup.

48. On 18 January 2007, the Belgian authorities informed Beneo-Orafti that it had been granted aid in the amount of EUR 59 679 771.50. [18]

49. In response to the Belgian authorities, following questions asked by the BIRB on 19 February 2007, the Commission replied, on 20 March 2007, that the transitional quotas represented no more than an extension of the basic quotas. In its view, an undertaking which had renounced its basic quota under the restructuring scheme could not continue production on the basis of the transitional quota. That information was communicated to the BIRB on 3 April 2007.

50. On 9 July 2007, the BIRB sent Beneo-Orafti a letter, pointing out that it was neither a formal notice nor a decision, repeating the Commission's position and stating that a levy on out-of-quota sugar production of EUR 13 878 493 would be payable by Beneo-Orafti unless it could show that it had fulfilled its obligations.

51. On 13 August 2007, the BIRB demanded the repayment by Beneo-Orafti of EUR 16 397 508.87, a sum composed of EUR 12 613 468.36, corresponding to the aid received in connection with the quantity produced under the transitional quota, increased by 30 % as a penalty pursuant to Article 27(3) of Regulation No 968/2006.

52. On 13 December 2007, the BIRB demanded the payment by Beneo-Orafti of the sum of EUR 13 878 493, corresponding to the levy charged on out-of-quota production mentioned in its letter of 9 July 2007.

53. The abovementioned amounts and their method of calculation can be summarised in table form:

18 — For the calculation of this amount, and of the following amounts, see the table at point 53 of this Opinion.

Description	Amounts granted (EUR)	Amounts claimed (EUR)
Total restructuring aid (quantity renounced of 131 330.3 tonnes x EUR 547.50 – Article 3(5) of Regulation No 320/2006)	71 903 339.25	
Aid due to Beneo-Orafti (total aid x 83 % – the balance due to producers and subcontractors)	59 679 771.50	
Levy charged on out-of-quota production (quantity produced x EUR 500 – Article 3(1) of Regulation No 967/2006)		13 878 493
Aid recovered (quantity produced x EUR 547.50 x 83 % – Article 26 of Regulation No 968/2006)		12 613 468.36
Penalty for intentional non-compliance or grave negligence (aid recovered x 30 % – Article 27(3) of Regulation No 968/2006)		3 784 040.51
Total amount claimed from Beneo-Orafti		30 276 001.87
Difference between amounts granted and amounts claimed (EUR 59 679 771.50 – EUR 30 276 001.87)	29 403 769.63	

54. After Beneo-Orafti objected to the payment of the sums claimed (EUR 13 878 493 and EUR 16 397 508.87), the BIRB referred the matter to the Tribunal de première instance de Bruxelles.

55. The Tribunal de première instance de Bruxelles decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Are the transitional quotas allocated to an undertaking producing sugar on the basis of Article 9 of... Regulation No 493/2006 exempt from the temporary restructuring scheme established by... Regulation No 320/2006 and by... Regulation No 968/2006 laying down detailed rules for implementation, given that:

(a) those quotas are not subject to payment of the temporary amount for restructuring;

(b) they do not give rise to restructuring aid; and

(c) they are not quotas within the meaning of... Regulation No 320/2006, as defined by Article 2(6) of that Regulation?

2. Even if the reply to Question 1 is in the negative, are transitional quotas quotas in their own right, independent of the normal basic quotas, given that:

(a) transitional quotas are allocated on the basis of Article 9 of... Regulation No 493/2006 and not on the basis of Article 7 of... Regulation No 318/2006;

(b) the criteria for the allocation of transitional quotas differ from the criteria for the allocation of normal basic quotas; and

(c) the transitional quotas are transitional measures intended to facilitate the transition from the former scheme for the sugar market to the new scheme for the Community sugar market and, as a consequence, apply in principle only during the 2006/2007 marketing year?

3. If the reply to either or both of Questions 1 and 2 is in the affirmative, does an undertaking producing sugar which has applied for restructuring aid for the marketing year 2006/2007 in accordance with Article 3 of... Regulation No 320/2006

have a right to a transitional quota allocated for the marketing year 2006/2007 in accordance with Article 9 of Regulation No 493/2006?

4. If the reply to Question 3 is in the negative, can the penalty applied consist in recovery of part of the restructuring aid granted, together with recovery of the transitional quota [19]?

How must the amount of aid to be recovered under Article 26(1) and the penalty provided for under Article 27 of... Regulation No 968/2006 be calculated where an undertaking producing sugar has received restructuring aid (for the 2006/2007 marketing year) and has used its transitional quota (for which no restructuring aid was granted)?

Must all or some of the following factors be taken into account in the calculation of that amount and of that penalty:

(a) the costs borne by the undertaking producing sugar in question for the dismantling of its production facilities?

(b) the losses incurred by the undertaking producing sugar in question as a result of giving up its normal basic quota?

(c) the fact that the transitional quota is a one-off, transitional measure which permits production for the 2006/2007 marketing year only and does not apply to other marketing years (save in the case of the transitional sugar quota)?

(d) is a calculation of the amount to be recovered which does not take into account the factors referred to in points (a) to (c) inconsistent with the principle of proportionality?

5. Notwithstanding the preceding questions, when do the commitments entered into on the basis of a restructuring plan take effect, that is to say, when do they become binding on the claimant?

(a) at the beginning of the marketing year for which the claimant submits its application for restructuring aid?

(b) on the submission of the application to the competent national authority?

