OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 17 June 1997 *

I — The questions referred for a preliminary ruling and their legislative background

1. By this reference for a preliminary ruling, the Länsrätt i Jönköpings Län (Jönköping County Administrative Court) is asking the Court to provide such guidance to interpretation as is necessary in order to decide whether it is compatible with Community law for Member States to introduce domestic taxes similar in object and purpose to the levy on sugar and rice stocks introduced by the Kingdom of Sweden on the eve of the entry into force of the Treaty of Accession to the European Union (hereinafter 'the EU').

To be precise, the national court asks, primarily:

'(1) On a true construction of the Act of Accession of Sweden, Finland and Austria, in particular of Articles 137(2), 145(2) and 149(1), are decisions taken at national level concerning levies on normal transitional stocks of sugar as set out in the Swedish Sugar Law, as amended, to be regarded as unlawful transitional measures?';

and, secondarily, in the event of a negative answer:

'(2) On a true construction of the European Community organization of the market in sugar, in particular of Articles 39 and 40 of the EEC Treaty, Council Regulation (EEC) No 1785/81 and Commission Regulation (EC) No 3300/94, are decisions taken at national level concerning levies on normal transitional stocks of sugar as set out in the Swedish Sugar Law, as amended, to be regarded as unlawful interference in the organization of the market?'

2. As will become clear in the course of this Opinion, these questions touch on the delicate matter of the residual role retained by Member States in sectors covered by the common organization of the markets where,

* Original language: Italian.

once 'the ground has been seized',[1] the Community institutions are as a rule attributed exclusive jurisdiction.

The Sugar Law was adopted by Sweden before (albeit by only one day) the Treaty of Accession entered into force. The questions put by the national court specifically concern the limits within which the Member States which most recently acceded to the EU may enact legislation, in the period prior to accession, in respect of sectors of agricultural production which, at Community level, are covered by the common organization of the markets.

3. The Treaty on the accession of Austria, Finland and Sweden to the EU entered into force on 1 January 1995; it was signed on 24 June 1994 and ratified by Sweden on 15 December 1994, in keeping with the results of the national referendum on accession, which had been held on 13 November 1994.

4. By contrast with earlier accessions to the Community (in 1973,[2] 1981[3] and 1986[4]), the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (hereinafter 'the Act of Accession')[5] did not prescribe a transitional period to enable the new Member States to proceed in gradual stages with the alignment of prices, rates of customs duty or levels of aid granted under the national arrangements for organization of the markets.

Although the Act of Accession made provision for the adoption — in accordance with the management committee procedure[6] — of *ad hoc* transitional measures to facilitate the transition from the national regime to that resulting from application of the common organization of the markets (see Article

1 — A quotation from G. Olmi, 'Politique agricole commune', in J. Megret, M. Waelbroeck, J.-V. Louis, D. Vignes and J.-L. Dewost, *Le droit de la Communauté économique européenne: Commentaire du traité et des textes pris pour son application*, Vol. 2, Brussels, 2nd Edition, 1991, p. 292.

2 — See the Act concerning the conditions of accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Communities and the adjustments to the Treaties (OJ 1972 L 73, p. 14), Article 52(1) and (4).

3 — See the Act concerning the conditions of accession of the Hellenic Republic to the European Communities and the adjustments to the Treaties (OJ 1979 L 291, p. 17), Article 59.

4 — See the final Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic to the European Communities and the adjustments to the Treaties (OJ 1985 L 302, p. 23), Articles 67(3), 70(2) and (3), and 131 et seq. (Spain); Articles 233(3) and 234 et seq. (Portugal).

5 — OJ 1994 C 241, p. 21.

6 — Introduced by Article 38 of Regulation No 136/66/EEC of the Council of 22 September 1966 on the establishment of a common organization of the market in oils and fats (OJ, English Special Edition (1965-66), p. 221); and specifically provided for, in relation to the common organization of the sugar markets, by Articles 38 to 42 of Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector (OJ 1981 L 177, p. 4).

149), [7] it laid down the general principle that rights and obligations resulting from the common agricultural policy were applicable immediately and in full in Austria, Finland and Sweden (see Article 137(2)).

5. Moreover, as on earlier occasions when the Community gained new members, [8] the contracting parties had expressly identified in the Act of Accession the risk of possible disturbance to the normal functioning of the Community agricultural markets represented by the possibility that, on the date of accession, there would be stocks of products in free circulation within the territory of the new Member States exceeding the quantity constituting a normal carryover of stock (see Article 145(2) of the Act of Accession). [9]

The precautions therefore adopted are easily understandable. Whenever the Community intervention guarantees (including the common pricing systems) in respect of a particular product are more attractive than those available under the national arrangements in force in a new Member State before its accession, the producers operating in that State are strongly tempted to hoard — on various grounds and the most ill-assorted pretexts — vast stocks of that product until the date of accession, since it thereupon acquires the status of 'product originating in the Community' and entitlement to the related guarantees. [10]

Article 145(2) of the Act of Accession prescribes the same solution as that adopted on the occasion of earlier accessions, that is to say, it requires new Member States to eliminate — at their own expense and without any financial commitment on the part of the EU — any excess stocks of agricultural products.

