OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 18 February 2009 [1]

I — Introduction

1. In these proceedings the Austrian Verwaltungsgerichtshof (Administrative Court; 'the referring court') seeks from the Court of Justice a preliminary ruling on two questions concerning the interpretation and, as appropriate, the validity of Article 11 of 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. [2]

2. The reference for a preliminary ruling was made in the context of a dispute between Agrana Zucker GmbH ('the applicant') and the Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (Federal Ministry of Agriculture, Forestry, the Environment and Water Management; 'the defendant') concerning the effectiveness of a decision adopted on the basis of Article 11 of Regulation No 320/2006 by which the applicant was required by the defendant to pay the first instalment of the temporary restructuring amount for the 2006/07 marketing year.

3. By its first question the referring court seeks essentially to ascertain whether the level of the restructuring amount to be paid must be calculated on the basis of the total quota allocated or whether the calculation must be made solely on the basis of the quota actually available after deduction of the quantity withdrawn from the market as a consequence of preventive withdrawal. The second question referred, by contrast, focuses on examining whether Article 11 of Regulation No 320/2006 is compatible with the superior provisions of Community law.

II — Relevant legislation

4. On 20 February 2006 the Council adopted Regulation (EC) No 318/2006 on the common organisation of the markets in the sugar sector [3] and Regulation No 320/2006 as part of the reform of the common organisation of the markets (COM) in the sugar sector. Transitional measures were adopted by the Commission in accordance with Article 44 of Regulation No 318/2006.

1 — Original language: German.
2 — OJ 2006 L 58, p. 42.
3 — OJ 2006 L 58, p. 1.

Regulation No 318/2006

5. The new tools for managing the market which were introduced by Regulation No 318/2006 include, in accordance with Article 19 thereof, the withdrawal of sugar from the market. Article 19 provides inter alia:

'1. In order to preserve the structural balance of the market at a price level which is close to the reference price, taking into account the commitments of the Community resulting from agreements concluded in accordance with Article 300 of the Treaty, a percentage, common to all Member States, of quota sugar ... may be withdrawn from the market until the beginning of the following marketing year.

...

2. The withdrawal percentage referred to in paragraph 1 shall be determined by 31 October of the marketing year concerned at the latest on the basis of expected market trends during that marketing year.

3. Each undertaking provided with a quota shall store at its own expense during the period of withdrawal the quantities of sugar corresponding to the application of the percentage referred to in paragraph 1 to its production under quota for the marketing year concerned.

The sugar quantities withdrawn during a marketing year shall be treated as the first quantities produced under quota for the following marketing year. However, taking into account the expected sugar market trends, it may be decided, in accordance with the procedure referred to in Article 39(2), to consider, for the current and/or the following marketing year, all or part of the withdrawn sugar... as:

— surplus sugar... available to become industrial sugar,...

or

— temporary quota production of which a part may be reserved for export respecting commitments of the Community resulting from agreements concluded under Article 300 of the Treaty.

…'

Regulation No 320/2006

6. Article 11 of Regulation No 320/2006 governs the payment of the temporary restructuring amount. That article provides inter alia:

'1. A temporary restructuring amount shall be paid per marketing year per tonne of quota by those undertakings to which a quota has been allocated.

Quotas that have been renounced by an undertaking as from a given marketing year in accordance with Article 3(1) shall not be subject to the payment of the temporary restructuring amount for this marketing year and subsequent marketing years.

2. The temporary restructuring amount for sugar and inulin syrup shall be set at:

— EUR 126.40 per tonne of quota for the marketing year 2006/07,

— EUR 173.80 per tonne of quota for the marketing year 2007/08,

— EUR 113.30 per tonne of quota for the marketing year 2008/09.

The temporary restructuring amount per marketing year for isoglucose shall be set at an amount equal to 50% of the amounts fixed in the first subparagraph.

3. Member States shall be liable to the Community for the temporary restructuring amount to be collected on their territory.

Member States shall pay the temporary restructuring amount to the restructuring fund in two instalments, as follows:

— 60% by 31 March of the marketing year concerned

and

— 40% by 30 November of the following marketing year.

…

5. The totality of the temporary restructuring amounts to be paid in accordance with paragraph 3 shall be allocated by the Member State among the undertakings on its territory according to the allocated quota during the marketing year concerned.

Undertakings shall pay the temporary restructuring amounts in two instalments, as follows:

— 60% by the end of February of the marketing year concerned

and

— 40% by 31 October of the following marketing year.'

Regulation (EC) No 493/2006

7. The transitional measures provided for by 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, [4] in order to ensure the transi-

4 — OJ 2006 L 89, p. 11.

tion between the existing regime and the new regime, include 'preventive withdrawal'.

8. In that regard, recital 6 in the preamble to Regulation No 493/2006 states:

'In order to improve the market balance in the Community without creating new stocks of sugar in the 2006/07 marketing year, provision should be made for a transitional measure to reduce eligible production under quota in respect of that marketing year. A threshold should be fixed above which the production under quota of each undertaking is considered withdrawn within the meaning of Article 19 of Regulation (EC) No 318/2006 or, at the request of the undertaking, as production in excess of the quota within the meaning of Article 12 of that Regulation. In view of the transition between the two regimes, this threshold should be obtained by a combination, in equal parts, of the method laid down in Article 10 of Regulation (EC) No 1260/2001 and that laid down in Article 19 of Regulation (EC) No 318/2006 and take into account the special efforts made by some Member States within the framework of the restructuring fund set up by Council Regulation (EC) No 320/2006…'

9. Article 3 of Regulation No 493/2006 lays down the transitional provisions concerning preventive withdrawal:

'1. For each undertaking, the share of the production of sugar... in the 2006/07 marketing year which is produced under the quotas listed in Annex III to Regulation (EC) No 318/2006 and which exceeds the threshold established in accordance with paragraph 2 of this Article shall be considered withdrawn within the meaning of Article 19 of that Regulation or, at the request of the undertaking concerned before 31 January 2007, shall be considered fully or partially to be produced in excess of the quota within the meaning of Article 12 of that Regulation.

2. For each undertaking, the threshold referred to in paragraph 1 shall be established by multiplying the quota allocated to the undertaking under Article 7(2) of Regulation (EC) No 318/2006 by the sum of the following coefficients:

(a) the coefficient fixed for the Member State concerned in Annex I to this Regulation;

(b) the coefficient obtained by dividing the sum of the quotas renounced in the 2006/07 marketing year in the Member State concerned under Article 3 of Regulation (EC) No 320/2006 by the

sum of the quotas fixed for that Member State in Annex III to Regulation (EC) No 318/2006. The Commission shall fix this coefficient not later than 15 October 2006.

However, where the sum of the coefficients exceeds 1.0000, the threshold shall be equal to the quota referred to in paragraph 1.

…'

III — Facts, main proceedings and questions referred for a preliminary ruling

10. By decision of 26 June 2006 on the allocation of the quota for the production of sugar in the marketing years 2006/07 to 2014/15 inclusive and by decision of 18 December 2006 on the allocation of the additional sugar quota, the defendant granted to the applicant a sugar quota totalling 405 812.4 tonnes (387 326.4 tonnes sugar quota plus 18 486.0 tonnes additional sugar quota). By decision of 28 June 2006 the defendant set a production threshold, in accordance with Article 3 of Regulation No 493/2006, for the production of quota sugar in the 2006/07 marketing year. The applicant's quota was reduced by 57246.84 tonnes as a result of the preventive withdrawal.

11. By decision of the board of Division I of the Agrarmarkt Austria (a legal person governed by public law set up by the defendant to administer support; 'the AMA') of 16 January 2007, the applicant was required to pay the first instalment of the temporary restructuring amount for the 2006/07 marketing year, which had been calculated on the basis of the original quota, in the amount of EUR 30 776 812.42.

12. The applicant appealed against that decision. By decision of 16 April 2007, the legality of which is subject to adjudication by the referring court in the main proceedings, the defendant dismissed the appeal as unfounded.

