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THE HIGH COURT

COMMERCIAL

JUDICIAL REVIEW

[2006 No. 933 J.R.]
[2006 No. 81 COM]

BETWEEN

GREENCORE GROUP PLC AND IRISH SUGAR LIMITED TRADING AS GREENCORE SUGAR

APPLICANTS

AND

THE GOVERNMENT OF IRELAND, THE MINISTER FOR AGRICULTURE AND FOOD, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE IRISH FARMERS ASSOCIATION (BY ORDER DATED 28TH JULY 2006) AND THE PROFESSIONAL AGRICULTURE CONTRACTORS OF IRELAND AND THE SPECIALISED BEET MACHINERY OWNERS GROUP (BY ORDER DATED 31ST JULY 2006)

NOTICE PARTIES

Judgment of Mr. Justice Clarke delivered the 14th June, 2007.

1. Introduction

1.1 It had been clear for some time prior to November 2005 that a quite radical restructuring of the sugar industry within the European Union was going to occur. On 24th November, 2005 the Council of the European Union decided on a new regime which was intended to come into effect on 1st July, 2006. The key components of that new regime involved significant price reductions in the guaranteed price for sugar and sugar beet together with a variety of compensation packages. These proceedings involve one of the compensation measures put in place.

1.2 A number of interlocking legislative measures were adopted by the Council on 20th February, 2006 for the purposes of giving effect to the decision taken the previous November. Council Regulation 318/2006 of that date provided for a significant reduction in the institutional support price for community sugar. Council Regulation 319/2006 of the same date set up a single payment scheme which had the effect of decoupling income support from production in relation to sugar. Council Regulation 320/2006 established a scheme for the restructuring of the sugar industry and amended Council Regulation 1290/2005.

1.3 In substance, therefore, the measures adopted had the effect of significantly reducing sugar prices, giving growers a single payment, and providing for a restructuring fund designed to encourage a reduction in the total capacity of the sugar industry. At a general level the mechanism adopted in relation to the restructuring fund was that those producers who continued in business had to pay a significant levy from which the compensation payable to producers exiting the business would be met.

1.4 There proceedings relate to the application of this latter scheme to Ireland. The applicants ("Greencore") were the sole processor in Ireland of sugar beet. In the events that happened Greencore decided to make an early exit from the sugar beet business. Disputes have arisen between Greencore and the respondents ("the State", "the Government", and "the Minister") as to the manner in which the State has made decisions about the allocation of the compensation available under Regulation 320/2006. Those disputes are at the core of these proceedings. It should be noted that, in general terms, one of the key decisions taken by the Government (under the provisions of Regulation 320/2006) which is contested by Greencore, concerns the percentage of the overall restructuring aid to be made available both to sugar beet producers and contractors in the sugar beet sector. It was in that context that the notice parties (who are representative bodies of the relevant sectors) were joined. The first named notice party ("The IFA") is, of course, the major body representative of farmers in Ireland. Apart from that general capacity, the IFA had been involved in making representations in relation to the level of compensation that should be made to sugar beet farmers. The other notice parties ("the contractors representatives") were joined for the purposes of ensuring appropriate representation in these proceedings for the interests of sugar beet contractors.

1.5 Against that general background it is necessary to turn to the categories of issue which arise in these proceedings.

2. The Broad Issues

2.1 It will be necessary to go into the precise provisions of the regulations in due course. However in general terms there are, so far as these proceedings are concerned, two key features of Council Regulation 320/2006. The basic provision is to be found in Article 3 of the Regulation which entitles an undertaking producing sugar (to which a quota had been allocated by the 1st July, 2006) to restructuring aid per tonne of quota renounced. It is, thus, the undertaking (in this case Greencore) which is, generally speaking, entitled to the restructuring aid. However Article 3.6 of the Regulation provides that some of the overall aid is to go to growers and contractors. Article 3.6 permits the member state concerned to specify the percentage to be allocated to growers and contractors but also provides that the minimum of such allocation is to be 10%. The Irish government, in fact, fixed the percentage to be reserved for growers and contractors at 32.38% (being as to 27.5% for growers and 4.88% for contractors).

2.2 Greencore questions, on a number of bases, that decision by the Government. It would, I feel, be fair to describe that contest as the central issue in the proceedings. While the amounts allocated to both the growers and the contractors would appear to be less than was sought by them, the notice parties do not seek to challenge, in these proceedings, the decision of the Government. Thus Greencore seeks to have that decision set aside and is resisted not only by the State but also by the IFA and the contractors representatives.

2.3 The first key issue is, therefore, as to whether Greencore are right in their contention that the Government's decision is flawed. A significant number of sub issues arise under this heading which it will be necessary to address in due course.

2.4 The second broad question which arises derives from the provisions of Article 4 of the Regulation. That Article provides that, in order to become entitled to restructuring aid as a result of renouncing its quota, a processor (such as Greencore) must submit a number of confirmations and commitments together with a restructuring plan. The restructuring plan is, in itself, required to specify the aid to be given to growers and contractors. It is also required to set out both a social plan (dealing with training and early retirement of the workforce and like matters) and an environmental plan (dealing with proposals to deal with environmental obligations).

2.5 It will be necessary to refer in more detail to the relevant provisions of Article 4 in due course. However, as is clear from the brief summary of the provisions referred to, any restructuring plan is required to make provision for both the social and environmental consequences of the closure of the plant concerned. It is also necessary that the plan demonstrate what is described as a "sound economic balance" between the various elements of the plan. The question of the way in which the government should go about ensuring that sound economic balance comes into stark relief in these proceedings. It would appear that the Government decision of the 12th July, 2006 (which is the decision under question) at least contemplated that the entire balance of the restructuring aid (over and above the amount to be allocated to the growers and contractors) would be designated to meet social and environmental costs. Therefore, in practice, it does not appear to have been envisaged that that Greencore, in itself, would directly obtain any of the benefit. It is, again, argued on behalf of Greencore that the Government decision in that regard was flawed.

The second broad set of issues, therefore, concerns that aspect of the Government decision. There are, again, a significant number of sub issues which it will be necessary to address in due course.

I propose to deal with the broad sets of issue in the order in which I have set them out above. However before turning to those issues it is important to set out the factual background first. It seems to me to be appropriate to leave some of the more detailed factual questions over until considering the precise issues to which those facts may be relevant.

3. The Broad Facts

3.1 As noted above the Council of the EU announced its decision to reform the EU sugar regime on the 24th November, 2005. It seems on all the evidence that there was widespread agreement both within the industry and amongst commentators on the industry, that there was no future in sugar beet in Ireland following the very significant price cut which was at the heart of the reform package. There was an initial question as to whether there might be one final beet campaign in which beet would be grown by farmers for the season 2006/2007, and supplied to and processed by Greencore. There seems to have been little question at the time (on the evidence presented) but that one final season was the most that could be expected. However Greencore concluded it would not be economic to continue processing sugar and announced, on the 15th March, 2006, that it intended to renounce its quota and to present a restructuring plan to the Government for the purposes of securing restructuring aid. It should be noted that Greencore had already closed one of its two processing facilities (that at Carlow) in March 2005. Thereafter, sugar production was concentrated at its plant in Mallow. The announcement of the 15th March, 2006 envisaged that the sugar factory at Mallow would close in May 2006 and this, subsequently, in fact occurred.

3.2 It will be necessary to refer in some detail to the procedural requirements of Council Directive 320/2006 in due course. However there were transitional provisions which permitted the process which might be thought to lead to the grant of restructuring aid to commence prior to the formal commencement of the Regulations themselves. Those Regulations were, of course, available in draft form prior to their formal adoption. On that basis the second named respondent ("the Minister") began a consultation process in May 2006 and made what was described an "open call for submissions". Greencore made a submission to the Minister on 2nd June, 2006 and included with that submission a report by DKM Economic Consultants and a report prepared by Farrelly and Mitchell Limited, who are agribusiness consultants. The reports were designed, amongst other things, to estimate the losses to growers contractors and Greencore itself. Greencore maintained in its documentation that the Minister could not take a decision as to the percentage to be reserved to growers and contractors until after Greencore had made its formal application for restructuring aid under Article 4 of Regulation 320/2006.

3.3 It is also clear that other interested parties made submissions to the Minister. It will be necessary to refer in some detail to the precise sequence of events that occurred in relation to the immediate run up to the Government decision of 12th July, 2006. However in general terms a number of issues of contention were the subject of both correspondence and meetings, between Greencore and officials of the Minister during the period between the commencement of the Government's consultative process and the decision taken by the Government on the 12th July, 2006.

