JUDGMENT OF THE COURT (Fourth Chamber)

21 July 2011 *

In Case C-150/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunal de première instance de Bruxelles (Belgium), made by decision of 5 March 2010, received at the Court on 29 March 2010, in the proceedings

Bureau d'intervention et de restitution belge

v

Beneo-Orafti SA,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, C. Toader, A. Prechal (Rapporteur) and E. Jarašiūnas, Judges,

* Language of the case: French.

Advocate General: Y. Bot,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 19 January 2011,

after considering the observations submitted on behalf of:

— Beneo-Orafti SA, by D. De Keuster, advocaat, and C. Pitschas, Rechtsanwalt,

— the Belgian Government, by J.-C. Halleux, acting as Agent, and E. Grégoire and J. Mariani, avocats,

— the European Commission, by A. Bouquet and P. Rossi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 March 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2(6) and 3 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 (OJ 2006 L 58, p. 42), Article 9 of 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), Article 4 of 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), Articles 26 and 27 of 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), the principle *ne bis in idem* and the principles of proportionality and non-discrimination.

2 This reference has been made in two sets of proceedings between the Bureau d'intervention et de restitution belge ('BIRB') and Beneo-Orafti SA ('Beneo-Orafti') concerning, first, the repayment of a restructuring aid and, second, the payment of a levy on sugar production in excess of the quota.

Legal context

The common organisation of the markets in the sugar sector

3 Article 1 of 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), entitled 'Scope', provides in paragraph 2:

'The marketing year for the products [governed by the common organisation of the markets in the sugar sector] shall begin on 1 October and end on 30 September of the following year.

However, the marketing year 2006/2007 shall begin on 1 July 2006 and end on 30 September 2007.'

4 Article 7 of that regulation, entitled 'Quota allocation', provides:

'1. The quotas for the production of sugar, isoglucose and inulin syrup at national or regional level are fixed in Annex III.

2. The Member States shall allocate a quota to each undertaking producing sugar, isoglucose or inulin syrup established in its territory and approved under Article 17.

…'

5 Chapter 3 of that regulation, entitled 'Out-of-quota production', contains Articles 12 to 15 of the regulation.

6 Article 12 of that regulation, entitled 'Scope', provides:

'The sugar, isoglucose or inulin syrup produced during a marketing year in excess of the quota referred to in Article 7 may be:

(a) used for the processing of certain products as referred to in Article 13;

(b) carried forward to the quota production of the next marketing year, in accordance with Article 14;

(c) used for the specific supply regime for the outermost regions …;

or

(d) exported within the quantitative limit fixed in accordance with the procedure referred to in Article 39(2) respecting the commitments resulting from agreements concluded under Article 300 of the Treaty.

Other quantities shall be subject to the surplus amount referred to in Article 15.'

7 Article 15 of that regulation, entitled 'Surplus amount', provides:

'1. A surplus amount shall be levied on quantities of:

(a) surplus sugar, surplus isoglucose and surplus inulin syrup produced during any marketing year, except quantities carried forward to the quota production of the following marketing year … or quantities referred to in Article 12(c) and (d);

…

2. The surplus amount shall be fixed … at a sufficiently high level in order to avoid the accumulation of quantities referred to in paragraph 1.

…'

8 Recital 10 in the preamble to Regulation No 493/2006 states:

'Under Article 1(2) of Regulation … No 318/2006, the period covered by the marketing year begins on 1 October and ends on 30 September of the following year. However, the 2005/2006 marketing year, as laid down by [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)], ends on 30 June 2006. The 2006/2007 marketing year therefore begins on 1 July 2006 and ends on 30 September 2007, and thus extends over 15 months. For the 2006/2007 marketing year, therefore, provision should be made for an increase in the quotas and the traditional refining requirements which previously corresponded to a 12-month period and which will, after this marketing year, again apply to a 12-month period, 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 should cover sugar production from the start of the 2006/2007 marketing year, from sugar beet sown before 1 January 2006.'

9 Article 9 of Regulation No 493/2006, entitled 'Transitional quotas', provides in paragraphs 3 and 4:

'3. For the 2006/2007 marketing year, a transitional inulin syrup quota of 80 180 tonnes of dry matter, expressed as white sugar/isoglucose equivalent, shall be allocated to the Member States in accordance with the breakdown in part C of Annex II.

