OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 21 January 2010[1]

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I – Introduction

1. In the present reference for a preliminary ruling, the Austrian Verwaltungsgerichtshof (Administrative Court; 'the referring court') is seeking from the Court of Justice a preliminary ruling on two questions concerning the interpretation and, if appropriate, the validity of Article 16 of Council Regulation (EC) No 318/2006 of 20 February 2006 on the common organisation of the markets in the sugar sector. [2]

2. The reference for a preliminary ruling was made in the context of a dispute between Agrana Zucker GmbH ('the applicant') and the Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (Federal Minister for Agriculture, Forestry, the Environment and Water Management; 'the defendant') concerning the effectiveness of an official decision adopted on the basis of Article 16 of Regulation No 318/2006, by which the production charge payable by the applicant in respect of sugar for the 2007/08 marketing year was set at EUR 4 869 748,80 and the applicant was ordered to pay that sum.

3. By its first question, the referring court essentially seeks to ascertain whether the amount of the production charge payable by a sugar-producing undertaking under Article 16 of Regulation No 318/2006 must be calculated on the basis of the total sugar quota allocated to that undertaking or whether the calculation must be made solely on the basis of the quota actually available after deduction of the quantity removed from the market as a consequence of withdrawal or on the basis of the quantity of quota sugar actually produced under that quota. In the event that the amount of the production charge is to be calculated on the basis of the total quota allocated, by its second question the referring court also essentially asks for clarification whether in that case Article 16

2 — OJ 2006 L 58, p. 1

of Regulation No 318/2006 – in conjunction with Article 19 of Regulation No 318/2006 and Article 1 of Commission Regulation (EC) No 290/2007 of 16 March 2007 establishing, for the 2007/08 marketing year, the percentage provided for in Article 19 of Regulation (EC) No 318/2006 [3] – is compatible with higher-ranking Community law, in particular the principle of proportionality and the principle of non-discrimination.

II – Legislative framework

A – *Regulation No 318/2006*

4. On 20 February 2006, the Council adopted Regulation No 318/2006 as part of the reform of the common organisation of the markets (CMO) in the sugar sector.

5. Recital 19 in the preamble to that regulation explains that a production charge should be introduced to contribute to the financing of the expenditure occurring under the CMO in the sugar sector.

6. According to recital 22 in the preamble to the regulation, 'new market tools to be managed by the Commission should be introduced'. In this connection, 'to maintain the structural balance of the markets in sugar at a price level close to the reference price, it should be possible for the Commission to decide to withdraw sugar from the market for as long as it takes for the market to rebalance'.

7. According to recital 40 in the preamble to the regulation, the Commission should be authorised 'to adopt necessary measures to solve specific practical problems in case of emergency'.

8. Article 1(2) of Regulation No 318/2006 states:

'The marketing year for the products listed in paragraph 1 shall begin on 1 October and end on 30 September of the following year.

…'

9. Under Article 2(5) of Regulation No 318/2006 '"quota sugar", "quota isoglucose" and "quota inulin syrup" mean any quantity of sugar, isoglucose or inulin syrup

3 — OJ 2007 L 78, p. 20.

production attributed to a specific marketing year under the quota of the undertaking concerned.'

10. Article 16 of Regulation No 318/2006 lays down rules governing the setting and levying of the production charge. Specifically, that provision states:

'Production charge

1. As from the marketing year 2007/08, a production charge shall be levied on the sugar quota, the isoglucose quota and the inulin syrup quota held by undertakings producing sugar, isoglucose or inulin syrup.

2. The production charge shall be set at EUR 12.00 per tonne of the quota sugar and quota inulin syrup. For isoglucose, the production charge shall be set at 50 % of the charge applicable to sugar.

3. The totality of the production charge paid in accordance with paragraph 1 shall be charged by the Member State to the undertakings on its territory according to the quota held during the marketing year concerned.

Payments shall be made by the undertakings by the end of February of the relevant marketing year at the latest.

4. Community sugar and inulin syrup undertakings may require sugar-beet or sugarcane growers or chicory suppliers to bear up to 50 % of the production charge concerned.'

11. The withdrawal of sugar is regulated in Article 19 of Regulation No 318/2006, which provides:

'Withdrawal of sugar

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, quota isoglucose and quota inulin syrup may be

withdrawn from the market until the beginning of the following marketing year.

In that case, the traditional supply need[ed] for refining imported raw sugar referred to in Article 29(1) of this Regulation shall be reduced by the same percentage for the marketing year concerned.

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, isoglucose or inulin syrup as:

— surplus sugar, surplus isoglucose or surplus inulin syrup available to become industrial sugar, industrial isoglucose or industrial inulin syrup,

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.

4. If sugar supply in the Community is inadequate, it may be decided, in accordance with the procedure referred to in Article 39(2), that a certain quantity of withdrawn sugar, isoglucose and inulin syrup may be sold on the Community market before the end of the period of withdrawal.'

B – *Regulation No 290/2007*

12. On 16 March 2007, the Commission adopted Regulation No 290/2007 establishing the withdrawal percentage for the 2007/08 marketing year.

13. Article 1 of Regulation No 290/2007 provides:

'1. For the 2007/08 marketing year, the percentage provided for in Article 19(1) of Regulation (EC) No 318/2006 shall be 13.5 %.

2. By way of derogation from paragraph 1:

(a) the percentage laid down in that paragraph shall not apply to undertakings whose production is less than 86.5 % of their quota for the 2007/08 marketing year;

(b) for undertakings that produce a quantity equal to or higher than 86.5 % of their quota for the 2007/08 marketing year, the quantities produced over the 86.5 % threshold shall be withdrawn;

(c) the percentage laid down in paragraph 1 shall not apply to quantities produced in the Member States in which at least 50 % of the national sugar quota has been released from 1 July 2006 as a result of quotas being renounced under Article 3 of Regulation (EC) No 320/2006.

For the Member States in which at least 50 % of the national sugar quota has been released from 1 July 2006 as a result of quotas being renounced under Article 3 of Regulation (EC) No 320/2006, the withdrawal percentage provided for in the first paragraph shall be reduced in proportion to the quotas released.

The percentage applicable under this point shall be as laid down in the Annex hereto.

…

4. The quantities withdrawn in accordance with paragraphs 2(b) and 3 shall be considered to be surplus sugar or surplus isoglucose

for the 2007/08 marketing year available to become industrial sugar or industrial isoglucose.

5. The obligation referred to in Article 6(5) of Regulation (EC) No 318/2006 to pay at least the minimum price shall apply only to the quantities of beet produced under quota after the application of paragraphs 1 and 2.'

III – The facts, main proceedings and questions referred for a preliminary ruling

14. By decision of the defendant 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 applicant was granted a sugar quota totalling 405 812.4 tonnes. By decision of 5 April 2007, in accordance with Article 1(1) and (2)(b) of Regulation No 290/2007, the defendant set the applicant a production threshold for the production of quota sugar in the 2007/08 marketing year of 86.5 % of the sugar quota, that is 351 027.73 tonnes.

15. By decision of the board of Division I of Agrarmarkt Austria (a legal person governed by public law set up by the defendant to administer support; 'AMA') of 28 January 2008, the sugar production charge payable by the applicant for the 2007/08 marketing year was set at EUR 4 869 748.80 and the applicant was ordered to transfer that sum to AMA by no later than 29 February 2008. In the grounds for that decision, AMA referred to the allocated sugar quota totalling 405 812,4 tonnes and calculated the production charge on that basis pursuant to Article 16 of Regulation No 318/2006.

16. The applicant appealed against that decision. By decision of 25 March 2008, the lawfulness of which must be decided by the referring court in the main proceedings, the defendant dismissed the appeal as unfounded.