19 — The notion of recovery of the transitional quota, a wording apparently proposed by Beneo-Orafti, is not completely obvious. It seems to be directed, somewhat imprecisely, at the fact that the quantities produced by Beneo-Orafti and considered by it to be covered by its transitional quota were not regarded as coming under an authorised quota, with the result that they were subject to a surplus amount.

(c) on notification by the competent national authority that the application is regarded as complete?

(d) on notification by the competent national authority that the application is regarded as admissible in respect of restructuring aid?

(e) on notification by the competent national authority of its decision to grant restructuring aid?

6. If the reply to either or both of Questions 1 and 2 is in the affirmative, is an undertaking producing sugar which has been allocated a transitional quota for the marketing year 2006/2007 authorised to use that quota during the marketing year even though the undertaking has been granted restructuring aid by reference to its normal basic quota, beginning with the marketing year 2006/2007?

7. If the reply to Questions 1, 2 and 6 is in the negative, is a competent national authority of a Member State authorised, in the event of failure to fulfil the commitments entered into on the basis of the restructuring plan, to combine recovery of the restructuring aid and the penalty under Articles 26 and 27 of... Regulation No 968/2006 with the imposition of a levy on surpluses in accordance with Article 4 of... Regulation No 967/2006 or is the combination of penalties in that way inconsistent with the principle *ne bis in idem* and the principles of proportionality and non-discrimination?'

56. Written and oral observations have been submitted by Beneo-Orafti, by the Belgian Government and by the Commission.

IV — My analysis

57. As I stated in the introduction to this Opinion, the seven questions referred for a preliminary ruling, which are very detailed, relate to four aspects of the case, which I propose to deal with in the following order: first, the question of the relationship between transitional quotas and renounced basic quotas (various aspects of which are raised by the first to third and sixth questions); secondly, the question of the point in time at which an undertaking applying for restructuring aid becomes bound by its commitments in this regard (fifth question); thirdly, the question whether the combination of the recovery, penalty and levy measures claimed by the BIRB is permissible (first part of the fourth question and seventh question), and, fourthly, the method of calculation of any

amount to be recovered (second part of the fourth question).

58. In examining these questions, it should be noted that the issues raised stem from the exceptional circumstances of the marketing year 2006/2007, namely the existence of transitional quotas and the adoption of decisions on the granting of restructuring aid before the start of the marketing year. Since these aspects were absent in subsequent marketing years, the interpretation provided by the Court in the present case will probably have little direct impact on proceedings relating to other marketing years.

A — *The relationship between transitional quotas and renounced basic quotas*

59. The first to third and sixth questions asked by the referring court can be summarised as follows. First, are the transitional quotas independent of the basic quotas, either because they are exempt from the temporary restructuring scheme or for some other reason? Secondly, if they are independent of the basic quotas, would an undertaking which has been allocated a transitional quota be prevented from using that quota either because it has applied for restructuring aid or because it has been granted restructuring aid?

60. As far as the first part of this question is concerned, contrasting arguments have been put forward to the Court. Beneo-Orafti invokes the wording of some of the relevant provisions to claim that the transitional quotas are exempt from the temporary restructuring scheme and independent of the basic quotas. The Belgian Government and the Commission, on the other hand, rely on the aim of the reform and the rationale of the transitional quotas to support the opposite point of view.

61. It seems, in fact, that the aim and the rationale clearly suggest that the transitional quotas should be regarded as an extension of the basic quotas, and cannot be exploited independently of them, even though in certain respects their nature calls for them to be given specific detailed treatment.

62. First of all, it is clear from the legislation that the transitional quota was introduced in order to avoid a situation where the volume of the basic quota, calculated on the basis of a normal marketing year of 12 months, proved insufficient for a marketing year which was to last, exceptionally, 15 months. [20] It is therefore

20 — See recital 10 in the preamble to Regulation No 493/2006.

conceived as a 25% increase in the basic quota, [21] corresponding to the 25% extension of the length of the marketing year.

63. Secondly, it also clear from the legislation that the aim of the mechanisms introduced with a view to the restructuring of the sugar industry was to encourage undertakings to abandon production definitively and totally and to dismantle the corresponding facilities. [22] Abandonment was to be effective 'as from the marketing year for which the quota is renounced'. [23] It would not seem very consistent with that aim to permit undertakings to declare that they have abandoned their quota for the marketing year 2006/2007 and to receive the corresponding aid, whilst using 20% of that cumulative quota (basic quota plus transitional quota) over the same marketing year.

64. Whilst the purpose of the transitional quota and that of the restructuring incentive mechanism thus clearly indicate that this quota should be treated in the same way as the basic quota, as an inseparable extension of that quota, it should nevertheless be established whether or not the arguments put forward by Beneo-Orafti based on the wording of certain provisions of the legislation call for a different analysis.

65. Beneo-Orafti first relies on Article 9 (4) of Regulation No 493/2006, under which the transitional quotas are not subject to the payment of the temporary restructuring amount provided for in Article 11 (2) of Regulation No 320/2006 and may not benefit from the payment of the aid provided for in that regulation. It infers that those quotas come outside the restructuring scheme. It says that this interpretation is confirmed by the fact that the quotas covered by the scheme, which is itself regulated by Regulation No 320/2006 and its implementing Regulation No 968/2006, are expressly limited [24] to those allocated in accordance with Regulation No 318/2006, whilst the transitional quotas are allocated under Regulation No 493/2006. Consequently, Article 3 of Regulation No 968/2006, which prohibits any production after the abandonment of the renounced quota, does not apply to transitional quotas.

