

OPINION OF ADVOCATE GENERAL

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I — Introduction

1. The Tallinna Halduskohus (Tallinn Administrative Court) has referred to the Court of Justice for a preliminary ruling six questions concerning the transitional measures adopted in order to facilitate the incorporation, on 1 May 2004, of ten new Member States into the European Union.

2. The questions refer to three Community regulations designed to persuade the economic operators of the Member States to avoid accumulating stocks of agricultural products, owing to the disruptive effects they may have on the common organisation of the markets. These restrictive devices consist, in short, in imposing a charge on surplus stocks created in the new Member States and eliminating them in some cases (sugar, isoglucose and fructose).

3. In connection with the 1994 accessions, the Court of Justice ruled on similar measures, which also included a charge on the afore-

mentioned surplus agricultural stocks.² The judgment in *Weidacher* declared that the Commission was competent to adopt that measure, after holding that the Community institutions enjoyed a broad discretion in attaining the objectives of the common agricultural policy, and denied that the regulation infringed the principle of proportionality or the principle of the protection of legitimate expectations.³

4. *Weidacher* is, to date, the only precedent in the matter, but it will not be the last. Simultaneously with and separately from this reference for a preliminary ruling, six of the ten new Member States have contested those three regulations and a Commission decision before the Court of First Instance of the European Communities. The actions are still pending.⁴

2 — In particular, Commission Regulation (EC) No 3108/94 of 19 December 2004 on transitional measures to be adopted on account of the accession of Austria, Finland and Sweden in respect of trade in agricultural products (OJ 2004 L 328 p. 42).

3 — Case C-179/00 *Weidacher* [2002] ECR I-501, inter alia paragraph 19.

4 — They are Cases T-257/04 *Poland v Commission*; T-258/04 *Poland v Commission*; T-300/05 *Cyprus v Commission*; T-316/05 *Cyprus v Commission*; T-324/05 *Estonia v Commission*; T-247/07 *Slovakia v Commission*; T-248/07, *Czech Republic v Commission*; and T-262/07 *Lithuania v Commission*.

1 — Original language: Spanish.

II — Legal framework

2. Regulation (EC) No 1972/2003 ⁶

A — *Community legislation*

1. The Act of Accession ⁵

5. Under the first paragraph of Article 41 of the Act of Accession, the transitional measures necessary for joining the regime of the common agricultural policy are to be adopted by the Commission 'during a period of three years following the date of accession' and are to be limited to that period.

6. On the basis of the aforementioned article of the Act of Accession, the Commission adopted three regulations.

7. Regulation No 1972/2003 contains a series of transitional provisions 'to avoid the risk of deflection of trade, affecting the common organisation of agricultural markets due to the accession of 10 new States to the European Union on 1 May 2004' (first recital).

8. The third recital warns of the need to levy deterrent charges on surplus agricultural stocks in the new Member States, since deflections 'liable to disrupt the market organisations often involve products moved artificially with a view to enlargement and do not form part of the normal stocks of the State concerned', although 'surplus stocks may also result from national production'.

9. Article 4(1) of Regulation No 1972/2003 requires those Member States which do not have stricter legislation to levy charges 'on holders of surplus stocks at 1 May 2004 of products in free circulation'.

⁵ — Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236 p. 33).

⁶ — Commission Regulation (EC) No 1972/2003 of 10 November 2003 on transitional measures to be adopted in respect of trade in agricultural products on account of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (OJ 2003 L 293 p. 3).

10. Article 4(2) mentions three factors which the new States must take into account when determining the surplus stock of each operator: (a) averages of stocks available in the years preceding accession; (b) the pattern of trade in those years; and (c) the circumstances in which stocks were built up.

the considerable risk of disruption on the markets in the sector as a result of speculative actions (fifth recital).

11. Under Article 4(4) of the regulation, for the charge to be correctly applied, the new Member States are required 'without delay' to carry out an inventory of stocks available as at 1 May 2004.

14. The regulation allocates obligations between the Commission and the Member States.

12. The entry into force of Regulation No 1972/2003 coincided with that of the Treaty of Accession, and was applicable 'until 30 April 2007' (Article 10).

15. It was for the Commission to determine, 'by 31 October 2004 at the latest', for each new Member State, the quantity of raw or processed sugar, isoglucose and fructose 'exceeding the quantity considered as being normal carry-over stock at 1 May and which has to be eliminated from the market at the expense of the new Member States. To determine this surplus quantity, account is in particular taken of the development during the year preceding accession in relation to the previous years of: (a) imported and exported quantities of raw or processed sugar, isoglucose and fructose; (b) production, consumption and stocks of sugar and isoglucose; and (c) the circumstances in which stocks were built up' (Article 6(1) of the regulation).