4. The transitional quotas laid down in paragraphs 1, 2 and 3:

(a) shall not be subject to the payment of the temporary restructuring amount provided for in Article 11(2) of Regulation … No 320/2006;

(b) may not benefit from the payment of the aid provided for in Regulation … No 320/2006.'

10 Article 3 of Regulation No 967/2006, entitled 'Amount', provides in paragraph 1:

'The levy provided for in Article 15 of Regulation … No 318/2006 shall be EUR 500 per tonne.'

11 Article 4 of Regulation No 967/2006, entitled 'Surplus subject to levy', states in paragraph 1:

'The levy shall be charged to manufacturers in respect of the surplus produced in excess of their quota for a given marketing year.

However, the levy shall not be charged on the quantities referred to in paragraph 1 which have been:

(a) delivered to a processor before 30 November of the following marketing year to be used in the manufacture of the products referred to in the Annex;

(b) carried forward in accordance with Article 14 of Regulation … No 318/2006 and, in the case of sugar, stored by the manufacturer until the last day of the marketing year in question;

(c) delivered before 31 December of the following marketing year in the context of the specific supply arrangements for the outermost regions …;

(d) exported before 31 December of the following marketing year under an export licence;

(e) destroyed or damaged without possibility of recovery, in circumstances recognised by the competent authority of the Member State concerned.'

The temporary scheme for the restructuring of the sugar industry in the European Union

12 Recitals 1 and 5 in the preamble to Regulation No 320/2006 state:

'(1) Due to developments within the Community and at international level, the sugar industry in the Community is faced with structural problems which could seriously put at stake the competitiveness and even the viability of the industry as a whole. These problems cannot be addressed effectively by using the market management instruments as provided for in the common market organisation for sugar. To bring the Community system of sugar production and trading in line with 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.

…

(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.'

13 Article 2 of that regulation, entitled 'Definitions', provides:

'For the purposes of this Regulation, the following definitions shall apply:

…

(6) "quota" means any quota for the production of sugar, isoglucose and inulin syrup allocated to an undertaking in accordance with Articles 7(2), 8(1), 9(1) and (2) and Article 11 of Regulation … No 318/2006 ….'

14 Article 3 of that regulation, entitled 'Restructuring aid', provides:

'1. Any undertaking producing sugar, isoglucose or inulin syrup to which a quota has been allocated by 1 July 2006 shall be entitled to a restructuring aid per tonne of quota renounced, provided that during one of the marketing years 2006/2007, 2007/2008, 2008/2009 and 2009/2010 it:

…

(b) 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;

or

(c) renounces a part of the quota assigned by it to one or more of its factories and does not use the production facilities of the factories concerned for refining raw sugar.

…

5. The amount of restructuring aid per tonne of renounced quota shall be:

…

(b) in the case referred to in point (b) of paragraph 1:

— EUR 547.50 for the marketing year 2006/2007,

…

(c) in the case referred to in point (c) of paragraph 1:

— EUR 255.50 for the marketing year 2006/2007,

…’

15 Article 5 of that regulation, entitled 'Decision on the restructuring aid and controls', states:

'1. By the end of February preceding the marketing year referred to in Article 3(2), Member States shall decide on the granting of the restructuring aid. However, the decision for the marketing year 2006/2007 shall be adopted by 30 September 2006.

2. The restructuring aid shall be granted if the Member State has established after thorough verification that:

— the application contains the elements referred to in Article 4(2),

— the restructuring plan contains the elements referred to in Article 4(3),

— the measures and actions described in the restructuring plan are in conformity with the relevant Community and national legislation;

and

— the necessary financial resources are available in the restructuring fund, on the basis of information obtained from the Commission.

...'

16 Article 11 of that regulation, entitled 'Temporary restructuring amount', provides:

'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 2006/2007,

…'

17 Article 3 of Regulation No 968/2006, entitled 'Renunciation of quota', provides:

'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 and no sugar, isoglucose or inulin syrup carried forward or withdrawn from the previous marketing year may be deemed as a production under that quota as regards the factories concerned.'

18 Article 11 of that regulation, entitled 'Amendments to the restructuring plan', provides in paragraph 1:

'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.'

19 Article 26 of that regulation, entitled 'Recovery', provides in paragraph 1:

'… [I]f 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 shall be recovered except in the case of force majeure.'

20 Article 27 of that regulation, entitled 'Penalties', provides:

'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.

…

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.'