13. It is apparent from the order for reference that the issue in dispute in the proceedings before the Verwaltungsgerichtshof is whether the restructuring amount pursuant to Article 11(2) of Regulation No 320/2006 should be calculated on the basis of the total allocated quota, as the defendant has done, or whether the quota on which the calculation is to be based should be reduced having regard to the production threshold and the associated preventive withdrawal. According to the applicant's submissions, the restructuring amount should be calculated on the basis of 348 565.56 tonnes only (that is to say, on the basis of the actual quantity of quota sugar) and not on the basis of 405 812.4 tonnes (that is to say, on the basis of the quota originally allocated and subsequently reduced), particularly since it could not sell the balance on the market as quota sugar.

14. It is clear from the order for reference that the applicant considers that inclusion of the balance, which is not available due to the reduction in the quota pursuant to Article 3 of Regulation No 493/2006 in the 2006/07 marketing year, in the basis of assessment for the restructuring amount payable in the 2006/07 marketing year is not permissible under Community law because it infringes the primary law principle of proportionality and the principle of non-discrimination set out in Article 34(2) EC.

15. The referring court assumes that the applicant did not have standing to bring an action for annulment under Article 230 EC and it can therefore have recourse in the main proceedings to the illegality of a Community legal act.

16. In this context, the Verwaltungsgerichtshof has stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 11 of Council Regulation (EC) No 320/2006 of 20 February 2006 be interpreted as meaning that even a sugar quota which cannot be utilised as a consequence of a preventive withdrawal in accordance with Article 3 of Commission Regulation (EC) No 493/2006 of 27 March 2006 must be included in the assessment of the temporary restructuring amount?

(2) In the event that the first question is answered in the affirmative:

Is Article 11 of Regulation (EC) No 320/2006 compatible with primary law, in particular with the principle of non-discrimination derived from Article 34 EC and the principle of the protection of legitimate expectations?'

IV — Proceedings before the Court of Justice

17. The order for reference of 19 November 2007 was received at the Court Registry on 28 January 2008.

18. The Council, the Government of the Republic of Lithuania and the Commission each submitted written observations within the period mentioned in Article 23 of the Statute of the Court of Justice.

19. In the course of measures of organisation of procedure the Court put a written question to the Commission, to which the Commission provided a response.

20. As none of the parties applied for the oral procedure to be opened, it was possible to prepare the Opinion in this case after the general meeting of the Court on 4 November 2008.

V — Main arguments of the parties

21. Both the *Council* and the *Commission* take the view that Article 11 of Regulation No 320/2006 must be interpreted as meaning that even the sugar quota which cannot in effect be utilised as a consequence of a preventive withdrawal in accordance with Article 3 of Regulation No 493/2006 must be included in the assessment of the temporary restructuring amount.

22. The *Lithuanian Government* takes the opposite view, arguing that the word 'quota' in Article 11 of Regulation No 320/2006 should be interpreted to mean the quota actually available to the undertakings in the marketing year at issue, that is to say, the quota produced following the preventive withdrawal.

23. The *Council* asserts in particular that the interpretation of Article 11 of Regulation No 320/2006 which it has proposed is the only one which takes account of the wording and purpose of that provision. In its view, it emerges clearly from that provision that the restructuring amount was to be paid per tonne of the quota allocated to an undertaking, in which context only those undertakings which had definitively renounced their quota or production should be exempted from the full or partial payment of the restructuring amount. The amounts collected in that way served as revenue assigned for financing the restructuring aid and guaranteed stability and neutrality of the budget, as defined by the Community legislature.

24. As to the validity of that provision, the Council notes that withdrawal from the market pursues a legitimate objective of the reform of the COM in the sugar sector, that is to say, the preservation of the structural balance of the market at a price level close to the reference price. A similar conclusion can be drawn in relation to Article 3 of Regulation No 493/2006, the preventive withdrawal arrangement under which was adopted as a transitional measure in order to improve the market balance in the Community without creating new stocks of sugar in the 2006/07 marketing year. Moreover, the negative effect

of withdrawal on an undertaking, it argues, is marginal compared with its positive overall effect on the sugar market in the Community. Due to the absence of overproduction, the overall price level can be maintained close to the reference price, from which all undertakings remaining in the market ultimately benefit.

25. The Council denies that there has been any infringement of the principle of non-discrimination, pointing to the fact that all undertakings are required to pay the restructuring amount on the basis of assessment of the respective quotas allocated to them. The quota distribution and subsequent management by the Member States as well as the coefficients applied in accordance with Article 3 of Regulation No 493/2006 are geared towards reducing overproduction in the same manner in each Member State in order to achieve a balance in production throughout the Community. In the case of two undertakings established in two Member States, different facts come into play which cannot be treated in the same way. In any event, different treatment is objectively justified by the spirit and purpose of the system of coefficients.

26. The *Commission* puts forward essentially the same arguments as the Council with regard to the interpretation of Article 11 of Regulation No 320/2006.

27. As to the validity of that provision, the Commission first submits that neither the applicant nor the referring court expressed any doubt as to the permissibility of the objectives pursued in the 2006 reform of the sugar sector. Furthermore, it was appropriate and expedient for such quantities of sugar, which, although unable to be sold in the marketing year concerned under the quota scheme as a consequence of other market mechanisms — in particular withdrawal — still were not withdrawn definitively from the market, not to be excluded from the calculation of the restructuring amount.

28. First, the funding for the restructuring aid could be secured only if there was a basis for calculation which could be devised in advance. Secondly, renunciation of a quota for the purposes of Article 3 of Regulation No 493/2006 and withdrawal under Article 19 of Regulation No 318/2006 could not be accorded the same treatment. The former measure was a longer-term measure with a view to the structural adjustment of the market, whereas the latter measure was a short-term scheme to support prices, which did not contribute to the restructuring of the sugar market. Thirdly, the economic consequences of including the quantities of sugar affected by the withdrawal in the basis of calculation for the temporary restructuring amount were limited. Furthermore, an undertaking such as the applicant had the option of minimising or indeed avoiding altogether the direct economic consequences of withdrawal for the 2006/07 marketing year. Thus, as early as 3 February 2006 the Commission had advised the sugar beet and sugar producers

by a communication in the Official Journal [5] that, because of the situation on the Community sugar market as scheduled, it might avail itself of the possibility afforded to it by the Council of withdrawing sugar as a transitional measure. Regulation No 493/2006, by which the Commission prescribed withdrawal for the 2006/07 marketing year, was then published in March 2006. As the sole producer of sugar in Austria, the applicant had the option of reducing its production for the marketing year concerned in order to prevent the carrying-over of the sugar quantities withdrawn or their disposal as non-quota production.

29. As regards the alleged infringement of the principle of non-discrimination, the Commission explains that the applicant's line of argument relates to the coefficient for calculation provided for in Article 3(2)(b) of Regulation No 493/2006, whereas the question referred for a preliminary ruling is concerned exclusively with Article 11(1) of Regulation No 320/2006. Irrespective of the fact that such recourse to withdrawal based on the power to carry over in the 2006/07 marketing year per se is not the subject-matter of the reference, the Commission takes the view that the differing respective effects of the measure do not constitute discrimination and, in any event, can be objectively justified. The reason for focusing on the renunciation of quotas at Member State level is that, until expiry of the quota system in the sugar sector in the 2014/15 marketing year, the sugar quotas will be allocated to the Member States and then distributed by the Member States among the undertakings established on their respective territories. It would appear, as far as the Community legislature can see, that the objective of restructuring the sugar market can therefore be best achieved, in the transitional period, by organising the definitive renunciation of quotas also at Member State level.

30. The *Lithuanian Government* maintains that Article 11(1) of Regulation No 320/2006 fails to define clearly the allocated quota that is meant — that is to say, whether it means the quota originally allocated or the quota allocated after the preventive withdrawal. It also takes the view that it cannot be concluded from the second subparagraph of Article 11(1) of Regulation No 320/2006 that the undertakings which have not renounced a quota must pay charges assessed on the basis of the total quota originally allocated.

31. It adds that the withdrawn quantities of sugar cannot be sold as quota sugar and that the possibilities available under Article 19(3) of Regulation No 318/2006 by no means allow the quantity by which the quota has been reduced as a result of preventive withdrawal to be treated as a sugar quota.

5 — Communication from the Commission to sugar beet and sugar producers of 3 February 2006 (OJ 2006 C 27, p. 8).