6. In accordance with that provision, in December 1994 the Commission introduced legislation to give effect to the remedial measures already provided for in the Act of Accession, *inter alia* with respect to the risk of excess stocks on the 'enlarged' internal market in sugar.

7 — Pursuant to Article 149(1) of the Act of Accession, such measures may be adopted until 30 December 1997 and their application is limited to that date.

8 — See Council Regulation (EEC) No 1009/67 of 18 December 1967 on the common organization of the market in sugar, the new Article 33a introduced by the Act on the conditions of accession to the European Communities of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the adjustments to the Treaties (cited in footnote 2, above), p. 67; Council Regulation (EEC) No 9/81 of 1 January 1981 concerning stocks of agricultural products in Greece on 1 January 1981 (OJ 1981 L 1, p. 15); Council Regulation (EEC) No 3770/85 of 20 December 1985 on stocks of agricultural products in Spain and Council Regulation (EEC) No 3771/85 of 20 December 1985 on stocks of agricultural products in Portugal (OJ 1985 L 362, pp. 18 and 21 respectively).

9 — Pursuant to Article 145(2), the concept of normal carry-over stock was to be defined for each product 'on the basis of criteria and objectives particular to each common market organization'.

10 — See A. Tilgenkamp, 'Agriculture (Réglementation relative aux adhésions)', in Gide-Loyrette-Nouel (Ed.), *Dictionnaire du Marché commun*, Paris, 1968 (loose-leaf edition, 1992 No 3), p. 35.

With specific reference to Sweden, there appeared to be a very real and imminent danger that Swedish traders would engage in the wide-scale importation of sugar for speculative purposes, with the intention of hoarding it, then re-selling it on the Community market after accession. Not surprisingly, in the months preceding the Treaty's entry into force, this attracted the attention of both the Commission and the Swedish Government.

It is common ground that the sugar reference price fixed by the Swedish Government before accession was approximately 35% lower than the Community intervention price. Market prices in Sweden differed from market prices in the Community by approximately the same amount — the latter being higher, as we know, than the 'official' prices.

7. In order to determine the quantities of sugar (and isoglucose) to be eliminated from the market, Commission Regulation No 3300/94 of 21 December 1994 [11] defined, for each new Member State and in respect of each product, the normal carry-over stock considered necessary, allowing for consumption, production, traditional exports and operating stocks for refineries. Under Article 5 thereof, the normal carry-over stock for Sweden in respect of sugar was fixed at 304 792 tonnes.

Austria, Finland and Sweden were thus required to undertake a survey of sugar (and isoglucose) stocks in free circulation in their respective territories at midnight on 1 January 1995. By the same token, any person holding, in whatever capacity, stocks of sugar (or isoglucose) of at least three tonnes was under a duty to declare it to the competent national authorities.

8. Since the Community sugar market was characterized by overall surplus production, any excess quantities — whether of sugar in the natural state or in the form of processed products — had to be disposed of by being exported from the Community without Community intervention. Accordingly, Regulation No 3300/94 required the new Member States to take all measures necessary by 1 January 1996 to discharge that obligation (see Article 11).

On the other hand, in the case of quantities which were not exported — to be regarded as disposed of on the internal market — Austria, Finland and Sweden were to have paid an amount equal to the import levy in

11 — Commission Regulation (EC) No 3300/94 of 21 December 1994 laying down transitional measures in the sugar sector following the accession of Austria, Finland and Sweden (OJ 1994 L 341, p. 39).

force on 1 January 1996, the final day of the period prescribed for exportation.

9. The Community rules for the disposal of the excess sugar stocks existing on the date of accession were taken into account by the Swedish legislature when introducing the tax challenged in the main proceedings, which was payable by any person holding sugar (or rice) stocks in excess of three tonnes.

According to the order for reference, the tax in question was introduced by Law No 1704 of 1994 (hereinafter 'the Sugar Law'), which was passed by the Swedish Parliament on 20 December 1994 and which entered into force on 31 December 1994, that is to say, only one day before Sweden's accession to the EU.

10. According to statements made by the Swedish Government in the course of these proceedings, the amount made payable by way of sugar tax (different rates being fixed for refined and raw sugar, respectively) exactly matched the expected increase in the market price following Sweden's accession to the EU.

It is clear from the related *travaux préparatoires* that the Sugar Law had a threefold objective: (i) to prevent speculative imports of sugar to Sweden; (ii) to tax the profits made by the traders concerned solely as a result of the transition from the national market arrangements to the Community system; and (iii) to raise for Sweden the funds needed for the disposal on the internal market (through payment of the charges provided for by Regulation No 3300/94) of any quantities of sugar in excess of the normal carry-over stocks which had not been disposed of through exportation.