66. According to Beneo-Orafti, Article 9(5) of Regulation No 493/2006 provides that the transitional quotas are 'allocated' by the Member States (and not that the basic quotas are 'increased' by a certain percentage), and that provision requires that the allocation must be made 'on the basis of objective criteria and in a manner ensuring equal treatment of producers and to avoid market and competition distortion', requirements which

21 — See the figures given in point 41 of this Opinion and in footnote 15.

22 — See, inter alia, Article 3(4) of Regulation No 320/2006.

23 — Article 3 of Regulation No 968/2006.

24 — See Article 2(6) of Regulation No 320/2006 and the first subparagraph of Article 1(2) of Regulation No 968/2006.

do not apply, under Article 7(2) of Regulation No 318/2006, to the allocation of basic quotas. Il follows that the two allocations are independent of one another (moreover, according to Beneo-Orafti, the transitional quota for sugar in southern Italy was not allocated in proportion to the allocation of the basic quota). Lastly, the transitional quotas have a different purpose from the basic quotas, namely to facilitate the transition between the preceding scheme and the reformed scheme.

67. It must be accepted that the arguments put forward by Beneo-Orafti do not appear to be completely irrelevant. If the legislature (in this case the Commission, since the transitional quotas come fully within the scope of the measures adopted by the Commission by virtue of the powers conferred by Regulations No 318/2006 and No 320/2006) intended to make transitional quotas subject to the same treatment as the basic quota, as far as the abandonment of production is concerned, it was perfectly at liberty to state this. However, not only is such a statement absent, but the legislation contains a number of indications to the contrary, as is pointed out by Beneo-Orafti in its arguments.

68. However, whilst understanding the reasoning put forward by Beneo-Orafti, I cannot see how its argument can be accepted.

69. If it is thought that the transitional quota is independent of the basic quota, that must be the case both from the point of view of the volume allocated and from the point of view of the period for which it was granted.

70. According to recital 10 in the preamble to Regulation No 493/2006, the transitional quota was to cover production from the start of the 2006/2007 marketing year. In view of the ratios between the quantities and the lengths in question, it can only be the case that the first three months of that marketing year, i.e. the months from July to September 2006 inclusive, constituted the transitional period required to ensure continuity between the previous annual marketing years (running from 1 July to 30 June of the following year) and subsequent annual marketing years (running from 1 October to 30 September of the following year), and thus to fill the gap resulting from the new dates of the marketing years.

71. In this case, the intention would have been to apply the mechanism for the restructuring aid and for its financing using temporary amounts based on the quantities produced under the basic quota, theoretically corresponding to the 12-month period starting on 1 October 2006, while excluding from that mechanism the quantities produced under the transitional quota, corresponding to the transitional period running from 1 July to 30 September 2006. Such an interpretation, which would appear to be the only way to reconcile the wording of the abovementioned provisions with the purpose of the reform and of the restructuring incentive

measures, is also supported by Article 5(1) of Regulation No 320/2006, under which the decision on the granting of restructuring aid for the marketing year 2006/2007 was to be adopted by 30 September 2006 (and is further confirmed by the fact that, in this case, the Commission informed the Member States that sufficient financial resources were available on 29 September 2006, thus giving them the green light to grant the aid for all the applications regarded as admissible).

72. However, in the main proceedings, the inulin syrup at issue was produced by Beneo-Orafti between 21 November and 13 December 2006, a period in which the transitional quota, if it could have existed independently, would therefore have expired. [25]

73. If, on the other hand, the interpretation advocated by Beneo-Orafti were accepted unreservedly, it would follow that, for the 15-month period between 1 July 2006 and 30 September 2007, producing undertakings would have had two separate quotas. On the one hand, they could have renounced their basic quota at the start of the marketing year in return for an appreciable amount of restructuring aid, but which would have required them to dismantle their corresponding facilities and to renounce totally and definitively any future sugar production using those facilities. On the other hand, they could still have used their transitional quota up to the last moment of the marketing year. Such an outcome seems not only inconsistent in itself, but is also completely at odds with the aims of the legislation.

74. It can be concluded that, whilst the legislation as a whole is not unequivocal and more careful drafting could have provided the missing clarity, the most reasonable interpretation, which largely reconciles the wording of the provisions with the purpose of both the reform and the allocation of the transitional quotas, is that the transitional quotas could exist independently of the basic quotas only in so far as they actually covered production in the beginning of the marketing year 2006/2007. Only such use could justify their exclusion from the temporary restructuring scheme. In contrast, the transitional quotas could not replace the renounced basic quotas in order to permit the undertakings concerned to continue to produce over the period corresponding to the annual marketing year, which is now from 1 October to 30 September, when they had renounced their basic quota.

75. Accordingly, an undertaking which renounced its basic quota could, without being penalised, have produced quantities equal

25 — At the hearing, Beneo-Orafti claimed that the production in question could not begin later than 21 November 2006 because the chicory could not be stored for longer than three months, which would seem to indicate that that chicory was already available some time before 30 September 2006.

to its transitional quota over the first three months of the extended 15-month marketing year, but not during the remaining 12 months. In these circumstances, its production under the transitional quota would have been exempt from payment of the temporary restructuring amount, and the undertaking would have received restructuring aid in respect of any quantity renounced under its basic quota, provided, of course, that it ceased production definitively and totally after producing its transitional quota over the first three months of the marketing year and, if necessary, dismantled the corresponding facilities.

76. Clearly, an undertaking which, on the other hand, had not renounced its basic quota could accumulate the two quotas in order to spread its production over the 15 months. Such an undertaking would not of course have received any restructuring aid, but would have been liable for the temporary amount under Article 11 of Regulation No 320/2006 on the quantities produced under the basic quota over the marketing year 2006/2007 and over the following marketing years, if it did not renounce it subsequently.

