JUDGMENT OF THE COURT (Eighth Chamber)

28 July 2011 *

In Case C-309/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 9 June 2010, received at the Court on 29 June 2010, in the proceedings

Agrana Zucker GmbH

v

Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft,

THE COURT (Eighth Chamber),

composed of K. Schiemann, President of the Chamber, C. Toader and E. Jarašiūnas (Rapporteur), Judges,

* Language of the case: German.

Advocate General: V. Trstenjak,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 31 March 2011,

after considering the observations submitted on behalf of:

— Agrana Zucker GmbH, by P. Pallitsch and C. Pitschas, Rechtsanwälte,

— the Greek Government, by E. Leftheriotou and K. Tsagkaropoulos, acting as Agents, assisted by V. Mereas, legal counsel,

— the Swedish Government, by A. Falk and S. Johannesson, acting as Agents,

— the Council of the European Union, by E. Sitbon and Z. Kupčová, acting as Agents,

— the European Commission, by G. von Rintelen and P. Rossi, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation and validity of Article 11 of Council Regulation (EC) No 320/2006 of 20 February 2006 establishing a temporary scheme for the restructuring of the sugar industry in the Community and amending Regulation (EC) No 1290/2005 on the financing of the common agricultural policy (OJ 2006 L 58, p. 42).

2 The reference has been made in proceedings brought by Agrana Zucker GmbH ('Agrana Zucker') against a decision of the Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (Federal Minister for Agriculture and Forestry, Environment and Water Management) of 10 December 2009, concerning the raising of the second instalment of the temporary restructuring amount ('the temporary amount') for the 2008/2009 marketing year.

Legal context

3 Recitals 1, 2 and 4 in the preamble to Regulation No 320/2006 state inter alia as follows:

'(1) … 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....

(2) A temporary restructuring fund should be set up in order to finance the restructuring measures for the Community sugar industry. For reasons of sound financial management the fund should form part of the Guarantee Section of the EAGGF and thus be governed by the procedures and mechanisms of Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy [OJ 1999 L 160, p. 103] and, as from 1 January 2007, of the European Agricultural Guarantee Fund set up by Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy [OJ 2005 L 209, p. 1].

...

4) The restructuring measures provided for by this Regulation should be financed by raising temporary amounts from those sugar, isoglucose and inulin syrup producers which will eventually benefit from the restructuring process. As this amount falls outside the scope of the charges traditionally known in the framework of the common market organisation for sugar, the proceeds resulting from its collection should be considered as "assigned revenue" as provided for by Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities [OJ 2002 L 248, p. 1]...'

4 Article 1 of Regulation No 320/2006 provides:

‘1. The temporary fund for the restructuring of the sugar industry in the Community (hereinafter referred to as “restructuring fund”) is hereby established....

The restructuring fund shall form part of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund. As from 1 January 2007 it shall form part of the European Agricultural Guarantee Fund (EAGF).

2. The restructuring fund shall finance the expenditure resulting from the measures provided for under Articles 3, 6, 7, 8 and 9.

3. The temporary restructuring amount referred to in Article 11 shall be revenue assigned to the restructuring fund in accordance with Article 18(2) of Regulation … No 1605/2002.

Any amount that may be available in the restructuring fund after the financing of the expenditure referred to in paragraph 2 shall be assigned to the EAGF.

...’

5 Article 3 of Regulation No 320/2006 provides:

‘1. Any undertaking producing sugar … 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:

(a) renounces the quota assigned by it to one or more of its factories and fully dismantles the production facilities of the factories concerned;

(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.

…’

6 Articles 6 to 9 of Regulation No 320/2006 provide, for their part, for various types of aid for diversification and transitional aid which, as is apparent from Article 10(1) and (3) of that regulation, are independent of the aid provided for in Article 3 and, like that aid, may be granted during the marketing years 2006/2007 to 2009/2010 within the limit of the appropriations available in the restructuring fund.

7 Article 11 of Regulation No 320/2006 provides:

'1. A temporary … 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 … amount for this marketing year and subsequent marketing years.