11. One last detail completes this sketch of the legislative background to the questions referred for a preliminary ruling. The Sugar Law was amended by Law No 329 of 1995, which entered into force on 1 April 1995, reducing the amount payable by sugar producers who had also paid the storage levy pursuant to Article 8 of Council Regulation (EEC) No 1785/81. [12] The purpose of that levy was to fund the common compensation system for storage costs, which was in turn designed to ensure a constant supply of sugar on the Community market throughout the year.

12 — Council Regulation (EEC) No 1785/81 of 30 June 1981 (cited in footnote 6 above), as later supplemented and amended.

II — Purpose of the main action

12. Danisco Sugar AB (hereinafter 'Danisco'), the applicant in the main action, is apparently Sweden's only sugar producer and its largest importer of sugar.

According to statements made by Danisco in these proceedings (which have gone unchallenged by the Swedish Government), in 1993 Danisco had entered into a two-year inter-trade agreement with Sveriges Betodlares Centralförening (SBC), the Swedish beet growers' association.

If I understand Danisco's observations correctly, that agreement entitled growers belonging to the SBC — ostensibly so as to comply with the Community legislation applicable as from the date of accession and only if accession took place — to more than one-half of the difference between the 'minimum' Community price for sugar applicable during the marketing year under way on the date of accession [13] and the reference price for sugar applicable in Sweden during previous marketing years.

13. Following Danisco's declaration that, as at 31 December 1994, it held 267 134 tonnes of sugar in stock, the Swedish agricultural board determined, by decision of 28 June 1995, that Danisco was liable to pay approximately SKR 435 million by way of sugar tax.

I should mention in passing that SBC nevertheless sued Danisco for back-payment of the price adjustment provided for under the 1993 inter-trade agreement, at least in respect of the difference between the actual purchase prices for beet already delivered and the basic prices for the 1994/95 marketing year, pursuant to Article 4 of Regulation No 1785/81, which had become applicable in Sweden as a result of accession.

13 — It was Danisco which referred in its observations to the 'minimum' price applicable to sugar for the marketing year 1994/95 (which began on 1 July 1994 and expired on 30 June 1995, in accordance with Article 2 of Regulation No 1785/81), but without clarifying whether by that term it meant the target price under Article 2 of Regulation No 1785/81, or the intervention price under Article 3 thereof. For the 1994/95 marketing year, Council Regulation (EC) No 1873/94 of 27 July 1994 (OJ 1994 L 197, p. 11) fixed the target price and the intervention price for white sugar, and the basic price for beet; Council Regulation (EC) No 1874/94 of 27 July 1994 (OJ 1994 L 197, p. 12) fixed the derived intervention prices for white sugar, the intervention price for raw sugar, the minimum prices for A and B beet, the threshold prices and the amount of compensation for storage costs.

14. Danisco brought proceedings before the Länsrätt i Jönköpings Län for annulment of the Sugar Law, arguing that, in two respects, its unilateral adoption by Sweden was *ultra vires*.

15. First and foremost, Danisco maintains, the Sugar Law amounted in substance to partial confiscation of the revenue obtained by selling sugar produced during the 1994/95 marketing year at the prices fixed by the Community legislation which had entered into force.

Danisco argues that, because of the Sugar Law, Swedish sugar manufacturers and beet growers were able to obtain the intervention price and the basic price fixed by Regulation No 1785/81, and to *retain the full amount* thereof, only after the stocks of sugar produced during the 1994/95 marketing year (to which the Sugar Tax applied) had been exhausted. Thus, contrary to Article 137 of the Act of Accession, a transitional period had been surreptitiously introduced, during which the common pricing system was not applied.

In other words, according to Danisco, in view of its object or at least because of its effects, the Sugar Tax constitutes a transitional measure which, pursuant to Article 149 of the Act of Accession, could properly be adopted only by the Community institutions.

Moreover, Regulation No 3300/94 had not conferred any power on the new Member States to tax sugar stocks existing on the date of accession, including any quantities in excess of the normal carry-over stocks. Furthermore, Regulation No 3300/94 is the only legislative instrument approved by the Act of Accession for the purpose of introducing transitional derogations from the principle that the common organization of the agricultural markets takes effect immediately on the date of accession.

16. Danisco also argued before the Länsrätt that Sweden's competence to introduce the Sugar Tax was precluded by the stringent limits placed on the jurisdiction of Member States to adopt any measure liable to affect the functioning of a common organization of the market which has already been established at Community level.

According to Danisco, that description fits the Sugar Law, which disturbed the common organization of the market in sugar through partial confiscation of the intervention price, to the detriment of both sugar producers and (as a 'knock-on effect') beet growers. That conclusion is inescapable even though, technically speaking, the measure in question was

adopted and brought into force before Sweden's accession, and the tax was levied on stocks of sugar which had been produced and stored in accordance with the national arrangements for organization of the market.