32. If Article 11 of Regulation No 320/2006, it argues, were to be interpreted as meaning that a sugar quota which could not be utilised as a consequence of a preventive withdrawal under Article 3 of Regulation No 493/2006 was to be included in the basis of assessment for assessing the temporary restructuring amount, that system for assessing the restructuring amount would lead to an unfairly high financial burden and consequently to an unjustifiable burden of charges on undertakings. Having regard to the Court's judgment in *Zuckerfabrik Jülich and Others*, [6] the Lithuanian Government points out that, in spite of the broad discretion enjoyed by the Community institutions in the area of agriculture, producers may not be burdened beyond the degree necessary to achieve the objective pursued by the levy.

33. An interpretation of that kind would, moreover, result in discrimination, particularly since the preventive measure is carried out using different coefficients for different Member States and the reduction in the quotas for undertakings established in one Member State can turn out to be smaller than for undertakings established in another Member State, and this irrespective of their performance. Such an interpretation would give rise to a distortion of competition in the internal market and an unjustified difference in treatment of those undertakings which had not effected a withdrawal from the market.

6 — Joined Cases C-5/06 and C-23/06 to C-36/06 [2008] ECR I-3231.

VI — Legal assessment

A — *Introductory remarks*

34. By Council Regulations No 318/2006 and No 320/2006 and Commission Regulation No 493/2006 the Community legislature introduced a far-reaching reform of the European organisation of the markets in sugar. Upon introduction of the new rules, which came into force on 1 July 2006, a system which had remained largely unchanged for almost 40 years [7] was incorporated into the general reform of the common agricultural policy (CAP). [8]

7 — The common organisations of the markets in the sugar sector were previously distinguished by their price support arrangements and the allocation of quotas. Some 70% of the agricultural products produced in the Community (for example, cereals, sugar, dairy products, meat, certain types of fruit and vegetables, and table wine) are subject to price support arrangements (see Brú Purón, C.M., *Exégesis conjunta de los tratados vigentes y constitucional europeos*, Cizur Menor, 2005, Article 34, p. 777). The quota regime created in 1967 along with the CAP in the sugar sector makes it possible to maintain relatively high prices without producing surpluses. The quota regime was intended originally to be of a temporary nature only and to expire in 1975, but it has been extended on a number of occasions. It was subsequently made more flexible in its structure in order to enable quotas to be increased for the benefit of the more efficient sugar producers (see Olmi, G., *Politique agricole commune*, Brussels, 1991, p. 173; Priebe, R., in Grabitz and Hilf, *Das Recht der Europäischen Union*, Munich, 2008, Volume I, Article 34, paragraph 57).

8 — On the reform of the CAP decided at the Berlin European Council of 26 March 1999, which was introduced upon the adoption of 'Agenda 2000', see my Opinion of 3 February 2009 in Case C-429/07 *Horvath*, still pending, point 45 et seq.

35. The objective of the reform is to secure the long-term prospects of sugar production in the European Union, to promote its competitiveness and market orientation and to strengthen the position of the European Union in the ongoing round of world trade negotiations. The matters at the heart of the reform are a reduction in the guaranteed minimum price for sugar, compensatory payments for farmers and a restructuring fund as an incentive for less competitive sugar producers to discontinue production. The restructuring scheme is financed by way of a specific restructuring amount charged on all quotas for sweeteners.

36. At the heart of this case lies the legal assessment of the methods to be applied for calculating the restructuring amount, the legality of which is challenged by the applicant as the party liable to pay that amount. The reference for a preliminary ruling must be understood as meaning that the first question referred focuses on obtaining an interpretation of Article 11 of Regulation No 320/2006 as the Community law basis for the adoption of the contested decision by the Member State, whereas the second question referred seeks to obtain an assessment of the validity of that provision.

B — *The first question*

37. Having regard to the first question, it must be borne in mind at the outset that the wording of a provision, having reference to the conventional principles of interpretation, is invariably the starting point and at the same time the limit of any interpretation. [9] Systematic, purposive and historical interpretation are among the additional methods of interpretation that the person applying the law must use in accordance with the Court's case-law in order to determine the terms of a provision of Community law.

38. First, it is evident from Article 11(1) of Regulation No 320/2006 that 'undertakings to which a quota has been *allocated*' must pay a temporary restructuring amount per marketing year 'per tonne of quota'. That provision expressly does not refer to the part of the quota for which the producer has actually produced sugar, which the applicant clearly takes as its starting point, and instead

9 — In that regard see Ehlers, D., *Allgemeines Verwaltungsrecht* (eds H.-U. Erichsen et al.), § 2 I 6, p. 59, paragraph 14. In his Opinion in Case C-350/03 *Schulte* [2005] ECR I-9215, point 84 et seq., Advocate General Léger proceeded on the assumption that there was a precedence, in a manner of speaking, in the interpretation of wording, explaining that purposive interpretation is used only where the provision in question is open to several interpretations or where it is difficult to interpret legislation from its wording alone, for instance because of its ambiguousness. Baldus, C. and Vogel, F., 'Gedanken zu einer europäischen Auslegungslehre: grammatikalisches und historisches Element', *Fiat iustitia — Recht als Aufgabe der Vernunft, Festschrift für Peter Krause zum 70. Geburtstag*, Berlin, 2006, p. 247 et seq., do not dispute that the interpretation of wording is the starting point for interpreting any instrument of Community law. However, they point to the difficulty involved, in the light of the linguistic diversity within the Community, in finding a reliable interpretation, which makes recourse to other methods such as purposive and historical interpretation necessary.

refers to the total quota *allocated* to the relevant undertaking. [10] The Commission and the Council rightly point to that fact. That provision thus connects the obligation to pay the temporary restructuring amount exclusively to the allocation of a quota in the marketing year concerned, without making distinctions of any nature or inquiring as to the fate of the quantity of sugar actually produced. Amendments to the quota made in the light of that interpretation are therefore irrelevant for calculating the temporary restructuring amount.

39. The sole derogation, set out in the second subparagraph of that provision, which provides for an exemption from payment of a temporary restructuring amount, exclusively concerns only those quotas 'that have been *renounced* by an undertaking as from a given marketing year in accordance with Article 3(1)'. By that is meant the definitive renunciation of the quota or parts thereof pursuant to Article 3(1) of Regulation No 320/2006, which, having regard to its wording, does not cover withdrawal from the market under Article 19 of Regulation No 318/2006 and cannot be treated as equivalent to it.

40. On comparison of the mechanisms involved in renouncing quotas and those involved in withdrawal from the market, it is clear that they are fundamentally different both in their mode of operation and in their purpose. While the former involves the definitive renunciation of the quota, including the dismantling or closure of the production facilities, the latter implies only the temporary withdrawal of the quantity of sugar concerned from the market, its storage or its disposal outside the quota system. That difference in the mode of operation originates in the different regulatory purpose of the relevant provisions in each case.

41. The renunciation of quotas on a socially acceptable and environmentally sustainable basis by less competitive sugar producers constitutes one of the methods to be applied for restructuring the sugar industry, which is the purpose of Regulation No 320/2006. It is apparent from recitals 1 and 5 in the preamble to that regulation that payment of an adequate restructuring aid is intended to offer an important economic incentive for sugar undertakings with the lowest productivity to abandon sugar quota production and renounce the quotas concerned. It is the intention of the Community legislature that such aid should make it possible, on the one hand, to reduce production to the extent necessary to reach a balanced market situation in the Community and, on the other hand, to achieve a significant reduction of unprofitable production capacity. For that

10 — Comparison of a number of language versions does not produce an alternative conclusion. The connecting factor in the German ('Unternehmen, denen eine Quote *zugeteilt* worden ist'), Danish ('virksomheder, der har fået *tildelt* en kvote'), English ('undertakings to which a quota has been *allocated*'), French ('entreprises qui *détiennent* un quota'), Italian ('imprese a cui è stata *assegnata* una quota'), Portuguese ('empresas às quais tiverem sido *atribuídas* quotas'), Dutch ('ondernemingen waaraan een quotum is *toegekend*'), Swedish ('företag som har *tilldelats* en kvot') and Spanish ('empresas a las que se haya *concedido* una cuota') versions alike is the quota allocated in each case to the undertaking.

reason those amounts are described in recital 4 as 'assigned revenue' which falls outside the scope of the charges traditionally known in the framework of the common market organisation for sugar.