3. Regulation (EC) No 60/2004⁷

13. Regulation No 60/2004 incorporates specific rules for the sugar sector, in view of

16. It was for the new Member States to ensure, 'by 30 April 2005 at the latest' the elimination from the market of a quantity of sugar or isoglucose, without Community

⁷ — Commission Regulation (EC) No 60/2004 of 14 January 2004 laying down transitional measures in the sugar sector by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (OJ 2004 L 9 p. 8).

intervention, equal to the surplus quantity referred to in paragraph 1 (Article 6(2)). For that purpose, the competent national authorities had to have available on 1 May 2004 a system for the identification of traded or produced surplus quantities of raw or processed sugar, isoglucose or fructose, at the level of the main operators concerned. Under Article 6(3) of the regulation, this system would ‘in particular rely on import tracking, fiscal monitoring, surveys based on operators’ accounts and physical stocks, and include measures such as risk guarantees’. Also, according to the provision, ‘the system of identification shall be based on risk assessment that takes due account in particular of the following criteria: type of activity of the operators concerned, capacity of storage facilities, and level of activities’.

4. Regulation (EC) No 832/2005⁸

17. By Regulation No 832/2005 the Commission established the surplus quantities of sugar, isoglucose and fructose to be destroyed by each new Member State.

⁸ — Commission Regulation (EC) No 832/2005 of 31 May 2005 on the determination of surplus quantities of sugar, isoglucose and fructose for the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (OJ 2005 L 138, p. 3).

B — National legislation

18. In implementation of this legislation, on 7 April 2004 the Estonian Parliament approved the Üleliigse laovaru tasu seadus (Law on the surplus stock charge, ‘the ÜLTS’).

19. By judgment of 5 October 2006, the Riigikohus (Estonian Supreme Court) declared certain provisions of the ÜLTS contrary to Regulation No 1972/2003, and annulled Paragraph 6(1) of the ÜLTS, taking the view that the requirement in Paragraph 6(1) of the ÜLTS to calculate the transitional stock by multiplying by a factor of 1.2 did not ensure a situation in which each operator was treated differently. The Riigikohus also criticised Paragraph 6(2) of the ÜLTS, because it considered that, under Community law, an operator who has not been active in his field of activity before 2004 or has been active for less than four years is not under an obligation to prove that the stock of the agricultural product in his possession on 1 May 2004 corresponds to the amounts of the stock of the agricultural product customarily produced, sold, transferred or acquired by him, for payment or without payment.

20. Following this judgment, on 16 June 2005 and 25 January 2007, the Riigikogu (Estonian Parliament) introduced significant amendments to the text of the ÜLTS, which came into force on 30 April 2005 and 16 February 2007, respectively.

21. Paragraph 7(1) of the ÜLTS specifies that the amount of the surplus stock is obtained 'by deducting the amount of the transitional stock from the amount of the stock of the agricultural product in the possession of the operator on 1 May 2004'. The amendment introduced a paragraph (2) to this provision, stating that, if it were essential 'for achieving the objectives of Commission Regulation No 1972/2003 or Commission Regulation No 60/2004, the operator's entire stock of the agricultural product is surplus stock'.

22. Paragraph 6(1) of the ÜLTS calculates the 'transitional stock' as the average amount stored on 1 May of the four years last preceding 2004, multiplied by 1.2. Paragraph 6(2) and (3) lessen the severity of this rule of calculation for operators who have been active for less than four years.

23. Accordingly, in accordance with Paragraph 6(2), if the operator was not active in the sector before 2004 or had been active for less than four years, he must show that the amount of the stock of the agricultural product in his possession on 1 May 2004 is equivalent to the amount of the stock of the agricultural product customarily produced, sold, or otherwise transferred or acquired by him for payment or without payment.

24. Paragraph 6(3), incorporated after the amendment, refers to those who have operated in the sector for less than four years but at least one, allowing them to choose, in calculating the amount of their transitional stocks, either the average of the positions on 1 May of the four years last preceding 2004, multiplied by 1.2, or the position on 1 May of the last years of operation preceding 2004, multiplied by 1.2.

25. Paragraph 10(1) of the ÜLTS places the responsibility for determining the transitional stock and surplus stock on the Ministry of Agriculture, on the basis of the data declared by the persons concerned. If the operator presents a reasoned application, Paragraph 10(2) permits account to be taken, in making this evaluation, of various circumstances, such as the growth in production, processing or sales volume of the company concerned (if it took place during the previous year and was reflected in the economic results for the last half year), the maturation period of the agricultural product, the fact that the stocks were built up before the third quarter of 2003, the reduction of the export or sales volume for reasons not attributable to the operator, and other eventualities beyond his control.

26. Paragraph 23 of the ÜLTS completes these provisions with rules permitting the revision upwards of the transitional stocks; thus, their amount may be increased if there has been a growth in production, processing or sales during the year preceding 1 May 2004,

provided that the increase is reflected in the economic results for the last half-year and continued in the period from 1 May 2004 to 1 May 2006.