Danisco maintains that there was a close causal link between the adoption of the Sugar Law in December 1994 and Sweden's forthcoming accession to the EU. What is more, by virtue of Article 18 of the 1969 Vienna Convention on the Law of Treaties (hereinafter 'the Vienna Convention'), [14] Sweden was under a duty — even before the entry into force of the Treaty of Accession, which it had already signed and ratified — to refrain from acts which would defeat that Treaty's object and purpose.

17. In addition to the question of Sweden's competence, illustrated above, Danisco raised another argument before the Länsrätt — touching this time on the merits — to the effect that the Sugar Law was contrary to Community law. As the survey of stocks in free circulation (see above) later revealed, Sweden's sugar stocks had fallen below the normal carry-over quantity, since the sugar tax had been levied across the board on *all* individual stocks in excess of three tonnes being held in Sweden on 31 December 1994.

Accordingly, it should be held that the Sugar Law — even if described as a measure 'necessary for the application of this Regulation', within the meaning of Article 11 of Regulation No 3300/94 [15] — runs counter to that regulation's declared aim of providing for the disposal solely of quantities in excess of the normal carry-over stocks.

III — Competence of the Court to rule on the interpretation of the EC Treaty and acts adopted by the Community institutions in relation to national measures adopted by new Member States before the date of accession

18. The Court is being called on to interpret the Act of Accession and, where appropriate — as a secondary consideration — the common organization of the sugar market and, in particular, Articles 39 and 40 of the EC Treaty (hereinafter 'the Treaty') and the relevant provisions of Regulations Nos 1785/81

14 — The Vienna Convention on the law of treaties, concluded on 23 May 1969 (United Nations Treaties, Vol. 788, p. 354). The Vienna Convention, drafted by the International Law Commission of the United Nations, codified the rules of customary international law regarding the procedure for drawing up international treaties and the conditions for their validity and effectiveness, and entered into force on 27 January 1980. Article 18 of the Vienna Convention, entitled 'Obligation not to defeat the object and purpose of a treaty prior to its entry into force' provides: 'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed'.

15 — See footnote 8 above.

and 3300/94. In order to enable the Länsrätt to assess whether the Sugar Law is compatible with Community law, due consideration must be given to two temporal factors to which the Swedish Government and the Commission have called attention in their observations.

By the time Sweden adopted the Sugar Law, it had signed and ratified the Treaty of Accession, but was not yet a Member of the EU. However, the entry into force of the Sugar Law pre-dates Sweden's accession (even if only by one day) and, consequently, so must the taxable event, namely the holding of a quantity of sugar (or rice) in excess of three tonnes.

Thus, according to the Swedish Government and the Commission, the question does not arise whether the Sugar Law is compatible with either the Act of Accession or the common organization of the sugar market. Neither body of legislation applied to Sweden at the time of the Sugar Law's adoption.

19. In response to that objection, Danisco observes — not without foundation, I would suggest — that Sweden's adoption of the Sugar Law one day before its accession to the EU, after signing and ratifying the Treaty of Accession, may well constitute an infringement of the customary international law on treaties, as consolidated by Article 18 of the Vienna Convention. [16]

Specifically, the introduction of the sugar tax in the circumstances described above contravened the principle of good faith in international relations, constituting conduct likely to defeat the object and purpose of the Treaty of Accession, at least so far as concerns the common organization of the sugar markets.

20. Technically, this point was not raised by the Länsrätt in the order for reference. However, that does not preclude the Court from taking it into account when giving the requested ruling on interpretation.

Indeed, it is established case-law that the Court's jurisdiction under Article 177 of the Treaty includes the power to take into consideration Community legislation to which the questions raised by the national court do

16 — Article 18 of the Vienna Convention is quoted in footnote 14 above.

not refer, but which appear relevant for the purposes of the decision in the main action. [17]

21. Among the sources of Community law to which the Court may refer for this purpose are the principles of public international law — including those which are not binding — applied as rules of customary law or general legal principles. [18]

22. Of particular relevance here is the statement made recently by the Court of First Instance, in proceedings brought under Article 173 of the Treaty, to the effect that the principle of good faith — a precept of customary international law, consolidated by Article 18 of the Vienna Convention — is 'the corollary in public international law of the principle of protection of legitimate expectations which, according to the case-law, forms part of the Community legal order [and on which] any economic operator to whom an institution has given justified hopes may rely ...'. [19]

That said, the Court of First Instance recognized that the applicant in the case before it had the right to request review of the lawfulness of the contested act in relation to certain provisions of an international agreement which have direct effect, stating that 'in a situation where the Communities have deposited their instruments of approval of an international agreement and the date of entry into force of that agreement is known, traders may rely on the principle of protection of legitimate expectations in order to challenge the adoption by the institutions, during the period preceding the entry into force of that agreement, of any measure contrary to the provisions of that agreement which will have direct effect on them after it has entered into force'.