3.4 So far as relevant to these proceedings the most important seem to be:-

> (a) a dispute as to whether it was required that for the Government make a decision concerning the allocation of a percentage to growers and contractors only after Greencore had submitted its restructured plan;
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> (b) differing contentions were made by a number of interested parties as to the losses which should properly be attributed to the growers and contractors. Those losses, under Regulation 320/2006, form the basis of the Government's decision to allocate a percentage of the restructuring aid to those parties. Apart from a number of issues as to both the basis of and the method of calculation of, those losses, a key issue centred on the fundamental basis upon which those losses were to be calculated. This issue had particular relevance to the growers. Greencore maintained (and maintains in these proceedings) that the percentage of the aid to which growers may be entitled under the Regulations is, in principle, to be calculated having regard to losses referable to the closure of the plant. In that context, it was and is argued, that losses which stem from the drop in price mandated by Regulation 318/2006 are not, it is said, properly taken into account. As part of that argument it is maintained that growers are to be taken as having been compensated for the drop in price by means of the single payment mechanism.
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> (c) There was a significant passage of correspondence and meetings concerning the proper approach to the calculation of Greencore's own losses attributable to the closure of the plant. While it is not maintained in these proceedings that Greencore is entitled to compensation, per se, for its losses, it is, nonetheless, argued that the Government was required to have proper regard to those losses in coming to its conclusions in relation to the restructuring aid distribution. On that basis both the Government and Greencore were engaged in a significant exchange concerning the losses which Greencore maintained should be taken into account. The Government had employed the services of Indecon, Consultant Economists, for the purposes of advising it. It is necessary to consider the role of Indecon in more detail.

3.5 Amongst other things Indecon advised on the extent of the losses attributable to the growers, contractors and Greencore. So far as the loss attributable to the growers and contractors were concerned Indecon advised on the competing estimates submitted to the government as part of the consultation process by the growers and contractors respectively on one side and Greencore on the other side. So far as those estimates are concerned, it is clear that the Government accepted the advice of Indecon in that the percentages set out in the Government's decision as to the percentage to be reserved for beet growers and machinery contractors (at 32.38%) converts to a sum of €47.1 million when the total amount of the restructuring aid available is taken into account. The estimate of losses for growers arrived at by Indecon was €40 million while the estimate for contractors was €7.1 million thus totalling €47.1 million. In addition the respective percentages of 27.5% and 4.88% of the total restructuring package to be devoted to those groups respectively represents the same overall percentages as arrived at by Indecon.

3.6 It can be inferred, therefore, that the Government fully accepted Indecon's estimates as to the losses to be attributable to the growers and contractors and determined that those losses were to be met in full by allocating a sufficient percentage of the overall restructuring aid package to those groups sufficient to meet those losses in full. Greencore contests the accuracy and methodology of the calculation by Indecon of the losses attributable to growers.

3.7 Greater difficulty seems to have arisen in relation to the calculation of the losses claimed on behalf of Greencore. It might be said that the financial costs and losses which Greencore maintained would arise on the closure of the Mallow plant could be divided into two broad categories as follows:-

> (a) financial costs to be actually incurred by Greencore such as increased pension funding, training and out placement costs, redundancy payments and environment and demolition costs; and
>
> (b) losses which Greencore maintained would arise derived from the loss of profits resulting from the closure of the plant.

3.8 No particular difficulty appears to have arisen in respect of most of category (a) with the exception of some of the calculations in respect of pension obligations. A particular difficulty seems to have arisen in respect of item (b). The two principal areas of loss under that heading put forward on behalf of Greencore were losses attributable to the accelerated write-off of fixed assets and the disappearance of a future income stream from sugar processing. For reasons which will become apparent when analysing the specific terms of the Regulation itself, the Government appear to have been under the impression that a decision on the percentage to be allocated to growers and contractors was required to be made by the 13th July. In the events that happened there was, therefore, a relatively tight time scale within which that decision had to be made, (if the Government was correct in its view as to the mandatory timing of the decision).

3.9 Significant correspondence passed between the Department and Greencore concerning the information that would be necessary to enable an appropriate estimate to be made of Greencore's losses. It does not appear that this correspondence really got anywhere. So far as the future income stream is concerned the Government, from the earliest time, maintained that something approximating to discovery of all internal memoranda from Greencore was appropriate. Greencore resisted this. Neither side seemed to have put forward any alternative basis for bringing the matter forward and, in reality, no real progress was made.

3.10 So far as the write-down of assets is concerned, Greencore produced a detailed calculation of the write-down of its sugar beet plant and machinery which was derived from its books and was certified as being, in their opinion, correct by the company's auditors PriceWaterhouseCoopers. The auditors did note in their report that the estimate had not been subject to a full audit and was, therefore, subject to an appropriate caveat. Again little progress seems to have been made in this regard until very close to the apparent deadline.

3.11 In the last number of days before the Government's decision, Greencore made available their entire asset register but it was said that it was too late to allow Indecon to carry out any proper analysis of it. In that context it should be noted that Greencore had offered, from an early stage in the process, to make that register available to the Government at Mallow and indicated a willingness to have appropriate officials of Greencore meet with representatives of the Department for the purposes of providing any necessary explanations. This offer was rejected on the part of the Department on the basis that it was considered appropriate that the entire process should be conducted in writing. It does have to be said that the reason for this rejection seems somewhat strange in the light of the fact that we now know that the way in which the Department estimated the loss attributable to the contractors (by reason of the write-off of their machinery) was by means of departmental officials, under the guidance of Indecon, actually going to the work places of the contractors concerned for the purposes of identifying machinery and obtaining relevant information on the basis of which Indecon carried out the necessary calculations of loss.

3.12 In those circumstances it does not seem to be factually the case that the Department maintained an absolute requirement that all communications be in writing. No adequate explanation was, in fact, provided for the difference in approach.

3.13 Be that as it may, Indecon ultimately concluded that it did not have sufficient information to formulate a definitive view as to the losses to be attributable to the disappearance of the income stream from beet processing, losses attributable to the accelerated write-down of plant and machinery, and certain aspects of additional, claimed pension provision requirement.

3.14 In the circumstances, what appears to have happened is that Indecon, in their recommendations, (and having assessed the losses which they attributed to the growers and the contractors) took the non contentious aspects of the claim put forward on behalf of Greencore and allocated, as a balancing figure, the remainder of the fund, (i.e. that not exhausted by the allocation to the growers and contractors and the non contentious aspects of Greencore's claim), to meet future losses and the more difficult aspects of the pension provision. It is clear, however, that the figure allocated to these items was not, in any meaningful sense, an estimate of the true figure likely to have arisen under those headings. It is inconceivable that such an exact level of equivalence between the available funds and the addition of a whole series of separate items independently calculated, could have resulted in such a degree of mathematical equivalence. While the affidavit evidence described this aspect of the facts in somewhat unclear terms, it seems to me that it is reasonable to conclude that that sum was simply put in as a balancing figure on the basis of Indecon being satisfied that some losses attributable to those items would occur, that they were unable, so it said, to produce any more accurate estimate, and that attributing the balance to those items was as good an exercise as could be done.

3.15 In any event on foot of Indecon's report the Government made a decision on 12th July which was in the following terms:-

> "I am refer to the memorandum ref. SS/1/001/3 dated 12 July, 2006, submitted by the Minister for Agriculture and Food concerning EU Restructuring Aid for the Sugar Industry and to inform you that, at a meeting held today, the Government authorised the Minister to act on the recommendation of the independent expert appointed by the Government to provide expert advice to her regarding the implementation of the restructuring scheme. The main recommendations are:
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> (1) to fix the percentage to be reserved for beet growers and machinery contractors at 32.8% (i.e. €471m);
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> (2) to apportion that amount between two groups as follows:
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> (a) 27.5% (€40m) for the growers which represents the aggregate income loss to this group over a 12 year period, and
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> (b) 4.88% (€7.1m) for the machinery contractors which represents the loss to contractors based on the book value of specialised machinery allowing for 8 years depreciation which will have no alternate use;

and

(3) the remainder of the restructuring fund of €145.5m would be available for allocation to the sugar processor (Greencore) for the specific costs to be directed as outlined below, subject to the submission and approval by the Government of a restructuring plan by the processor,

Employee Redundancy Payments €28.4m

Pension/training/outplacement costs €12.8m

Environmental/Demolition Costs €20.0m

Transfer to meet Employees Pension Fund Requirement €37.2m"

3.16 The decision is in exact conformity with Indecon's advice save in one respect. The final figure under the heading "Transfer to Meet Employees Pension Fund Requirement" of €37.2 million was, in fact, in Indecon's report, made up to two figures of €35.1 million and €2.1 million applied respectively to the composite figure for losses and pension provision to which I referred to and for operational closure costs.

3.17 In those circumstances Greencore challenges the Government decision in three particular main respects:-

(a) It is said that the Indecon estimate of €40 million for losses attributable to growers is calculated on a fundamentally flawed basis in a number of respects which it will be necessary to consider in some detail. On that basis it is said that the percentage allocated to the growers by the Government is, itself, therefore, flawed.