77. With regard to this first aspect of the questions raised by the referring court, I therefore conclude that an undertaking which benefited from a basic quota and a transitional quota for the marketing year 2006/2007 and renounced its basic quota was entitled to produce up to the amount of the transitional quota before 30 September 2006 without affecting the conditions governing its renunciation of the basic quota and the restructuring aid resulting from that renunciation, but that any production from 1 October 2006 had to be regarded as a breach of the commitments entered into by virtue of the renunciation of the basic quota.

B — *The point in time at which an undertaking applying for restructuring aid becomes bound by its commitments*

78. The fifth question essentially concerns the point in time from which an undertaking which has applied for restructuring aid in return for a commitment to abandon its production quota and to dismantle the corresponding facilities becomes bound by that commitment.

79. This question arises in the present case in the context of the interval of almost six months between the submission of the application by Beneo-Orafti on 27 July 2006 and the notification given to Beneo-Orafti that its application had been successful on 18 January 2007. What steps can and/or must such an undertaking take during such a period of uncertainty? If it does not produce any part of its quota before being given a definitive response and if that response turns out to be negative,

it will have to concentrate its production for the entire marketing year into a shorter period. If, on the other hand, it commences a part of its production and the response is positive, it will run the risk of incurring penalties and/or levies. The dilemma is further complicated by the fact that sugar production depends on agricultural activities which must be planned over periods of at least several months and which are seasonally dependent. [26]

80. In the view of Beneo-Orafti, the commitments in question become binding on the undertaking when it receives notification from the competent national authority of the granting of restructuring aid (i.e. in the case of Beneo-Orafti, on 18 January 2007). [27] The Belgian Government considers that the undertaking is bound by its commitments from the beginning of the marketing year in question (in this case, on 1 July 2006). [28] The Commission seems to waver between these two dates, but also points out that, as from the publication of the Communication from the Commission on 29 September 2006, Beneo-Orafti possessed all the information needed to conclude that its application would be successful. At the hearing, the Commission suggested that the commitment to renounce the quota and the commitment to dismantle the corresponding facilities, being different in nature, could become binding on different dates.

81. On the one hand, it would appear that the premiss of a binding obligation from the first day of the marketing year 2006/2007 must be rejected. Contrary to the argument put forward by the Belgian Government at the hearing, the commitment to cease production and to dismantle the facilities concerned cannot be regarded as a unilateral commitment. In the scheme of the legislation, it is in return for the restructuring aid, conceived as an 'important economic incentive' to abandon production. [29] For the commitment to become binding from the beginning of the marketing year (or from the submission of the application for restructuring aid [30]), the granting of the aid would have had to have been guaranteed merely by submitting the application, which is not the case. In any event, it must be stated that neither the Belgian Government nor the

26 — It should nevertheless be noted that the problem arises, in principle, only for the marketing year 2006/2007 (see point 58 of this Opinion). Article 5(1) of Regulation No 320/2006 provides that, for the subsequent marketing years, the decision on the granting of aid is adopted by the end of February *preceding* the marketing year.

27 — See Article 11(1) of Regulation No 968/2006.

28 — See Article 3 of Regulation No 968/2006. It should be noted, however, that that provision begins with the words 'as from the marketing year for which the quota is renounced...' and not 'as from *the beginning of* the marketing year...'

29 — See recital 5 in the preamble to Regulation No 320/2006.

30 — Which took place, in the present case, almost one month after the beginning of the marketing year. It seems completely inconceivable that an undertaking could be bound by a commitment from a date on which it has not even offered to assume that commitment.

Commission has put forward any sound arguments in support of this contention.

82. On the other hand, it seems undeniable that the undertaking must be bound by its commitments at the latest from the time it receives official notification of the granting of the aid applied for. At that point in time, all the aspects of the restructuring 'contract' have been verified and put definitively in writing. The aid cannot be withdrawn if the commitments are complied with and the commitments must be complied with, otherwise not only will the aid be withdrawn, but also the relevant penalties will be incurred.

83. It nevertheless seems, following the same logic, that an undertaking applying for aid cannot consider itself entitled not (yet) to comply with its commitments if, as a well-informed economic operator, it is in a position to know that it will be granted the aid applied for. In the present case, that point in time is the date on which the Commission published in the *Official Journal of the European Union* its Communication informing the Member States (and, thereby, the undertakings concerned – Beneo-Orafti's argument that the communication was addressed solely to the Member States does not seem to be relevant in the case of such a public document) that the available financial resources were sufficient to satisfy all the applications considered to be admissible, namely 29 September 2006. From that point in time, Beneo-Orafti's right to receive the aid applied for was established, since all the conditions under Article 5(2) of Regulation No 320/2006 were satisfied, even though, for unexplained reasons, the Belgian authorities still took more than three and a half months before notifying Beneo-Orafti officially. From that point in time, then, Beneo-Orafti was also required to comply with the commitments it had entered into in return for the granting of the aid, failing which it would lose its benefits and incur penalties.

84. Of course, it is not impossible that Beneo-Orafti could have relied on the delay on the part of the Belgian authorities in notifying the decision if that delay had caused it genuine doubts as to the content of the decision. If that were the case, Beneo-Orafti could have pleaded the uncertainty caused in order to be released at least from paying the penalty for intentional non-compliance or grave negligence. [31] However, there is nothing in the papers before the Court to suggest that Beneo-Orafti relied on such an argument, which would not appear to be obviously guaranteed of success, in the light of the publication of the Communication from the Commission in the Official Journal, about which a well-informed operator must have been aware.