23. The question whether or not Sweden's conduct in this case amounts to an infringement of public international law falls outside this Court's jurisdiction and I shall therefore

17 — See, *ex multis*, Joined Cases 73/63 and 74/63 *Handelsvereniging Rotterdam* v *Minister van Landbouw* [1964] ECR 1; Case 70/77 *Simmenthal* v *Amministrazione delle Finanze dello Stato* [1978] ECR 1453; Case 35/85 *Procureur de la République* v *Tissier* [1986] ECR 1207; Joined Cases C-153/88 to C-157/88 *Fauque and Others* [1990] ECR I-649; Case C-241/89 *SARPP* [1990] ECR I-4695; Case C-187/91 *Belovo* [1992] ECR I-4937; Case C-114/91 *Claeys* [1992] ECR I-6559.

18 — See Case 10/61 *Commission* v *Italy* [1962] ECR 1, particularly p. 10; Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337, paragraph 22; Case 36/75 *Rutili* v *Minister for the Interior* [1975] ECR 1219, paragraph 32; Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Åhlström and Others* [1988] ECR 5193, paragraph 18; Case C-286/90 *Poulsen and Diva Corp.* [1992] ECR I-6019, paragraphs 9 to 10.

19 — Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39, paragraphs 89 to 93. In that judgment, the Court of First Instance upheld Opel Austria's application for annulment of a Council regulation withdrawing tariff concessions, which renewed an import duty on certain products manufactured exclusively by Opel. The regulation in question had been adopted by the Council seven days after the Communities had deposited their instruments of approval in relation to the Agreement on the European Economic Area, and 12 days before that Agreement entered into force, one of the Agreement's most important objectives being abolition of customs duties as between the contracting parties.

refrain from consideration of the merits. [20] Nevertheless, I must admit that I agree with the approach taken by the Swedish Government and the Commission.

Let us suppose that the principle of good faith forms part of the body of *Community law* to which reference must be made in order to reach a decision in the main proceedings, its *counterparts* in the Community legal order being the principles of legal certainty and protection of legitimate expectations. Even so, however, the Court would still be precluded from providing the national court with the necessary assistance by way of interpretation in deciding whether a domestic fiscal measure adopted by a non-member State (that being Sweden's status until 1 January 1995) was compatible with Community law.

The circumstances here are different from those on which the Court of First Instance ruled in *Opel Austria*. In that case, the Communities were — in the exercise of their powers — indisputably subject to the Treaty and the rules of law governing its application. [21] In the present case, Sweden, before its accession to the EU, was not subject to obligations arising from Community law, including the fundamental principles.

24. That does not mean, however, that as from 1 January 1995 Sweden, as one of the Member States, was not required — by virtue of the general obligation laid down by Article 5, as lent substantive content by other, more specific, provisions of the Treaty, [22] such as Article 40 [23] — to act sincerely and in good faith to further the aims of the Treaty and fulfil its obligations thereunder. That obligation in turn gave rise to further obligations, which Sweden was called on to discharge in practice, namely: (a) to revoke any domestic measure which was contrary to the Act of Accession, the Treaty provisions or secondary legislation on the common organization of the sugar markets, even if adopted before accession; and (b) to eliminate any unlawful consequences ensuing from such a measure [24] after accession.

25. The questions currently before the Court should be viewed in the context described above; to my mind, the Court has jurisdiction to give a ruling, in respect of the Swedish Sugar Law, on the interpretation of Articles 137(2), 145(2) and 149 of the Act of Accession, and, as a secondary consideration,

20 — Another question which there is no need to address here is that of the possible direct effect *vis-à-vis* individuals of the Community rules referred to in the Länsrätt's order for reference.

21 — See Case C-286/90, cited in footnote 18 above.

22 — See, *ex multis*, Case 2/73 *Geddo* v *Ente Nazionale Risi* [1973] ECR 865, paragraph 4, and Case C-195/90 *Commission* v *Germany* [1992] ECR I-3141.

23 — See footnote 29 below.

24 — See, *ex multis*, Case 6/60 *Humblet* v *Belgian State* (concerning Article 86 of the ECSC Treaty) [1960] ECR 559, in particular p. 569; Case 231/83 *Cullet* [1985] ECR 305, paragraph 16; Joined Cases C-6/90 and C-9/90 *Francovich and Others* v *Italy* [1991] ECR I-5357, paragraphs 36 and 37.

of Articles 39 and 40 of the Treaty and the relevant provisions of Regulations Nos 1785/81 and 3300/94.

Let us look now at Articles 137(2), 145(2) and 149 of the Act of Accession. I cannot see what *other* limits — separate from and further to those mentioned above — result from those provisions as regards the competence accorded to Sweden, in the present matter, as a State which is now a member of the EU.

IV — Question 1

26. Although two distinct questions have been referred for a preliminary ruling, they raise only one issue, as I shall now seek to demonstrate. By both questions the Court is asked to define the limits within which Member States (including those which have recently acceded to the EU) may legitimately exercise their own competence in sectors which, at Community level, are covered by the common organization of the markets.