(b) It is said that the manner in which Greencore's own losses were addressed was wholly inadequate and that in the circumstances the overall decision of the Government is unbalanced (or more accurately does not reflect a "sound economic balance" as mandated by Regulation 320/2006). In this regard it should be noted that Greencore does not take issue with the calculation of the figure attributable to the contractors at €7.1 million. It does, however, insofar as the contractors as concerned, argue that if proper allowance had been made for Greencore's own losses, then the total amounts of losses and other payments under consideration would have exceeded the available fund. In those circumstances it is said, it follows, that it would have been inappropriate for the Government to compensate growers and contractors in full while leaving Greencore with no compensation. It is only on that basis that Greencore challenges the allocation to the contractors. In other words it accepts that it was open to the Government to form the view that losses in the sum of €7.1 million would be attributable to the write-down of plant and machinery in the hands of the contractors. It is, however, argued that the contractors are not necessarily entitled to all of that sum in circumstances where, Greencore argues, a proper evaluation of all of the legitimate claims on the fund reveal an excess demand over availability in the fund, resulting in the necessity that all parties take some level of reduction.

(c) Finally it is argued that the specific allocation (set out in paragraph (3) of the Government decision) of the balance of the fund which was to be allocated to Greencore, to each of the specific items specified, is inappropriate having regard to the provisions of the Council Directive and amounts to a pre-judgment. In addition it is said that no adequate basis has been established for departing from Indecon's advise that, at a minimum, most of the relevant €37.2 million figure should be made available to Greencore as compensation for its own losses.

3.18 Within those general contentions further detailed and specific issues arise which it is more convenient to deal with in the course of the discussion of those issues.

3.19 However each of those arguments arises in the context of Council Regulation 320/2006 and it is to the provisions of that Regulation that I now turn.

4. Council Regulation 320/2006

4.1 The principal recitals to the Regulation which are of relevance to the issues in this case are as follows:-

"Whereas:

(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 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.

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

(6) To support sugar beet, cane and chicory growers that have to give up production due to closure of factories they had supplied previously, a part of the restructuring aid should be made available to these growers as well as to machinery contractors that have worked for these growers in order to compensate for losses resulting from these closures and in particular the loss of value of investments in specialised machinery.

(9) A restructuring plan should form part of the application for restructuring aid. This plan should provide the Member State concerned with all the relevant technical, social, environmental and financial information allowing it to decide on the granting of the restructuring aid. Member States should take the necessary measures in order to exercise the necessary control over the implementation of all of the elements of the restructuring."

4.2 As indicated earlier in the course of this judgment the central Articles of the Regulation which are in controversy are Articles 3 and 4. The relevant provisions of Article 3 read:-

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

(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 ore 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.

This last condition shall not apply in respect of:

- the sole processing plant in Slovenia,

- the sole beet processing plant in Portugal,

existing on 1 January 2006.

For the purpose of this Article, dismantling of production facilities during the marketing year 2005/2006 shall be deemed to take place in the marketing year 2006/2007.

3. Full dismantling of production facilities shall require:

(a) the definitive and total cessation of the production of sugar, isoglucose and inulin syrup by the production facilities concerned;

(b) the closure of the factory or the factories and the dismantling of the production facilities thereof within the period referred to in point (d) of Article 4(2);

and

(c) the restoring of the good environmental conditions of the factory site and the facilitation of redeployment of the work-force within the period referred to in point (f) of Article 4(2). Member States may require the undertakings referred to in paragraph 1 to make commitments which go beyond the statutory minimum requirements imposed by Community law. However, such commitments shall not restrict the operation of the restructuring fund as an instrument.

6. An amount of at least 10% of the relevant restructuring aid fixed in paragraph 5 shall be reserved for:

- growers of sugar beet, cane and chicory having delivered these products during a period preceding the marketing year referred to in paragraph 2 for the production of sugar or inulin syrup under the relevant quota renounced,

and

- machinery contractors, being private persons or enterprises having worked under contract with their agricultural machinery for the growers, for the products and in the period referred to in the first indent.

After consultation of the interest parties, Member States shall determine the applicable percentage as well as the period referred to in the first subparagraph provided that an economically sound balance between the elements of the restructuring plan as referred to in Article 4(3) is ensured.

Member States shall grant the aid on the basis of objective and non-discriminatory criteria, taking into account the losses resulting from the restructuring process.

The amount resulting from the application of the first and second subparagraphs shall be deducted from the applicable amount referred to in paragraph 5."

4.3. The provisions of Article 4 read:-

"1. Applications for restructuring aid shall be submitted to the Member State concerned by 31 January preceding the marketing year during which the quota is to be renounced.

However, applications in respect of the marketing year 2006/2007 shall be submitted by 31 July 2006.

2. Applications for restructuring aid shall include:

(a) a restructuring plan;

(b) a confirmation that the restructuring plan has been prepared in consultation with the sugar beet, cane and chicory growers;

(c) a commitment to renounce the relevant quota in the marketing year concerned;

(d) in the case referred to in Article 3(1)(a), a commitment to fully dismantle the production facilities within the period to be determined by the Member State concerned;

(e) in the case referred to in Article 3(1)(b), a commitment to partially dismantle the production facilities within the period to be determined by the Member State concerned and not to use the production site and the remaining production facilities for the production of products covered by the common market organisation for sugar;

(f) in the cases referred to in Article 3(1)(a) and Article 3(1)(b), a commitment to meet the requirements provided for in, respectively, Article 3(3)(c) and Article 3(4)(c) within the period to be determined by the Member State concerned;

(g) in the case referred to in Article 3(1)(c), if applicable, a commitment not to use the production facilities for refining raw sugar.

The respect of the commitments under points (c) to (g) shall be subject to a decision granting the aid as referred to in Article 5(1).

3. The restructuring plan referred to in paragraph 2(a) shall include at least the following elements:

(a) a presentation of the purposes and the actions foreseen, demonstrating a sound economic balance between them and their consistency with the objectives of the restructuring fund and of the rural development policy in the region concerned as approved by the Commission;

(b) the aid to be granted to growers of sugar beet, cane or chicory and, if appropriate, machinery contractors in accordance with Article 3(6);

(c) a complete technical description of the production facilities concerned;

(d) a business plan detailing the modalities, timetable and costs for the closure of the factory or factories and the full or partial dismantling of the production facilities;

(e) if appropriate, the scheduled investments;

(f) a social plan detailing the actions planned in particular with respect to re-training, redeployment and early retirement of the workforce concerned and, if applicable, national specific requirements provided for in accordance with Article 3(3)(c) or Article 3(4)(c);

(g) an environmental plan detailing the actions planned in particular to respect mandatory environmental obligations and, if applicable, national specific requirements provided for in accordance with Article 3(3)(c) or Article 3(4)(c);

(h) a financial plan detailing all the costs in relation to the restructuring plan."

4.4 It should also be noted that the Commission adopted Commission Regulation 968/2006 on the 27th June, 2006 for the purposes of laying down detailed rules for the implementation or Regulation 320/2006. It will be necessary to refer specifically to some of the provisions of the Commission Regulation with particular reference to Article 9 which deals with the processing of applications for restructuring aid and Article 26 which provides that in the event that an undertaking does not comply with one or more of his commitments under a restructuring plan the part of the aid granted in respect of the relevant commitment is to be recovered save in the case of *force majeure* in addition Article 27 provides for a penalty of 10% to be recovered on top of the basic recovery provisions of Article 26. In the case of intentional or reckless non compliance the penalty is increased (under Article 27.3) to 30%.

4.5 A number of issues arise as to the proper construction of the regulations. I propose addressing first the dispute between the parties as to the basis upon which the Government was obliged to determine the percentage of the restructuring aid which was to be reserved for growers and contractors. As will be seen the relevant provision is Article 3.6 of the Council Regulation. From the second full paragraph it is clear that the decision as to the appropriate percentage is to be taken by the member state (in this case the Government of Ireland) "after consultation of (sic) the interested parties". The member state must be satisfied that "an economically sound balance exists" between the elements of the restructuring plan as referred to in Article 4(3).

4.6 It will be seen that that restructuring plan requires to make provision for the growers and contractors as well as for the social and environmental obligations resulting from the closure of the plant.

4.7 The second last paragraph of Article 3.6 makes clear that the member state is to take into account "the losses resulting from the restructuring process". It seems to me to be clear, therefore, that when the Article speaks of losses it refers to losses resulting from the restructuring process rather than any other losses associated with the reforms of the sugar industry. It is clear from the recitals that the restructuring element of the overall reforms is confined to those measures designed to bring about what is described as "a significant reduction of unprofitable production capacity in the community". In addition it is clear that the purpose of providing some of the restructuring aid to growers and contractors is because those parties may have to give up production (due to the closure of factories they had supplied previously). For all of those reasons it seems to me to be clear that the assessment of the losses to be taken into account in determining the percentage to be allocated to growers and contractors are those losses which are attributable to the closure of the factory concerned rather than losses attributable to the reduction in the community maintenance price which were not fully compensated by the single payment.