42. The restructuring of the sugar industry serves to achieve long-term policy objectives of the Community which, according to recital 1 in the preamble to Regulation No 320/2006, consist in bringing the Community system of sugar production and trading into line with international requirements [11] and ensuring its competitiveness in the future.

43. By contrast, withdrawal from the market is an instrument to support prices which, according to Article 19(1) of Regulation No 318/2006 and recital 22 in the preamble thereto, is aimed at preserving the structural balance at a price level close to the reference price. A similar conclusion can be drawn in relation to Article 3 of Regulation No 493/2006, the preventive withdrawal scheme of which was adopted, according to recital 6 in the preamble to that regulation, as a transitional measure in order to improve the market balance in the Community without creating new stocks of sugar in the 2006/07 marketing year.

44. The answer to the first question referred must therefore be that Article 11(1) of Regulation No 320/2006 must be interpreted as meaning that even a sugar quota which cannot be utilised as a consequence of a preventive withdrawal in accordance with Article 3 of Commission Regulation No 493/2006 of 27 March 2006 must be included in the assessment of the temporary restructuring amount.

C — *The second question*

45. In preliminary ruling proceedings under point (b) of the first paragraph of Article 234 EC aimed at examining the validity of an instrument of secondary Community

11 — The reform of the common organisation of the markets in the sugar sector is also a reaction on the part of the Community to a decision by the Dispute Settlement Body of the World Trade Organisation of 28 April 2005 (see the Report of the Appellate Body, European Communities — Export Subsidies on Sugar, proceedings WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R), in which several infringements by the Community of the Agreement on Agriculture adopted as part of the Uruguay Round of multilateral trade negotiations ('Agreement on Agriculture') were established.

law, by its question a national court is in principle defining the scope of assessment enjoyed by the Court of Justice in that case. [12]

46. As mentioned at the outset, the second question referred, to repeat the exact wording used, focuses on examining whether Article 11 of Regulation No 320/2006 is compatible with primary law, or, to be more precise, with the Community law principle of the protection of legitimate expectations and the principle of non-discrimination derived from the second subparagraph of Article 34(2) EC. It must be noted, however, that the observations set out in the order for reference, including the objections raised by the applicant in the course of the main proceedings, [13] relate in their entirety to the proportionality requirement and the principle of non-discrimination.

47. On a judicious appraisal of the reference for a preliminary ruling, it must be assumed that the referring court is actually seeking an assessment as to the compatibility of Article 11 of Regulation No 320/2006 with the latter two principles mentioned above. For that reason, I propose rewording the second question accordingly.

1. Alleged infringement of the proportionality requirement

(a) Discretion enjoyed by the Community legislature in the context of the CAP

48. The principle of proportionality, which is one of the general principles of Community law and has been confirmed on a number of occasions, inter alia in matters concerning the CAP, by the case-law of the Court, requires that measures adopted by Community institutions should not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice

12 — To that effect, see also Middecke, A., in *Handbuch des Rechtsschutzes der Europäischen Union*, 2nd edition, Munich, 2003, § 10, paragraph 40, p. 227. Accordingly, the national court may, for example, restrict a reference to specific grounds for validity which are then taken by the Court as the basis for its assessment (see Case C-26/96 *Rotexchemie* [1997] ECR I-2817 and Case C-408/95 *Eurotunnel and Others* [1997] ECR I-6315). Lenaerts, K., Arts, D. and Maselis, I., *Procedural Law of the European Union*, 2nd edition, London, 2006, paragraphs 10 to 12, p. 361, likewise obviously assume that, in preliminary ruling proceedings addressing the validity of an instrument of Community law, the starting point for determining the scope of assessment is the question referred for a preliminary ruling.

13 — The submissions put forward by the plaintiff in the main proceedings constitute an essential point of reference for interpreting a question referred for a preliminary ruling which focuses on assessment of the validity of an instrument of Community law and has either general or non-specific wording (see Joined Cases 103/77 and 145/77 *Royal Scholten-Honig and Tunnel Refineries* [1978] ECR 2037, paragraphs 16 and 17).

between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. [14]

49. However, the Court has at the same time held that, in matters concerning the CAP, the Community legislature has a broad discretionary power which corresponds to the policy responsibilities conferred on it by Articles 34 EC to 37 EC. In implementing the CAP, inter alia in the sugar sector, the legislature is required to evaluate complex economic situations and to take decisions of an economic, political and social nature. [15] Accordingly, the Court has held that judicial review must be limited to verifying that the measure in question is not vitiated by a manifest error or misuse of powers and that the institution concerned has not manifestly exceeded the bounds of its discretion. [16]

50. In the Court's view, as regards judicial review of compliance with the principle of proportionality, it follows from that broad discretion that the legality of a measure adopted in the sphere of the CAP can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. [17] Thus, the criterion to be applied is not whether the measure adopted by the legislature was the only one or the best one possible, but whether it was manifestly inappropriate. [18]

51. However, as Advocate General Sharpston rightly pointed out in the Opinion she delivered on 14 June 2007 in *Zuckerfabrik Jülich*, [19] that case-law cannot be understood as meaning that the Court intended to give the Community legislature *carte blanche*. The Court has by no means excluded judicial review of the institutions' exercise of their wide discretionary powers. If such review is to

14 — Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13; Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 41; Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 81; and Case C-310/04 *Spain* v *Council* [2006] ECR I-7285, paragraph 97.

15 — In that regard, see Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, paragraph 25; Case C-289/97 *Eridania* [2000] ECR I-5409, paragraph 48; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 69; and *Spain* v *Council*, cited in footnote 14, paragraph 96; and the Opinion of Advocate General Kokott in Case C-441/05 *Roquette Frères* [2007] ECR I-1993, point 72.

16 — Case 265/87 *Schräder* [1989] ECR 2237, paragraph 22; *Fedesa and Others*, cited in footnote 14, paragraphs 8 and 14; *Eridania*, cited in footnote 15, paragraph 49; *Jippes and Others*, cited in footnote 14, paragraph 80; Case C-304/01 *Spain* v *Commission* [2004] ECR I-7655, paragraph 23; *Spain* v *Council*, cited in footnote 14, paragraph 96; Case C-375/05 *Geuting* [2007] ECR I-7983, paragraph 44; Joined Cases C-37/06 and C-58/06 *Viamex and Others* [2008] ECR I-69, paragraph 34; and Opinion of Advocate General Kokott in *Roquette Frères*, cited in footnote 15, point 72.

17 — *Fedesa and Others*, cited in footnote 14, paragraph 14; *Crispoltoni and Others*, cited in footnote 14, paragraph 42; *Jippes and Others*, cited in footnote 14, paragraph 83; Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 80; *Spain* v *Council*, cited in footnote 14, paragraph 98; and *Geuting*, cited in footnote 16, paragraph 46.

18 — *Jippes and Others*, cited in footnote 14, paragraph 83; *Spain* v *Council*, cited in footnote 14, paragraph 99); and *Geuting*, cited in footnote 16, paragraph 47. However, as Advocate General Sharpston rightly pointed out in her Opinion delivered on 14 June 2007 in Case C-5/06 *Zuckerfabrik Jülich*, point 65, that case-law cannot, on the other hand, be construed as meaning that the Community legislature has been given *carte blanche* by the Court. The Court has not excluded judicial review of the institutions' exercise of their wide discretionary powers. The Advocate General took the view that it had to be possible for the Court to intervene, for instance, in cases where the producers were subject to a manifestly disproportionate burden.

19 — See the Opinion of Advocate General Sharpston in *Zuckerfabrik Jülich*, cited in footnote 18, point 65.

be of any value, it must be possible for the Court to intervene in specific cases, such as when the producers are disproportionately burdened by overcharging.

52. In what follows, it is necessary to examine whether, in the light of all the evidence submitted to the Court, it is appropriate for producers to be required to pay the restructuring amount under Article 11 of Regulation No 320/2006 in order to achieve the objectives pursued, and whether such a measure must be regarded as a disproportionate burden on producers.