28. Let us suppose for the sake of argument that the Sugar Law genuinely constitutes a transitional measure, adopted for the sole purpose of facilitating the transition from the existing national regime to that resulting from application of the common organization of the markets, within the meaning and for the purposes of Article 149 of the Act of Accession. For the adoption of such measures, that provision refers — admittedly — to the management committee procedure, as noted above.

27. Let us consider the problem a little more closely. Article 40 of the Treaty and the secondary legislation setting up the common organization of the agricultural markets limit the powers which an individual Member State, on acceding to the EU, can exercise through the adoption of domestic measures which may affect the objectives of the common agricultural policy or in any way impede their attainment in practice.

That procedure, however, was not so designed as to preclude new Member States from exercising any form of concurrent competence. Even in the particular sector of sugar, the procedure to which Article 149 refers involves merely an implied delegation of powers to the Commission by the Council, and a corresponding obligation on the part of the Commission to communicate in good time to the Council any measures adopted which are not in accordance with the opinion delivered by the competent committee, composed of representatives of the Member States and chaired by a representa-

tive of the Commission. [25] Thus the Member States participate in the decision-making procedure for measures which are then definitively adopted, as appropriate, either by the Commission in accordance with an opinion from the management committee for sugar, or the Council: [26] all of which goes to show that the Member States have not consented to the complete surrender of their own powers. [27]

In other words, the procedure referred to in Article 149 of the Act of Accession reflects the division of powers between the Commission and the Council, rather than between the Community and the Member States. That being so, the question before the Court is none other than the more general question concerning the residual role for Member States in the sectors covered by the common organization of the markets.

29. Should doubts persist, I would add that there is another and decisive reason for which the first question cannot be answered in the affirmative. The Sugar Law was *not*, in reality, a transitional measure within the meaning of Article 149 of the Act of Accession. It is clear from the related *travaux préparatoires* that the legislation adopted by Sweden was not designed, purely and simply, to prevent the product in question from being imported into the country for speculative purposes; nor was it solely concerned with raising the resources necessary to fund the disposal on the internal market of any quantities of sugar in excess of the normal carry-over stock. Now, *only* if those had been the *sole* purposes underlying the Sugar Law, could that legislation have been described as designed to facilitate the transition from the national regime to that resulting from application of the common organization of the markets. That is not the position, however.

Instead, the Sugar Law had a different and quite separate purpose, to do with the exercise of fiscal powers. It introduced a tax on the profits made by the traders concerned as a result of the transition from national pricing to Community pricing. That tax was levied on *all* stocks of sugar held by the traders concerned in Sweden on 31 December 1994, not only on those in excess of the normal carry-over stock fixed for Sweden by Regulation No 3300/94.

30. It seems to me, therefore, that the answer to the first question must be that a national measure such as the Sugar Law cannot be regarded as an unlawful transitional

25 — Under Article 41 of Regulation No 1785/81, the Commission may in that event defer application of the measures which it has adopted for not more than one month from the date of their communication to the Council. The Council may take a different decision but, likewise, it must do so within one month.

26 — See footnote 25 above and the relevant part of the provision.

27 — See Y. Petit, 'Agriculture', in C. Gavalda-R. Kovar (Ed.), *Répertoire de droit communautaire Dalloz*, Paris, 1992 (and a loose-leaf edition, April 1994), Vol. I, paragraph 91.

measure for the purposes of Articles 137(2), 145(2) or 149 of the Act of Accession.

V — Question 2

31. As I have already had occasion to remark, [28] the second question also refers to possible limits on the power of Member States (including those which have recently acceded to the EU) to adopt unilaterally domestic measures (including fiscal measures) which are liable to affect the objectives of the common agricultural policy or to impede the functioning of the mechanisms designed for the pursuit of those objectives.

32. The Community rules setting up the common organization of the markets are autonomous and must not be encroached upon by national legislation. [29] For example, the Court has held that, in the sectors covered by a common organization of the markets based on a common pricing system, the Member States can no longer intervene unilaterally through domestic legislation in the price formation system laid down by the Community system. [30]

33. However, the setting up of a common organization does not necessarily insulate producers in the Member States from domestic measures — fiscal, environmental protection or animal health measures, for example — which affect the functioning of the single market and the Community regime in respect of the product in question, even if they are not expressly designed to do so.

34. It seems appropriate here to recall one judgment which is of authority on this point. In *Irish Creamery Milk*, [31] the Court interpreted the Community rules setting up the common organization of the markets in certain agricultural products and thus provided the national court with the information necessary to determine whether an indirect tax

28 — See above, points 26 to 28.