85. I therefore consider that, as far as this aspect of the questions raised in the present case is concerned, a commitment to abandon

31 — Article 27(2) and (3) of Regulation No 968/2006.

a quota, entered into by an undertaking which applied for restructuring aid in respect of the marketing year 2006/2007, was binding on that undertaking as soon as the undertaking ought to have known, as a reasonably well-informed operator, that it would be paid the aid corresponding to that commitment.

C — *The possibility of combining recovery, penalty and levy measures*

86. If it transpires that an undertaking has actually produced quantities which it claims are covered by an authorised quota, whereas in fact it had undertaken to renounce that quota, the question arises as to the financial consequences for the undertaking. In the present case, the BIRB is seeking to recover the amount of the aid paid in connection with the quantity produced, to impose a penalty for non-compliance with the commitments entered into, and to collect a levy on that quantity as surplus production. The referring court wishes to ascertain, by its fourth question (first part) and its seventh question, whether these three measures can be combined. More specifically, by its seventh question, it asks whether such a combination is inconsistent with the principle of *ne bis in idem* and the principles of proportionality and non-discrimination.

87. It should be noted that, because they are asked only in the event of a negative reply to the first to third and sixth questions, these questions assume that the undertaking in question did not have the right to use its temporary quota, an assumption which is consistent with my analysis of those questions in the present case. The undertaking has thus renounced a certain production volume and has been granted restructuring aid corresponding to that volume, but has nevertheless produced a quantity equivalent to all or part of the volume in question.

88. First of all, in those circumstances, I consider it perfectly justified to recover the part of the aid corresponding to the quantity which was produced, [32] but which it had nevertheless renounced. That aid was granted in return for the renunciation of production. In so far as production still took place, the granting of the aid is no longer justified and it must be recovered pursuant to Article 26 (1) of Regulation No 968/2006.

89. Secondly, the fact that the penalties under Article 27 of that regulation supplement the recovery of the part of the aid in question does not seem to be contrary to the principle of *ne bis in idem* at all, or to the principles of proportionality and non-discrimination. It should be borne in mind that this is a financial penalty equal to 10 % of the amount of aid to be recovered in normal cases, or in the case of intentional behaviour

32 — With regard to the calculation of amount of that part of the aid, see point 104 et seq., especially point 110 et seq., of this Opinion.

or grave negligence 30 % of the amount to be recovered, whilst in cases of *force majeure* the penalty is not applied.

90. As regards the principle of *ne bis in idem*, the recovery of a sum which should not been have been paid (a simple recovery of the amount not due) is clearly a measure completely different in nature from the imposition of a penalty. Accordingly, the concurrent application of two measures cannot in any case breach the principle in question, under which, in essence, the same person cannot be punished more than once for a single instance of unlawful conduct in order to protect the same legal asset. [33] In the absence of a second penalty, any reliance on the principle is immaterial.

91. As far as the principle of proportionality is concerned, the imposition of a penalty corresponding to 10 % of the amount to be recovered in the case of simple negligence (cases of *force majeure* not being subject to any penalty) does not seem unreasonable at all. Such a penalty encourages undertakings to take their commitments seriously and to check carefully that their conduct is consistent with those commitments. It can also compensate for the administrative expenses which are necessarily but pointlessly incurred in connection with the examination of cases and the payment and recovery of sums not due. As regards the 30 % penalty in cases of intentional acts or grave negligence, this does not appear excessive either, in so far as it penalises objectionable conduct which could have significantly impaired the restructuring scheme and the common organisation of the market, since the existence of the penalty will, from the outset, act as a deterrent for those who might be tempted by such conduct. [34] Of course, categorisation of a case of negligence as serious or minor must be done in each case by the responsible authority, and an error of categorisation could give rise to a disproportionate penalty, but this is an aspect of the application of the penalty which can be rectified by a judicial review such as is performed in the present case by the referring court, [35] and not a characteristic of the system of penalties under Regulation No 968/2006.

92. Lastly, as far as the principle of non-discrimination is concerned, the reasons why the national court has asked the Court about a possible breach of that principle are not clear from the order for reference. Beneo-Orafti also failed to give any clarification in this regard in its observations. As the Belgian

33 — See Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 338.

34 — The penalty does not even seem very heavy in fact, with a maximum of only EUR 164.25 (30 % of EUR 547.50), whilst quota production is itself liable for a temporary amount of EUR 126.40 per tonne under Article 11(2) of Regulation No 320/2006.

35 — It should be noted that the referring court does not ask the Court about the characterisation of Beneo-Orafti's conduct in the present case. I will not therefore deal with this aspect, which is part of the appraisal of the facts by the national court, in the present Opinion.

Government pointed out, there seems to be nothing to suggest that comparable situations are treated differently or different situations are treated alike, [36] whether in terms of the legislation in question or as regards the specific treatment of Beneo-Orafti's situation by the BIRB.

93. Whilst the combination of the recovery of aid and the financial penalty, provided for in Articles 26 and 27 respectively of Regulation No 968/2006, does not raise any problems under European Union law, is the same true if, for the same quantity produced, it is also intended to apply the surplus amount under Article 15 of Regulation No 318/2006, the level of which is fixed in Article 3(1) of Regulation No 967/2006?

94. First of all, does the combination of that levy and the financial penalty under Article 27 of Regulation No 968/2006 constitute a double penalty for a single instance of conduct, imposed to protect the same legal asset, which is accordingly prohibited by the principle of *ne bis in idem*?