The protection of European Union financial interests

21 The tenth recital in the preamble to 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) states:

'… not only under the general principle of equity and the principle of proportionality but also in the light of the principle of *ne bis in idem*, appropriate provisions must be adopted while respecting the acquis communautaire and the provisions laid down in specific Community rules existing at the time of entry into force of this Regulation, to prevent any overlap of Community financial penalties and national criminal penalties imposed on the same persons for the same reasons.'

22 Article 1(2) of that regulation provides:

'"Irregularity" shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.'

23 Article 4 of that regulation provides:

'1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:

— by an obligation to pay or repay the amounts due or wrongly received,

…

4. The measures provided for in this Article shall not be regarded as penalties.'

24 Article 5(1) of that regulation states:

'Intentional irregularities or those caused by negligence may lead to the following administrative penalties:

(a) payment of an administrative fine;

(b) payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate; …

(c) total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage;

(d) exclusion from, or withdrawal of, the advantage for a period subsequent to that of the irregularity;

(e) temporary withdrawal of the approval or recognition necessary for participation in a Community aid scheme;

(f) the loss of a security or deposit provided for the purpose of complying with the conditions laid down by rules or the replenishment of the amount of a security wrongly released;

(g) other penalties of a purely economic type, equivalent in nature and scope, provided for in the sectoral rules adopted by the Council in the light of the specific requirements of the sectors concerned and in compliance with the implementing powers conferred on the Commission by the Council.'

The actions in the main proceedings and the questions referred for a preliminary ruling

25 According to the order for reference, in July 2006 Beneo-Orafti obtained from the competent Belgian authorities, for the 2006/2007 marketing year, a normal basic quota of 131 330 tonnes and a transitional quota of 32 833 tonnes of inulin syrup.

26 On 27 July 2006, Beneo-Orafti submitted an application for restructuring aid to the competent Belgian authorities. On 18 August 2006, those authorities replied that the application was regarded as complete and, on 18 September 2006, they informed Beneo-Orafti that its application was admissible and notified the Commission accordingly.

27 In November 2006, the competent Belgian authorities informed Beneo-Orafti that they could not give an unchallengeable legal assessment as to whether the latter's wish to use its transitional quota was compatible with the conditions for obtaining the restructuring aid requested. They proposed contacting the Commission in order to clarify the question or supporting Beneo-Orafti in making contact.

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

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

30 In reply to a question from the competent Belgian authorities, the Commission replied, by letter of 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 solely on the basis of the transitional quota.

31 On 3 April 2007, the competent Belgian authorities replied, in the same terms as the Commission's letter of 20 March 2007, to the questions that the BIRB had asked them on 19 February 2007.

32 On 9 July 2007, the BIRB sent Beneo-Orafti a letter, repeating the Commission's position and stating that a levy on out-of-quota sugar production of EUR 13 878 493 (27 756.986 tonnes x EUR 500 per tonne) would be payable by Beneo-Orafti unless it could show that it had complied with its commitments.

33 By registered letter of 13 August 2007, the BIRB demanded the repayment by Beneo-Orafti of EUR 12 613 468.36, corresponding to the aid received in connection with the quantity produced under the transitional quota, together with EUR 3 784 040.51, corresponding to a penalty of 30 % of the amount to be recovered pursuant to Articles 26 and 27(3) of Regulation No 968/2006, making a total of EUR 16 397 508.87.

34 Beneo-Orafti also requested partial release of the bank guarantee, which was refused by the BIRB.

35 By writs of 21 March and 25 July 2008, the BIRB brought proceedings before the referring court in order to obtain payment from Beneo-Orafti of the said amounts of EUR 16 397 508.87 and EUR 13 878 493.

36 Since it considered that the outcome of the disputes before it depended on the interpretation of European Union law, the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels) decided to stay the proceedings and 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], 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?

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 born 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), and

(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?

(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?'

Consideration of the questions referred

37 It should be observed at the outset that, as is apparent from the documents before the Court, the restructuring aid to Beneo-Orafti was granted pursuant to Article 3(1)(b) of Regulation No 320/2006.

The first to third and sixth questions

38 By its first to third and sixth questions, which should be considered together, the referring court asks, in essence, whether Article 3(1)(b) of Regulation No 320/2006 should be interpreted as meaning that the term 'quota' in that provision also includes the transitional quotas within the meaning of Article 9 of Regulation No 493/2006.