ÜLTS, in the version following the amendment made by the judgment of the Riigikohus.

III — The main proceedings and the questions referred for a preliminary ruling

27. The applicant in the main proceedings, AS Balbiino, is an Estonian company which sells ice-cream and frozen foods.

28. Faced with the prospect of the changes which the accession of Estonia to the European Union would cause in the market, Balbiino improved and enlarged its facilities, opening a new warehouse to store raw materials such as sugar. At around the same time, the undertaking also undertook a new activity, selling frozen foods wholesale.

29. Following several procedural steps, on 19 April 2007 the Minister for Agriculture determined Balbiino's transitional stocks and surplus stock at a total of 12 agricultural product groups, taking as a basis for the determination Paragraphs 6, 7 and 10 of the

30. The charge on this surplus stock was fixed on 30 April 2007 by the Maksu- ja Tolliameti Põhja maksu- ja tollikeskus (Tax and Customs Office, Northern Tax and Customs Centre) at EEK 1.243.867 (approximately EUR 77 000).

31. This tax notice and the decision of the Minister of Agriculture of 19 April 2007 were contested by Balbiino before the Tallinna Halduskohus, which doubts whether the ÜLTS is compatible, even after amendment, with Community law. It has therefore referred the following questions to the Court of Justice pursuant to Article 234 EC:

‘(1) Does the law of the European Union, in particular Article 6(1) of Regulation No 60/2004, in conjunction with recital 3 in the preamble to Regulation No 832/2005 and Article 4(1) and (2) of Regulation No 1972/2003, preclude the ascertainment of the amount of an operator's surplus stock by automatically deducting from the surplus stock (regarded as transitional stock) the average stock as at 1 May of the operator's years of activity preceding 1 May 2004, but not more than four years of activity, multiplied by 1.2?

If the answer is in the affirmative, would the answer be different if, in determining the transitional stock and surplus stock, account were also taken of the growth of the operator's production, processing or sales volume, the maturation period of the agricultural product, the time when the stocks were built up, and other circumstances independent of the operator?

If the answer is in the affirmative, would the answer be different if, regardless of the operator's obligation to provide proof, the administrative body had an obligation to take into account, on the basis of the declaration of the agricultural product submitted by the operator, in assessing the operator's transitional stock and surplus stock, the growth of the operator's production, processing or sales volume and stock after 1 May 2004?

- (2) Is it compatible with the law of the European Union, in particular the objective of Commission Regulation No 1972/2003, to regard the entire stock of an agricultural product in the operator's possession as at 1 May 2004 as the operator's surplus stock?
- (3) If the operator started to deal in the corresponding agricultural product less than one year before 1 May 2004, does the law of the European Union, in particular Article 4 of Commission Regulation (EC) No 1972/2003 and Article 6 of Commission Regulation (EC) No 60/2004, preclude that operator himself having to prove that the amount of the stock of the agricultural product in his possession on 1 May 2004 is equivalent to the amount of the stock of the agricultural product customarily produced, sold, or otherwise transferred or acquired by him for payment or without payment?
- (4) Is it compatible with the objective of Commission Regulation No 1972/2003 and Commission Regulation No 60/2004 to levy the surplus stock charge where the operator is found to have a surplus stock as at 1 May 2004, provided that the operator shows that he has not obtained a real advantage in terms of a price difference from marketing the surplus stock after 1 May 2004?
- (5) May the provisions of Article 6(3) of Commission Regulation No 60/2004, under which account is taken, in determining surplus quantities of sugar, isoglucose or fructose, inter alia, of storage capacities, be interpreted as meaning that in a situation in which the operator's storage capacities have increased during the year preceding accession that is a basis for reducing the surplus stock of the agricultural product in the possession of the operator as at 1 May 2004, regardless of the operator's economic activity, the volume of the agricultural product processed and the

amount of stocks of the agricultural product in the years of activity preceding 1 May 2004 and during the two years following 1 May 2004?

33. Written observations have been submitted by the applicant in the main proceedings, the Estonian and Lithuanian Governments and the Commission.

- (6) Does Article 10 of Commission Regulation No 1972/2003 preclude the demanding of a surplus stock charge from an operator by a tax notice in a situation in which the tax notice was indeed drawn up while the regulation was applicable, on 30 April 2007, but according to national law became enforceable against the operator after the final date of application of the Commission regulation, provided that national law does not establish a time-limit for demanding the stock charge?

34. At the hearing, which was held on 18 December 2008, the representatives of AS Balbiino, the Republics of Estonia and Cyprus, and the Commission presented oral argument.