95. In this regard, it would appear, first of all, that the surplus amount does indeed constitute a penalty. Unlike the temporary amount on quota production under Article 11 of Regulation No 320/2006, whose explicit aim is to finance the restructuring measures, [37] the surplus amount is paid to the Union's general budget and seeks to avoid the accumulation of surplus quantities threatening the market situation, as it must be fixed at a sufficiently high level in order to be a deterrent. [38] Such characteristics make the levy a penalty, the aim of which is to penalise out-of-quota production, in the same way as the financial penalty under Article 27 of Regulation No 968/2006 penalises non-compliance with the commitments entered into with a view to obtaining restructuring aid.

96. Of course, these are not criminal penalties, but administrative penalties. However, such administrative penalties generally fall within the scope of Regulation (EC, Euratom) No 2988/95 [39] (in particular Article 5 of that regulation) which, according to the tenth recital in its preamble, takes due account of the principle of *ne bis in idem*, which is, moreover, 'recognised in the case-law as a fundamental principle of Community law'. [40]

36 — See, inter alia, Case C-133/09 *Uzonyi* [2010] ECR I-8747, paragraph 31 and the case-law cited.

37 — See the fourth recital in the preamble to that regulation.

38 — See recital 18 in the preamble to and Article 15(2) of Regulation No 318/2006 and recital 3 in the preamble to Regulation No 967/2006.

39 — Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1).

40 — Case C-436/04 *Van Esbroeck* [2006] ECR I-2333, paragraph 40 and the case-law cited. See also points 80 and 81 of the Opinion of Advocate General Sharpston in Case C-467/04 *Gasparini and Others* [2006] ECR I-9199.

97. Secondly, this double penalty relates not only to a single person, but also to a single course of conduct. Although this is covered in two different ways (first as a failure to fulfil the commitment to renounce the quota, then as surplus production), the basic conduct is the same in both cases and consists in producing a quantity not covered by an authorised quota. Furthermore, the legal interest protected in both cases [41] is that pursued by the new legislation, which is to limit production in the markets in the sugar sector.

98. It can be concluded that the combination of the surplus amount under Article 15 of Regulation No 318/2006 and the financial penalty under Article 27 of Regulation No 968/2006 is inconsistent with the principle of *ne bis in idem*.

99. It must also be made clear that, of the two aspects of that principle, namely the prohibition of double proceedings [42] and the prohibition of double penalties, [43] it is the second which is relevant in the present case. Even though the BIRB has initiated two proceedings against Beneo-Orafti, the crucial factor is the prohibition of the combination of two penalties under European Union law, irrespective of procedural issues. However, in the Court's case-law, [44] the prohibition on double penalties, according to which the level of a first penalty imposed must be taken into account if a second penalty can also be imposed for the same offences, also comes under the principle of proportionality, which is also relied on by Beneo-Orafti.

100. The financial penalty which the BIRB is seeking from Beneo-Orafti under Article 27 of Regulation No 968/2006 is EUR 136.33 per tonne produced. [45] The surplus amount is EUR 500 per tonne produced. The prohibition on double penalties therefore requires the application of only the surplus amount, the more severe penalty of the two, which prevails over the less onerous penalty.

41 — It should be noted that, in criminal matters, since its judgment in Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345, the Court has abandoned the requirement of the protection of a single legal interest for the application of the principle of *ne bis in idem* and that a similar approach has been taken by the European Court of Human Rights in its judgment of 10 February 2009 in *Sergey Zolotukhin v. Russia*.

42 — More precisely expressed by the maxim '*nemo debet bis vexari*' or '*bis de eadem re ne sit actio*' and known in Germanic law as the 'Erledigungsprinzip', a term which emphasises the exhaustion of the proceedings by the first completed procedure.

43 — More precisely expressed by the maxim '*nemo debet bis puniri pro uno delicto*' and known in Germanic law as the 'Anrechnungsprinzip', a term which instead refers to the idea of 'reckoning' penalties, namely the consideration of a less onerous penalty in the imposition of a heavier penalty for the same offence.

44 — See Case 137/85 *Maizena* [1987] ECR 4587, paragraph 19 et seq. See also Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 37 et seq.

45 — See the table at point 53 of this Opinion. It is an amount equivalent to 30% of the aid received by Beneo-Orafti, which represented 83% of the total amount of EUR 547.50 per tonne. However, I believe that a correct calculation would give an even smaller figure (see point 110 et seq. of this Opinion).

101. It must still be established whether or not the level of the surplus amount is in itself inconsistent with the principle of proportionality.

102. I do not think that this is the case. The aim of the reform of the sugar sector is to impose strict, reduced production quotas in order to maintain the balance and stability of the market within the European Union and to comply with the Union's commitments at international level. To that end, it is necessary to avoid the production of quantities out of quota which are likely to disrupt the market. The levy (which, as was stressed at the hearing, in particular by the Commission, is not due if the quantity in question is intended for certain specific uses [46]) is fixed at the same level as the import duties on sugar produced externally. Such a level is a very clear deterrent, whilst allowing the producer to benefit from the price on the world market, which would not appear to be a disproportionate penalty, particularly if account is taken of the fact that its real impact is less than EUR 500, as it replaces the temporary amount of EUR 126.40 per tonne levied on quota production. [47] It is irrelevant to this analysis, in my view, whether the production is out of quota because the producer has exceeded its quota, has never had a quota or has renounced its quota.

46 — See Articles 12 to 15 of Regulation No 318/2006 and Article 4(1) of Regulation No 967/2006.