39 Beneo-Orafti proposes that that question, thus reformulated, be answered in the negative. In its view, the commitment entered by an undertaking to renounce the quota applicable to the production of sugar, isoglucose and inulin syrup that is allocated to it and which that undertaking has assigned to one or more of its factories, referred to in Article 3(1)(b) of Regulation No 320/2006 ('the commitment to renounce the quota'), relates only to the quotas allocated under Article 7 of Regulation No 318/2006, excluding the transitional quotas allocated under Article 9 of Regulation No 493/2006. The Belgian Government and the Commission propose that this question be answered in the affirmative.

40 In that regard, it should be noted that the term 'quota' in Article 3(1)(b) of Regulation No 320/2006 is defined in Article 2(6) of that regulation. As Beneo-Orafti rightly observes, the wording of that latter provision contains a reference only to quotas allocated under various provisions of Regulation No 318/2006 and not to transitional quotas within the meaning of Article 9 of Regulation No 493/2006.

41 However, according to settled case-law, in interpreting a provision of European Union law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, inter alia, Case C-116/10 *Feltgen and Bacino Charter Company* [2010] ECR I-14187, paragraph 12).

42 As is apparent from recital 10 in the preamble to Regulation No 493/2006, the transitional quotas were established with the aim of increasing, during the 2006/2007 marketing year, the quotas provided by Regulation No 318/2006 and, more specifically, Article 7 of that regulation, since those quotas, like the quotas provided under the previously applicable Regulation No 1260/2001, applied for 12 months whereas that marketing year, exceptionally, extended over 15 months.

43 Having regard to that specific objective pursued by the legislature of the European Union, which is solely to adjust the volume of the quotas to the exceptional length of the 2006/2007 marketing year, the transitional quotas cannot be considered as being different in nature to those of which they constitute a simple increase intended to achieve that objective. As the Advocate General has observed at paragraph 62 of his Opinion, that increase is, moreover, proportional to the exceptional extension of that marketing year.

44 In these circumstances, even if Article 2(6) of Regulation No 320/2006 does not expressly mention the transitional quotas, which, in any event, was not possible, as Regulation No 493/2006 establishing those quotas was subsequent to Regulation No 320/2006, the term 'quota' in Article 3(1)(b) of Regulation No 320/2006 should be interpreted as also including the transitional quotas.

45 That interpretation is confirmed by the objective pursued by the legislature of the European Union in adopting Regulation No 320/2006. As is apparent, in particular, from recitals 1 and 5 in the preamble to that regulation, that objective is to restructure the sugar sector in order to reduce unprofitable production capacity in the European Union by introducing an economic incentive, in the form of a restructuring aid, for undertakings with the lowest productivity, to give up their quota production and renounce the quotas concerned (see, to that effect, Case C-33/08 *Agrana Zucker* [2009] ECR I-5035, paragraph 22).

46 As the Advocate General has observed at paragraph 73 of his Opinion, that objective would be disregarded if an undertaking benefiting from that aid and required, because of this, to renounce its quotas and dismantle its corresponding production facilities were still allowed to use those facilities until the end of the marketing year for the use of its transitional quota.

47 The interpretation according to which the term 'quota' in Article 3(1)(b) of Regulation No 320/2006 also includes the transitional quotas is not affected by the circumstance that, as Beneo-Orafti argues, the transitional quotas are allocated by a legal act that is distinct from that under which the quotas within the meaning of Article 7 of Regulation No 318/2006 are allocated and that the former, unlike the latter, are not allocated on a historical basis.

48 It does not appear that those circumstances are, in themselves, capable of altering the nature of the transitional quotas, as follows from the objective pursued by the legislature of the European Union when introducing those quotas, recalled in paragraph 42 above.

49 Nor is that conclusion affected by the fact, emphasised by Beneo-Orafti, that, under Article 9(4) of Regulation 493/2006, 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.

50 The fact that the legislature of the European Union expressly provided that the transitional quotas should not affect the level of the charges or of the financial advantages linked to the temporary restructuring scheme, represented by those amounts and by that aid, respectively, does not in itself imply that the transitional quotas were intended by that legislature not to come within the scope of that scheme. On the contrary, the specific exclusion provided for by the legislature of the European Union in

Article 9(4) of Regulation No 493/2006 confirms rather that the transitional quotas come, a priori, within that scope.