V — A preliminary matter: the applicability of the Community regulations

35. The Tallinna Halduskohus has referred six questions to the Court of Justice for a preliminary ruling concerning Community Regulations Nos 1972/2003, 60/2004 and 832/2005. However, the applicant undertaking in the main proceedings claims that, in accordance with the judgment in *Skoma-Lux*,⁹ those regulations were unenforceable against it, because on the date of accession they had not yet been published officially in Estonian.

IV — Procedure before the Court of Justice

32. The reference for a preliminary ruling was lodged with the Court Registry on 18 December 2007.

36. In *Skoma-Lux*, the Court of Justice declared that, where Community legislation has not appeared in the *Official Journal of the*

⁹ — Case C-161/06 *Skoma-Lux* [2007] ECR I-10841.

European Union in the language of a new Member State, Article 58 of the Act of Accession ‘precludes the obligations contained... from being imposed on individuals in that State, even though those persons could have learned of that legislation by other means’, such as the version in electronic format published on the EUR-Lex website.

37. However, this precedent is of only limited relevance to the present case, since the Community regulations were developed in Estonia by law before accession. As I have pointed out, the Estonian Parliament adopted the ÜLTS on 7 April 2004, introducing a charge on surplus stocks of agricultural products and establishing the procedure for calculating them, in accordance with Article 4(1) and (2) of Regulation No 1972/2003 respectively.

38. The Court of Justice was at pains to point out, in its judgment in *Skoma-Lux*, that, if a Community regulation has not been published in one of the official languages, it is unenforceable against the nationals of the relevant Member State, but that does not alter the fact that, ‘as part of the *acquis communautaire*, its provisions are binding on the Member State concerned as from its accession.’¹⁰ In short, the regulation retains its validity and the Republic of Estonia cannot avoid its obligation to tax surplus stocks of agricultural products by arguing that the Community regulation requiring it to do so did not appear in the Official Journal in the language of its country.

39. Accordingly, there is no objection to be made against the ÜLTS,¹¹ and it therefore applies to Estonians, acting as a ‘drive belt’ for the Community regulations. At least, this is what happens as regards the measures in the Community regulations which are understood to be ‘incorporated’ into the national legislation: provisions which, because they had not been published, had not created obligations for individuals, create them by means of a national law.

40. The *Skoma-Lux* decision would have residual scope in this matter with regard to those provisions in the Community regulations which the ÜLTS has not incorporated. In that event, non-publication in Estonia would make it impossible to rely on the provisions concerned. However, it is for the national court alone to carry out that examination and decide whether there are parts of the Community legislation which are not contained in the national law and are therefore unenforceable against individuals.

41. Therefore, the failure to publish the corresponding regulations in Estonian must be considered by the national court when it gives its decision in the main proceedings, but it does not affect the admissibility of the questions referred for a preliminary ruling. The Court of Justice is asked whether legislation such as the ÜLTS constitutes a transpos-

10 — Judgment in *Skoma-Lux*, paragraph 59.

11 — Any objections raised pursuant to national law concerning the validity or applicability of the ÜLTS (such as its alleged belated publication, to which the undertaking refers in points 22 and 23 of its observations) must be raised only before the national court.

ition which is correct and in accordance with the Community regulations, a point which is relevant since, although that Community legislation is not enforceable against Estonian nationals, it did create obligations for the new Member State. The Tallinn court must evaluate the national legislation in the light of the Community legislation and, in particular, of the criteria which the Court of Justice offers for its interpretation.

States are authorised to adopt implementing measures: the creation and levying of a charge on surplus stock, their elimination in some cases (the sugar sector) and the prior identification of their amount.

VI — Analysis of the questions referred for a preliminary ruling

A — The characteristics of the method for calculating the surplus stock

1. General considerations

42. In the first five questions referred for a preliminary ruling the Court of Justice is asked to clarify the conditions which Community Regulations Nos 1972/2003, 60/2004 and 832/2005 require the new Member States to satisfy for calculating the surplus stocks of agricultural products.

43. From the wording of the first two of these regulations it is clear that the new Member

44. The regulations not only expressly authorise the Member States to develop them, but also give them ample enough room for manoeuvre when carrying out this task. Article 4(2) of Regulation No 1972/2003 and Article 6(3) of Regulation No 60/2004 list the criteria for fixing the amounts of surplus stock, but allow other elements to be taken into account, depending on what each Member State deems appropriate. The lists are not, therefore, exhaustive, although it is mandatory to consider the factors they set out.

45. Furthermore, the aforementioned regulations propose a flexible method of calculation, perfectly capable of being adapted to the particular features of each operator and each product. For that reason, they do not provide a detailed arrangement of the process, but simply indicate minimum and very generic

guidelines: ‘the pattern of trade’, ‘the circumstances in which stocks were built up’, ‘type of activity of the operators concerned’ and ‘level of activities’ (the last two for sugar).