(b) Determining the scope of assessment

53. Without presenting a detailed account of the doubts as to the validity of Article 11 of Regulation No 320/2006, the referring court alludes in its order for reference to the applicant's line of argument on the alleged infringement of the proportionality requirement. The applicant essentially submits that sugar produced above the production threshold cannot be sold as quota sugar in any case. Due to the fact that the restructuring amount is calculated for the total quota, without taking into account the quota withdrawn from the market as a result of the preventive withdrawal, the actual net reference price drops below EUR 505.50 for the producer and has to be achieved through the sale of a smaller quota. Furthermore, the quota withdrawn is considered to be the first quota of the next marketing year 2007/08 and is therefore included again in the assessment of the restructuring amount. As its final argument, the applicant submits that, contrary to the objective of the scheme, established in recital 4, namely to present advantages to those undertakings required to pay the restructuring amounts, it has the contrary effect that the undertakings with reduced quotas never benefit from payment of the restructuring amount.

54. It should be noted, first, that the applicant and the referring court do not challenge the legitimacy of the objectives pursued in the 2006 reform of the COM for sugar. Nor do they question the appropriateness of the Community legislature's mechanism to present financial incentives, with the aid of which unprofitable sugar producers are to be encouraged to renounce quotas definitively. Equally, little scrutiny is applied to the fact that the restructuring scheme is to be financed by the undertakings remaining in the market, thus by those ultimately benefiting from the restructuring.

55. It does, however, appear appropriate and expedient, in my opinion, that the restructuring amount should be paid exclusively by those undertakings which are ready and able to continue to take part in sugar production on a competitive basis, especially as they ultimately benefit from the withdrawal of less productive competitors and the associated market adjustment. It is likewise appropriate and expedient for less well performing undertakings, which are ready definitively to withdraw from sugar production by renouncing or otherwise dispensing with their quota, to be exempted from that obligation to contribute and instead to obtain appropriate restructuring aid. In that respect, the allocation of a quota under Article 11 of Regulation No 320/2006 is a suitable connecting factor for justifying the obligation to contribute.

56. The main question arising in this case, however, is whether, in view of the restructuring objective, it can be considered to be disproportionate for such quantities of sugar that cannot be sold under the quota scheme in the marketing year concerned as a consequence of other mechanisms, in particular withdrawal, not to be excluded from the restructuring amount.

(c) Appraisal of the arguments put forward

(i) Need for a basis for calculation which is capable of being organised in advance

57. The Council and the Commission refer primarily to the need for a basis for calculation which is capable of being organised in advance in order to guarantee the self-financing of the restructuring system. The objective of the temporary restructuring scheme, which is to grant all applications for aid, must not be undermined by an element of uncertainty, such as the lack of sufficient financial resources in the restructuring fund. If only the quantities of sugar actually produced under the quota or even the quantities of sugar subject to withdrawal, rather than all quotas allocated, were to be included in that basis for calculation, that objective could not be met and individual applications would, where appropriate, have to be rejected.

58. The Commission adds that the fact that the restructuring amount relates to quotas allocated on an abstract basis and not to the quotas actually produced follows from the consideration that even restructuring aid granted to undertakings for the definitive

renunciation of their quotas is paid irrespective of the fact that those undertakings cannot by any means have utilised parts of those quotas in one marketing year as a result of a withdrawal.

59. In my view, the budgetary considerations put forward and the reference to the need for the restructuring system to be self-financing present sufficiently conclusive arguments in favour of calculating the restructuring amount on the basis of the quota allocated on an abstract basis. That approach ensures, on the one hand, the stability of revenue for the restructuring fund but, on the other hand, also secures the financial balance between revenue and expenditure, which is not only a central principle of Community budgetary law but is also indispensable [20] if it is borne in mind that the restructuring aid to which each producer is in principle entitled is calculated likewise on the basis of the quotas allocated on an abstract basis. If a unilateral rise in costs at the same time as inadequate financing of the restructuring fund is to be prevented, then it is logical to lay down uniform criteria for calculating the restructuring amount and the restructuring aid.

60. Moreover, in response to a written question from the Court the Commission furnished evidence, in the form of its letter of 11 December 2008, to which is attached a breakdown of the estimated and the actual revenue and expenditure of the restructuring fund, confirming the self-financing of the restructuring system, the expected or actual revenue not unduly exceeding the expenditure. [21]

(ii) Temporary nature of the withdrawal from the market

61. The Council and the Commission also point to the differences between withdrawal from the market as a short-term scheme with a view to supporting prices and the renunciation of quotas as a longer-term measure with a view to structural adjustment of the market.

20 — In this connection, reference must be made first to the third paragraph of Article 268 EC, which lays down the principle that the Community budget must be in balance. Under that provision the revenue and expenditure accounted for in the budget must be in balance. It is therefore essential to ensure that the earmarked expenditure can be effected using the available revenue (to this effect, see also Schoo, J., *EU-Kommentar* (ed. J. Schwarze), Baden-Baden, 2000, Article 268, paragraph 19, p. 2198).
See also Ackrill, R., *The Common Agricultural Policy*, Sheffield, 2000, p. 78, who, on the contrary, takes the view that the requirement that the Community budget must be in balance constitutes a rule. According to the author, a budget in deficit is not permissible. That rule was to be observed also in the context of the CAP. The European Investment Bank was permitted to grant loans for investment projects but not for the purpose of financing Community charges. Furthermore, it was the objective of the authors of the founding treaties to offer the Community and in particular the Commission no easy solutions as regards determining expenditure and revenue.
Although the restructuring amount is assigned revenue for the purposes of recital 4 in the preamble to Regulation No 320/2006, that fact does not release the Community institutions from compliance with that principle. In the Commission proposal for a Council regulation on the common organisation of the markets in the sugar sector of 22 June 2005 (COM(2005) 263 final, p. 9), express reference was made to the objective that the restructuring system should have the capacity to be self-financing.

21 — From that breakdown it can be concluded that the revenue in the 2006/07 marketing year amounted to EUR 2 145 million. The expenditure for its part amounted to EUR 1 358 million. Consequently, the balance for the 2006/07 marketing year came to EUR 787 million, which was used to finance the restructuring in the subsequent year.

As they accurately state, withdrawal from the market does not by any means entail the definitive loss of the quota. [22] It is indeed true that an undertaking cannot sell the quantities of sugar subject to withdrawal in the marketing year concerned under the quota scheme. However, it retains that part of the quota and is therefore at liberty either to sell that part of the quota on the international market [23] or to carry it over to the subsequent marketing year. In the latter case the quota may be fully utilised once more under the quota scheme because the actual quantity of sugar withdrawn in the first marketing year is considered to be the first quantity produced in the subsequent marketing year. That follows expressly from Article 19(3) of Regulation No 318/2006.

62. Contrary to the opinion of the applicant reproduced in the order for reference, [24] this does not give rise to any additional burden on sugar producers as a consequence of the obligation to contribute under Article 11 of Regulation No 320/2006 since the withdrawal mechanism under Article 3 of Regulation No 493/2006 does not, according to the Commission's explanations, result in the same quota being subject to the charge in two successive marketing years. Rather, each marketing year is considered in isolation, thus in each marketing year the full quota allocated is subject to the temporary restructuring amount. In that context it is irrelevant whether the actual quantity of sugar produced is produced in the first or in the subsequent marketing year.

(iii) Foreseeable economic consequences for the producers concerned

63. The Council and the Commission explain further that any negative economic consequences of including the sugar quantities affected by withdrawal in the basis for calculating the temporary restructuring amount are limited but are in any event offset by the advantages of a withdrawal from the market.

22 — See, to this effect, the observations in points 40 to 43 of this Opinion.

23 — Although quota schemes do not limit production to certain quantities in such a way that they prohibit continuing production, they do so due to the fact that overproduction entails 'penalties' for individual producers (for example, marketing prohibition in the Community, payment of charges) and, therefore, any expansion of production would be completely absurd in economic terms. However, it is important to mention that each of the prevailing quota systems (in particular for sugar, fisheries, milk and processed tomatoes) follows special rules as per the requirements of the products concerned. There are also sugar quotas in the organisation of the market in sugar. However, no charge is payable here on exceeding the quota. What is more, the producer is not entitled to export refunds for the additional quantities produced (see Van Rijn, T., *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft — Kommentar* (eds H. von der Groeben and J. Schwarze), Volume 1, 6th edition, Article 34, paragraph 35, p. 1207).