2. The temporary … amount for sugar … shall be set at:

— EUR 126.40 per tonne of quota for the marketing year 2006/2007,

— EUR 173.8 per tonne of quota for the marketing year 2007/2008,

— EUR 113.3 per tonne of quota for the marketing year 2008/2009.

...'

8 Recital 1 to Council Regulation (EC) No 1261/2007 of 9 October 2007, amending Regulation (EC) No 320/2006 (OJ 2007 L 283, p. 8), by which certain measures were adopted in order to improve the functioning of the restructuring scheme, states:

'Council Regulation … No 320/2006 … was adopted with the aim of enabling the least competitive sugar producers to give up their quota production. However, the renunciation of quotas under that Regulation has not reached the level that was initially expected.'

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

9 By decision of the Agrarmarkt Austria (supervisory body) of 28 September 2009, corrected by decision of 13 October 2009, Agrana Zucker was called upon to pay the second instalment of the temporary amount for the marketing year 2008/2009, amounting to EUR 15 908 561.77.

10 The complaint lodged by Agrana Zucker against that decision was rejected by decision of the Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft on 10 December 2009, the latter decision being the subject of the action before the referring court.

11 It emerges from the order for reference that, in disputing the lawfulness of that decision, Agrana Zucker relies in particular on Case C-33/08 *Agrana Zucker* [2009] ECR I-5035, which confirmed – as is apparent from the first subparagraph of Article 1(3) of Regulation No 320/2006 and from recital 4 thereto – that the proceeds derived from the temporary amount are 'assigned revenue' for the purposes of Regulation No 1605/2002 and that they are intended to ensure the self-financing of the restructuring measures provided for in Regulation No 320/2006. Agrana Zucker infers from this that, according to a teleological interpretation of Article 11 of that regulation, the temporary amount should not be levied if it is manifestly no longer needed to finance those measures. According to Agrana Zucker, that is the position with regard to the second instalment of the temporary amount for the marketing year 2008/2009, which would lead to a clear surplus in the restructuring fund.

12 Before the Verwaltungsgerichtshof, Agrana Zucker submits in particular that the temporary amount cannot be assigned to any other expenditure, notwithstanding the second subparagraph of Article 1(3) of Regulation No 320/2006, which provides that the balance of the restructuring fund after the financing of the restructuring measures is to be assigned to the EAGF.

13 Agrana Zucker argues that, if the collection of the second instalment of the temporary amount for the 2008/2009 marketing year is not entirely cancelled, or if the final determination of that amount is not adjusted in the light of the final statement of the restructuring fund, Article 11 of Regulation No 320/2006 would infringe the principle of proportionality. Moreover, the European Union does not have competence to levy a general tax which is not going to be used to finance measures to restructure the European sugar market.

14 In addition, Agrana Zucker claims that, if Article 11 of Regulation (EC) No 320/2006 were to be construed in the manner proposed by the defendant authority in the main proceedings, it would then be unlawful on grounds of breach of the obligation to state reasons.

15 The Verwaltungsgerichtshof observes that Agrana Zucker has shown that, contrary to the situation considered in the case which led to the judgment in Case C-33/08 *Agrana Zucker*, the financing needs of the restructuring measures have already been fully covered. Accordingly, the Verwaltungsgerichtshof states that it is not in a position to respond, on the basis of the applicable rules and the case-law of the Court of Justice, to the questions of law raised in the case before it.

16 In those circumstances, the Verwaltungsgerichtshof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1) Is Article 11 of … Regulation … No 320/2006 … to be interpreted as meaning that the temporary restructuring amount, laid down in Article 11(2), of EUR 113.30 per tonne of quota for sugar and inulin syrup for the marketing year 2008/2009 must in any case be imposed in full, even if such payment would result in a (significant) surplus in the restructuring fund and there appears to be no prospect of any further increase in financing requirements?