4.8 Indeed, even if they were some doubt as to the construction of the relevant Articles, a consideration of the consequences of the alternative construction ought lead, in any event, to the same conclusion. It is possible to be somewhat misled by the fact that there was only one processor in Ireland and that the consequence of the closure of Mallow was an end to the sugar beet industry in

Ireland. The Regulations are, of course, equally applicable in all member states. There must be member states where some but not all of the capacity has been closed. In those circumstances growers who supplied factories which do not close will have to continue within the reduced price regime which will operate. A similar grower in the same country, perhaps even a neighbour, who happened to supply a different factory, which in fact closed, will not only get the single payment (as will his colleague whose factory has continued to function) but will also have an entitlement to share in the restructuring aid. This analysis makes clear that the intention of permitting growers (and indeed contractors) to share in restructuring aid is to compensate them for the closure alone and not for any other consequences of the reform of the sugar beet regime as a whole.

4.9 The next matter that requires to be addressed concerns the mechanism for application for restructuring aid. It is clear from the Commission Regulation that particular specific measures of a procedural variety were introduced for the year 2006 to deal with the problems which would appear to have been associated with attempting to introduce the restructuring aid regime for that year, notwithstanding that the Regulations were only in the course of being adopted and were only to come into force during that year. However it is, perhaps, best to start with what might be termed the ordinary regime that was intended to operate in future years. That model required a member state to decide on the granting of restructuring aid by the end of February in a year. (The decision for the initial marketing year 2006/7 was to be adopted by the 30th September, 2006 – see Article 5.1 of the Council Regulation). Article 9 of the Commission Regulation requires the member state to decide on eligibility of an application within 30 days of receipt of the complete application and makes detailed provisions, in Article 9.2, as to what is required for an application to be considered eligible. If there is time within the deadline for a decision, the member state can, in effect, allow an adjusted application designed to remedy any aspect of the original application which, it is considered, renders that application ineligible.

4.10 In addition Article 3.2 of the Council Regulation requires consultation prior to the renunciation of quota. Article 2 of the Commission Regulation makes more detailed provisions for that consultation. In an "ordinary year" the decision by the member state as to the percentage to be allocated to growers and contractors is, by virtue of Article 6 of the Commission Regulation to be taken 45 days after the initiation of that consultation. However Article 6.2 specifically derogates from that provision in relation to 2006 and provides that the relevant decision is to be taken by the 15th July, 2006 in circumstances where the necessary consultations, (in accordance with the allowance in that regard as set out in the Regulations) pre-date the coming into force of the Regulations as a whole and are thus not in strict conformity with the Regulations.

4.11 These provisions do cause some confusion. As will have be seen from the provisions of Articles 3 and 4 of the Council Regulation (320/2006), two different forms of consultation seem to be contemplated. Firstly the undertaking (Greencore in this case) is required to enter into consultations. Secondly the member state seems to be obliged to enter into its own consultations prior to fixing the percentage to be given to growers and contractors. The undertaking's consultations may lead to an agreement between the various interested parties which would be incorporated into the restructuring plan. In that event, and provided that the competent authority in the member state is satisfied that the elements of the restructuring plan suggest a sound economic balance, that authority can approve the plan and in so doing may well fix the percentage to be attributed to growers and contractors in the amount agreed.

4.12 In addition there will, undoubtedly, be difficulties for a member state in forming an appropriate assessment of the sound economic balance (which it is mandated to do by the Regulation) until it has received the restructuring plan. It is in that context that the particular level of confusion in respect of 2006 arises. The last date for the submission of a restructuring plan for that year was the 31st July. However the decision on the allocation to growers and contractors had to be made by the 15th July. While this apparent contradiction gives rise to a somewhat unsatisfactory state of affairs, it seems to me that the Regulations contemplate that, in the particular circumstances pertaining in 2006, a member state might have to do the best it could (as a result of its own consultations) to form a view as to the competing needs to be dealt with in the restructuring plan, even before the restructuring plan itself had been submitted.

4.13 While, therefore, satisfied that in the ordinary course (i.e. in later years) the natural implementation of the process envisaged in the Regulations would have involved a draft restructuring plan, consultations in relation to it, its submission to the Government and a decision, thereafter, on the percentage to be allocated to growers and contractors, I am satisfied that the only reasonable reading of the Regulations as a whole, for the purposes of considering the regime in 2006, leads to the conclusion which I have identified. To the extent that it may be suggested that the Commission Regulation is in breach of mandatory requirements in the Council Regulation, then that is not a matter in relation to which this court has any competence.

4.14 I, therefore, propose to consider the facts in this case on the basis that the Government was under an obligation to make a decision on the relevant percentage to be allocated to growers and contractors by the 15th July, 2006. The Government's view that it was under an obligation to make that decision some two days earlier seems to have derived from what appears to have been a mistaken view that the process of consultation had commenced 45 days before that date. However Article 6.2 of the Commission Regulation makes it clear that the determination date by reference to the starting of the process has no application to 2006 in cases where (as here) the consultation process pre-dates the coming into force of the Regulations. It seems clear, therefore, that the Government was wrong in its view that the decision had to be made by 13th July. For the reasons which I have set out I am satisfied that the decision had, in fact, to be made by the 15th July.

5. Application to facts of this case

5.1 The first and central challenge made by Greencore to the Government decision concerns a contention that the Government misconstrued the Regulations by, it is said, calculating the losses attributable to the growers on the basis of losses derived not just from the closure of the Mallow plant but also from the effects of the reform of the regime as a whole. For the reasons which I have analysed in the last segment of this judgment I am satisfied that the Government was obliged to consider only losses attributable to the closure of the Mallow plant.

5.2 As indicated earlier the Government, at least so far as the calculation of losses attributable to growers was concerned, fully accepted the recommendations of Indecon. It must be inferred, therefore, that the Government accepted the basis upon which Indecon had carried out its appraisal. In passing it should be recalled that no challenge is made to the calculation of the losses attributable to the contractors. Having carefully reviewed all of the affidavit evidence filed on behalf of the State from Mr. Gray (the deponent on behalf of Indecon) I am satisfied that the exercise actually carried out by Indecon was to estimate the entire losses attributable to the reform of the sugar regime as a whole rather than one confining itself to losses attributable to the restructuring by means of the closure of the Mallow plant. It is important when reading some of Mr. Gray's later affidavits to see them in the context of the sequence of the affidavits as filed and the sequence of the various reports prepared both by Mr. Brendan Dowling of DKM and Indecon.

5.3 In closing, counsel for the State placed reliance on certain paragraphs from Mr. Gray's affidavits, to suggest that the original exercise engaged in by Indecon did, in fact, assess only losses attributable to closure. Seen in context the passages upon which counsel for the State placed particular reliance are, in fact, a response by Mr. Gray to certain contentions made by Mr. Dowling,

which in turn were a commentary upon an alternative analysis set out by Mr. Gray. That alternative analysis was designed to suggest that, even had the original analysis been carried out on the basis of confining the concept of losses to those attributable solely to the closure of the Mallow plant, the same result might still have occurred. Mr. Dowling analysed the assumptions which underlay the exercise which led Mr. Gray to venture that opinion. The portions of Mr. Gray's replying affidavit relied on make reference to those assumptions. However it is clear to me that Mr. Gray is speaking of the assumptions which underlay his alternative exercise rather than the assumptions and methodology which were adopted in the original Indecon report. The alternative analysis was not part of the exercise originally carried out by Indecon on which the Government decision of the 12th July was based. It was, rather, an exercise carried out for the purposes of these proceedings and in answer to some of Mr. Dowling's criticisms.

5.4 I am confirmed in that view by the complete absence of any mention in the original Indecon report of any assumptions or factors which were taken into account in assessing what would have happened in the event that the price changes at EU support level had gone ahead but the factory had remained open. There are undoubtedly such assumptions contained in Mr. Gray's alternative analysis. There are no such assumptions in the original analysis.

5.5 I, therefore, conclude as a fact, and on the evidence, that the exercise originally conducted by Indecon was designed to estimate the losses attributable to growers on the basis of the overall losses deriving from reform of the sugar market as a whole, rather than losses attributable to the closure of the Mallow factory specifically. Given that the conclusions of Indecon were accepted fully by the Government in its decision, then it seems to me that it necessarily follows that the Government adopted and accepted the same analysis. On that basis I must conclude that the Government made its finding as to the losses attributable to growers on the same basis. For the reasons which I have indicated earlier in this judgment it seems to me that that basis is legally incorrect. It follows that the Government carried out its analysis and reached its conclusion as to the losses attributable to growers on a legally incorrect basis. It, therefore took into account factors (i.e. losses deriving from the failure of the single payment to adequately compensate farmers for price reduction) which were not appropriate factors. It therefore follows that the Government decision must be quashed.

5.6 I should, however, go on to consider some other aspects of Greencore's attack on this aspect of the Government's decision (i.e. the calculation of losses to growers). Firstly this should be done lest I be wrong in the conclusion which I have already reached. Secondly if I am not wrong it will be necessary for the Government to carry out a new exercise and it would be unfortunate if the same or similar issues were to arise again.

5.7 In its specific attack on the Indecon calculation of the losses attributable to growers Greencore raised a significant number of different points.