17. It is apparent from the order for reference that the issue in dispute in the proceedings before the referring court is whether the production charge under Article 16 of Regulation No 318/2006 should be calculated on the basis of the quota available in principle of 405 812.4 tonnes or whether that quota should be reduced having regard to the production threshold established and the connected withdrawal from the market.

18. In view of the differing views of the parties to the main proceedings, the correct application of Community law appears unclear to the referring court. The interpretation problems reside primarily in answering the question on what basis the production charge under Article 16 of Regulation No 318/2006 should be calculated. In the view of the referring court, it is also uncertain whether a calculation of that production charge on the basis of the sugar quota originally allocated would be compatible with higher-ranking primary law.

19. The Verwaltungsgerichtshof therefore stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 16 of Council Regulation (EC) No 318/2006 of 20 February 2006 on the common organisation of the markets in the sugar sector be interpreted as meaning that even a sugar quota which cannot be utilised as a consequence of a preventive withdrawal in accordance with Article 1 of Commission Regulation (EC) No 290/2007 of 16 March 2007 establishing, for the 2007/08 marketing year, the percentage provided for in Article 19 of Regulation (EC) No 318/2006 must be included in the assessment of the production charge?

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

Is Article 16 of … Regulation … No 318/2006 … compatible with primary law, in particular with the principle of proportionality and the principle of non-discrimination derived from Article 34 EC?'

IV – Procedure before the Court of Justice

20. The order for reference of 4 July 2008 was lodged at the Registry of the Court of Justice on 11 August 2008. In the written procedure, the Council, the Governments of the Kingdom of Spain, the Republic of Lithuania and the Republic of Poland, the applicant in the main proceedings and the Commission submitted observations. The representatives of the applicant in the main proceedings, the Council and the Commission participated in the hearing held on 19 November 2009.

V – Arguments of the parties

A – *First question*

21. The Council, the Commission and the Republic of Poland take the view that the production charge under Article 16 of Regulation No 318/2006 should be calculated on the basis of the total sugar quota allocated to an undertaking.

22. In the view of the Council and the Commission, this is immediately apparent from the clear wording of Article 16(1) and (3) of Regulation No 318/2006, under which the production charge is levied on the sugar quota 'held' by the sugar-producing undertakings. A reason for the confusion is offered by the imprecise wording of Article 16(2), which provides that the production charge is set at EUR 12 per tonne of the 'quota sugar'. It is clear from the schematic context and the purpose pursued by Article 16, however, that the choice of words used in Article 16(2) is a drafting error.

23. That drafting error in Article 16 (2) of Regulation No 318/2006 is connected with the misleading designation of the charge payable as the 'production charge'. That designation was adopted from Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector,[4] even though the new charge differs fundamentally from the old 'production charge'. The designation 'quota charge' would have been more accurate. This classification as a 'quota charge' is supported by the fact that under the second subparagraph of Article 16 (3) of Regulation No 318/2006 the undertakings must pay the charge by the end of February of the relevant marketing year at the latest, and therefore at a time when the volume produced by the undertakings in the marketing year in question is not yet known. Lastly, the Council and the Commission refer to the purpose of the provision, which is to ensure consistent receipts of own resources for the Communities.

24. In the view of the Republic of Poland too, an interpretation of Articles 16 and 19 of Regulation No 318/2006 on the basis of their wording and scheme can only suggest that even the part of a sugar quota which cannot be utilised in a marketing year as a consequence of a withdrawal in accordance with Article 19 of Regulation No 318/2006 must be included in the basis for assessment of the production charge within the meaning of Article 16 of that regulation.

4 — OJ 2001 L 178, p. 1.

25. In the applicant's opinion, on the other hand, regard must be had to the clear wording of Article 16(2) of Regulation No 318/2006, in which the production charge is set at EUR 12 per tonne of the 'quota sugar'. It is also clear from the designation 'production charge' that this can only refer to the quota sugar actually produced. The Kingdom of Spain reaches a similar conclusion, taking the view that the actual production should be used as the basis for assessment of the production charge under Article 16 of Regulation No 318/2006.

26. From a schematic perspective, the applicant and the Kingdom of Spain point out that a different approach would mean that, if an undertaking did not utilise the sugar quota allocated to it, the production charge would also have to be paid for sugar which did not actually exist, as a result of which the undertakings which produced less sugar would be penalised by having to pay a higher amount of charges. Furthermore, the quota sugar withdrawn from the market, which would be stored in accordance with Article 19(3) of Regulation No 318/2006 and classified in the following marketing year as the first quantities produced under the quota, would be subject to the production charge twice.

27. Lastly, the Republic of Lithuania takes the view that Article 16 of Regulation No 318/2006 is to be interpreted to the effect that the term 'quota' means the quota which might actually be held by the undertakings in the course of the marketing year concerned. The sugar quota after deduction of the withdrawal percentage must therefore be used as the basis for assessment of the production charge.

B – *Second question*

28. In the view of the applicant and the Republic of Lithuania, an interpretation of Article 16 of Regulation No 318/2006 according to which the calculation of the production charge on the basis of the total allocated sugar quota infringes the principle of proportionality and the principle of non-discrimination. In the opinion of the Republic of Poland, there is an infringement of the principle of proportionality. The Commission and the Council, on the other hand, take the view that an interpretation of Article 16 of Regulation No 318/2006 according to which the production charge is calculated on the basis of the total allocated sugar quota is compatible with the general principles of proportionality and non-discrimination.

29. The applicant considers that there are grounds for the existence of an infringement of the principle of proportionality in its case if the production charge is calculated on the

basis of the total allocated sugar quota in particular because in the 2007/08 marketing year it actually produced 13.5 % or 54 784.67 tonnes less quota sugar and a calculation of the production charge on the basis of the total sugar quota would therefore mean a charge of EUR 12 per tonne being levied on a volume of 54 784.67 tonnes of sugar which does not actually exist. Viewed in another way, this means that even if the production threshold of 351 027.73 tonnes of quota sugar is fully utilised a charge of EUR 13.87 per tonne of quota sugar would be levied. The levying of such a charge is disproportionate.

30. Furthermore, in accordance with Article 1(4) of Regulation No 290/2007, sugar produced by the undertakings concerned as quota sugar in excess of the production threshold would be considered to be surplus sugar available to become industrial sugar or carried over to the next marketing year as quota sugar. In both cases the levying of a production charge on the surplus sugar would be disproportionate. Because only around half of the reference price for quota sugar could be achieved for industrial sugar, the production charge, which would be nominally the same, of EUR 12 per tonne for the surplus sugar used as industrial sugar would be twice as high as the production charge for quota sugar. If, on the other hand, the surplus sugar were carried over to the following marketing year, there would be a double charge on the surplus sugar on which the production charge was levied in two marketing years.

31. Moreover, the income from the production charge exceeds the expenditure occurring under the CMO in the sugar sector, with the result that it is neither essential nor necessary to levy the production charge on quotas not actually used.

32. The Republic of Poland and the Republic of Lithuania also consider that Article 16 of Regulation No 318/2006 infringes the principle of proportionality in so far as thereunder the production charge is also to be levied on quota sugar withdrawn from the market. In this connection, the Republic of Poland and the Republic of Lithuania state, inter alia, that the quota sugar withdrawn from the market does not cause the European Community any expenditure occurring under the CMO in the sugar sector. Because, in accordance with recital 19 in the preamble to Regulation No 318/2006, the production charge is intended to contribute to the financing of the expenditure occurring under the CMO in the sugar sector, it is disproportionate to levy a charge also on the cost-neutral quota sugar withdrawn from the market. The Republic

of Poland also stresses the financial consequences – which are unacceptable in its opinion – of that sugar being treated as surplus sugar or of carrying it over to the next marketing year as surplus sugar. The Republic of Lithuania likewise argues that the sugar producers whose quotas were reduced were exposed to a disproportionate financial burden since they could not generate any income from the existing production. In addition, those undertakings would have great difficulties selling the quantities of sugar in excess of the quota reduced as a consequence of a preventive withdrawal. Lastly, in the view of the Republic of Poland, Article 16 of Regulation No 318/2006 has a technical character with the result that the Community legislature does not have a wide discretion in such matters.