2) In the event that the reply to the first question is in the affirmative: Does Article 11 of Regulation … No 320/2006 in that case infringe the principle of conferral, because Article 11 could, by means of the temporary restructuring amount, introduce a general tax which is not limited to financing expenditure benefiting the persons called upon to pay the tax?'

Consideration of the questions referred

The first question

17 By its first question, the referring court asks whether Article 11 of Regulation No 320/2006 is to be interpreted as meaning that the temporary amount must be levied in full, even if that would result in a revenue surplus in the restructuring fund.

18 Agrana Zucker argues, as does the Greek Government, that it follows from a teleological interpretation of Article 11 of Regulation No 320/2006 that the temporary amount may not be raised if it is clearly unnecessary for the financing of the restructuring measures provided for in that regulation. Accordingly, the sugar producing undertakings should not be obliged to pay the second instalment of the temporary amount for the 2008-2009 marketing year because the raising of that instalment would lead the restructuring fund to accrue a surplus. According to Agrana Zucker, raising the instalment would be contrary, in particular, to the principle of self-financing on which the Court has already ruled in Case C-33/08 *Agrana Zucker*, and in Joined Cases C-5/06 and C-23/06 to C-36/06 *Zuckerfabrik Jülich* [2008] ECR I-3231 and Case C-365/08 *Agrana Zucker* [2010] ECR I-4341, and which implies that there must be a budgetary balance between expenditure incurred and revenue raised.

19 In the alternative, Agrana Zucker submits that a final statement must be established for the restructuring fund after the restructuring measures have been implemented and that the surplus must be repaid to the producers required to pay the temporary amount. It submits, in the further alternative, that, after the surplus has been transferred to the EAGF, it may be used only to finance the expenditure arising in the context of the organisation of the markets in the sugar sector.

20 In that regard, it is sufficient to note, first, that, under Article 11(1) of Regulation No 320/2006, undertakings to which a quota has been allocated are to pay a temporary amount per marketing year, that temporary amount being fixed as to quantum, for the marketing years 2006/2007, 2007/2008 and 2008/2009, in Article 11(2) of that regulation, and, second, that the European Union ('EU') legislature has contemplated the possibility that the revenue accruing from the temporary amount could exceed the expenditure linked to the financing of the restructuring measures for which it is intended, by providing, in the second subparagraph of Article 1(3) of Regulation No 320/2006, that any amount that may be available in the restructuring fund after the financing of that expenditure is to be assigned to the EAGF.

21 Thus, contrary to the assertions made by Agrana Zucker and the Greek Government on the basis of a teleological interpretation of Regulation No 320/2006, it is clear from the wording of Article 11 of that regulation and from its general scheme that the temporary amount must be paid in full by the undertakings concerned for every marketing year referred to, even if that gives rise to a revenue surplus in the restructuring fund following the implementation of the temporary restructuring scheme for the sugar industry established by that regulation.

22 Consequently, the answer to the first question referred is that Article 11 of Regulation No 320/2006 is to be interpreted as meaning that the temporary amount must be raised in full, even if there were to be a revenue surplus in the restructuring fund.

The second question

23 The second question referred concerns the validity of Article 11 of Regulation No 320/2006, thus interpreted. Although that question refers expressly only to the principle of conferral, it is necessary, in the light of the order for reference and the

observations lodged before the Court, to examine the validity of that provision also in relation to the obligation to state reasons, the principle of proportionality and the alleged unjust enrichment of the European Union.

The validity of Article 11 of Regulation No 320/2006 in the light of the principle of conferral

24 The referring court asks whether Article 11 of Regulation No 320/2006 is contrary to the principle of conferral to the extent that it would permit the introduction of a general tax which is not limited to covering the financing expenditure for which the temporary amount is intended.

25 Agrana Zucker submits, as does the Greek Government, that the levying of a tax which is used to finance measures which fall outside the common organisation of the markets in the sugar sector would vest that tax with the character of a general tax the imposition of which does not fall within the competence of the European Union.