In fairness to counsel for Greencore it was conceded that some of the points raised, both in the pleadings, the statement of grounds, and advanced in the written submissions, might not be sufficient to sustain an argument that the Government's decision should be quashed. The threshold by reference to which the Government's decision should be reviewed is of some relevance in that context. I turn to that question.

6. Manifest Error

6.1 In *SIAC v. Mayo County Council* [2002] 2 I.R. 148 the Supreme Court dealt with a question as to whether a construction contract had been awarded in conformity with the relevant EU directives on public procurement.

6.2 In the course of his judgment in that case Fennelly J. analysed the jurisprudence of the courts of the European Union and the "manifest error" test which has been developed by those courts in reviewing decisions of community institutions. It is, of course, the case that EU law requires that there be a remedy in respect of public procurement matters. Therefore the remedy itself, being a creature of European law, was found by the Supreme Court in *SIAC* to be one which required to be assessed on the "manifest error" basis of review.

6.3 I am not, here, dealing with exactly the same thing. The remedy is, at least in part, domestic, relating to an exercise by the Irish Government of its powers under the Regulation. However the power to make the decision which is contested in this case is one which is expressly conferred under an applicable Regulation and it seems to me, therefore, that by a parity of reasoning to that adopted by the Supreme Court in *SIAC* I should apply the "manifest error" test. In saying that it is also highly noteworthy that Fennelly J. in *SIAC* was of the view that in very many cases there will not, in practice, be a significant difference between the application of the traditional common law measure of review on the one hand or the "manifest error" test on the other. Where a decision maker has to evaluate complex evidence a wide margin of appreciation will be afforded to the judgment of that decision maker under either system. I therefore propose addressing the specific issues raised and evaluation same on the basis of the "manifest error" test.

6.4 The precise application of a "manifest error" test was the subject of some debate at the hearing before me. It is important, in my view, to start with the views of Fennelly J. in *SIAC*. At p. 176 he said the follows:-

> "I would observe, however, that the word, manifest, should not be equated with any exaggerated description of obviousness. A study of the case-law will show that the Community Courts are prepared to annul decisions, at least in certain contexts, when they think an error has clearly been made.
>
> The decisive additional consideration in the area of the public procurement is the explicit concession of a wide margin of discretion to awarding authorities.
>
> I do not think, however, that the test of manifest error is to be equated with the test adopted by the learned trial judge, namely that, in order to qualify for quashing, a decision must 'plainly and unambiguously fly in the face of fundamental reason and common sense.' It cannot be ignored that the Advocate General thought the test should be 'rather less extreme.'"

6.5 Reliance was placed by the applicants on a number of judgments of the Court of First Instance in competition cases: *Airtours plc v. Commission* [2002] ECR II-2585, *Schneider Electric SA v. Commission* [2002] ECR II-4071 and *Tetra Laval v. Commission* [2002] ECR II-4381. While the specific issues with which the Court of First Instance was concerned in those cases concerned, therefore, assessments made by the Commission in the context of its jurisdiction in the competition law field, those cases do seem to suggest that, at least to some extent, the court, in applying a manifest error test, is entitled to look at least at the general methodology adopted. Where that methodology appears to be incorrect then the court is entitled to intervene.

6.6 Finally, before passing on to the application of the manifest error test to the facts of this case, I should deal with *Aplin v. Canada* [2004] FC 691 on which reliance was also placed by Greencore. That case involved an application for judicial review of the decision of

a chairperson of the Canadian Public Service Commission Appeal Board. The case involves, amongst other things, an analysis of the appropriate basis of review. However the Canadian courts have adopted a more nuanced approach to the question of the extent to which decisions of administrative bodies should be reviewed that has not, as yet, found favour in this jurisdiction. In those circumstances it does not seem to me that it is possible to get any great assistance from Canadian authorities in this field in the absence of a full review of the overall Canadian approach to judicial review of this type. It would not, therefore, have seemed to me to be appropriate, in this case, to revisit the well established Irish jurisprudence which delimits the boundaries of judicial review. Such an exercise should only be contemplated by reference to the Canadian position in a case in which there was an opportunity to engage in a widespread consideration of all of the relevant aspects of the Canadian jurisprudence as a whole.

6.7 However, for the reasons which I have analysed, I am satisfied that, in the context of this case, it is appropriate to apply the "manifest error" test derived from the jurisprudence of the Courts of the European Union. I now turn to the application of that test to the aspects of the Government decision which are under challenge and commence by a consideration of the challenge to the growers loss calculation.

7. The challenge to the growers loss calculation

7.1 Counsel for Greencore identified some key detailed aspects of the exercise carried out by Indecon in assessing the growers losses (and by implication adopted by the Government) which, it is argued, amount to a manifest error. As these issues may well arise again I propose setting out my views on them.

7.2 (a) the correct counterfactual

The term "counterfactual" was used by both Mr. Gray and Mr. Dowling to describe the basis by reference to which losses were to be calculated. While the term is not one with which lawyers would necessarily be familiar, the same cannot be said for the concept. In every case concerning the calculation of damages, a court has to have regard to what would have happened had the compensatable event (for example a tort or a breach of contract) not occurred. Identifying what would have been likely to have occurred had the compensatable event not itself happened may be straightforward or complex. Nonetheless it is a task with which courts are familiar. It does not seem to me that, in substance, the issue of the correct counterfactual is, in principle, any different. The task of Indecon (on behalf of the Government) was to identify losses. Losses involve a comparison of events that actually happened with events which would have happened had the matter in respect of which compensation is to be paid not occurred. It is clear, therefore, that, at the level of principle, for the purposes of calculating losses, the counterfactual is an estimation of the relevant events which would have occurred had the compensatable event not happened.

7.3 At the level of overall principle, and for the reasons which I have analysed in the preceding segments of this judgment, the compensatable event in this case is the closure of the Mallow factory rather than the reform of the sugar beet industry as a whole. For that reason, as a matter of law rather than as a matter of opinion, the counterfactual used by Indecon, in the analysis which was relied upon by the Government, was incorrect. However, as I have also indicated, Mr. Gray conducted an alternative exercise which was designed to demonstrate that the same or a similar result would have occurred if the counterfactual, at the level of principle, was what I have found to be the correct one. Further criticisms are made by Mr. Dowling of that alternative analysis. Given that it is on the basis of conducting such an alternative analysis that, in my view, a proper calculation of the losses is required to be achieved, I am of the view that it is appropriate to deal with at least some of those criticisms.

7.4 I should start by making clear that it is no function of this court in a judicial review process, to attempt to resolve any legitimate matters of expert difference where reasonable experts may come to different conclusions. Still less is it a function of this court to attempt to second guess the application of any appropriate principles to the facts of the case where there is a sustainable basis for the view taken by the expert whose findings are under challenge. It does have to be said (and was more or less conceded by counsel on behalf of Greencore) that some of the detailed items of challenge are not sustainable for reasons such as those which I have just set out.

7.5 However, in particular, one key aspect of the analysis conducted by Indecon in its alternative analysis is stated to be based upon a "manifest error". It is clear that the alternative analysis conducted by Indecon assumes that the price that would actually have been paid by Greencore to growers would not have reduced. Indeed on one basis (and this is an issue to which I will have to return) it may be said that that analysis presupposes that the price actually paid would have increased in line with inflation. Mr. Dowling suggests that there is no basis for such an assumption. It is, undoubtedly, clear that, by virtue of the changes in the price support mechanism which formed part of the package of measures designed to reform the sugar industry, the support price at EU level will fall progressively and to a significant extent over the next number of years. There is no basis for any suggestion that, at least at European Union level, any change in what is now projected as the support price will occur.

7.6 While accepting that fact Mr. Gray suggests that it is appropriate to make an assumption that Greencore would have "made up the difference". It is undoubtedly the case that, historically, Greencore had been prepared to pay, on occasions, a premium over and above the EU support price. It does seem that one such premium was designed as a temporary measure to deal with the transfer of growers from the closed Carlow plant to Mallow. It is, it has to be said, difficult to understand the basis upon which it is assumed, not only that that temporary measure would be continued but that, despite the fact that it is, in express terms, stated to be a declining sum of money over time, it is assumed, in Indecon's alternative analysis, to be restored to its full value. Whatever may, or may not, be the merits of that assumption, there is, in my view, a more fundamental difficulty with the overlying assumption which is to the effect that no price reduction whatsoever would have occurred and that Greencore would have made up the difference by means of whatever form of premia was required.