33. In the opinion of the applicant and the Republic of Lithuania, there are grounds for the existence of an infringement of the principle of non-discrimination if the production charge is calculated on the basis of the total allocated sugar quota in particular because the withdrawal percentage under Article 19 of Regulation No 318/2006 in conjunction with Article 1(2)(c) of Regulation No 290/2007 would be different in the individual Member States, with the result that the burden of the production charges is different from one undertaking to the next depending on the Member State in which they are established.

34. In the view of the Commission and the Council, there is no doubt that an interpretation of Article 16 of Regulation No 318/2006 to the effect that the production charge should be calculated on the basis of the total allocated sugar quota is compatible with the general principles of proportionality and non-discrimination. On the ground that the referring court has not put forward a single argument regarding the basis for its doubts as to the compatibility of Article 16 with the principle of non-discrimination under Community law, the Commission and the Council restricted their written observations to examining the allegation of an infringement of the principle of proportionality.

35. In this connection, the Commission and the Council point out, first of all, the wide discretion enjoyed by the Community legislature in matters concerning the common agricultural policy. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution intends to pursue. Against this background, it is a crucial factor that the production charge is intended to contribute to the financing of the expenditure occurring under the CMO in the sugar sector, but was not linked to specific expenditure. In other words, it is not assigned income with the result that, in the view of the Commission, even the fact that income could possibly be higher than the expenditure incurred in a certain marketing year is

irrelevant for assessing the lawfulness of Article 16 of Regulation No 318/2006.

36. Furthermore, the Commission and the Council also consider a calculation of the production charge on the basis of the total sugar quota held by the sugar-producing undertakings to be substantively appropriate and expedient. The withdrawal from the market in a specific year does not result in a definitive reduction of the production quota. Moreover, each marketing year should be seen in isolation, with the result that there can be no double charge on quota sugar. The economic consequences of including the quantities of sugar withdrawn from the market in the basis for assessment of the production charge are limited, especially since the withdrawal specifically results in a general increase in the price of quota sugar. Lastly, the Commission points out that the aim mentioned in recital 19 in the preamble to Regulation No 318/2006 of contributing to the financing of the expenditure occurring under the CMO in the sugar sector is to be construed as meaning that the envisaged expenditure covers all costs stemming from the different measures in the sugar sector, including the large number of market support measures.

37. At the hearing, the Commission put forward additional arguments in support of this view, stating that the production charge is intended to contribute to covering Community expenditure in the sugar sector, which can be estimated at more than EUR 1 500 million each year and would thus exceed the income from the production charge many times over.

VI – Legal assessment

A – *Introductory remarks*

38. By Regulation No 318/2006, Council Regulation (EC) No 319/2006 of 20 February 2006 amending Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers [5] and 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, [6] the Community legislature introduced a far-reaching reform of the European organisation of the markets in sugar. Upon introduction of the new rules, a system which had remained largely

5 — OJ 2006 L 58, p. 32.
6 — OJ 2006 L 58, p. 42.

unchanged for almost 40 years [7] was incorporated into the general reform of the common agricultural policy (CAP). [8]

39. The aim of this reform of the CMO in the sugar sector was the gradual abolition of the intervention mechanism and the intervention price for sugar. To that end, the intervention price for sugar was replaced by a reference price which is reduced by 36 % in total in the period of the marketing years 2006/07 to 2009/10 in comparison with the intervention price. This reference price was to be achieved in principle by reducing the supply of sugar on the European market, for which purpose financial incentives were created as part of a restructuring fund for less competitive sugar producers to discontinue production. In addition to these structural measures to reduce unprofitable production capacity in the Community, the Commission was also granted the power to decide to withdraw sugar from the market in the event of impending excess supply in order to maintain the structural balance of the markets in sugar at a price level close to the reference price.

40. This reduction of market support in the sugar sector was offset – at least partially – by increasing direct income support for agricultural undertakings. The policy of price and production support in the sugar sector was thereby progressively shifted to a policy of agricultural income support decoupled from production.

B – *First question*

41. By its first question, the referring court is essentially seeking clarification as to the basis on which the production charge under Article 16 of Regulation No 318/2006 should be calculated.

7 — The common organisations of the markets in the sugar sector were previously distinguished by their price support arrangements and the allocation of quotas. The quota regime created in 1967 along with the CMO in the sugar sector also made 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 was 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, and Priebe, R., in Grabitz, E. and Hilf, M., *Das Recht der Europäischen Union*, Volume I, Article 34 EC, paragraph 57 (39th supplement, July 2009).

8 — For the background to that reform of the CMO in the sugar sector, see Swinbank, A., 'EU Sugar Policy: An Extraordinary Story of Continuity, But Then Change,' *Journal of World Trade* 2009, pp. 603 to 620. For an analysis of the broad outline of the reform in comparison with the previous organisation of the markets in the sugar sector, see Michel, J. and Merten-Lentz, K., 'La réforme du marché du sucre communautaire,' *Revue du Marché commun et de l'Union européenne* 2005, pp. 671 to 676, and Barents, R., 'De zure smaak van Europese suiker,' *NTER* 2005, pp. 228 to 235.

42. In calculating the production charge under Article 16 of Regulation No 318/2006, there are, in theory, four possible different bases of assessment, namely:

(1) the sugar quota allocated to the sugar-producing undertakings in a certain marketing year (that is the sugar quota within the meaning of Article 7 of Regulation No 318/2006, increased by the additional sugar quota within the meaning of Article 8 of that regulation);

(2) the sugar quota allocated to the sugar-producing undertakings in a certain marketing year after deducting the withdrawal percentage established for that marketing year within the meaning of Article 19 of Regulation No 318/2006. With this calculation method, the withdrawal percentage would be deducted from the sugar quota in a first step. In a second step, the resulting sugar quota, adjusted by the withdrawal, would be used as the basis for assessment of the production charge. The basis for assessment would therefore be consistent with the production threshold within the meaning of Article 1(2)(a) and (b) of Regulation No 290/2007;

(3) the quantity of sugar produced by the sugar-producing undertakings in a certain marketing year, limited by the allocated sugar quota (that is the quota sugar within the meaning of Article 2(5) of Regulation No 318/2006);

(4) the quantity of sugar produced by the sugar-producing undertakings in a certain marketing year, limited by the production threshold.

43. The referring court's doubts regarding the determination of the basis for assessment of the production charge and the ensuing very different answers proposed by the parties to the preliminary ruling proceedings can be attributed to the imprecise wording of Article 16 of Regulation No 318/2006. In particular, the heading 'Production charge' and the setting of that charge at 'EUR 12.00 per tonne of the quota sugar' in Article 16 (2) suggest a method of calculation based on the quantities of sugar actually produced in the marketing year in question. The wording of Article 16 (1) and (3), on the other hand, refers explicitly to the sugar quotas allocated for the marketing year in question, which are to be determined irrespective of actual production. This inconsistency in wording can also be seen in most other language versions of Article 16 of Regulation No 318/2006. [9]

9 — The English heading 'Production charge' is rendered in French as 'Taxe à la production', in Slovenian as 'Proizvodna dajatev', in German as 'Produktionsabgabe', in Danish as 'Produktionsafgift', in Spanish as 'Canon de producción' and in Portuguese as 'Encargo de produção'. In those language versions, Article 16(2) refers to 'sucre sous quota', 'kvotnega sladkorja', 'quota sugar', 'kvotesukker', 'azúcar de cuota' and 'açúcar de quota', whilst Article 16(1) and (3) mention 'quota de sucre', 'kvote za sladkor', 'sugar quota', 'sukkerkvote', 'cuotas de azúcar' and 'quotas de açúcar'. In the Dutch version, the heading is 'Productieheffing', but then the term 'suikerquotum', rather than 'quotumsuiker', is used in Article 16(2), as well as in Article 16(1) and (3).