2. The first and fifth questions

(a) The first question

46. With these basic ingredients, the Member States had to prepare a mechanism of overall assessment which contained various components, each with its own specific weight.

47. In any event, the Community legislation forms the boundary and yardstick for the national legislation adopted by each Member State, whose power of development and implementation does not jeopardise the objectives of the regulations, or amend their provisions or go beyond what they permit.¹²

48. The answer to the first five questions from the Tallinna Halduskohus is based on these initial ideas.

49. In its first question, the Tallinn Administrative Court asks the Court of Justice whether Article 6(1) of Regulation 60/2004, the third recital of Regulation No 832/2005 and Article 4(1) and (2) of Regulation No 1972/2003 prohibit quantifying an operator’s surplus stock by deducting from the stock actually held on 1 May 2004 what is known as transitional stock, which is calculated as the average stock as at 1 May the four years before accession, multiplied by 1.2. If the answer to this first part of the question is in the affirmative, the national court wishes to know whether the situation would be different if account were taken, in that calculation, of ‘the growth of the operator’s production, processing or sales volume, the maturation period of the agricultural product, the time when the stocks were built up, and other circumstances independent of the operator’.¹³

50. So as to bring order to the motley mass of details relating to this first question, it is necessary to distinguish between the three basic stages in the procedure for calculating

¹² — With regard to the discretion enjoyed by the Member States in the application and development of the Community regulations, see Case 31/78 *Bussone* [1978] ECR 2429, paragraph 16; Case C-313/99 *Mulligan* [2002] ECR I-5719, paragraph 33; and Case C-55/06 *Arcor* [2008] ECR I-2931, paragraph 140.

¹³ — The question referred for a preliminary ruling cites, among the relevant Community provisions, Article 6(1) of Regulation No 60/2004. It would be more appropriate, however, to refer to Article 6(3), since it is necessary to evaluate the correctness of a method of calculating the surplus stock of each operator, not to determine, as in Article 6(1), the overall surplus stock of each Member State.

surplus stocks which is under consideration: the use of averages obtained on the basis of the stocks accumulated at a certain date; the application of a general coefficient; and the weighting of the result according to factors beyond the economic operator's control.

(i) The calculation of averages using details of stocks at a certain date

51. The reference for a preliminary ruling and the observations of the parties in this case show doubts as to the compatibility with Community law of a system for calculating surplus stock which is based on the stock held by each undertaking on a calendar date.

52. This is the system of the ÜLTS, which may be summarised in the following mathematical formula:

Surplus stock = (stocks at 1/5/04) — (average of stocks at 1/5/00, 1/5/01, 1/5/02 and 1/5/03) x 1.2.¹⁴

¹⁴ — The weighted average which constitutes the subtrahend of this subtraction is given the name 'transitional stocks'.

53. Under Article 4(2) of Regulation No 1972/2003, in order to ascertain the surplus stocks of each holder, 'the averages of stocks available in the years preceding accession', are taken into account, among other factors. The Community legislation therefore requires that former information about stock to be used, but leaves the Member States a certain freedom to specify the figures which must be taken as a reference, and the number of years over which and the manner in which the average must be taken.

54. The applicant in the main proceedings maintains in its observations that to consider the level of stocks only at four precise moments (1 May in the four years preceding accession) gives unrepresentative results, since an operator did not know that the situation in his facilities on those days would be used as an indication of his 'normal stock'. It adds that Balbiino's activity is cyclical, particularly with regard to the sale of ice-cream, which requires a greater stock of these products in the months prior to the summer. 1 May falls precisely within that period of preparation for the high season.

55. None of the arguments put forward by Balbiino is persuasive. The handling of those figures cannot be criticised in the light of the principle of equality for, although they are not always a 'true reflection', to use an accounting term, of what is normal in the warehouse of

each operator, the possibility of amending the data obtained according to the particular circumstances of each economic operator allows for a fairer outcome.

56. I therefore consider that the Community legislation does not preclude calculating the transitional stocks on the basis of the average of the stocks at 1 May 2000, 2001, 2002 and 2003.

(ii) The weighting of the transitional stocks with a single coefficient of 1.2

57. The Tallinn court also asks whether the introduction of a single coefficient of 1.2 to weight the transitional stocks is consistent with the Community legislation, pointing out that the Riigikohus held, in its judgment of 5 October 2006, that that multiplier infringed Article 4(2) of Regulation No 1972/2003, because it does not authorise any distinction according to the circumstances of each operator.

58. The view of the Riigikohus is shared by Balbiino and the Commission, which points out in its observations that, in accordance with the principle of equal treatment, holders of stocks who are in different situations cannot be treated in the same way.

59. The Estonian Government has stated that the purpose of introducing the coefficient of 1.2 was to take into account the rapid economic growth of Estonia in the years before accession.¹⁵ When the average of the stocks for those years was multiplied by 1.2, the transitional stocks of all economic operators increased, with a corresponding reduction in their surplus stock.