47 — Article 11(2) of Regulation No 320/2006.

103. It can therefore be concluded in this regard that where an undertaking, as a result of non-compliance with a commitment to renounce its quota, has produced a quantity out of quota, the recovery of the restructuring aid granted in return for the renunciation constitutes recovery of a sum wrongly paid, the combination of which with a financial penalty is not prohibited by any principle of European Union law. However, the imposition of two concurrent penalties in respect of the same production is prohibited by the principle of *ne bis in idem*, under which only the more severe of the two penalties is to be applied.

D — *The calculation of the amount to be recovered*

104. It remains to answer the question raised by the referring court in the second part of its fourth question. It seeks to ascertain how to calculate the amount to be recovered (possibly increased by 10% or 30%, as appropriate) where an undertaking has failed to comply with one or more of the commitments it has entered into in return for the aid received. In particular, where the undertaking concerned has produced a certain quantity, having renounced its basic quota, must that calculation take into account the costs for the dismantling of production facilities, the losses incurred as a result of giving up the basic quota and/or the fact that the transitional quota concerns only the marketing year 2006/2007? And if those factors are not

taken into account, is this inconsistent with the principle of proportionality?

105. Whilst the first part of the fourth question, which we have already examined, is explicitly asked in the event that the third question is answered in the negative (i.e. on the assumption, which I have accepted, that the undertaking in question cannot benefit from a transitional quota if it has applied for restructuring aid), the second part of the fourth question seems to assume a situation where the undertaking has received the aid in question and has used its transitional quota.

106. However, if it is concluded, as I have proposed, that production after 1 October 2006 could not come under the transitional quota where, as in the present case, the undertaking concerned had renounced its basic quota in its entirety, it follows that such production had to be covered by that quota and not by the transitional quota.

107. In these circumstances, the approach taken by the BIRB, and endorsed by the Belgian Government in its written observations, seems logical at first sight. Article 26(1) of Regulation No 968/2006 requires the recovery of 'the part of the aid granted in respect of the commitment(s)' entered into by the undertaking, inter alia under the restructuring plan, with which it has failed to comply. The BIRB essentially considered that the amount to be recovered corresponded to the amount of aid received by Beneo-Orafti for each tonne it had renounced, multiplied by the number of tonnes actually produced over the marketing year 2006/2007.

108. Beneo-Orafti points out, however, that the amount of aid granted in return for a renunciation of production is differentiated, under Article 3(1) and (5) of Regulation No 320/2006, depending on the commitments entered into with regard to the production facilities and connected with renunciation (full dismantling, partial dismantling or simple non-use of those facilities). In the case of renunciation without dismantling, the aid is EUR 255.50 per tonne. In the case of renunciation with partial dismantling, that figure is increased by EUR 292 per tonne, to a level of EUR 547.50 per tonne, in order to compensate for the costs of dismantling; and in the case of renunciation with full dismantling of facilities, the amount is increased by a further EUR 182.50 per tonne, to a total of EUR 730 per tonne, in order to reflect the higher cost of full dismantling. Accordingly, in the view of Beneo-Orafti, if an undertaking fails to comply with its commitment to renounce production, whilst complying with its dismantling obligation, the amount to be recovered should be only EUR 255.50 per tonne and should not take account of the part of the

aid intended to compensate for the costs of dismantling.

109. The Commission considers that both approaches are permissible, [48] among others, but that in the final analysis it is for the competent national authorities to determine the precise method of calculation, provided that it is based on objective criteria and it does not breach any of the general principles of Union law, in particular the principles of effectiveness and equivalence and the principle of proportionality.

110. In my view, the objections raised by Beneo-Orafti in this regard are relevant. The differentiation of the amount of aid received depending on the nature of the commitment entered into with regard to the production facilities tends to show that that amount corresponds only partially to the renunciation of the quota as such. It is clear from Article 26 (1) of Regulation No 968/2006 that the amount to be recovered corresponds to 'the part of the aid granted in respect of [[49]] the commitment(s)' which have not been complied with. If the commitment which has not been complied with concerns only production and not the dismantling of facilities, a recovery which takes into account the distribution of the aid between these two elements seems appropriate. It can be inferred from Article 3 (1) and (5) of Regulation No 320/2006 that, in the case of a renunciation of production together with a commitment partially to dismantle the facilities concerned, the part of the aid granted by virtue of the renunciation is equivalent to EUR 255.50 per tonne, [50] possibly increased by 10 % or 30 % as appropriate. If the commitments entered into as regards the facilities are complied with, it would seem contrary to the principle of proportionality, which is not only a general principle of European Union law, but is also enshrined, at least implicitly, in Article 26 (1) of Regulation No 968/2006, to recover the part of the aid which corresponds to those commitments.

111. Furthermore, such an approach is precluded by the principle of equal treatment, as it would imply identical treatment of two groups of operators (those who have not complied with any of the commitments entered into and those who have failed to fulfil only their obligation not to produce over

48 — Although, in its written reply to a question asked by the Court, it seemed to take the view, without explaining its reasoning, that the calculation proposed by Beneo-Orafti would give rise to a recovery of EUR 292 per tonne, rather than EUR 255.55 per tonne.

49 — Whilst the words "conformément à", taken in context, may seem a little ambiguous in French, their meaning is clearer in the other language versions, such as English ("the part of the aid granted *in respect of* the commitment(s) concerned") or Spanish ("la parte de la ayuda concedida *correspondiente al* compromiso o compromisos en cuestión") (my emphasis in both cases).