44. In view of this ambiguous wording of Article 16 of Regulation No 318/2006, only a schematic and teleological interpretation can achieve the aim in the present case. In interpreting Community law, the purpose of an unclear provision takes precedence over its wording. [10]

45. A schematic and teleological interpretation of Article 16 of Regulation No 318/2006 leads me to conclude that only a calculation method where the sugar quota allocated in a certain marketing year is used as the basis for assessment of the production charge is compatible with the content and the aims of that regulation.

46. A first important indication that the production charge is to be determined on the basis of the sugar quotas allocated to the sugar-producing undertakings in a certain marketing year is provided by the second subparagraph of Article 16(3) of Regulation No 318/2006. Under that provision, the sugar-producing undertakings must pay the production charge by the end of February of the relevant marketing year at the latest. In view of the fact that under Article 1(2) of Regulation No 318/2006 the marketing year begins on 1 October of a certain year and ends on 30 September of the following year, this means that the production charge is to be paid at a time when the sugar has not yet been produced. Because the quantities of sugar which are ultimately produced by the undertakings concerned cannot be ascertained with any certainty on the date when the production charge becomes payable, the quantity of sugar actually produced under the sugar quotas – adjusted, if necessary, by the withdrawal – cannot be used as a basis for assessment of the production charge on purely practical grounds.

47. In addition, the general scheme of Article 16 of Regulation No 318/2006 clearly expresses the fundamental decision taken by the Community legislature to levy the 'production charge' on the sugar quota allocated and not on the quantity of sugar actually produced.

48. Article 16(1) of Regulation No 318/2006 lays down the principle that a charge is to be levied on the 'sugar quota' held by undertakings producing sugar. Article 16(2) sets the amount of that charge at EUR 12 per tonne of the 'quota sugar'. Article 16(3) establishes the practical form in which the charge is levied to the effect that the Member States must levy the charge by the end of February of the relevant marketing year at the latest. Lastly, Article 16(4) governs the possibility for sugar-beet or sugar-cane growers or chicory suppliers to contribute to the financing of that charge.

10 — See also Riesenhuber, K., *Europäische Methodenlehre*, Berlin, 2006, p. 266, paragraph 51.

49. From a schematic point of view, Article 16(1) of Regulation No 318/2006 contains the basic rule that as from the 2007/08 marketing year, a charge will be levied on the sugar quotas held by undertakings producing sugar. In Article 16(2), the amount of that charge is set at EUR 12 per tonne. The substantive focus of Article 16(2) is therefore on determining the amount of the charge – namely EUR 12 per tonne – and not on determining the basis for assessment, which has already been established in Article 16(1). Against this background, the use of the expression 'quota sugar' in Article 16(2) of Regulation No 318/2006 must clearly be seen as a drafting error by the Community legislature, especially since another reference is made in Article 16(3) to the quotas allocated to the undertakings.

50. The use of the quotas allocated to undertakings as the basis for assessment and the resulting decoupling of the 'production charge' payable by those undertakings from the quantity of sugar actually produced is also consistent with the decoupled agricultural income support offered to producers which is one of the central components of the reform of the CMO in the sugar sector. [11] Furthermore, under Article 16 (4) of Regulation No 318/2006 such producers may be required by the sugar-producing undertakings to bear up to 50 % of their production charge.

51. Against this background, the argument based on legislative history put forward by the applicant and by the Kingdom of Spain to the effect that the expression 'production charge' in the basic regulations on the CMO in the sugar sector preceding the current one [12] was always intended to be used to mean a charge for the quantities of sugar produced in the relevant reference period is also redundant. In view of the fact that the CMO in the sugar sector was comprehensively reformed by Regulation No 318/2006 and established on a new financial basis, the retention of the same designation for the charge payable must be regarded as a misleading relic from the wording of the predecessor regulations, from which no substantive inferences can therefore be drawn in determining the basis for assessment.

52. The sugar quota allocated to the sugar-producing undertakings in a certain marketing year must therefore be taken as the basis for calculating the production charge under Article 16 of Regulation No 318/2006. However, it must still be clarified whether the withdrawal percentage for the purposes of Article 19 of that regulation must be taken into consideration. Because that withdrawal

11 — See points 39 and 40 of this Opinion.

12 — Regulation No 1260/2001 and Council Regulation (EC) No 2038/1999 of 13 September 1999 on the common organisation of the markets in the sugar sector (OJ 1999 L 252, p. 1).

percentage was remodelled as a production threshold in Article 1 (2)(a) and (b) of Regulation No 290/2007, [13] the question therefore arises whether the withdrawal percentage must be deducted from the sugar quota in the calculation of the production charge, with the result that the relevant production threshold would constitute the basis for assessment of the production charge.

53. In my opinion, that question must be answered in the negative.

54. As I have already said in my Opinion of 18 February 2009 in *Agrana Zucker*, [14] and as the Court of Justice confirmed in the judgment of 11 June 2009 in that case, [15] a withdrawal certainly cannot be treated in the same way as a quota being renounced for the purposes of Regulation No 320/2006. 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.

55. That difference in the mode of operation originates in the different regulatory purpose of the relevant provisions in each case. 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. 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.

56. Because the withdrawal of sugar on the basis of the withdrawal percentage set by the Commission does not as such affect the sugar quotas of the undertakings concerned, Article 16 of Regulation No 318/2006 does not contain either textual or schematic evidence in support of the view taken in particular by the Republic of Lithuania that the sugar quota reduced by the withdrawal percentage forms the basis for assessment of the production charge under Article 16 of Regulation No 318/2006.

57. In the light of the foregoing, I conclude that Article 16 of Regulation No 318/2006

13 — Article 1(2)(a) and (b) of Regulation No 290/2007 essentially provides that the withdrawal obligation only applies to sugar produced in excess of a production threshold. That production threshold is calculated by deducting the withdrawal percentage from the allocated sugar quota which, for the 2007/08 marketing year, normally gave a production threshold of 86.5 % of the allocated sugar quota.

14 — My Opinion in Case C-33/08 [2009] ECR I-5035, point 40 et seq.

15 — Case C-33/08 [2009] ECR I-5035, paragraph 21 et seq.

is to be interpreted as meaning that even the part of a sugar quota which cannot be utilised as a consequence of a withdrawal in accordance with Article 19 of Regulation No 318/2006 in conjunction with Article 1 of Regulation No 290/2007 must be included in the basis for assessment of the production charge.

C – *Second question*

1. Alleged infringement of the principle of proportionality

58. By its second question, the referring court seeks clarification whether the calculation and levying of the production charge under Article 16 of Regulation No 318/2006 on the basis of the abstractly allocated sugar quota is compatible with the principle of proportionality. In order to answer this question, I will first consider the criterion for analysis which is to be applied in examining a purported infringement of the principle of proportionality in matters concerning the CAP. I will then examine whether the decoupling of the charge from production under Article 16 of Regulation No 318/2006 is to be regarded as an infringement of the principle of proportionality.

(a) Criterion for analysis

59. The principle of proportionality, which is one of the general principles of Community law, requires that acts adopted by Community 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. [16]

60. In the context of the judicial application of the principle of proportionality, in principle a three-stage scheme of analysis must therefore be employed, [17] where (1) the appropriateness, (2) the necessity, and (3) the

16 — *Agrana Zucker*, cited in footnote 15, paragraph 31; Case C-310/04 *Spain* v *Council* [2006] ECR I-7285, paragraph 97; Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 81; Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 41; and Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13.