7.7 Before addressing that issue specifically I should say something about the basis of the approach to what is described both Mr. Gray and Mr. Dowling as the "counterfactual. There was dispute in the affidavit evidence between those two experts as to whether a counterfactual should assume that all existing factors would continue unchanged (as substantially suggested by Mr. Dowling – with the caveat that the existing situation might be adjusted for items whose change was foreseeable) or, on the other hand, should be calculated on the basis of what was likely to have, in fact, happened. In this respect it seems to me that Mr. Gray is correct. The proper approach to the calculation of any loss is to attempt, as best one can, (and it is frequently a hypothetical question to a greater or lesser extent) to identify what would have been likely to have occurred had the event for which compensation is to be paid not itself occurred. That will involve (often on the basis of probability or likelihood), assessing the range of things which might be said would have occurred and taking a view as to the most likely. As to the general approach to the calculation of loss in such circumstances, see for example, my judgment in *Lett and Company v. Wexford Borough Corporation and Others* (High Court, Unreported, Clarke J., 18th May, 2007) where there is an analysis of the proper approach to be adopted where there are a range of eventualities which might reasonably be expected to have occurred.

7.8 In any event it seems to me that no criticism can be made, in principle, against Mr. Gray for approaching his alternative analysis

on the basis of attempting to estimate what would, in fact, have occurred as a result of the implementation of the sugar reform proposals but without the closure of the Mallow plant.

7.9 However it does seem to me that criticism can be made of the way in which that exercise was, in fact, carried out.

7.10 On all of the evidence it is clear that the level of profits made by Greencore from its sugar business was, in recent years, of the order of €25 million. It also seems clear on the evidence that had Greencore continued in the sugar business and had, therefore, to pay the levy which continuing processors would have been required to pay under the reform measures, then virtually all of those profits would have been wiped out.

7.11 Mr. Gray's stated basis for assuming that Greencore would have "made up the difference" was that it would have been necessary for Greencore so to do in order to secure a continuation of supply. It is, of course, the case that for supply to continue, that supply would have to have been at a price which made it economic for growers to make that supply. However it equally follows that the same economic equation has to be addressed from the other side as well. There would also have to have been some point from Greencore's perspective in paying the additional prices. If the consequence of paying a significant premium was to render Greencore's business loss making, then it is difficult to see how any realistic calculation of losses could be based on such an assumption. There is no analysis in Mr. Gray's alternative methodology which suggests that consideration was even given to the question of whether Greencore could, on any realistic basis, have paid those prices. Certainly on the evidence currently available to me it seems that the prices which are implicit in Mr. Gray's analysis could not have been paid by Greencore (certainly after the first few years) without incurring massive and increasing losses. To base a counterfactual on such an assumption would, therefore, be, in my view, a manifest error.

7.12 If it is possible to put forward an analysis which can demonstrate a viable continuing business (even though one which, both from the point of view of growers and of the processor, might not be meaningfully profitable) then it may be possible to conduct an analysis of that type. Even then it certainly would not be an analysis similar to that carried out by Mr. Gray in his alternative. If it is not possible to put forward a sustainable analysis which suggests the continuance of the business on a viable basis from both sides point of view then the losses have to be calculated on the basis that the business could not have survived in any event. It is for the Government to conclude, on the basis of expert advice, whether that there was a basis upon which the business could have survived, even if not very profitable either to growers or the processor, and if so for how long.

7.13 It is not for this court to suggest the precise type of analysis which should have been conducted or, indeed, still less, to carry out that exercise itself. That is for the Government and its advisors. However it seems to me that to carry out such an exercise on the basis of an assumption that payments would have been made to sustain an ongoing business which could not, in fact, be made without incurring very substantial losses, is so flawed an analysis as to render it a manifest error. There were, in my view, no materials on which a conclusion could have been reached to the effect that the business could have continued in the manner assumed in Mr. Grey's alternative analysis.

7.14 (b) The rate of return

There was a significant debate between the expert witnesses, on the affidavit evidence, as to the appropriate rate of return to be included in the calculation of the losses into the future. This is again a concept with which courts are familiar. This issue is also inextricably linked with the question of inflation. It is appropriate to look at the overall principle first.

7.15 The loss of money at any time in the future (and including, therefore, the loss of a continuous stream of money going into the future) involves two separate questions that must be addressed when attempting to calculate a single capital sum today to compensate for that loss or those losses.

7.16 The first matter that needs to be taken into account is inflation. As a result of inflation money in (say) three years time will be less valuable, in real terms, than the same nominal sum today. Thus, if inflation over the next three years is expected to be 10%, the loss of a sum estimated in nominal terms at €99 in three years time is the equivalent of a loss of €90 today.

7.17 However in addition to that question, it has always been accepted that money today is more valuable than the same sum of money (even if appropriately adjusted to take account of inflation) in the future. This is, of course, because the receiving party has the benefit of the use of the money for the intervening period. To continue with the same example, the person who will actually lose €99 in three years time would be compensated by the payment of a sum today which is even less than the €90 which represents that same sum shorn of inflation. That is because he will get the sum today rather than in three years time and will have the use of it in the intervening period. The amount by which that sum requires to reduced depends on the rate of return that might reasonably be expected in the intervening period. There is frequently great debate between experts as to the appropriate rate of return to be applied. In that context it should be noted that the rate of return may well be dependent on factors such as risk. There are different ways of taking that into account.

7.18 Traditionally the courts have reflected risk in relation to future income streams (from, for example, an employment) by calculating a capital sum with the aid of actuarial evidence using the so called risk free rate of return (i.e. the rate of return which someone can expect to get from investment in risk free bonds and the like) but then making an appropriate deduction to reflect the fact that there may be some chance that the person concerned would not have earned that income stream for reasons wholly unassociated with the compensatable event. The amount of the deduction will have regard to the likelihood of the person actually earning the full income stream and, consequently to the risks, whether from ill health, unemployment or the like, to that eventuality. I suspect that the approach of an economist to the same problem might be to discount the income stream on the basis of a higher rate of return to reflect that additional risk, rather than the method adopted by the courts. However the principle is still the same and either method is well within the bounds of the acceptable.

7.19 While I note, and have had regard to, some of the criticisms made by Mr. Dowling as to the rate of return adopted by Indecon, it does not seem to me that, save with one exception to which I will turn, the issues raised put the matter outside the realm of legitimate debate and, therefore, those issues are outside the realm of judicial review even on a manifest error basis.

7.20 The one exception concerns the interaction of rate between return and inflation. Mr. Dowling made the point in the course of the exchange of affidavits that the rate of return applied by Indecon was derived from and was, therefore, to be applied to, figures which were themselves deflated to take into account inflation. It is, of course, possible to set out a future income and expenditure stream in one of two ways. It is possible to set it out, in nominal terms, the amounts which are actually expected to arise. In those circumstances the income and expenditure (say) in five years will actually be set out in money of that time rather than of today. In such a case, and in order to obtain a figure for the award of a sum of compensation today, it is necessary to deflate those future

sums of money for both inflation and also to reflect an appropriate rate of return.

7.21 An alternative method of conducting the same exercise is to specify the future income stream in today's money. Thus the figure to be received in five years time may be written down as the same as today with an assumption that all other figures in the calculation are similarly converted into today's money. In those circumstances it is only necessary to deflate the future income stream for whatever might be considered to be the appropriate rate of return.

7.22 Either method is an entirely appropriate and acceptable way of calculating future losses. However the two cannot be mixed. Mr. Dowling's criticism is that the rate of return used by Indecon (being at least in part derived from the return on bonds and calculations adopted by the courts) was clearly designed to be a rate of return to be applied to figures which had already been adjusted for inflation. In response to that criticism counsel for the State, in the course of the hearing, stated from instructions that it was his understanding that the table produced by Indecon in its alternative analysis was in fact a table expressed in today's' money. If that is correct, then, of course, no criticism of the general approach to the use of the rate of return adopted could be made. However there are some difficulties with that contention.

7.23 Firstly some of the monies in the table are sums actually to be obtained from the EU as part of the package of measures adopted in the reform of the sugar regime. These include the so called single payments. The amounts of those payments are fixed by EU regulation. If, as is now contended, the table was produced on the basis of "money of today" rather than the actual nominal sums that will in fact be obtained in the future, then it is manifestly clear that the figures to be received from the EU should have been deflated to reflect the fact that their value in today's money, when received, in real terms, will be less than the nominal value because of inflation. To include, in a table which is stated to be prepared on the basis of all figures being converted into today's money, actual figures in the future which are not appropriately deflated for inflation purposes, would be a very fundamental error. While it might not, on the facts of this case, have a very significant effect on the overall result (and indeed that effect might well have been favourable to the growers), it nonetheless would represent a very significant mistake.

7.24 Perhaps of even greater importance are the consequences that the assertion of counsel has for the counterfactual issue. If, as asserted by counsel, it is correct to state that the alternative analysis is based on a table which is expressed in today's money, then it is implicit and necessarily follows that it was assumed that not only would Greencore make up the difference necessary to keep the price at today's level in circumstances where the EU support price was falling but also that Greencore would increase that price in line with inflation by paying even greater premia. It is difficult to see the basis for any such assumption. If there were difficulties in reconciling the assumptions which are dealt with under the heading "counterfactual" above, with Greencore's ability to pay, then those difficulties would be significantly compounded if the analysis contains within it, as asserted, an assumption that Greencore would not only make up any shortfall brought about by the drop in the EU support price but would also increase the price by reference to inflation.