51 Consequently, the answer to the first to third and sixth questions is that Article 3(1)(b) of Regulation No 320/2006 must be interpreted as meaning that the term 'quota' in that provision also includes the transitional quotas within the meaning of Article 9 of Regulation No 493/2006.

The fifth question

52 By its fifth question, which should be considered next, the referring court seeks to ascertain the date on which, in circumstances such as those at issue in the main proceedings, the commitment to renounce the quota takes effect.

53 In the view of Beneo-Orafti, which refers to Article 11(1) of Regulation No 968/2006, that date is the date of receipt of the notification, by the competent national authority, of the granting of the restructuring aid, which, in the main proceedings, was 18 January 2007, while in the Belgian Government's view the relevant date is the beginning of the marketing year, which, for the 2006/2007 marketing year, was 1 July 2006. The Commission, in turn, considers that the commitment to renounce the quota takes effect at the beginning of the marketing year or, at the latest, on the date when the producer is informed by the national authorities of the admissibility of its application and the Commission publishes its communication that the funds are available. In the main proceedings, that date was 29 September 2006.

54 It should be noted that, under Article 11(1) of Regulation No 968/2006, as soon as the restructuring aid is granted, the beneficiary is obliged to carry out all measures detailed in the approved restructuring plan and to respect the commitments included in its application for restructuring aid.

55 Even if, read a contrario, those terms mean that, before granting the aid, the beneficiary is not bound to carry out all the measures and respect the commitments referred to in that provision, it remains the case that, as recalled in paragraph 41 above, in interpreting a provision of European Union law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part.

56 In that regard, consideration should be given to Article 5 of Regulation No 320/2006, which concerns the decision on the restructuring aid and controls.

57 As is apparent from Article 5(2) of that regulation, when exercising their competence to decide to grant restructuring aid, under Article 5(1) of that regulation, once they have established that the conditions set out in the former provision have been fulfilled, the Member States have no further discretion to decide that the aid shall not be granted.

58 It follows that an undertaking such as Beneo-Orafti is in a position to know that it will obtain the restructuring aid as soon as it becomes aware that, in the view of the competent authorities, the conditions to obtain that aid, set out in Article 5(2) of Regulation No 320/2006, have been fulfilled. Such awareness may result from communications made to that undertaking by those authorities after it has applied for the restructuring aid, as is apparent from the documents submitted to the Court, or

from the publication made by the Commission in the *Official Journal of the European Union* concerning the availability of the necessary financial resources in the restructuring fund.

59 In these circumstances it cannot be considered, without infringing the objective pursued by the legislature of the European Union by adopting Regulation No 320/2006, recalled at paragraph 45 above, that the commitment to renounce the quota only takes effect on the date when the restructuring aid is granted, within the meaning of Article 11(1) of Regulation No 968/2006.

60 As is specifically shown by the facts in the main proceedings, that interpretation would allow an undertaking which has made a commitment to renounce the quota, and which is sure to obtain restructuring aid in return for that commitment, to continue to produce under the quota that it is supposed to renounce, which runs directly counter to the aim pursued by the legislation at issue of reducing unprofitable production capacity in the European Union by introducing such aid.

61 Consequently, the answer to the fifth question is that Article 3(1)(b) of Regulation No 320/2006 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the commitment to renounce the quota takes effect on the date when, having regard to the information that is communicated to it or that is published in the *Official Journal of the European Union*, the undertaking that makes that commitment is in a position to know, as a reasonably diligent undertaking, that, in the view of the competent authorities, the conditions for obtaining the restructuring aid set out in Article 5(2) of that regulation have been fulfilled.

The first part of the fourth question and the seventh question

62 By the first part of its fourth question and by its seventh question, which should be considered together, the referring court asks, in essence, whether Articles 26(1) and 27 of Regulation No 968/2006 and Article 15 of Regulation No 318/2006 should be interpreted as meaning that a production such as that at issue in the main proceedings, on the assumption that it is contrary to the commitment to renounce the quota, may give rise to recovery of the aid, the imposition of a penalty and the collection of the levy on surpluses, as respectively set out in those provisions, and, if so, whether the principles of *ne bis in idem*, proportionality and non-discrimination should be interpreted to mean that they preclude a cumulative application of those measures.