17 — With regard to this three-stage scheme of analysis, see Simon, D., 'Le contrôle de proportionnalité exercé par la Cour de Justice des Communautés Européennes,' *Petites affiches* 2009, No 46, p. 17, at p. 20 et seq. According to the author, however, the review of the lawfulness of the aims pursued and the subjective reasons for the adoption of the measure in question represent two additional stages of analysis in many judgments.

reasonableness of the measure in question are to be reviewed. [18]

61. Even though the application of the principle of proportionality has also been confirmed in matters concerning the CAP on many occasions, at the same time the Court has consistently held that the Community legislature enjoys a wide discretion in that sphere and concludes that judicial review of the implementation of that principle in the context of the CAP is limited to ascertaining whether the measure is manifestly inappropriate in terms of the objective which the competent institution is seeking to pursue. [19]

62. It is settled case-law that in the proportionality test in matters concerning the CAP, 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. [20]

63. The Court's restriction of the proportionality test to reviewing the manifest inappropriateness of the measure in question is not a feature peculiar to matters concerning the CAP, but, according to settled case-law, applies in all areas which entail political, economic and social choices on the part of the legislature, and in which it is called upon to undertake complex assessments, for which it therefore enjoys a broad margin of assessment and action. [21]

64. As I have already said elsewhere, [22] I do not find this case-law, and in particular the reduction of the proportionality test to a mere review of appropriateness, persuasive. In my opinion, such a structural reduction of the three-stage proportionality test to a one-

18 — In many judgments, the Court has admittedly simply found that the principle of proportionality requires that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it. In so far as in those judgments the reasonableness of the measures to be examined is typically not important, they do not allow the conclusion to be drawn that the proportionality test must follow a two-stage scheme of analysis without consideration of the reasonableness of the measure in question.

19 — *Agrana Zucker*, cited in footnote 15, paragraph 32; Case C-34/08 *Azienda Agricola Disarò Antonio and Others* [2009] ECR I-4023, paragraph 76; *Spain* v *Council*, cited in footnote 16, paragraph 98; Case C-535/03 *Unitymark and North Sea Fishermen's Organisation* [2006] ECR I-2689, paragraph 57; Case C-94/05 *Emsland-Stärke* [2006] ECR I-2619, paragraph 54; *Jippes and Others*, cited in footnote 16, paragraph 82; *Crispoltoni and Others*, cited in footnote 16, paragraph 42; *Fedesa and Others*, cited in footnote 16, paragraph 14; and Case 265/87 *Schräder* [1989] ECR 2237, paragraph 22.

20 — *Agrana Zucker*, cited in footnote 15, paragraph 33; *Spain* v *Council*, cited in footnote 16, paragraph 99; and *Jippes and Others*, cited in footnote 16, paragraph 83.

21 — See Case C-558/07 *S.P.C.M. and Others* [2009] ECR I-5783, paragraph 42; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 52; Case C-434/02 *Arnold André* [2004] ECR I-11825, paragraph 46; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 48; and Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 123. See also Case C-17/98 *Emesa Sugar* [2000] ECR I-675, paragraph 53.

22 — See my Opinion in *Azienda Agricola Disarò Antonio and Others*, cited in footnote 19, point 61 et seq.

stage review of appropriateness results in an excessive erosion of the principle of proportionality, which is part of primary law.

65. The starting point for the application of the proportionality test in matters concerning the CAP must be that the judicial review of a measure taken by the Community legislature is not precluded by its broad discretion. [23]

66. An argument against the Court's approach of restricting the proportionality test in matters concerning the CAP to examining appropriateness is that the conditions of appropriateness, necessity and reasonableness do not reflect different shades of the same concept. Rather, the examination of the necessity and reasonableness of a measure is distinct from appropriateness and important for individual protection. The objective pursued by the Community legislature and the affected rights of individuals are 'compared' only in the context of necessity and reasonableness. If only the appropriateness of a measure is examined, there is no review of proportionality as such, but only an objective review of discretion without elements of individual protection. [24]

67. Thus, the example of the present case clearly illustrates that reducing the proportionality test to merely examining the appropriateness of the measure adopted by the Community legislature may result de facto in any practical examination of the proportionality of the measures concerned being abandoned.

23 — See my Opinions in *Azienda Agricola Disarò Antonio and Others*, cited in footnote 19, point 61, and *Agrana Zucker*, cited in footnote 15, point 51. See also the Opinion of Advocate General Sharpston in Joined Cases C-5/06 and C-23/06 to C-36/06 *Zuckerfabrik Jülich and Others* [2008] ECR I-3231, point 65, and the Opinion of Advocate General Kokott in *S.P.C.M. and Others*, cited in footnote 21, point 69 et seq., which rightly state that even in matters in which complex technical and/or political choices must be made and the Community legislature therefore enjoys a wide margin of assessment and action, it must be reviewed if there are clearly less oppressive measures available which are equally effective, or if the measures adopted are obviously out of proportion to the aims pursued. Otherwise the principle of proportionality, which is part of primary law, would be deprived of its practical effect.

24 — See my Opinion in *Azienda Agricola Disarò Antonio and Others*, cited in footnote 19, point 63. See also von Danwitz, T., 'Der Grundsatz der Verhältnismäßigkeit im Gemeinschaftsrecht', *Europäisches Wirtschafts- und Steuerrecht*, 2003, p. 391, at p. 396, who points out that such an approach reduces the principle of proportionality to a discretionary review.

68. According to recital 19 in the preamble to Regulation No 318/2006, the production charge was introduced to contribute to the financing of the expenditure occurring under the CMO in the sugar sector. Because by its nature the production charge implies an influx of funds to the Community, such a charge is appropriate per se for attaining the objective set by the Community legislature, regardless of the chosen basis for assessment of that charge. Consequently, in the case of a proportionality test in a case like the present one, the examination of the necessity and the reasonableness of the production charge introduced by the Community legislature is specifically relevant.

69. It must also be stressed that in connection with the proportionality test for Community measures in areas which entail political, economic and social choices on the part of the legislature, and in which it is called upon to undertake complex assessments, despite its finding in principle that such an examination is limited to reviewing the manifest inappropriateness of the measures in question, the Court nevertheless regularly takes into consideration elements relating to the necessity and the reasonableness of the measures to be reviewed. [25]

70. In my view, the measures adopted by the Community legislature in matters relating to the CAP are therefore in principle also subject to a three-stage proportionality test (appropriateness, necessity and reasonableness). However, because it is not for the Court to substitute its own decisions for the social, economic or political decisions of the Community legislature in matters relating to the CAP, the three-stage proportionality test in such matters is to be limited to examining whether the measures in question are manifestly inappropriate, manifestly unnecessary or manifestly unreasonable and that in that review account was taken of the right of assessment enjoyed by the Community

25 — See *Agrana Zucker*, cited in footnote 15, paragraph 42; *British American Tobacco (Investments) and Imperial Tobacco*, cited in footnote 21, paragraph 126 et seq.; and *Emesa Sugar*, cited in footnote 21, paragraph 54 et seq. See also Koch, O., *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften*, Berlin, 2003, p. 212, who stresses that nearly all the judgments in which the Court seemingly reduced the review to 'inappropriateness' included an analysis of possible alternative measures and, in some cases, detailed reasons why those measures were not preferable. The notion of 'manifest inappropriateness' must therefore be understood merely as a synonym for a reduced level of scrutiny as part of the multi-stage proportionality test. See also Kischel, U., 'Die Kontrolle der Verhältnismäßigkeit durch den Europäischen Gerichtshof', *EuR* 2000, p. 380, at p. 398 et seq., who says that the Court does not give its own wording, according to which the review of proportionality is to be limited to an examination of manifest inappropriateness in the relevant areas, the purport which it appears to have at first sight. In contrast, it is clear from the relevant rulings that the discretion enjoyed by the Community legislature does not restrict proportionality to manifest inappropriateness, but limits the review of proportionality in general to manifest errors.

legislature. [26] In this way, respect for the political margin of discretion enjoyed by the Community legislature can be guaranteed, without taking away any practical relevance from the principle of proportionality in those matters.