60. In my view, the application of a coefficient for the purpose of evaluating the economic situation of the applicant State does not undermine the objectives of the Community legislation. Furthermore, Regulation No 1972/2003 requires the overall economic framework of the State concerned to be assessed, stating in Article 4(2) that it is necessary to take into account 'the pattern of trade in the years preceding accession'. I consider that this expression refers to the changes which have occurred in the volume of trade of the State concerned.¹⁶

61. The percentage likewise does not jeopardise the attainment of the objectives of the Community legislation, because it makes it possible to gauge more accurately the volume of surplus stocks which might incur a risk for the economy of the Union. The increase in the

15 — The volume of production in the food industry in 2004 had increased by 20.7% in relation to 2000.

16 — The wording of Regulation No 3108/94, adopted in connection with the 1994 enlargement, is clearer. Article 4(2) thereof referred to the need to record 'the pattern of trade in the years preceding accession'.

transitional stocks reflects the normal effects of economic growth stemming from the prospect of accession: the greater the economic buoyancy, the higher the storage rates.

(iii) The assessment of factors beyond the economic operator's control

62. Enlargements of the Union involve a clear risk of speculative activity which must be prevented, but they also create legitimate expectations of economic progress and greater market flexibility, so it is reasonable for operators to prepare to meet them in the most favourable circumstances. The Community regulations seek only to avoid the consequences of an excessive accumulation of stocks, but a particularly high increase in stock levels in the years preceding accession is a natural consequence of enlargement and must be taken into account in order to reduce the degree of disruption which surplus stocks cause in the normal operation of the agricultural markets.

64. The national court alludes to this last aspect of the question referred for a preliminary ruling in a secondary question, probably with the aim of examining more effectively whether the ÜLTS, once amended, complies with the Community legislation. However, the calculation method of the new Member States must be assessed overall, taking all the factors together. The use of a general coefficient and the calculation of the average on the basis of details of stocks on four specific dates must not be detached from the remaining characteristics of the procedure of each Member State. On their own, they do not make up a satisfactory system for identifying surplus stocks, but there can be no objection to their use if they are supplemented, as the Community legislation requires, by additional elements in order to adjust the result obtained.

63. I also consider that there is no objection to the application of this coefficient from the perspective of the principle of equal treatment, since it is just one factor in the complex method of calculating the surplus stocks. The possibility of amending the result in the light of other circumstances — as explained below — removes any suspicion of unequal treatment.

65. Article 4(2) of Regulation No 1972/2003 requires the new States to take into account, when determining the surplus stocks liable to a charge, the averages of the stocks available in the years preceding accession, the pattern of trade during that period and the circumstances in which the stocks were built up.

66. Thus, ‘the growth of the operator’s production, processing or sales volume, the maturation period of the agricultural product, the time when the stocks were built up, and other circumstances independent of the operator’ are contextual references easily adaptable to the concepts dealt with in the aforementioned provision.

fructose, due account should be taken of the ‘capacity of storage facilities’. Furthermore, the third recital in the preamble to Regulation No 832/2005 emphasises that, to calculate the surplus stocks of sugar, isoglucose and fructose, the Commission has taken into consideration ‘specific circumstances of stock-piling’. Admittedly, these last two provisions apply only to the sugar sector, for the purposes of eliminating stocks, but they constitute an important criterion for the interpretation of the legislation which concerns, in general, all agricultural products.

67. However, even with the residual clause inserted at the end, this list of circumstances is not enough to comply with the Community legislation.

(b) The fifth question

68. It is necessary, in addition, to integrate, as an essential criterion, the operator’s storage capacity, even though it is not included in the list given, because that capacity is linked to a decision taken by the operator. However, the Community regulations require the increase or reduction in the storage capacity of the person concerned to be assessed.

70. Since it is connected with the aspects considered, for the sake of greater clarity I shall now examine the fifth question, in which the national court expresses doubts as to the form and extent of that storage capacity.

69. This may be deduced, on the one hand, from Article 4(2)(c) of Regulation No 1972/2003, because it is a relevant circumstance of the process of generating stock; and, on the other, from Article 6(3) of Regulation No 60/2004, which provides, that, in the system of identification for calculating the surplus stocks of sugar, isoglucose and

71. It wishes to know whether the aforementioned provision of Regulation No 60/2004 may be interpreted as meaning that an increase in an operator’s storage capacity during the year preceding accession means that the surplus stock of the agricultural product in his possession as at 1 May 2004 is reduced, regardless of his economic activity,

the volume of the agricultural product processed and the amount of stocks of the agricultural product in the years of activity preceding 1 May 2004 and during the two years following 1 May 2004.

capacity when the surplus stocks of each operator are calculated, which does not mean that any increase in that capacity automatically gives rise to a reduction in that operator's surplus stocks.