63 Beneo-Orafti argues that the production at issue in the main proceedings does not constitute a production that gives rise to the levy on surpluses within the meaning of Article 15 of Regulation No 318/2006, since it cannot be regarded as out-of-quota production. In any event, the principles of *ne bis in idem*, proportionality and non-discrimination preclude the cumulative application of the measures set out in Articles 26(1) and 27 of Regulation No 968/2006 and in Article 15 of Regulation No 318/2006. The Belgian Government and the Commission take the opposite view.

64 In that regard, in relation to Articles 26(1) and 27 of Regulation No 968/2006, it should be noted that those apply 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. This is without doubt the case where that beneficiary produces sugar, isoglucose or inulin syrup despite its commitment to renounce the quota. Such production may therefore give rise to recovery of the aid within the meaning of Article 26(1) of Regulation No 968/2006 and the imposition of a penalty within the meaning of Article 27 of that regulation, whereas the penalty under Article 27(3)

of that regulation may only be imposed if, having regard to all the circumstances of the case, the non-compliance can be regarded as having been committed intentionally or as a result of grave negligence. It is for the national court to assess whether this is the case in the main proceedings.

65 Furthermore, such production constitutes out-of-quota production within the meaning of Chapter 3 of Regulation No 318/2006, which, unless the conditions set out in the second subparagraph of Article 4(1) of Regulation No 967/2006 are fulfilled, give rise to the collection of the levy on surpluses within the meaning of Article 15 of Regulation No 318/2006.

66 For the same reasons as those set out in paragraphs 42 and 43 above, the concept of 'quota', in relation to out-of-quota production within the meaning of Chapter 3 of Regulation No 318/2006, should be interpreted as also including the transitional quotas.

67 Moreover, as the Advocate General observed in paragraph 102 of his Opinion, production is out-of-quota where the producer has exceeded its quota, has never had a quota or has renounced its quota. In the latter event, that interpretation is confirmed, moreover, by Article 3 of Regulation No 968/2006, under which, as from the marketing year for which the quota is renounced in accordance with Article 3 of Regulation No 320/2006, no production may be deemed as a production under that quota.

68 Regarding the issue of whether the principle of *ne bis in idem* precludes the cumulative application of the measures set out in Articles 26(1) and 27 of Regulation No 968/2006 and in Article 15 of Regulation No 318/2006, it should be noted, first, that this principle is enshrined, inter alia, in Article 50 of the Charter of Fundamental Rights of the European Union.

69 Second, it should be recalled that, in the area of checks and penalties for irregularities committed under European Union law, the European Union legislature has, by adopting Regulation No 2988/95, laid down a series of general principles and has required that, as a general rule, all sectoral regulations comply with those principles (see, inter alia, Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 61).

70 With regard to recovery of the aid within the meaning of Article 26(1) of Regulation No 968/2006, that constitutes withdrawal of a wrongly obtained advantage within the meaning of Article 4(1) of Regulation No 2988/95. As is apparent from Article 4(4) of that regulation, such a measure does not constitute a penalty to which the principle of *ne bis in idem* is applicable, as is explicitly confirmed in the tenth recital in the preamble to that regulation.

71 The same applies to the levy on surpluses within the meaning of Article 15 of Regulation No 318/2006, as the Belgian Government and the Commission rightly argue.

72 It is apparent from Article 5(1) of Regulation No 2988/95 that administrative penalties may be imposed if irregularities, intentional or caused by negligence, have been committed. An irregularity is defined in Article 1(2) of that regulation as, in essence, an infringement of a provision of European Union law.

73 The rules on out-of-quota production, in particular Chapter 3 of Regulation No 318/2006, do not lead to the conclusion that such production must be regarded as an irregularity within the meaning of Article 1(2) of Regulation No 2988/95. It is certainly true that the levy on surpluses represents a substantial economic incentive not to produce in excess of the quota. However, it does not appear from those provisions that out-of-quota production constitutes, as such, an infringement of a provision of

European Union law and therefore an irregularity that could give rise, under the conditions laid down in Article 5(2) of Regulation No 2988/95, to the imposition of a penalty.

74 It follows that, as only the measure set out in Article 27 of Regulation No 968/2006 can be regarded as a penalty, the *ne bis in idem* principle does not apply to a situation such as that at issue in the main proceedings.

75 With regard to the principle of proportionality, it should be noted that this principle, which is one of the general principles of European Union law, requires that acts adopted by European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, inter alia, *Agrana Zucker*, paragraph 31).