71. In the light of the foregoing, I conclude that in the proportionality test for matters relating to the CAP a three-stage criterion for analysis with a reduced level of scrutiny is to be applied. In the main proceedings, it must therefore be reviewed in particular whether the levying of the production charge and the fixing of its basis for assessment in a manner that is decoupled from production appear manifestly inappropriate, manifestly unnecessary or manifestly unreasonable having regard to the aims pursued by the Community legislature.

(b) Proportionality test

72. According to recital 19 in the preamble to Regulation No 318/2006, the production charge was introduced to contribute to the financing of the expenditure occurring under the CMO in the sugar sector. For the reasons set out above, it is clear that neither the levying of the production charge nor the setting of the amount of the charge on the basis of the sugar quota allocated, without taking into consideration any relevant production thresholds and corresponding withdrawals, is manifestly inappropriate for attaining that aim. [27]

73. Furthermore, I cannot see anything to suggest that the levying of the production charge and the calculation of that charge on the basis of the sugar quota allocated were manifestly unnecessary.

74. A measure is necessary if, from among several measures which are appropriate for meeting the objective pursued, it is the least onerous for the interest or legal right in question. [28]

75. It is probably not disputed that the Community legislature is free in principle to require the sugar-producing undertakings to contribute to the financing of the CMO in the sugar sector by means of a production charge. However, it is disputed whether the specific form of that charge and in particular its calculation on the – decoupled – basis of the sugar quotas allocated was necessary for attaining that aim.

26 — See my Opinion in *Azienda Agricola Disarò Antonio and Others*, cited in footnote 19, point 62 et seq.

27 — See points 67 and 68 of this Opinion.

28 — *Schräder*, cited in footnote 19, paragraph 21.

76. By decoupling the basis for calculation from production, the Community legislature expressed its intention to organise the contribution of sugar-producing undertakings to the financing of the CMO in the sugar sector in such a way that that financial contribution remains constant in relation to the sugar quotas over a period of several years and, at the same time, can be called in during the current marketing year. Against the background of the wide discretion enjoyed by the Community legislature in these matters, there can be no objection, from the point of view of the necessity of the measure, to this specific form of organisation of the charge and the associated need to define the basis for calculation as decoupled from production.

77. A further set of arguments concerning the alleged non-necessity of the decoupled charge for the purposes of Article 16 of Regulation No 318/2006 concerns the specific relationship between the Community's expenditure occurring under the CMO in the sugar sector and its revenue from that production charge. In this connection, it is argued in particular that the revenue from the production charge exceeds the expenditure to be covered.

78. According to recital 19 in the preamble to Regulation No 318/2006, the production charge was introduced to require sugar-producing undertakings to contribute to the financing of the expenditure occurring under the CMO in the sugar sector.

79. If it were to emerge that the production charge arrangements were fixed in such a way that as a rule the Community's income from that charge exceeded the expenditure to be financed by the charge, they would have to be regarded as manifestly unnecessary and therefore as disproportionate.

80. It should not be overlooked in this connection, however, that the wide discretion enjoyed by the Community legislature in matters concerning the CAP, which implies limited judicial review of its exercise, applies, in accordance with settled case-law, not only to the nature and scope of the measures to be taken but also, to some extent, to the finding of the basic facts. [29]

81. In its communication to the Council and the European Parliament of 14 July 2004, [30] the Commission estimated the Community's expenditure following the reform of the sugar sector at around EUR 1 540 million per year, these annual costs being consistent with the

29 — See *Spain* v *Council*, cited in footnote 16, paragraph 121; Case C-120/99 *Italy* v *Council* [2001] ECR I-7997, paragraph 44; Case C-179/95 *Spain* v *Council* [1999] ECR I-6475, paragraph 29; Case C-4/96 *NIFPO and Northern Ireland Fishermen's Federation* [1998] ECR I-681, paragraphs 41 and 42; Case C-122/94 *Commission* v *Council* [1996] ECR I-881, paragraph 18; and Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, paragraph 25.

30 — Communication from the Commission to the Council and the European Parliament: 'Accomplishing a sustainable agricultural model for Europe through the reformed CAP – sugar sector reform' (COM(2004) 499 final, p. 11).

status quo expenditure scenario. The costs of the new measures proposed for the sugar sector, for which the direct decoupled payment to producers represented the major element, would be offset by the savings resulting from a substantial reduction in export refund expenditure and from the abolition of the production refund for the chemical and pharmaceutical industries and of the refining aid. When the proposed measures for the sugar sector had been fully implemented, the envelopes for direct income support would involve an annual cost of EUR 1 340 million, whilst expenditure in respect of export refunds for sugar and export refunds for sugar contained in exported processed products were estimated at about EUR 100 million each. In its – slightly amended – proposal for a Council regulation on the common organisation of the markets in the sugar sector, [31] the Commission reiterated the neutrality of the proposed reform as regards expenditure. The major element as regards costs was once again the direct decoupled payments to producers, the costs for which would now amount to EUR 1 542 million per marketing year.

82. Furthermore, it is clear from the Council's note of 3 November 2005 containing a tabular summary of the financial consequences of the reform of the sugar sector, provided by the applicant as an annex, that the Council also expected expenditure between EUR 1 550 and EUR 1 600 million as from the 2007/08 marketing year, whilst the costs of direct income support were also estimated at EUR 1 542 million per marketing year.

83. Comparing that estimated expenditure with the financial consequences of the production charge under Article 16 of Regulation No 318/2006, it becomes immediately clear that the total amount of that charge is far below the Community's estimated annual expenditure in the sugar sector. [32] Against this background, reliance on the judgment in *Zuckerfabrik Jülich and Others* [33] also appears to be inappropriate. In that judgment, the Court decided against an interpretation of the production charge – applicable at that time – which would entail the risk that the

31 — COM(2005) 263 final, point 5 of the explanatory memorandum.

32 — Under Article 16(2) of Regulation No 318/2006, the production charge is set at EUR 12 per tonne of the sugar and inulin syrup quota and at EUR 6 per tonne for the isoglucose quota. In Annex III to that regulation, the national and regional quotas are set at up to 17 440 537 tonnes for sugar, 507 680 tonnes for isoglucose and 320 718 tonnes for inulin syrup. In Annex IV the additional quotas for sugar are set at up to 1 100 000 tonnes for sugar and 103 000 tonnes for isoglucose. The maximum production charge to be paid by all sugar-producing undertakings is mathematically therefore around EUR 230 million, without taking into account the renunciations of quotas which have since taken place.

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

charges due to the Community might exceed the expenditure to be covered.

84. In this connection, the applicant's argument that the production charge does not serve to finance the direct income support scheme and therefore exceeds the Community's remaining expenditure occurring under the CMO in the sugar sector must be firmly rejected. Irrespective of whether the Community's expenditure for the direct decoupled payments to producers in the sugar sector are to be classified in budgetary terms as 'expenditure occurring under the CMO in the sugar sector', it is clear from the drafting history of Regulation No 318/2006 that Community expenditure in the sugar sector was now intended to be concentrated primarily on those direct payments. The objective of the production charge, as set out in recital 19 in the preamble to Regulation No 318/2006, is therefore to be understood to the effect that that charge was also conceived, in terms of its amount, as a contribution to the financing of expenditure for the direct decoupled payments.

85. In the light of these considerations, I consider that the levying of the production charge and the calculation of that charge on the basis of the allocated sugar quota are not manifestly unnecessary for attaining the aim pursued by the Community legislature of requiring the sugar-producing undertakings to contribute to the financing of the Community's expenditure in the sugar sector.