24 — See page 9 of the order for reference.

64. The applicant is indeed correct in maintaining that it is possible that the sugar produced above the production threshold as a result of withdrawal which can be sold as quota sugar only in the following marketing year will not always be capable of achieving the reference price. However, the Council points out in this regard that since intervention pricing was abolished by the 2006 reform of the COM in sugar, Regulation No 318/2006 no longer guarantees sale at the reference price. In addition, Article 18(2) of that regulation states that the intervention price for quota sugar amounts to 80% and not, for instance, to 100% of the reference price.

65. A producer will not therefore be able always to rely on securing the reference price. Ultimately, the sale of sugar depends on many economic factors. First, the actual market price is influenced by supply and demand, and thus a producer will, circumstances permitting, even be able to achieve a price higher than the reference price for the quantities of sugar subject to withdrawal.

66. I must also concur with the submissions, presented by the Council and the Commission, that a withdrawal from the market ultimately has an advantageous effect on producers. As already stated, [25] the objective of the withdrawal mechanism is to preserve the price of sugar at a level which is close to the reference price, that is to say, at a level above the intervention price. Any losses arising directly from the withdrawal are in any event offset indirectly by a general rise in the price of quota sugar which can be caused by that very measure.

67. The applicant's allegation that withdrawal primarily concerns highly competitive producers must be rejected as untenable. The truth of the matter is, in fact, that withdrawal concerns all undertakings to which quotas have been allocated. However, that connecting factor per se is neutral as it makes no distinction based on the productivity and competitiveness of the undertakings concerned. Thus, all undertakings are subject to the same conditions of competition, regardless of their respective productivity. Consequently, the allegations of discriminatory disadvantage and distortion of competition are unfounded.

68. That notwithstanding, undertakings such as the applicant are not exempt from a general

25 — See point 43 of this Opinion.

obligation to act with due diligence [26] in their own interests, under which they are required in particular to avert as far as possible negative economic consequences which may arise as a result of a withdrawal. This involves adopting all necessary measures, including an appropriate adjustment of production, as soon as a withdrawal becomes evident on the basis of Commission notices. Accordingly, the Commission pointed out on 3 February 2006 by way of a notice in the Official Journal [27] that it could, in the light of the situation on the Community sugar market as scheduled for the 2006/07 marketing year, avail itself of the possibility conferred on it by the Council of withdrawing from the market as a transitional measure. Regulation No 493/2006, by which the Commission ordered withdrawal for that marketing year, was published in March 2006. Consequently, the applicant would have had the possibility at that time of reducing its production for the marketing year in question [28] to the amount appropriate in order to prevent the carrying-over of the sugar quantities withdrawn or their disposal as non-quota sugar.

(d) Conclusion

69. In the light of all of the foregoing, it is clear that the Community legislature took account of all essential aspects, including the advantages and disadvantages for undertakings, when it established the procedure to be adopted for calculating the restructuring amount.

70. Using the quota allocated on an abstract basis pursuant to Article 11 of Regulation No 320/2006 as the basis for calculating the restructuring amount is, in view of the

26 — In examining the validity of a regulation the Court has already referred to certain obligations of persons concerned to act with due diligence, presented in the form of obligations to prevent a loss (see Case 57/72 *Westzucker* [1973] ECR 321, paragraph 20).

27 — The communication from the Commission to sugar beet and sugar producers, cited in footnote 5, states: 'The Commission draws the attention of sugar beet and sugar producers to the situation on the Community sugar market as scheduled for the 2006/07 marketing year. As a result of the stocks accumulated during the 2004/05 marketing year and the rules and limits on exports laid down by the World Trade Organisation, the 2006/07 marketing year may commence with considerable quantities of sugar available in stock, but with fewer possibilities for disposal than in the past. Under these circumstances, the reform of the common market organisation for sugar and the resultant restructuring of sugar production will not be sufficiently advanced to ensure market balance in the 2006/07 marketing year. *Therefore, the possibility cannot be ruled out that the Commission may have to take special management measures for sugar beet sown for harvest in 2006/07.* Such measures, to be laid down as transitional measures under the powers which the Council could confer on the Commission, may relate to the quantity of production eligible under the quotas for the 2006/07 marketing year and provisions on the disposal of C sugar produced during the 2005/06 marketing year.'

28 — Under Article 1(2) of Regulation No 318/2006, the marketing year for the products listed in paragraph 1 is to begin on 1 October and end on 30 September of the following year. However, the marketing year 2006/07 is to begin, pursuant to the second subparagraph of Article 1(2), on 1 July 2006 and end on 30 September 2007.

objective of restructuring the sugar industry and in the light of the broad discretion granted to the Community legislature in the sphere of the CAP, not manifestly inappropriate, nor does it constitute a disproportionate burden on producers.

2. Alleged infringement of the principle of non-discrimination

(a) Determining the scope of review

71. According to settled case-law, under the prohibition of discrimination between producers and consumers within the Community laid down in the second subparagraph of Article 34(2) EC, comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified. [29] Measures in the context of the common organisation of the markets — to be more precise, their intervention mechanisms — may therefore make a distinction by region and other conditions of production or consumption, but not by the territory of the Member States, only on the basis of objective criteria which guarantee a balanced distribution of advantages and disadvantages among the parties concerned. [30]

72. Moreover, with regard to judicial review of compliance with the conditions for implementing the prohibition of discrimination

29 — The Court has consistently held that the prohibition of discrimination laid down by Community law in Article 34(2) EC is a specific enunciation of the general principle of equal treatment, which is one of the fundamental principles of Community law and provides that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. See, on both the general and the specific prohibition of discrimination under Article 34(2) EC, Case C-273/04 *Poland* v *Council* [2007] ECR I-8925, paragraph 86; Case C-182/03 *Belgium* v *Commission* [2006] ECR I-5479, paragraph 170; Joined Cases C-87/03 and C-100/03 *Spain* v *Council* [2006] ECR I-2915, paragraph 48; Case C-14/01 *Niemann* [2003] ECR I-2279, paragraph 49; Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 39; Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 62; Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraph 35; Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115, paragraph 46; Case C-98/91 *Herbrink* [1994] ECR I-223, paragraph 27; Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 18; Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraph 13; Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 25; Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraph 9; Joined Cases 66/79, 127/79 and 128/79 *Salumi and Others* [1980] ECR 1237, paragraph 14; Joined Cases 117/76 and 16/77 *Ruckdeschel and Ströh* [1977] ECR 1753, paragraph 7; Joined Cases 124/76 and 20/77 *Moulins et Huileries de Pont-à-Mousson and Providence agricole de la Champagne* [1977] ECR 1795, paragraph 16; Case 125/77 *Koninklijke Scholten-Honig and De Bijenkorf* [1978] ECR 1991, paragraph 26; and *Royal Scholten-Honig and Tunnel Refineries*, cited in footnote 13, paragraph 26; and my Opinion in *Horvath*, cited in footnote 8, point 99 et seq.

30 — Case 203/86 *Spain* v *Council*, cited in footnote 29, paragraph 25; Case C-311/90 *Hierl* [1992] ECR I-2061, paragraph 18; and Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 67.

contained in the second subparagraph of Article 34(2) EC, in matters concerning the CAP the Community legislature has, as already mentioned, a broad discretion which corresponds to the political responsibilities imposed upon it by Articles 34 EC to 37 EC. [31]

73. The doubts expressed by the referring court as to the validity of Article 11 of Regulation No 320/2006 are based on the arguments presented by the applicant within the main proceedings and reproduced in the order for reference. The applicant thus considers itself to be disadvantaged as a result of the preventive withdrawal inasmuch as the withdrawal is not effected on a uniform basis for all undertakings but is to be determined by applying coefficients which differ from one Member State to another. In the applicant's view, the fact that undertakings in the Member States more severely affected by the withdrawal can sell proportionately less sugar at the reference price amounts to inequality of treatment. That inequality of treatment is, it argues, only reinforced by calculating the restructuring amount on the basis of the quota allocated because the undertakings concerned then have to sell their residual sugar production at an even lower net reference price.