7.25 (c) The retirement age issue

Under this heading there is a dispute between Mr. Gray and Mr. Dowling as to how one should properly go about arriving at a capital sum today, to compensate for the loss of a future income stream, by reference to a number of future years loss that should be taken into account in the calculation. There are a variety of approaches to an issue such as this. In the case of loss of employment it is, frequently, the case that the appropriate calculations are based on loss up to normal retirement age discounted as appropriate. There is an obvious logic in this. In business cases it is, more frequently, taken to be the case that the loss is calculated on a certain number of years "purchase". In general terms the more certain the continuance of the future income stream, the larger number of years that are taken to represent its current value. There is obviously room for a significant amount of subjective expert opinion in this field. The case of growers represents something of a hybrid between a pure contractual entitlement to a specific sum in an employment context and a pure business income stream on the other hand. While it might be said that the approach adopted by Indecon is overly dependent on the employment model (where the future income is fixed by contract rather than open to doubt and variation and calculated by reference to a range of factors), nonetheless it does not seem to me that, under this heading, the approach taken is one which could not be said to be a manifest error.

7.26 (d) Greencore's own losses

The final major attack on the overall calculation process concerns an alleged failure to have proper regard to Greencore's own losses. On this basis it is said that the proper approach should have been to calculate Greencore's losses and, if it proved to be the case that all of the demands on the available aid exceeded the total amount available, to adopt a rational approach to how each of those demands was to be met. This dispute operates both at the level of principle and also at the level of detail. I propose addressing the principle first.

7.27 The Regulation (320/2006) requires that the government adopt a sound economic balance between each of the elements of the package. In those circumstances it does not seem to me that it is, in principle, open to the government to adopt a position whereby some elements of the package receive compensation in full and others receive no compensation at all. That is not a balance let alone a sound balance. Whether it is, on the other hand, necessarily the case that a purely proportional approach needs to be taken is by no means clear. I do not rule out the possibility that, in adopting a sound economic balance, government could favour, at least to some extent, and for good and stated reasons, one element of the package over others. However, that is not what was done in this case. It is clear that the government made a deliberate decision to afford no actual compensation to Greencore. By actual compensation I mean the allowance of restructuring aid to Greencore which was not either allocated to the growers and contractors or earmarked for social and environmental expenditure. It does not seem to me that such an approach is, in principle, permissible. In fairness to Indecon it should be said that their report, at least, made some allowance for Greencore's losses.

7.28 On that basis it seems to me that a proper exercise of an evaluation of the "sound economic balance", required the best calculation possible to be carried out in respect of Greencore's losses. As indicated earlier those losses were principally under two headings. The first was a contended for loss of a future income stream. This contention seems to me problematic. By the very same logic as Greencore argues should have been applied to the growers (and which I have accepted), Greencore's own losses cannot be calculated on the basis of income figures which pre-dated the reform of the sugar regime as a whole. The other elements of the reform (i.e. the price changes) are a given. It is again not for the court to carry out the exercise itself. However, on the evidence currently before me, it does not seem likely that any substantial losses occurred to Greencore as a result of the closure of the Mallow Plant. It undoubtedly lost a significant income stream. However, that income stream was, at least in very significant part, lost by reason of the price changes rather than the plant closure. It seems to me that at least most of the losses attributable to the disappearance of income stream are, therefore, not properly taken into account.

7.29 I should note that counsel for Greencore drew attention to the fact that, while growers received compensation for the price

reduction in the form of the single payment, no direct compensation was allowed to processors such as Greencore for those reductions. This is undoubtedly correct. However, it does not seem to me to be a relevant consideration. The fact that the compensation measures put in place by the Council made specific provision for growers but not processors is matter for the Council. For the reasons which I have analysed in some detail earlier in this judgment, the losses which the government was required to take into account in assessing the sound economic balance between the various elements of the restructuring plan, were losses attributable solely to the closure of the Mallow plant. That argument cuts both ways and must, it seems to me, exclude or at a minimum very substantially reduce any losses in Greencore's hands attributable to future loss of income.

7.30 That leads to the question of detail concerning the calculation of losses relating to the early write-down of the value of plant and machinery. For reasons which I have analyzed earlier, it seems to me that the government were incorrect in assuming that a decision had to be made by 13th July. Rather a decision could have been made as late as the 15th July. The government had, therefore, three further days from the date upon which it made its decision on these matters (the 12th July) to allow for a proper consideration of the additional information concerning plant and machinery losses supplied by Greencore. It seems to me that that exercise could have been advanced at least to the stage where Indecon could have made a more meaningful estimate of the losses under this heading. It seems to me, therefore, that the government error in relation to the date by which a decision had to be made contributed to Indecon's difficulties in being able to come up with a figure. If a new exercise has to be carried out then, in my view, proper regard must, therefore, be had to a calculation of Greencore's losses deriving from the accelerated write down of its plant and machinery, consequent on the closure of the Mallow plant.

7.31 I should, at this stage, also deal with the issue of fair procedures raised on behalf of Greencore. In essence Greencore argues that, in a number of respects, it did not have a reasonable opportunity to make its case. Having regard to the findings which I have made it does not seem to me that this issue really puts the case any further. On the basis that I have accepted that the only legally correct criteria for the assessment of losses was one which had regard only to losses deriving from the closure of the Mallow plant, then it follows that this was the criteria mandated by the Regulations and criteria which were, in any sense, discretionary. Issues concerning whether and to what extent the criteria intended to be applied by Indecon should have been disclosed to Greencore do not, therefore, arise.

In similar vein I have held that the Government had some further period in which to make the decision of the 12th July and could, within that extended period, have at least obtained a better assessment from Indecon of the losses attributable to the write-down of plant and machinery. In those circumstances the procedural questions concerning that element of the process do not, it seems to me, arise.

7.32 However, having concluded that those losses should have been taken into account, it does seem to me that there is a further item that can be set against those losses. The closure of the Mallow plant has freed the fixed assets (in the form of the land and building) deployed at that plant so that they are now available for other uses. If I am correct in the view which I have taken (at Greencore's urging) that the proper counterfactual to use in the case of the growers is to assess the position in which the growers would have found themselves after the change in the price regime but before the closure in Mallow plant, then the same situation applies equally to Greencore. It is again not a matter for this court to carry out the exercise itself. However, on the basis of the evidence currently available, it might well be the case that the continued use of the Mallow plant, after the price regime changes, could only have given rise to a very small level of profit (or indeed to no profit at all). In those circumstances one of the consequences of the closure of the Mallow plant has been to free those fixed assets from being confined (if the Mallow plant had continued in operation) to a situation where those assets could only generate a small or no profit, to a new situation where those assets may now be capable of generating a larger profit.

7.33 Any proper calculation of the additional potential profitability to be derived from those assets going into the future can, in my view, properly be taken into account. I should emphasise that it is not the capital value of those assets in themselves which is properly taken into account. Rather it is the fact that the capital employed in those assets maybe capable, by reason of the closure of the Mallow plant, of being used in a more beneficial way from Greencore's point of view than would have been the case had they being required to have been kept in use for sugar production in the economic conditions that prevailed after the price regime had been altered. In my view it would be entirely appropriate to take such factors into account in a proper calculation.

7.34 (e) The other complaints

I am not satisfied that any of the other issues raised on behalf of Greencore in respect of the Indecon report amount to matters which could legitimately justify the intervention of a court exercising a judicial review function even on a manifest error basis. Those matters might legitimately be argued before a court which was being asked to carry out a similar calculation exercise in the context of loss calculation. However none of them, in my view, amount to matters which could legitimately be described as giving rise to a "manifest error", even if I was persuaded that I might have gone about an analogous damages assessment in a different way.

7.35 For the reasons which I have set out, I am, therefore, of the view that at least in the respects which I have identified, the alternative analysis carried out by Indecon after the Government's decision is also flawed to the extent of representing a manifest error. For reasons which I have sought to identify it is, however, by no means clear as to what the appropriate result of a proper analysis would be and it is not for this court to indicate what that result should be.

7.36 If I am correct, then it seems certain that the growers losses need to be recalculated. The contractors losses are not disputed. Whether the contractors entitlement to share in the restructuring aid is affected depends on questions concerning Greencore's own losses and is a matter which is by no means clear. It remains possible that, on a proper application of the sound economic balance test, the contractors share of the available aid might have to be reduced. In those circumstances it seems to me that I should confine myself, under this part of the case, to quashing that part of the Government decision which allocated percentages to growers and contractors. It will then be for the Government to make a new decision which does not contain the manifest errors which I have identified.