86. Lastly, there is also not a manifestly unreasonable relationship between the objectives pursued and the disadvantages caused.

87. In this connection, the main objection raised is that calculating the production charge on the basis of the allocated sugar quota would mean that the charge is levied, to some extent, on sugar which does not actually exist, if – as in the main proceedings – production does not exceed the production threshold. If, by contrast, quota sugar were produced in excess of the production threshold, the same charge would be imposed twice where quota sugar is carried over to the next marketing year. In the case of reclassification as industrial sugar, the production charge, which remains at the same level, is disproportionately high.

88. I do not find these arguments persuasive.

89. A common feature of the arguments is that they stress the consequences of levying the charge exclusively in relation to the quota sugar withdrawn from the market. However, they overlook the fact that the production charge was conceived by the Community legislature in the exercise of its wide discretion as a quota charge independent of production. The reasonableness of that charge cannot be called into question by referring to the

consequences of that charge in relation to a relatively small subcategory of quota sugar, namely that withdrawn from the market. Rather, the examination of reasonableness must take account of all the advantages and disadvantages of the quota charge independent of production in the context of the overall scheme of that regime.

90. Because the Community legislature used the allocated sugar quota as the basis for assessment of the production charge, it introduced a charge system in which the charges are levied on the basis of the total sugar quota even if the sugar quota is not fully utilised. The causes of such incomplete utilisation of the sugar quota can be not only a crop failure, other problems or a free economic decision by the sugar-producing undertaking, but also a Commission decision ordering a withdrawal of sugar from the market for a certain marketing year.

91. If a sugar-producing undertaking is not able or is not permitted to utilise its sugar quota fully, it will be able to sell less sugar at the relevant market price or dispose of it by selling it to the national intervention agencies. [34] Because the charge is based on the quota and not on the quantities of sugar actually sold, it remains constant even if the sugar-producing undertakings' income from the sale of their sugar falls.

92. Even though this fact may certainly represent a financial disadvantage for the sugar-producing undertakings, it is not manifestly unreasonable in relation to the aims pursued by the Community legislature to require the sugar-producing undertakings to help to finance the CMO in the sugar sector by means of a contribution which is payable in advance and is as constant as possible.

93. In weighing those interests, it must be borne in mind in particular that by the reform of the CMO in the sugar sector, decoupled agricultural income support was also increased. [35] In the overall context of the CMO in the sugar sector, the decoupled charge under Article 16 of Regulation No 318/2006 is

34 — Under Article 18(2) of Regulation No 318/2006, the intervention price for quota sugar amounts to 80 % of the reference price applicable for the following marketing year. That intervention possibility is limited both in time, to the 2006/07 to 2009/10 marketing years, and in volume, to a total quantity of 600 000 tonnes per marketing year for the Community.

35 — See point 40 of this Opinion.

therefore clearly the basic approach adopted by the reform of the CMO in the sugar sector.

94. Furthermore, a numerical analysis of the consequences of the non-utilisation of the sugar quota on the relationship between the charge payable by the sugar-producing undertakings and their income from the sale of quota sugar clearly shows that the unchanging nature of the charge does not result in an unreasonably high burden on those undertakings. For example, the applicant's own calculations show that even in a case like the present one, where the Commission has set a drastic withdrawal percentage of 13.5 %, the charge increases, arithmetically, only from EUR 12 per tonne to EUR 13.87 per tonne in the case of full utilisation of the production threshold in relation to the quota sugar placed on the market. Having regard to the reference price of EUR 631.90 per tonne in the 2007/08 marketing year – which had to be secured precisely by means of that withdrawal from the market – the increase in the charge per tonne of quota sugar placed on the market, based on that estimate, does not entail an unreasonable burden on the sugar-producing undertakings, especially since under Article 16 (4) of Regulation No 318/2006 they may require sugar-beet or sugar-cane growers or chicory suppliers to bear up to 50 % of the production charge concerned. [36]

95. In the light of the foregoing, I conclude that neither the levying nor the calculation of the production charge under Article 16 of Regulation No 318/2006 on the basis of the abstractly allocated sugar quota appears to be manifestly inappropriate, manifestly unnecessary or manifestly unreasonable having regard to the aim pursued by that charge and in the light of the wide discretion enjoyed by the Community legislature in matters concerning the CAP. Article 16 of Regulation No 318/2006 is therefore compatible with the principle of proportionality.

2. Alleged infringement of the principle of non-discrimination

(a) Insufficient express clarification of the alleged infringement in the order for reference

96. Even though by its second question the referring court expressly seeks clarification from the Court as to the compatibility of

36 — At the hearing the applicant confirmed, moreover, that it had taken this option of requiring the farmers to contribute to the financing of the production charge.

Article 16 of Regulation No 318/2006 with the principle of non-discrimination derived from Article 34 EC, the order for reference does not contain any express analysis or description of the facts or doubts which led the referring court to ask that question. Against that background, neither the Council nor the Commission examined the question whether the decoupled calculation and levying of the production charge under Article 16 of Regulation No 318/2006 might infringe the principle of equal treatment.

97. Nevertheless, in my opinion, this question must not be ignored in the present proceedings.

98. It should be stated, first of all, that the description of the defendant's views and arguments in the order for reference contains an important reference to the referring court's doubts regarding a possible infringement of the principle of equal treatment. The referring court states in particular that, in the defendant's opinion, 'it is unsatisfactory for an undertaking to be able to produce quota sugar only up to a production threshold, which depends on the Member State in which it is established, but for it still to have to pay the production charge on the total quota allocated to it'. It is immediately clear from this statement that even the defendant in the main proceedings has considered the existence of an infringement of the principle of equal treatment stemming from the fact that the production thresholds have regional differences, but the production charges were calculated on the basis of the total sugar quota allocated without reference to the production thresholds.

99. On a sound appraisal of the information contained in the order for reference, an infringement of the principle of non-discrimination could, in the view of the referring court, stem in particular from the fact that the production thresholds are set on a regionally differentiated basis under Article 1 (2) of Regulation No 290/2007, whilst the production charges under Article 16 of Regulation No 318/2006 are determined on the basis of the sugar quota and therefore independently of production, with the result that the burden of the production charges could be different from one undertaking to the next depending on nationality. The applicant and the Republic of Lithuania expressed the same doubts in their written observations. [37]

100. In view of the above considerations, I consider it appropriate, despite the insufficient clarification given in the order for reference, also to examine the question of a possible infringement of the principle of non-discrimination in the present preliminary ruling proceedings. I will first consider the criterion for analysis to be applied in examining an alleged infringement of the principle of non-discrimination in matters concerning the CAP. I will then examine whether the

37 — See point 33 of this Opinion.

decoupling of the charge from production under Article 16 of Regulation No 318/2006 in combination with the regional differentiation of the production thresholds under Article 1(2) of Regulation No 290/2007 is to be regarded as an infringement of the principle of non-discrimination.

(b) Criterion for analysis

101. 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. [38]

102. A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment. [39]

103. I have already considered above the fact that, in matters concerning the CAP, it is settled case-law that the Community legislature has a wide discretion. [40] That discretion is also to be taken into consideration in the context of the second subparagraph of Article 34 (2) EC. [41]

104. If it were found that a Community measure in the sphere of the CAP results in unequal treatment of producers of the same product in different Member States, the judicial review of observance of the principle of equality must therefore essentially be limited to examining whether the difference in treatment relates sufficiently to a legally permitted aim and is not manifestly inappropriate in relation to that aim.

38 — 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; see *Agrana Zucker*, cited in footnote 15, paragraph 46, and Case C-313/04 *Franz Egenberger* [2006] ECR I-6331, paragraph 33.

39 — Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 47, and the case-law cited.

40 — See point 61 et seq. of this Opinion.