74. The Council and the Commission, it is true, correctly point out that the applicant's observations are essentially concerned with the instrument of preventive withdrawal under Article 3 of Regulation No 493/2006, whereas the second question referred actually deals with the validity of Article 11 of Regulation No 320/2006. In the Commission's view, the referring court's question on validity must therefore be regarded as devoid of purpose, in particular as no details regarding the withdrawal mechanism can be drawn from that provision. I none the less take the view that the applicant's observations definitely have a degree of relevance for examining the second question referred. In the light of the facts of the case in the main proceedings, the consequences of calculating the restructuring amount on the basis of the allocated quota cannot be assessed with any accuracy if, at the same time, there is a failure to have regard to the effect of the withdrawal on the sugar producers. Furthermore, all parties to the proceedings have made observations on this topic, and thus the scope of judicial review in the preliminary ruling procedure has been broadened accordingly.

75. Consequently, in reviewing that complaint the Court of Justice must take the applicant's observations into account in so far as they concern the validity of Article 11 of Regulation No 320/2006.

31 — *Wuidart and Others*, cited in footnote 29, paragraph 14.

(b) Assessment of an infringement of the principle of non-discrimination

76. First, it must be stated clearly that the payment of the temporary restructuring amount alone, as prescribed by Article 11(1) of Regulation No 320/2006, cannot be considered to amount to an infringement of the principle of non-discrimination since all undertakings remaining in the market for sugar have to pay that amount on the basis of assessment of the quotas allocated to them. Moreover, the applicant does not object either that undertakings which renounce their quota definitively are not called upon also to contribute to the financing of the restructuring fund.

(i) Method of operation of the system of coefficients

77. Before I address the allegation that the withdrawal has been implemented in a non-uniform and thus allegedly discriminatory manner, it may be useful to explain in greater detail the method of operation and the spirit and purpose of the system of coefficients.

78. The Council authorised the Commission, by Article 44 of Regulation No 318/2006, to adopt measures to facilitate the transition from the market situation in the 2005/06 marketing year to that in the 2006/07 marketing year, in particular by reducing the quantity that may be produced under quota. Those measures include the preventive withdrawal laid down in Article 3 of Regulation No 493/2006.

79. The threshold established under that provision is calculated, pursuant to paragraph 2 thereof, by multiplying the quota allocated to the undertaking under Article 7(2) of Regulation No 318/2006 by the sum of two coefficients set out in Article 3(2)(a) and (b) of Regulation No 493/2006. As explained by the Commission, the first coefficient, fixed in Annex I to Regulation No 493/2006, represents a combination of the application of Article 10(6) of Regulation No 1260/2001 [32] and the method laid down in Article 19 of Regulation No 318/2006 to be applied to withdrawal. The second coefficient takes account of the efforts made by the Member States in the 2006/07 marketing year, under

32 — Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector (OJ 2001 L 178, p. 1).

the restructuring scheme established by Regulation No 320/2006, definitively to renounce quotas and was fixed by the Commission by way of Regulation No 1541/2006. [33]

(ii) Assessment

— Relevant reference framework

80. The applicant's observations clearly relate to the application of the coefficient provided for in Article 3(2)(b) of Regulation No 493/2006.

81. According to the concordant observations of the Commission and the applicant, [34] by applying that coefficient in respect of the 2006/07 transitional year, the threshold in the 2006/07 marketing year is consequently higher, the greater the number of quotas that have been definitively renounced pursuant to the second subparagraph of Article 3(1) of Regulation No 320/2006. In other words, the effect of applying that coefficient in respect of the 2006/07 transitional year is that undertakings in a Member State in which fewer quotas have been definitively renounced in the 2006/07 marketing year can sell less sugar under the quota scheme than if they were established in a Member State in which a greater number of quotas have been renounced definitively.

82. The establishment of the withdrawal threshold is preceded by a complex calculation which takes account of the abovementioned coefficients as well as the quota ultimately allocated to the relevant undertaking. Individual quotas are allocated again under Article 7(2) of Regulation No 318/2006 by the respective Member States on the basis of the national quotas fixed by the Council.

83. Since both Community law and national law considerations play a part in the assessment of the burden imposed on individual undertakings as a result of withdrawal, the question arises as to whether the reference framework for assessing whether the undertakings concerned have been the subject of unequal treatment is to be established at Community level or at the level of the individual Member States.

33 — Commission Regulation (EC) No 1541/2006 of 13 October 2006 fixing the coefficient for establishing the withdrawal threshold referred to in Article 3 of Regulation (EC) No 493/2006 (OJ 2006 L 283, p. 22).

34 — See page 6 of the order for reference.

84. The Court has consistently held that the Member States must comply with the principle stated in Article 34(2) EC in implementing Community rules and in particular where those rules leave them to choose between various methods of implementation or options. [35] The principle of non-discrimination is therefore regarded as an objective rule of law not only in respect of the Community legislature, to which it is primarily addressed, but also in respect of the Member States, where they take action, for example, on the basis or in execution of an authority conferred on them by a Community regulation. [36]

85. As far as the present case is concerned, I take the view that the reference framework for assessing whether any inequality of treatment exists must be established at Community level, not at Member State level. The determining factor, in my opinion, is the decision-making body to which the inequality of treatment is ultimately to be attributed. I must concur with the Commission's view that the authority to allocate quotas, contained in Article 7(2) of Regulation No 318/2006, in fact confers on the individual Member States a degree of discretion to set the course of industrial policy. However, viewed from a legal perspective, an action attributable to the Community legislature ultimately exists, especially since the Council and the Commission laid the foundation for a uniform reduction in overproduction in all Member States by fixing the country-specific coefficients and quotas. The scope enjoyed by the Member States in making decisions, for instance in reallocating and reducing quotas, to which the Commission refers, cannot obscure the fact that it was ultimately the Community legislature that adopted the relevant decisions on the arrangement of the sugar market. It created one market organisation for sugar applying to the entire Community, within which it can avail itself of diverse mechanisms to adjust production, including preventive withdrawal under Article 3(1) of Regulation No 493/2006, the mechanism at issue in the present proceedings.

86. Consequently, the reference framework for assessing whether inequality of treatment arises must be established at Community level. Therefore, it is in principle possible in law, in circumstances such as those here obtaining, to compare the situation of the applicant with that of an undertaking established in a different Member State.

35 — *Klensch and Others*, cited in footnote 29, paragraph 10; Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19; Joined Cases 196/88 to 198/88 *Cornée and Others* [1989] ECR 2309, paragraph 20 et seq.; and Case C-351/92 *Graff* [1994] ECR I-3361, paragraphs 17 and 18.

36 — In this regard see Van Rijn, T., cited in footnote 23, Article 34 EC, paragraph 59.

— Inequality of treatment

87. According to the applicant, the system of coefficients results in the unequal treatment of producers. In this connection it relies on a hypothetical situation which it has devised with the intention of illustrating the effect produced by that system as described in point 81 of this Opinion. [37]

88. On the basis of that hypothetical situation, the applicant makes a comparison of the effects of an unequal quota reduction in two Member States of the same size with the same quotas, which in each case are apportioned in equal parts to two undertakings established in those countries. If in one of those Member States one of the two undertakings producing sugar wholly or partially closes down production and renounces its quota pursuant to Article 3 of Regulation No 320/2006, then the other undertaking in that Member State which maintains its full extent of sugar production is given an indirect advantage by the other undertaking's conduct. In comparison with the equivalent undertaking in the other Member State, where neither of the two undertakings renounces or restricts production, its quota is reduced less severely as a result of the second undertaking renouncing the quota, conduct which it could not influence. Undertakings in the Member States more severely affected by the reduction could sell proportionately less sugar at the reference price of EUR 631.9 per tonne in the 2006/07 marketing year than undertakings in other Member States. That should, according to the applicant, in itself be regarded as discrimination within the meaning of Article 34(2) EC.

89. In my view, it is sufficient to recall that none of the parties seriously contests that the application of the system of coefficients results in the effect described above. Therefore, the possibility cannot be ruled out that two undertakings established in two different Member States may be affected differently by a withdrawal, depending on the size of the market share of the undertaking established in the relevant Member State which definitively renounces production. If it is assumed, as the applicant clearly has done, that the undertakings concerned are the same, at least in formal terms, [38] then in such circumstances a difference in treatment will indeed arise.