72. The question is based on the fact that the decree of the Minister for Agriculture of 30 March 2007, contested by Balbiino in the main proceedings, stated that the increase in the undertaking's storage capacity between 2000 and 2003 as a consequence of the construction of additional premises was not reflected in a proportional increase in the level of processing of the products stored (especially sugar), which showed that Balbiino does not customarily acquire or possess large stocks of sugar.¹⁷ Therefore, the volume of surplus stock obtained on the basis of the information about the new facilities was not taken into account.

74. It must not be forgotten that the Community legislation is intended to discourage the accumulation of surplus stocks and to identify those operators involved in major speculative trade movements (the eighth recital in the preamble to Regulation No 60/2004). Changes in the storage capacity of the person concerned may therefore alter the assessment of his normal level of stocks, provided that the storing of more goods has also been reflected in the level of activity related to those goods.

73. It should be emphasised again that the intention of the Community legislature was to create an overall assessment mechanism combining various factors, to be assessed together. Storage capacity is no exception. The Community legislation (particularly Regulation No 60/2004, for the sugar sector) requires 'due' account to be taken of storage

(c) Corollary

75. I therefore consider that the Community regulations do not preclude quantifying an operator's surplus stock by deducting from the stock actually held on 1 May 2004 the so-called transitional stock, which is calculated as the average stock as at 1 May of the four years before accession, multiplied by 1.2, provided that, in that calculation, account is taken of the growth of the operator's production, processing or sales volume, the matur-

¹⁷ — AS Balbiino's sugar stock fluctuated, before May 2004, only between 0.9% and 2.4% of that year's processed volume, since the operator did not have a sufficiently large storage capacity of its own in which to keep sugar in the necessary amount, and as at 1 May 2005 it still did not exceed 3% of the volume processed in that year (from 1 May 2005 to 1 May 2006), that is, 9.7 times less than on 1 May 2004.

ation period of the agricultural product, the time when the stocks were built up, the operator's storage capacity and other circumstances independent of the operator.

78. In my view, the reply should be in the affirmative.

76. As regards storage capacity, Article 6(3) of Regulation No 60/2004 may not be interpreted as meaning that an increase in that capacity in the year preceding accession gives a reason for reducing the surplus stock of the agricultural product in his possession as at 1 May 2004, regardless of his economic activity, the volume of the agricultural product processed and the amount of stocks of the agricultural product in the years of activity preceding 1 May 2004 and during the two years following 1 May 2004.

79. As has already been pointed out, the transitional measures in Regulation No 1972/2003 are intended to prevent the artificial movement of products which do not form part of the normal stocks of the State awaiting accession, or an excessive accumulation of nationally produced goods in the same context, from causing trade deflections liable to disrupt the market organisations.¹⁸

80. Accordingly, the regulation establishes a procedure for calculating those surplus stocks, in which a whole series of factors have to be taken into account together, among them the circumstances in which the stocks were built up and the pattern of trade in the years preceding accession.

3. The second question

77. By its second question, the Tallinn Administrative Court wishes to know whether it is compatible with Regulation No 1972/2003 to regard as surplus stock the entire stock of an agricultural product in the operator's possession as at 1 May 2004.

81. Consequently, the Community legislation does not preclude regarding all a company's stock as surplus stock, in certain circumstances, such as limited commercial activity in relation to the product concerned.

¹⁸ — The third recital in the preamble to the regulation.

82. The Government of Estonia sets out the facts in the main proceedings which have given rise to this reference for a preliminary ruling. On 1 May 2004, Balbiino had 1 346 kilogrammes of Camembert cheese and 1 338 kilogrammes of Brie. During the previous months, the undertaking sold 1.8% and 2% respectively of the Camembert and Brie acquired during that period. In contrast, in the two years following accession (from 1 May 2004 to 1 May 2006) it did not acquire a single kilogramme of either of the two cheeses and all the stock it held in 2004 was sold by the end of 2005.

stocks may be eliminated (in the case of sugar) or taxed probably deters them.

85. Therefore, in the aforementioned circumstances, it is compatible with the objective pursued by Regulation No 1972/2003 to regard the entire stock of an agricultural product in the operator's possession on 1 May 2004 as surplus stock.

83. This situation shows that the entire stock of a product held by a company at the time of accession may be regarded as surplus stock, where there is evidence of stock-piling with a view to speculation, for example, because following the transaction there has not been a proportional movement of sales nor has the supply been kept up.