41 — See *Unitymark and North Sea Fishermen's Organisation*, cited in footnote 19, paragraph 57. See also Groussot, X., *General Principles of Community Law*, Groningen, 2006, p. 167 et seq.; Thiele, G., in Calliess, C. and Ruffert, R. (eds), *Kommentar zu EUV/EGV*, 3rd edition, Munich, 2007, Article 34 EC, paragraph 57; and Barents, R, 'Recent developments in Community case law in the field of agriculture', *CML Rev.* 1997, p. 811, at p. 840 et seq.

c) Examination of the alleged infringement of the principle of non-discrimination

105. Under Article 16 of Regulation No 318/2006, the production charge is levied at a level of EUR 12 per tonne on the total sugar quota allocated to a sugar-producing undertaking. Consequently, the part of a sugar quota which cannot be utilised as a consequence of a withdrawal in accordance with Article 19 of Regulation No 318/2006 in conjunction with Article 1 of Regulation No 290/2007 must be included in the basis for assessment of the production charge. [42]

106. In Article 1 (1) of Regulation No 290/2007, the withdrawal percentage is set at 13.5 % for the 2007/08 marketing year. In Article 1 (2)(a) and (b) of Regulation No 290/2007, that withdrawal percentage is remodelled as a production threshold. [43] In Article 1 (2)(c) of Regulation No 290/2007, that production threshold is then regionally differentiated, as the sugar-producing undertakings in the Member States in which at least 50 % of the national sugar quota has been released from 1 July 2006 as a result of quotas being renounced under Regulation No 320/2006 are exempted from withdrawal. For the Member States in which less than 50 % of the national sugar quota has been released from 1 July 2006 as a result of quotas being renounced, the withdrawal percentage provided for in the first paragraph is reduced in proportion to the quotas released.

107. On the basis of this regional differentiation, the withdrawal percentage for the 2007/08 marketing year was reduced for Spain to 10.53 %, for Sweden to 10.26 %, for the Czech Republic to 7.29 %, for Hungary to 6.21 %, for Slovakia to 4.32 % and for Finland to 3.24 %, whilst it ceased to apply to Greece, Italy and Portugal. [44] This reduction of the withdrawal percentage resulted in a corresponding increase in the production thresholds applicable in those Member States.

108. In view of these figures, it is clear that the regional differentiation of the withdrawal percentage has meant that the degree to which the sugar-producing undertakings could utilise their sugar quotas in the 2007/08 marketing year was dependent inter alia on the Member State in which they were established. In contrast, the production charge under Article 16 of Regulation No 318/2006 was levied uniformly throughout the Community on the basis of the allocated sugar quota, irrespective of the relevant withdrawal percentage and the corresponding production threshold.

42 — See point 57 of this Opinion.

43 — See footnote 13 to this Opinion.

44 — Annex to Regulation No 290/2007.

109. It follows directly from these findings that the part of the production charge payable by the undertakings, which corresponded to the part of their quota which was subject to a preventive withdrawal, varied in the 2007/08 marketing year depending on the Member State in which the undertakings were established. [45] To that extent, the fixing of the production charge provided for in Article 16 of Regulation No 318/2006 resulted in different treatment for undertakings which could be in a similar situation but were established in different Member States.

110. However, it must still be examined whether that difference in treatment is based on an objective and reasonable criterion, that is, if it pursues a legally permitted aim and whether it is appropriate having regard to that aim.

111. With regard to responsibility for the regional differentiation of the withdrawal percentage and the corresponding production thresholds, recital 8 in the preamble to Regulation No 290/2007 stresses, first of all, that the constraints associated with the withdrawal could have serious economic consequences for undertakings in Member States which have made particular efforts under the restructuring scheme established by Regulation No 320/2006. It is then explained that such an effect would be contrary to the very objective of this scheme and of the common organisation of the markets in the sugar sector, which is to guarantee the viability and competitiveness of this sector.

112. On a sound appraisal of statements contained in recital 8 in the preamble to Regulation No 290/2007, account is to be taken of the efforts made by the Member States with regard to the definitive renunciation of quotas by reducing the withdrawal percentage and making a corresponding increase in the production thresholds in individual Member States. Because, in the view of the Commission – which is evident from recital 8 in the preamble to Regulation No 290/2007 – this renunciation of national quotas and the ensuing restructuring result in a national economic environment in which an unrestricted application of the withdrawal mechanism and the corresponding production thresholds would threaten the viability and competitiveness of the remaining sugar-producing undertakings – and therefore also of sugar-beet producers [46] – the withdrawal percentage in Article 1 (2)(c) of Regulation No 290/2007 for

45 — With regard to this finding of unequal treatment with regard to the part of the sugar quota affected by the withdrawal which is subject to a charge, see *Agrana Zucker*, cited in footnote 15, paragraph 49.

46 — In this connection, recital 35 in the preamble to Regulation No 318/2006 also states that in Member States with a significant reduction of sugar quota sugar-beet producers will face particularly severe adaptation problems and in such cases the transitional Community aid to sugar-beet growers will not suffice to fully address the beet growers' difficulties. Against that background, Member States having reduced their quota by more than 50 % should be authorised to grant State aid to sugar-beet growers during the application period of the transitional Community aid.

the Member States concerned – and therefore for the sugar-producing undertakings established there – was reduced and the production thresholds were thereby increased.

113. In view of the structural adjustment problems in connection with the reform of the sugar sector which are faced by sugar-producing undertakings in individual Member States, by setting the withdrawal percentage for the 2007/08 marketing year on a regionally differentiated basis, the Commission therefore complies with the primary law requirement under Article 33(2)(a) EC that, in working out the CAP, account must be taken of the particular nature of agricultural activity, resulting in part from natural and structural disparities between the various agricultural regions.

114. In the light of these considerations, I conclude that a legally permitted aim was pursued with the regional differentiation of the withdrawal percentage and the corresponding production thresholds and the resulting difference in treatment of sugar-producing undertakings which may be in a similar situation but are established in different Member States.

115. In my opinion, the unequal treatment is also not manifestly inappropriate in relation to the aim pursued.

116. In this respect, it must be stressed in particular that the withdrawal percentage pursuant to Article 1(2)(c) of Regulation No 290/2007 was reduced in proportion to the quotas released, whilst the withdrawal from the market ceased to apply completely only in the Member States in which at least 50 % of the national sugar quota was released. This variable form of regional graduation of the withdrawal percentage and the corresponding production thresholds is a clear indication of the balanced character of this regime, where only the sugar-producing undertakings in the Member States where the reduction of sugar production capacities was particularly marked, at more than 50 %, and the sugar sector was therefore undergoing radical changes were fully exempted from the withdrawal from the market.

117. In view of the discretion which the Commission is to be granted in connection with the organisation of the withdrawal mechanism in the light of the specific characteristics of the individual marketing years, I cannot therefore see anything to suggest a possible infringement of the principle of non-discrimination.

118. In the light of the foregoing, I conclude that the setting of the production charge in accordance with Article 16 of Regulation No 318/2006 on the basis of the allocated sugar quota, despite the regional differentiation of the withdrawal mechanism and the

resulting difference in treatment of undertakings which could be in a similar situation but were established in different Member States, does not give grounds for the existence of an infringement of the principle of equality.

119. It follows from all 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.

VII – Conclusion

120. 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 16 of Council Regulation (EC) No 318/2006 of 20 February 2006 on the common organisation of the markets in the sugar sector is to be interpreted as meaning that even the part of a sugar quota which cannot be utilised as a consequence of a preventive withdrawal in accordance with Article 19 of Regulation No 318/2006 in conjunction with Article 1 of Commission Regulation (EC) No 290/2007 of 16 March 2007 establishing, for the 2007/08 marketing year, the percentage provided for in Article 19 of Regulation (EC) No 318/2006 must be included in the assessment of the production charge.

(2) The examination of the second question has not revealed anything which might affect the validity of Article 16 of Regulation No 318/2006.