76 As regards judicial review of the implementation of that principle, bearing in mind the wide discretion enjoyed by European Union legislature where the common agricultural policy is concerned, the lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate in terms of the objective which the competent institution is seeking to pursue (*Agrana Zucker*, paragraph 32).

77 What must be ascertained is therefore not whether the measure adopted by the legislature was the only measure possible or the best measure possible but whether it was manifestly inappropriate (*Agrana Zucker*, paragraph 33).

78 Having regard to the importance assigned by the legislature of the European Union, both in Regulation No 318/2006 and in Regulation No 320/2006, to respecting the quota system with a view to stabilising the markets in the sugar sector, it does not appear that the possibility, permitted by that legislature, of the cumulative application

of the measures set out in Articles 26(1) and 27 of Regulation No 968/2006 and in Article 15 of Regulation No 318/2006 constitutes a manifestly inappropriate measure in terms of the objective pursued by it.

79 Furthermore, the mere repayment of wrongly paid aid under Article 26(1) of Regulation No 968/2006, plus a penalty set out in Article 27 of that regulation, is not necessarily such, of itself, as to prevent the accumulation, by the out-of-quota production that constitutes the production infringing the commitment to renounce the quota, of the quantities referred to in Article 15(1) of Regulation No 318/2006. As is apparent, inter alia, from Article 15(2) of that regulation, the specific objective of the levy on surpluses is to avoid that accumulation.

80 Finally, with regard to the principle of non-discrimination, it should be noted that this requires 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, to that effect, Case C-133/09 *Uzonyi* [2010] ECR I-8747, paragraph 31 and case-law cited). However, the documents before the Court do not contain any information relating to a situation that might be comparable to that in the main proceedings. It cannot be concluded from those documents, therefore, whether and, if appropriate, in what conditions, the principle of non-discrimination could apply to such proceedings.

81 The answer to the first part of the fourth question and to the seventh question is therefore that Articles 26(1) and 27 of Regulation No 968/2006 and Article 15 of Regulation No 318/2006 must be interpreted as meaning that a production such as that at issue in the main proceedings, on the assumption that it is contrary to the commitment to renounce the quota, may give rise to recovery of the aid, the imposition of a penalty and the collection of the levy on surpluses, as respectively set out in those provisions. With regard to the penalty under Article 27(3) of Regulation No 968/2006, it is for the referring court to assess whether, having regard to all the circumstances of

the case, the non-compliance can be regarded as having been committed intentionally or as a result of grave negligence. The principles of *ne bis in idem*, proportionality and non-discrimination must be interpreted as not precluding the cumulative application of those measures.

The second part of the fourth question

82 By the second part of its fourth question, which should be considered last, the referring court asks, in essence, how to calculate the amount of aid to be recovered under Article 26(1) of Regulation No 968/2006.

83 Beneo-Orafti argues that this calculation must be done taking into account the elements listed by the referring court in the second part of the fourth question, whereas the Belgian Government considers that the BIRB correctly calculated the amount to be recovered by multiplying the amount of aid per tonne received by the quantity of tonnes produced by Beneo-Orafti. The Commission suggests that several methods of calculation are possible.

84 It should be noted that, under Article 26(1) of Regulation No 968/2006, 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.

85 It is apparent from the documents before the Court that, in the main proceedings, obtaining restructuring aid was subject to two commitments set out in Article 3(1)(b) of Regulation No 320/2006, namely a commitment to renounce the quota and a commitment partially to dismantle the production facilities of the factories concerned, and that the main proceedings concern compliance with the first commitment only.

86 Since, in such a case, the only 'commitment concerned' within the meaning of Article 26(1) of Regulation No 968/2006 is that arising from the commitment to renounce the quota, only the part of the aid relating to that commitment may be recovered, pursuant to that provision and if the commitment has not in fact been complied with.

87 With regard to the distribution of the aid between the various commitments concerned, it should be noted that, in relation to the two commitments at issue in the main proceedings, that distribution is apparent from the various amounts fixed by the legislature of the European Union at Article 3(5) of Regulation No 320/2006. Thus, whereas, in return for the two commitments referred to in Article 3(1)(b) of that regulation, the amount of restructuring aid per tonne of renounced quota for the marketing year 2006/2007 is EUR 547.50 under Article 3(5)(b), first indent, of that regulation, the amount is EUR 255.50 under Article 3(5)(c), first indent, of that regulation if the commitment to renounce the quota is not accompanied by a commitment partially to dismantle the production facilities of the factories concerned.