26 In that regard, it should be noted that, as emerges from recital 1 to Regulation No 320/2006, the Council of the European Union considered it necessary, in order to bring the Community system of sugar production and trading into line with international requirements and to ensure its competitiveness in the future, to launch a profound restructuring process of the sector leading to a significant reduction of unprofitable production capacity in the Community. To that end, it established, by that regulation, a separate and autonomous temporary scheme for the restructuring of the sugar industry in the Community (Case C-33/08 *Agrana Zucker*, paragraph 34).

27 Within the framework of that temporary scheme, Regulation No 320/2006 established, as described in recital 5 thereto, an economic incentive in the form of restructuring aid, intended for undertakings with the lowest productivity and designed to encourage them to give up their quota production. To that effect, Article 3 of that regulation provides for restructuring aid for four marketing years – the years 2006/2007 to 2009/2010 – with the aim of reducing production to the extent necessary to reach a balanced market situation in the Community (Case C-33/08 *Agrana Zucker*, paragraph 35).

28 In order to finance that restructuring aid, as well as the aid for diversification and the transitional aid referred to in Articles 6 to 9 of Regulation No 320/2006, the Council set up a temporary restructuring fund and in particular decided that, as is stated in recital 4 to that regulation, the financing for those measures would be ensured by raising temporary amounts from those sugar, isoglucose and inulin syrup producers which will eventually benefit from the restructuring process. The proceeds resulting from its collection are considered to be 'assigned revenue' for the purposes of Council Regulation No 1605/2002 (Case C-33/08 *Agrana Zucker*, paragraph 36).

29 Intended, accordingly, to contribute to the restructuring of the sugar industry in the Community, the raising of the temporary amount is a common agricultural policy measure lawfully adopted on the basis of Article 37 EC (see, by analogy, Case 265/87 *Schräder HS Kraftfutter* [1989] ECR 2237, paragraph 9, and Case C-8/89 *Zardi* [1990] ECR I-2515, paragraph 9).

30 The fact that a revenue surplus may arise on the expiry of such a temporary multiannual restructuring scheme, inter alia because producers have ultimately had less recourse than expected to the restructuring aid offered in return for the renunciation of production quotas, and that that surplus is assigned to the EAGF pursuant to the second subparagraph of Article 1(3) of Regulation No 320/2006, does not call into question the competence of the EU legislature to adopt that measure; nor does it divest the measure of its character as an agricultural measure.

31 First, the legality of an EU measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7) and cannot in particular depend on retrospective considerations relating to its efficacy (Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 87 and the case-law cited).

32 Second, in so far as any surplus in the restructuring fund is assigned to the EAGF, of which that fund forms part, the surplus continues to be earmarked for financing common agricultural policy measures only.

33 It follows that Article 11 of Regulation No 320/2006 is not contrary to the principle of conferral.

The validity of Article 11 of Regulation No 320/2006 in the light of the obligation to state reasons

34 Agrana Zucker submits in essence, as does the Greek Government, that, according to the preamble to Regulation No 320/2006, the temporary amount mechanism was to be set up in order to finance the measures for restructuring the Community sugar industry. The statement of reasons for that regulation would therefore be incorrect or incomplete if the proceeds generated by that mechanism could be assigned to the financing of other measures, thereby shedding their temporary character.

35 In that regard, it should be observed that, although the statement of reasons required under Article 296 TFEU must show clearly and unequivocally the reasoning of the EU authority which adopted the measure in question, so as to make it possible for the

persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review, it is not required to go into every relevant point of fact and law. Compliance with the obligation to state reasons must be assessed with reference not only to the wording of the measure but also to its context, and to the whole body of legal rules governing the matter in question. If the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for each of the technical choices made by the institution (see, inter alia, Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraphs 133 and 134).

36 In the present case, the objective of the temporary scheme set up by Regulation No 320/2006 for the restructuring of the sugar industry and the means deployed for attaining that objective – the establishment of an economic incentive to give up quotas and the financing of restructuring measures through the raising of the temporary amount – are covered, in particular, in the preamble to Regulation No 320/2006, by the reasons set out in paragraphs 26 to 28 above.