29 — According to established case-law (see Case 111/76 *Officier van Justitie* v *Van den Hazel* [1977] ECR 901; Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347; Case 151/78 *Sukkerfabriken Nykøbing* v *Ministry of Agriculture* [1979] ECR 1; Case 16/83 *Prantl* [1984] ECR 1299), when, pursuant to Article 40 of the Treaty, the Community makes regulations establishing a common organization of the markets in a particular sector, the Member States are required to refrain from any measure which would derogate from those regulations or undermine their effectiveness. Undoubtedly, that principle also applies to the introduction of levies on agricultural products (see, for example, Case 55/83 *Italy* v *Commission* [1985] ECR 683, paragraph 11).

30 — See Case 31/74 *Galli* [1975] ECR 47. However, where the price regime on which the common organization of the markets is based applies solely at the production and wholesale stages, the Member States remain free to legislate on price formation at the retail and consumption stages, so long as the aims and functioning of the organization in question are not jeopardized (see Case 5/79 *Buys* [1979] ECR 3203, paragraph 18).

31 — Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* v *Government of Ireland* [1981] ECR 735.

on the value of certain agricultural products, applied at a low rate by the Irish Government solely for a few months, was permissible. That tax was levied on the product at the moment of delivery for processing, warehousing or export.

What points, precisely, did the Court make in *Irish Creamery Milk*? The contested tax formed part of an incomes policy designed to divide the tax burden between the various sectors of Ireland's working population, and the common organizations of the markets do not in principle preclude a national policy of that nature. Furthermore, the fixing of common prices — target, intervention or minimum — in a sector covered by such organizations was not intended to guarantee agricultural producers a net price independently of any taxation imposed by the national authorities. [32]

On the basis of those considerations, the Court ruled that a temporary measure like the Irish measure in question did not as such constitute an unlawful encroachment by domestic legislation on the common organization of the markets. [33]

35. However, in *Irish Creamery Milk* the Court laid down another test — in addition to that referred to above — which must also be mentioned. Regardless of their impact on the income of national agricultural producers, methods used to implement a national incomes policy which includes agricultural producers cannot always be regarded as lawful: they are, in fact, incompatible with Community law if ever they have the effect of interfering with the functioning of the machinery employed by individual common organizations of the markets in order to achieve their ends. The essential aim of that machinery, the Court stated, is 'to achieve price levels at the production and wholesale stages which take into account both the interests of Community production as a whole in the relevant sector and those of consumers, and which guarantee market supplies without encouraging over-production'.

The national court will therefore have to evaluate the effects produced by the contested tax, in particular when the distribution stage of agricultural products on which the tax is levied essentially coincides with that taken into consideration by the common organization of the markets, which operates in that sector. The tax becomes unlawful for the purposes of Community law if it has the effect of impeding the functioning of the machinery used by the organizations in question, having 'an appreciable influence, even if unintentionally, on price levels on the national market at the same stages, or on supplies on that market'.

32 — Ibid., paragraphs 13 and 14. In working out the common agricultural policy, not only must regard be had, in accordance with Article 39(2)(c) of the Treaty, to 'the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole', but also to the fact that the wording of Article 39(1)(b) indicates that increasing the individual earnings of persons engaged in agriculture is deemed to be the result of the structural measures for increasing agricultural productivity, mentioned in Article 39(1)(a).

33 — Ibid., paragraph 14.

In the examination which it is required to undertake, the national court is called on to take into account not only the rate and duration of the tax, but also the market situation in question and the number of agricultural products on which the tax is levied. In effect, according to *Irish Creamery Milk*, '[while] a short-term duty on a large number of products may be neutral in the sense that it does not alter the structure of agricultural production, [...] if the duty encourages producers to replace some of the production of the goods subject to the duty by production of other goods not subject thereto, the duty is liable to create distortion on a number of markets'. [34]

36. However, neither the order for reference nor the oral phase of the present proceedings has brought to light any figures from which it could be inferred that the Sugar Tax operated in such a way as to undermine the purposes and functioning of the common organization of the market in sugar, in the ways indicated above.

Nor is such a finding substantiated by the documents before the Court. The contested fiscal measure undoubtedly sought, *inter alia*, to raise revenue for the Swedish public purse, and has obviously had a considerable impact on the income of the national agricultural producers; however, it does not appear thereby to have exercised any significant influence, even temporarily, on the level of prices or supplies on the sugar market. [35]

37. It cannot even be said that the Sugar Tax neutralized the effects of the Act of Accession and the common organization of the sugar market, as Danisco alleges. The predicted rise in the 'official' prices and the market price as a result of Sweden's accession to the EU duly took place.

38. That is not all. In economic terms, the effect of the Sugar Law was simply to absorb, on a single occasion only, a portion, albeit quite considerable, of the money made by Danisco and the other Swedish producers concerned on selling their products, through the normal workings of the laws of the market and the common pricing system. Let us reflect on this. The measure at issue in the main proceedings is similar in more than one respect to the measure which fell to be considered by the Court in the case concerning the temporary increase in the Danish property tax on agricultural land. [36]

34 — Ibid., paragraphs 15 to 20.