50 — A figure which it might be appropriate to revise downward in the present case in view of the fact that Beneo-Orafti was granted only 83 % of the total amount of the aid.

the marketing year in question) which are objectively different. This would even give an incentive not to comply with all the commitments once a single commitment has not been fulfilled.

112. It follows, in my view, that where it is necessary to recover restructuring aid on grounds of non-compliance with only some of the commitments entered into in return for the granting of that aid, only the part of the aid corresponding to the commitments which have not been complied with must be recovered. In a situation like the present case, where only the commitment to abandon production is concerned, the dismantling costs mentioned by the referring court are not relevant to the calculation. It may also be noted in this regard that the amount of aid granted is flat-rate and therefore independent of those costs.

113. As far as the approach taken by the Commission is concerned, I do not think it is conceivable to leave it to the national authorities alone to decide on the calculation of the amounts, which form part of the aid from the European Union budget and which must be recovered or collected under Union law and repaid to the Union budget, especially since, in a written reply to a question asked by the Court, the Commission cites, 'among the many possible formulae', four calculations which give four very different results, ranging from EUR 8 103 292 to EUR 59 679 771, a ratio of 1 to 7.36. The mere possibility that such disparate sums could be claimed, in different Member States, from producers in objectively comparable situations would appear to be a flagrant breach of the principle of equal treatment.

114. As regards the other arguments put forward by Beneo-Orafti concerning the loss incurred as a result of giving up the basic quotas and the ad hoc nature of the transitional quotas, I am less convinced.

115. First of all, Beneo-Orafti claims that the quota which it renounced concerns production not only in the marketing year 2006/2007, but also production for the eight subsequent marketing years, up to the marketing year 2014/2015. [51] Thus, the part of the aid corresponding to the basic quota for the marketing year 2006/2007 represents only one-ninth of the total, and only that ninth should be recovered if the failure to comply with the renunciation commitment applied only to that single marketing year. I think that this line of argument is wrong, however. The aid is not granted each year in return for the commitments complied with over the marketing year concerned, it is granted once and for all in return for a commitment to abandon production (and, if appropriate, to dismantle facilities) which is valid for all marketing years following the year during which it takes effect. [52] Any production failing to comply with the commitment gives rise to the recovery of the related aid. Furthermore, it is clear from Article 10 of Regulation No 318/2006 that there is no guarantee that the quota allocated for the marketing year 2006/2007, if

51 — See Article 46 of Regulation No 318/2006.
52 — See Article 3(2) of Regulation No 320/2006.

it is not renounced, will stay at the same level over the subsequent marketing years. On the contrary, it must inevitably be reduced from the marketing year 2010/2011.

116. Secondly, Beneo-Orafti derives certain arguments from the fact that the transitional quotas relate to only a single marketing year, whereas the basic quotas (where they are not renounced) relate to all the marketing years to which Regulation No 318/2006 is applicable. I do not consider these arguments to be relevant in so far as I believe that the production in question, taking place after 1 October 2006, cannot come under a transitional quota.

117. I therefore take the view that where it is necessary to recover restructuring aid on grounds of non-compliance with only some of the commitments entered into in return for the granting of that aid, only the part of the aid corresponding to the commitments which have not been complied with must be recovered.

V — Conclusion

118. In the light of the foregoing, I propose that the questions asked by the Tribunal de première instance de Bruxelles be answered as follows:

The relevant provisions of Council Regulation (EC) No 318/2006 of 20 February 2006 on the common organisation of the markets in the sugar sector, Council Regulation (EC) No 320/2006 of 20 February 2006 establishing a temporary scheme for the restructuring of the sugar industry in the Community and amending Regulation (EC) No 1290/2005 on the financing of the common agricultural policy, Commission Regulation (EC) No 493/2006 of 27 March 2006 laying down transitional measures within the framework of the reform of the common organisation of the markets in the sugar sector, and amending Regulations (EC) No 1265/2001 and (EC) No 314/2002, Commission Regulation (EC) No 967/2006 of 29 June 2006 laying down detailed rules

for the application of Council Regulation (EC) No 318/2006 as regards sugar production in excess of the quota, and Commission Regulation (EC) No 968/2006 of 27 June 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 320/2006 establishing a temporary scheme for the restructuring of the sugar industry in the Community must be interpreted as meaning that:

— an undertaking which benefited from a basic quota and a transitional quota for the marketing year 2006/2007 and renounced its basic quota was entitled to produce up to the amount of the transitional quota before 30 September 2006 without affecting the conditions governing its renunciation of the basic quota and the restructuring aid resulting from that renunciation, but any production from 1 October 2006 had to be regarded as a breach of the commitments entered into by virtue of the renunciation of the basic quota;

— a commitment to abandon a quota, entered into by an undertaking which applied for restructuring aid in respect of the marketing year 2006/2007, was binding on that undertaking as soon as the undertaking ought to have known, as a reasonably well-informed operator, that it would be paid the aid corresponding to that commitment;

— where an undertaking, as a result of non-compliance with a commitment to renounce its quota, has produced a quantity out of quota, the recovery of the restructuring aid granted in return for the renunciation constitutes recovery of a sum wrongly paid, the combination of which with a financial penalty is not prohibited by any principle of European Union law. However, the imposition of two concurrent penalties in respect of the same production is prohibited by the principle of *ne bis in idem*, under which only the more severe of the two penalties is to be applied;

— where it is necessary to recover restructuring aid on grounds of non-compliance with only some of the commitments entered into in return for the granting of that aid, only the part of the aid corresponding to the commitments which have not been complied with must be recovered.