37 Regarding the financial details of that scheme, recital 2 to Regulation No 320/2006 explains that a temporary restructuring fund should be set up in order to finance the measures for restructuring the Community sugar industry and that, for reasons of sound financial management, that fund should form part of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and, as from 1 January 2007, of the EAGF, set up by Council Regulation (EC) No 1290/2005.

38 Admittedly, that recital does not explain the reasons for which, as provided for under the second subparagraph of Article 1(3) of Regulation No 320/2006, any amount that may be available in the restructuring fund after the financing of the expenditure is to be assigned to the EAGF. However, it should be noted, first, that the recital does state that it is for reasons of sound financial management that that fund should form part of the EAGF, which was set up in order to ensure the financing of various common agricultural policy measures, including those relating to the common organisation of the markets in the sugar sector. Second, it should be noted that, on a financial level, Regulation No 320/2006 is essentially designed to ensure that all the expenditure for

the restructuring which that regulation is designed to bring about in practice, in order to reduce unprofitable production capacity by providing an incentive for producers to give up their quota production, is covered. Accordingly, at the relevant date for the purposes of assessing the legality of that measure – that is to say, as was stated in paragraph 31 above, the date of its adoption – it was possible to predict only that a residual amount of surplus might arise in the restructuring fund after that expenditure had been effected. The decision to assign that surplus to the EAGF, of which the restructuring fund forms part, should therefore be regarded as merely a technical choice, for which no specific statement of reasons can be required.

39 It follows from the foregoing that Article 11 of Regulation No 320/2006 is not flawed by any unlawful element with regard to the obligation to state reasons.

The validity of Article 11 of Regulation No 320/2006 in the light of the principle of proportionality

40 Agrana Zucker submits that Article 11 of Regulation No 320/2006 is contrary to the principle of proportionality if the proceeds from the second instalment of the temporary amount for the marketing year 2008/2009 is not earmarked for specific purposes and can be used to finance expenditure which falls outside the organisation of the markets in the sugar sector. According to recital 4 to that regulation, the objective of the temporary amount is to require the producers to bear the cost of the restructuring measures, in accordance with the principle of self-financing. Since that second instalment is not, in Agrana Zucker's view, necessary for the financing of those measures, the raising of that instalment, which would give rise to a considerable surplus, is manifestly inappropriate for attaining the objectives pursued. In addition, it results in a disproportionate burden for European sugar producers.

41 According to the Greek Government, the raising of the temporary amount infringes the principle of proportionality if it is manifestly inappropriate for attaining the objectives pursued, which would be the case if the revenue accrued were to exceed the expenditure linked to the restructuring measures. The transfer of that surplus to the EAGF constitutes a serious infringement of that principle because, in the view of the Greek Government, the measure constitutes a disproportionate burden on producers and is used to pursue objectives other than the restructuring of the sugar industry.

42 In that regard, it should be recalled that, in accordance with the principle of proportionality, which is one of the general principles of EU law, the acts adopted by EU institutions must 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 (Case C-33/08 *Agrana Zucker*, paragraph 31 and the case-law cited).

43 As regards judicial review of the implementation of that principle, in view of the wide discretion enjoyed by the EU 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 relation to the objective which the competent institution is seeking to pursue (see Case C-33/08 *Agrana Zucker*, paragraph 32 and the case-law cited).

44 Thus, what must be ascertained is not whether the measure adopted by the legislature was the only measure possible or the best measure possible, but whether it was manifestly inappropriate (Case C-33/08 *Agrana Zucker*, paragraph 33 and the case-law cited).

45 In addition, it should be recalled that, as is stated in paragraph 31 above, the lawfulness of an EU measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted and cannot in particular depend on retrospective considerations of its efficacy. Where the EU legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time when the rules in question were adopted (Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraph 14; Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 43; and Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 84).