35 — It should be noted that, according to Danisco, the interruption allegedly caused by the Sugar Tax to the common organization of the markets resulted from the partial 'confiscation' of (i) the money obtained from selling sugar produced during the 1994/95 marketing year at the prices fixed by the Community legislation which had newly taken effect, to the detriment of both Swedish sugar manufacturers (namely, Danisco) and beet growers, and (ii) the reimbursement of the storage costs incurred by Danisco pursuant to Article 8 of Regulation No 1785/81.

36 — See Case 297/82 *Samvirkende Danske Landboforeninger* v *Ministry of Fiscal Affairs* [1983] ECR 3299.

39. That increase remained in force solely for the year 1980. It had been introduced by the Danish Government following devaluation of the Danish krone (one of the steps decided upon as part of a general economic policy plan) and, consequently, of the representative conversion rate *vis-à-vis* the ecu, the currency used for implementing the common agricultural policy. By adjusting that representative conversion rate, the Danish Government intended to avoid the introduction of compensatory monetary imports.

Specifically, the taxable amount for the contested property tax was the value of the land, determined on the basis of a general estimate of its commercial value, irrespective of the volume or nature of actual agricultural production. The tax was designed to compensate for the increase in agricultural prices, expressed in Danish krones, and the resulting considerable increase in the income of national agricultural production as a whole, brought about by the change in the representative conversion rate.

The Court, it should be recalled, considered a domestic tax measure of the kind described above to be compatible with Community law, at least in the absence of significant effects on the level of prices or — through changes to the structure of agricultural undertakings — the nature and quantity of supplies on the market. [37]

40. That test can properly be applied to the present case. The Sugar Law was in force for a very short time, and did not even form part of a more general national incomes policy — levied as it was simply, on a single occasion only, on certain gains: those which Danisco and the Swedish beet growers made 'in their sleep' as a result of accession, that is to say, those earned by the agricultural population in a sector where there was a considerable difference between 'official' prices and the national or Community market prices. It was no accident that the amount made payable by way of Sugar Tax was set so as to match exactly the increase in the market price expected as a consequence of Sweden's accession to the EU.

To my mind, the Sugar Tax — which, as Danisco itself has pointed out, amounts to confiscation of an expected gain — not only has failed to produce but, by force of circumstances, ***would not even have been capable*** of producing any distortion or disturbance on the sugar market, altering the level of prices or supplies.

37 — Ibid., paragraphs 10 to 16.

In other words, the Sugar Tax has a wholly neutral impact on the functioning of the common agricultural policy in the sector. It is not a tax which could realistically bring about changes to the structure of agriculture production or encourage the producers concerned partially to replace sugar production with production of other, non-taxable, goods; nor, consequently, can it produce distortions on a number of markets.

This also means that the Sugar Tax does not have the effect of impeding the functioning of the mechanisms set up by the common organization of the markets.

41. The Court has consistently held that it is for the national court to determine whether and to what extent the domestic tax or charge contested before it has actually produced, on the basis of a power of judgment acknowledged by the Court itself, effects of the kind described. [38] However, I consider it quite in order for me [39] to propose that the Court rule directly on the effects of a domestic tax such as that in issue here.

42. That said, the reply to the second question raised by the Länsrätt is the natural conclusion of the foregoing considerations. A domestic fiscal measure having the characteristics of the Swedish Sugar Tax should be recognized, on the terms specified above, as being compatible with Community law.

VI — Conclusion

In the light of the foregoing considerations, I propose that the Court give the following answer to the questions referred by the Länsrätt for a preliminary ruling:

The Act of Accession of Austria, Finland and Sweden and, in particular, Articles 137(2), 145(2) and 149 thereof are to be interpreted as meaning that the levying by

38 — See, *ex multis*, ibid., paragraph 17.

39 — See Case 222/82 *Apple and Pear Development Council* v *Lewis* [1983] ECR 4083, paragraph 31, in which the Court stated that 'although it is for the national court to consider whether, and if so, to what extent, the charge which it is called upon to consider has actually produced such effects, it should nevertheless be noted that *as a general rule* a charge of which the proceeds are essentially used for publicity measures which would otherwise have to be financed by the producers themselves cannot have such effects' (emphasis added).

a new Member State of a tax on normal transitional sugar stocks, on the same terms and in the same circumstances as the Swedish Sugar Tax, as amended, does not constitute a prohibited transitional measure.

The rules governing the common organization of the sugar market, in particular Articles 39 and 40 of the EC Treaty, Council Regulation No 1785/81 and Commission Regulation No 3300/94, are to be interpreted as meaning that the introduction by a Member State which has recently acceded to the European Union of a national tax on stocks of a particular product, which is characterized by the significant difference between the 'official' prices and national or Community market prices existing before accession, is not as such incompatible with Community law, provided that (a) the fiscal measure in question remains in force for a very short time, (b) is designed to be levied, on a single occasion only, on the gains obtained by the agricultural producers concerned solely as a result of accession, and (c) the amount of the tax is so set as to match the increase in the market price expected as a result of accession.