88 As Beneo-Orafti rightly argues, if an undertaking complies with its dismantling commitment but not its commitment to renounce the quota, it follows that the aid wrongly received by it must be considered, in circumstances such as those at issue in the main proceedings, to be EUR 255.50 per tonne produced in breach of the latter commitment.

89 By contrast, as regards the elements referred to by the referring court in its fourth question, points (a) to (c), there is nothing in the applicable rules, in particular in Article 26(1) of Regulation No 968/2006, to suggest that those elements are relevant for the calculation of the repayment of the aid received.

90 Furthermore, it is apparent from the latter provision that the extent to which the aid is wrongly paid is determined by the commitment that has not been complied with. Since it follows from the answer to the first to third and sixth questions that the commitment to renounce the quota applies without distinction to quotas within the meaning of Article 7 of Regulation No 318/2006 and transitional quotas within the meaning of Article 9 of Regulation No 493/2006, it cannot be considered that the aid would be less wrongful if an undertaking described its production, contrary to that commitment, as production under those transitional quotas rather than production under the quotas within the meaning of Article 7 of Regulation No 318/2006.

91 Finally, in relation to the principle of proportionality, which the referring court makes reference to in the second part of its fourth question, it does not appear that a measure to recover restructuring aid, the extent of which, as provided by Article 26(1) of Regulation No 968/2006, depends on the commitment that has not been complied with, constitutes a measure that is manifestly disproportionate, within the meaning of the case-law cited at paragraph 77 above, in terms of the objective which the legislature of the European Union sought to pursue by introducing that aid, recalled at paragraph 45 above.

92 The answer to the second part of the fourth question is, therefore, that Article 26(1) of Regulation No 968/2006 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, if an undertaking has complied with its commitment partially to dismantle the production facilities of the factories concerned but not its commitment to renounce the quota, the amount of the aid to be recovered is equal to the part of the aid corresponding to the commitment that has

not been complied with. That part of the aid must be determined on the basis of the amounts laid down in Article 3(5) of Regulation No 320/2006.

Costs

93 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 3(1)(b) 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 must be interpreted as meaning that the term 'quota' in that provision also includes the transitional quotas within the meaning of Article 9 of 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.**

2. **Article 3(1)(b) of Regulation No 320/2006 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the commitment to renounce the quota for the production of sugar, isoglucose**

and inulin syrup that has been allocated to an undertaking and assigned by it to one or more of its factories, referred to in that provision, takes effect on the date when, having regard to the information that is communicated to it or that is published in the *Official Journal of the European Union*, the undertaking that makes that commitment is in a position to know, as a reasonably diligent undertaking, that, in the view of the competent authorities, the conditions for obtaining the restructuring aid set out in Article 5(2) of that regulation have been fulfilled.

3. Articles 26(1) and 27 of Commission Regulation (EC) No 968/2006 of 27 June 2006 laying down detailed rules for the implementation of Regulation No 320/2006 and Article 15 of Council Regulation (EC) No 318/2006 of 20 February 2006 on the common organisation of the markets in the sugar sector must be interpreted as meaning that a production such as that at issue in the main proceedings, on the assumption that it is contrary to the commitment to renounce the quota for the production of sugar, isoglucose and inulin syrup that has been allocated to an undertaking and assigned by it to one or more of its factories, referred to in Article 3(1)(b) of Regulation No 320/2006, may give rise to recovery of the aid, the imposition of a penalty and the collection of the levy on surpluses, as respectively set out in those provisions. With regard to the penalty under Article 27(3) of Regulation No 968/2006, it is for the referring court to assess whether, having regard to all the circumstances of the case, the non-compliance can be regarded as having been committed intentionally or as a result of grave negligence. The principles of *ne bis in idem*, proportionality and non-discrimination must be interpreted as not precluding the cumulative application of those measures.

4. Article 26(1) of Regulation No 968/2006 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, if an undertaking has complied with its commitment partially to dismantle the production facilities of the factories concerned but not its commitment to

renounce the quota for the production of sugar, isoglucose and inulin syrup that has been allocated to it and assigned by it to one or more of its factories, referred to in Article 3(1)(b) of Regulation No 320/2006, the amount of the aid to be recovered is equal to the part of the aid corresponding to the commitment that has not been complied with. That part of the aid must be determined on the basis of the amounts laid down in Article 3(5) of Regulation No 320/2006.

[Signatures]