8. Pre-judgment

8.1 As indicated at the beginning of this judgment the second major set of issues concern the question of whether the Government decision amounts to a pre-judgment as to the allocation of that portion of the restructuring aid not earmarked for the growers and contractors. As will have been seen, the text of the Government decision at paragraph (3) noted that the balance of the fund would be available, for the "specific costs to be directed as outlined below". There followed a table setting out the social and environmental costs. As also indicated earlier Indecon had not, itself, recommended that a sum of €37.2 million was required to be transferred to meet employees pension fund requirement. Rather certain specific pension obligations, which Indecon were satisfied were capable of detailed calculation, were dealt with, and the remaining portion of the sum of €37.2 million was generally allocated to losses and other pension requirements which, in Indecon's view, were less capable of specific analysis.

8.2 Firstly it should be said that no real basis was expressly put forward by the Government for departing from Indecon's recommendations. It might be inferred that the Government was entitled to take into account assertions made by Greencore, in its original submissions to the Minister, which suggested that a sum, even in excess of the amount of €37.2 million, might be required to meet additional pension funding. On that basis it is argued that there were materials before the Government that would have allowed it to come to a different view than Indecon. I am satisfied that that point is well made. The decision is a decision of the Government. The test which a court should apply requires the court to look at the materials which were before the Government and determine whether it was open to the Government to come to the conclusion which it did. On the basis of the argument put forward by counsel on behalf of the Government, I am satisfied that there were materials which would have allowed the Government to come to that view even though it was different from the recommendation of Indecon. Nor am I satisfied that it can be said that the Government's conclusion in this regard amounts to a "manifest error". It was Greencore itself which suggested that a larger sum might be required for pension requirements. In those circumstances it can hardly be said to be a manifest error for the Government to have concluded that the sum was so required. I am not, therefore, satisfied that any valid argument has been advanced to challenge, in itself, the contents of the table included in para. C3 of the Government decision.

8.3 However the real thrust of the argument under this heading is that the Government, it is said, was guilty of pre-judgment in setting out, in advance of receiving the restructuring plan, the elements which it would require to be present in that plan. In addition it is also said that the Regulations do not permit of a decision of that type, that is a decision "directing" how the restructuring aid is to be allocated. It is said that the proper process which the Regulations contemplate is that the plan is put forward by the processor containing all of the relevant restructuring elements (including the social and environmental matters specified in this aspect of the Government decision). Thereafter, it is said, the Government should consider whether the plan is appropriate and, if it approves the plan, that is the end of the matter. If the Government does not consider that the plan meets the requirements of the Regulations then, if time allows, a revised plan may be considered. The plan is, of course, subject to the repayment provisions contained in the Commission Regulations to which I have drawn attention and which apply if the processor does not, in fact, comply with all or any element of the plan. In those circumstances, it is said that it is not open to the Government either to pre-determine or specify the elements of the plan but rather it is for the Government to consider the plan as put forward and to make a decision on it.

8.4 The argument put forward on behalf of the State was that the Government did no more than give an indication as to the elements of the plan which it would consider would meet the sound economic balance test mandated by the Regulations. It is, I have to say, difficult to reconcile that approach to the text of the actual Government decision and the specific wording contained in paragraph (3) which refers to the "specific costs to be directed" in accordance with the table set out. It seems to me that the Government decision was more than a general guidance as to the type of restructuring plan that might be found to have a sound economic balance.

8.5 It was, of course, necessary for the Government to give some preliminary consideration to the remaining elements of the restructuring aid package as of that time. For the reasons which I have analysed earlier in the course of this judgment I am satisfied that the Government was required to reach a decision on the percentage to be allocated to growers and contractors by the 15th July, 2006. That decision had to be made even in advance of the receipt of a restructuring plan where the plan had not been submitted by that date. In assessing the "sound economic balance" involved, the Government was required to have regard to the social and economic obligations which would form part of that plan. There was nothing, therefore, in itself, wrong with the Government forming a view on the percentage to be allocated to growers and contractors by having regard to the figures contained in the Indecon report relating to the expenditure which would be necessary on social and environmental matters.

8.6 However the Government decision speaks of directing expenditure in a particular way. In some circumstances there may not be any material difference between ensuring compliance with the provisions of the plan on the one hand and directing that a particular sum of money be applied on the other hand. For example the amounts required to be spent on redundancy were carefully calculated on the basis of figures supplied. It is difficult to envisage circumstances where there would be any material difference between the projections and the outcome under that heading.

8.7 While it might, strictly speaking, in relation to that item, have been more appropriate for the Government to have decided that the restructuring plan would need to contain the elements of which the Government had already been advised in relation to redundancy (and then relied on the enforcement provisions of the Commission Regulation in the event that those elements were not in fact complied with) it might well be that there would be little difference in practice between those two positions.

8.8 However, quite a difference situation arises in respect of at least some elements of the pension provision and, possibly, the environmental programme as well. I agree with counsel for Greencore when he argues that the requirements in respect of a restructuring plan mandate that certain objectives be specified and be required to be met rather than requiring that a specific sum of money must be spent on a particular project. It is, of course, the case that some reasonable estimate of the amount of money that would be required to meet a social or environmental aspect of a restructuring plan would need to be arrived at prior to the approval of the plan in the first place. This would be for two reasons. Firstly the enforcement measures to which I have referred require the repayment (with interest if appropriate) of the amount allocated to any aspect of the plan not complied with. This presupposes that there will be at least a notional allocation of sums within the plan to particular projects. Secondly the Government, in order to assess the sound economic balance involved, will need to have some reasonable overall assessment of the amount to be allocated to the various elements of the plan.

8.9 However the example taken by counsel for Greencore seems to me to illustrate the point. If the plan makes provision for a whole series of specific environmental measures, and estimates a particular sum of money as being the likely cost of achieving those ends, then the obligation under the plan is to meet those ends rather than to spend that money. If it should prove possible to achieve those ends at a somewhat lower cost, then the plan's objectives have been met and no penalty should arise. In those circumstances a "directive" to spend money in a particular way seems to me to be inappropriate.

8.10 It is, likewise, inappropriate to direct that a specific sum be paid into the pension fund in circumstances where the precise requirements of the pension fund had not been determined with any degree of accuracy. It would, again, be entirely appropriate for the Government to ensure that there was adequate provision in the restructuring plan to ensure that there was no pension shortfall. It was not open to the Government (and certainly not as of the 12th July) to "direct" that a particular sum would, necessarily, have to be put into the pension fund to achieve that end.

8.11 In those circumstances I am satisfied that at least elements of the Government decision which "directed" payments of specific sums amounted to a pre-judgment and also must be quashed. On that basis para (3) of the Governments decision also falls.

9. Bias

9.1 The final discrete aspect of Greencore's claim suggests that objective bias can be found both in a number of media comments made by the Minister and in the way in which the announcement of the Government decision was made (and in particular the deletion

of those aspects of the Indecon report dealing with Greencore losses from the portion of Indecon's conclusions that was published with the Government's decision).

9.2 At an overall level what seems to me to be suggested on behalf of Greencore is that, at all times, the Minister, on behalf of the Government, acted with a view to satisfying the public, and in particular the growers, that Greencore was not going to get anything out of the restructuring aid. Given that the Government was, under the Regulations, in a position where it was going to make a number of important decisions under the Regulations which involved adjudication, rather than the formulation of policy, then it seems to me that it was somewhat unwise for the Minister to have allowed herself to be interviewed in relation to the merits of the farmer's claims. I appreciate that in the course of the interviews relied on the Minister did attempt to distance herself from any prejudgment. However it is important that a distinction be drawn between upcoming governmental issues which are purely policy matters (and in respect of which the Government and its Ministers are as free to engage in public debate as anyone else) and governmental decisions which are adjudicative in nature and in respect of which it is important that no legitimate impression of prejudgment is given out.

9.3 It is also appropriate that I take into account the fact that the principle adjudicative decisions were taken on the basis of independent advice. It is, of course, the case that in determining whether objective bias has been established that it is necessary to look at the issue from the standpoint of the reasonable apprehensions of a person in the position of the complainant. However that complainant must be assumed to have all relevant knowledge. Part of that relevant knowledge, in this case, concerns the involvement of Indecon.

9.4 At the end of the day, therefore, it seems to me that the key elements of the Government's decision were taken solely on the basis of the Indecon report (with the exception of the one element which I have already dealt with). While I have found fault, in the course of this judgment, with the Indecon report, I am not satisfied that there is sustainable suggestion that Indecon did not act in an entirely independent and impartial way. If any suggestion to the contrary were to be made then it would, undoubtedly, have required the cross examination of Mr. Gray and, probably, of senior officials in the Minister's Department as well. While some of the Minister's media comments might be regarded as unguarded they do not, in my view, read as a whole, give a sufficient basis for sustaining an allegation or objective bias.

All in all, I am not, therefore, satisfied that this aspect of the claim is made out.

10. Conclusion

10.1 I am, therefore, satisfied that for the reasons which I have identified, both parts of the Government's decision must be quashed. The first two paragraphs (which fix the percentage for growers and contractors) on the basis, principally, that inappropriate factors were taken into account but also on the basis, if the alternative analysis is to be considered, of manifest error. Paragraph (3) is to be quashed on the basis of pre-judgment. I will hear counsel further, in due course, on the precise form of order which should be made.