46 In the present case, it follows from what is stated in paragraphs 26 to 28 above that the purpose of the temporary amount provided for in Article 11 of Regulation No 320/2006 is the financing, by the producers, of the temporary scheme for restructuring the sugar industry in the European Union, which implies that there must be a budgetary balance between the expenses incurred and the revenue raised during the four marketing years in question (see Case C-33/08 *Agrana Zucker*, paragraph 37).

47 To that end, the revenue required to finance the restructuring aid paid to undertakings which decide to give up their quota during one of those marketing years was determined on the basis of a provisional evaluation of the expenditure linked to that aid, carried out – according to the Council and the European Commission – on the basis, in particular, of a quantitative objective of eliminating quota sugar. The actual implementation of that expenditure depended, however, on the choices made by undertakings, because Regulation No 320/2006 establishes only an economic incentive for the giving up of quotas.

48 In those circumstances, it must be held that the temporary amount was determined on the basis of the future effects of the restructuring scheme set up by that regulation, when it was not possible to predict with accuracy what those effects would be.

49 As it is, concerning those effects, there is no dispute that, as is stated in recital 1 to Regulation No 1261/2007, the renunciation of quotas has not reached the level that was initially expected and that, because of that fact, notwithstanding the measures enacted by that regulation to improve the functioning of the restructuring scheme with the aim of increasing the renunciation of quotas, the restructuring fund has a revenue surplus which was not foreseen.

50 However, it is not apparent from the case-file that the assessment of the expenditure and of the revenue necessary to meet that expenditure was manifestly incorrect in the light of the information available to the Community legislature at the time when Regulation No 320/2006 was adopted, the size of that surplus not being a factor sufficient to prove the existence of such an error.

51 Accordingly, the determination of the temporary amount was not manifestly inappropriate for the purposes of attaining the objective pursued. In consequence, Article 11 of Regulation No 320/2006 and the raising of the temporary amount pursuant to that provision cannot be regarded as contrary to the principle of proportionality.

The validity of Article 11 of Regulation No 320/2006 in the light of the alleged unjust enrichment of the European Union

52 On the view that Article 11 of Regulation No 320/2006 is invalid on grounds of lack of competence, lack of reasoning and infringement of the principle of proportionality, Agrana Zucker submits that the raising of the second instalment of the temporary amount for the marketing year 2008/2009 constitutes unjust enrichment of the European Union and that the sugar producing undertakings are therefore justified in calling for the repayment of that second instalment, which was unlawfully levied.

53 However, a claim for restitution based on unjust enrichment of the European Union requires, in order to succeed, proof of an enrichment on the part of the European Union for which there is no legal basis and of impoverishment on the part of the applicant which is linked to that enrichment (see, to that effect, Case C-47/07 P *Masdar (UK)* v *Commission* [2008] ECR I-9761, paragraphs 46 and 49).

54 In the present case, it follows from the findings made above that Article 11 of Regulation No 320/2006 is valid in the light, specifically, of the principles of conferral and of proportionality and that the raising of the second instalment of the temporary amount for the 2008/2009 marketing year, notwithstanding the appearance of a surplus in the restructuring fund, is therefore not without valid legal foundation. Consequently, the raising of that instalment does not constitute unjust enrichment of the European Union which may properly found a claim for restitution and, in any case, cannot be relied upon for the purposes of assessing the validity of Article 11 of the regulation as the legal basis for raising that instalment.

55 In the light of all of the foregoing, the answer to the second question is that an examination of that question has not revealed anything which might affect the validity of Article 11 of Regulation No 320/2006.

Costs

56 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 (Eighth Chamber) hereby rules:

1. **Article 11 of Council Regulation (EC) No 320/2006 of 20 February 2006 establishing a temporary scheme for the restructuring of the sugar industry in the Community and amending Regulation (EC) No 1290/2005 on the financing of the common agricultural policy is to be interpreted as meaning that the temporary amount must be raised in full, even if there were to be a revenue surplus in the temporary restructuring fund.**

2. **The examination of the second question referred for a preliminary ruling has not revealed anything which might affect the validity of Article 11 of Regulation No 320/2006.**

[Signatures]