37 — See page 7 of the order for reference.

38 — However, a formal viewpoint provides no insight into whether the undertakings concerned are actually the same in substance. That, however, will rarely or almost never be the situation in view of the special features of the individual case (for example, production, demand, economic situation and size of the business). As Schwarze, J., *European Administrative Law*, 1st edition, Luxembourg, 2006, p. 548, rightly states, equality can never be absolute; it can be only partial and only in relation to certain features and circumstances. A judgment confirming or precluding the equality of two comparable objects can claim to be valid only in relative terms. According to the author, maintaining that two objects are absolutely identical is completely illogical. As regards this case, the applicant has presented no arguments or criteria in support of its opinion that it is in the same situation as other sugar producers concerned.

— Justification

90. It is uncertain whether such potential inequality of treatment of undertakings from one Member State to another can be objectively justified.

91. It must be stated at the outset that, on closer inspection of its method of operation and purpose, the withdrawal mechanism is a mechanism which permits different treatment on a case-by-case basis. Contrary to the applicant's intimations, when the level of the withdrawal threshold is being established a distinction is made on the basis of the conditions of production prevailing in the relevant Member States, not on the basis of their territory. After all, a distinctive feature of the withdrawal mechanism devised by the Community legislature is that it takes specific account of the special features of sugar production in the individual Member State. This is made possible by the method of operation — already described — of the system of coefficients as well as by the allocation of individual quotas which is in essence left to the discretion of the Member States. Therefore, the applied criteria for a difference in treatment are permissible for the purposes of the case-law. [39]

92. As regards assessing whether there is a legitimate reason for any difference in treatment, reference must be had to the case-law of the Court, [40] under which, when intervening in the market, the Commission enjoys a significant freedom of evaluation, which excludes any automatism and is to be exercised in the light of the objectives of the economic policy laid down by the applicable regulation governing the COM in the sugar sector. The Court has inferred from those considerations that, in reviewing the legality of the exercise of such freedom, the courts may not replace the findings reached by the competent authorities with their own. They must confine themselves to examining whether those findings are vitiated by a manifest error or by a misuse of power. The same conditions must also apply by analogy in connection with the judicial review of a difference in treatment attributable to the Commission. [41]

93. For the purpose of examining the issue of justification, it appears relevant to me first of all to look at the Commission's statement, [42]

39 — See No 71 of the order for reference [*sic*].

40 — *Westzucker*, cited in footnote 26, paragraph 14.

41 — See Joined Cases C-296/93 and C-307/93 *France and Ireland* v *Commission* [1996] ECR I-795, paragraph 31, and Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 50. Thiele, G., in *EUV/EGV Kommentar* (eds C. Calliess and M. Ruffert), Article 34, paragraph 57, p. 684, refers to the discretion of the Community legislature in matters concerning the CAP and proceeds from the principle that a policy decision would be challenged for that reason only if it appears to be manifestly erroneous in the light of the information available to the Community legislature when adopting the decision. Iliopouliou, A.,'Le principe d'égalité et de non-discrimination', *Droit Administratif Européen* (eds J.-B. Auby and J. Dutheil de la Rochere), Brussels, 2007, p. 446, explains that the Court of Justice as a rule exercises a degree of reserve and points to the broad discretion enjoyed by the Community institutions when assessing complex economic situations.

42 — See paragraph 53 of the Commission's written pleadings.

according to which the Community legislature sought to take account of the efforts, differing from one Member State to another, to restructure the sugar market as well as other particular situations in certain Member States.

94. I also consider the Council's statement [43] to be relevant; in it the Council maintains that the Commission created coefficients as part of the implementing provisions in order to reduce overproduction in a uniform manner in each Member State and at the same time to achieve a balance in production across the entire Community. According to the Council, instruments for regulating the market, such as withdrawal, must be applied differently depending on the circumstances in order to achieve structural balance in the Community. If the undertakings established in a Member State voluntarily renounce their quotas, then that Member State has already reduced production to a certain level. By contrast, in the Member States in which the production quotas have been fully utilised, the withdrawal mechanism is needed — according to the Council's submissions — in order to reduce proportionately the production quota allocated to the Member State.

95. The objective of making a proportionate reduction in the allocated production quota, taking into account the sugar production in each Member State for the purpose of stabilising prices on a uniform basis across the Community, can in my view by all means justify adopting a discriminatory approach in implementing the withdrawal because, on the one hand, it is consistent with the principle of unity in the European internal market, which calls for common tariffs for regulated products, [44] and because, on the other hand, withdrawal ultimately produces an advantageous effect for all sugar producers in the Community, including the applicant.

96. Against this, in exercising its decision-making powers in regulating the withdrawal the Community legislature cannot be criticised for adopting a discriminatory approach which takes account of the situation in each Member State and, above all, the individual

43 — See paragraph 45 of the Council's written pleadings.

44 — See Halla-Heißen, I. and Nonhoff, F., *Marktordnungsrecht — Marktordnungswaren im grenzüberschreitenden Warenverkehr*, Cologne, 1997, p. 34. In this publication, it is claimed that the regulations adopted on the basis of the objectives of the CAP set forth three main fundamental principles: market unity, Community preference and financial solidarity. Market unity primarily comprises freedom of movement for goods, including agricultural products, between the Member States. Customs duties and barriers to trade, and subsidies granted to individual Member States for their agriculture, which can lead to a distortion of competition, are supposed to be ruled out. In fact, it should make no difference whether movement of goods takes place within a Member State or in the internal market. The prerequisite for this is, above all, common tariffs and common rules on competition.

quota allocation per undertaking pursuant to Article 7(2) of Regulation No 318/2006 and the proportion of the quotas definitively renounced under Article 3(1) of Regulation No 320/2006.

97. A discriminating approach is called for, on the one hand, on administrative grounds since the Member States are better placed, because of their precise knowledge of the relevant structures and conditions for production, to assess the eligibility of sugar producers to receive aid, subject to certain objective criteria, such as regional specialisation [45] and competitiveness. In controlling sugar production by establishing priorities, the Member States also contribute ultimately to the achievement of the Community's restructuring objective.

98. On the other hand, I must agree with the Council that it is necessary to establish a variable low withdrawal threshold depending on how high the proportion of the renounced quotas is. In view of the need for a proportional reduction in sugar production throughout the Community, it appears justified to set a higher withdrawal threshold in those Member States in which the production has already been reduced to a certain level. Conversely, it is necessary to introduce a lower withdrawal threshold in a Member State in which the facility for renouncing quotas, which is eligible for financial support, has not been utilised.

99. Having assessed all the facts and arguments submitted to the Court, I conclude that there is no reason to suggest that the application of the system of coefficients at issue here in establishing the withdrawal threshold is vitiated by a manifest error or a misuse of power. Nor can it be concluded from that measure that the Community legislature exceeded its discretion.

100. It follows from all of those considerations that an infringement of the principle of non-discrimination derived from the second subparagraph of Article 34(2) EC cannot be considered to arise.

45 — In Case 250/84 *Eridania and Others* [1986] ECR 117, paragraph 20, the Court held that dividing the fixed sugar quotas between the individual undertakings on the basis of their actual production is justified, since such a distribution of the burden is consistent with the principle of regional specialisation, which is one of the foundations of the common market and which requires production to occur at the place that is economically the most suitable. It is also consistent with the principle of solidarity between producers, since production is a legitimate criterion for assessing the economic strength of producers and the benefits which they derive from the system.

VII — Conclusion

101. In the light of the foregoing considerations, I propose that the Court should give the following answers to the questions referred to it by the Verwaltungsgerichtshof:

(1) Article 11 of Regulation (EC) No 320/2006 must be interpreted as meaning that even a sugar quota which cannot be utilised as a consequence of a preventive withdrawal in accordance with Article 3 of Commission Regulation (EC) No 493/2006 of 27 March 2006 must be included in the assessment of the temporary restructuring amount.

(2) Article 11 of Regulation (EC) No 320/2006 is compatible with primary law, in particular with the principle of non-discrimination derived from the second subparagraph of Article 34(2) EC and the principle of proportionality.