4. The third question

84. According to the applicant, any operator has the right to buy and sell any goods, and to enter into any transactions or marketing of goods of different kinds whenever it is in his best interests. Certainly, the free market is limited by Community law. In the circumstances, the operators of the State applying to join the Union may accumulate stocks of agricultural products, but the fact that surplus

86. The third question refers to the burden of proof in the calculation of the surplus stocks of agricultural products. The national court wishes to ascertain whether Article 4 of Regulation No 1972/2003 and Article 6 of Regulation No 60/2004 are infringed by a scheme under which an operator who started to deal in the goods less than one year before accession has to prove that the amount of the stock in his possession on 1 May 2004 is equivalent to the amount customarily produced, sold, or otherwise transferred or acquired by him for payment or without payment.¹⁹

¹⁹ — It is surprising that the only article of the ÜLTS which establishes a scheme similar to the one under consideration here does not concern operators who have been dealing for less than one year, but less than four years (Article 6(2)), which does not affect the reply suggested.

87. Neither of the aforementioned regulations refers to the *onus probandi*. That silence allows the Member States to regulate this aspect as they think fit, according to national law, provided that the attainment of the objectives of the Community legislation is not jeopardised.

88. Moreover, it seems logical that, where the State does not have points of comparison for assessing the ‘normal’ level of stocks, the interested party should himself have to justify the figures in that respect.

89. Since the reply to the first part of the question is in the negative, there is no need to analyse the second part.

5. The fourth question

90. By the fourth question referred for a preliminary ruling, it is sought to clarify whether it is compatible with the aforementioned Community regulations to levy the surplus stock charge where the operator is found to have a surplus stock as at 1 May 2004

but proves that he has not obtained a real advantage, in terms of a price difference, from marketing it since 1 May 2004.

91. It is therefore a question of deciding whether, for the purposes of taxing the surplus stocks, the operator has to have obtained an advantage.

92. The regulations do not include a requirement to that effect, which is rather revealing; it is apparent from the wording that the aim of the charge is not to punish the speculator but to prevent any behaviour of this kind from unduly distorting the agricultural markets.²⁰

93. Therefore, the deterrent measure must apply to any activity which might cause such disruption, despite the economic benefits attained by the operator.

²⁰ — To that effect see, in relation to Regulation No 3108/94, the judgment in *Weidacher*, paragraph 22.

B — *The consequences for the national measures concerning the charge of the fact that the regulation was no longer applicable*

immaterial that, for various reasons (specific features of the national law or unsettled actions challenging the tax notices, for example) none of the sums charged has been collected. If it were otherwise, that period could easily be manipulated by the persons concerned.

94. Leaving aside the system for identifying the surplus stocks of agricultural products, the Tallinn court raises, finally, the matter of the interpretation of Article 10 of Regulation No 1972/2003, according to which the provision would apply until 30 April 2007. The problem arises because the tax notice charging Balbiino tax on its surplus stocks was adopted while the regulation was applicable (30 April 2007),²¹ but, under national law, was not enforceable until a later date, and no time-limit was established for the demand.

96. The delay in collecting the tax does not undermine legal certainty (as the assessment was to have been sent by 30 April 2007) or jeopardise the objectives of the Community legislation, since its impact of discouraging stock-piling is achieved provided that, during that period, the national law is adopted and the taxation procedure initiated.

95. In my view, the Estonian rules on whether the tax dues are payable are irrelevant in this respect. As the Commission points out, in that period of three years from accession to the time the regulation ceased to be in force, the States had to regulate taxation of the surplus stocks, determine their amount and identify their holders, and calculate the charges. It is

97. Therefore, Article 10 of Regulation No 1972/2003 does not invalidate a tax notice imposing a charge on surplus stocks issued on 30 April 2007, even though under national law that notice did not become enforceable against the operator until after that date and no time-limit was established for issuing the demand.

21 — The assessment was handed over to the postal services on that date, 30 April.

VII — Conclusion

98. In the light of the foregoing considerations, I propose that the Court of Justice give the following reply to the questions referred by the Tallinna Halduskohus:

- (1) Article 6(3) of Commission Regulation (EC) No 60/2004 of 14 January 2004 laying down transitional measures in the sugar sector by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, the third recital in the preamble to Commission Regulation (EC) No 832/2005 of 31 May 2005 on the determination of surplus quantities of sugar, isoglucose and fructose for the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, and Article 4(1) and (2) of Commission Regulation (EC) No 1972/2003 of 10 November 2003 on transitional measures to be adopted in respect of trade in agricultural products on account of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, do not prohibit quantifying an operator's surplus stock by deducting from the stock held on 1 May 2004 what is known as transitional stock, which is calculated as the average stock as at 1 May of the four years of activity before accession, multiplied by 1.2, provided that, in that calculation, account is taken of the growth of the operator's production, processing or sales volume, the maturation period of the agricultural product, the time when the stocks were built up, the operator's storage capacity and other circumstances independent of the operator.

As regards storage capacity, Article 6(3) of Regulation No 60/2004 is not to be interpreted as meaning that an increase in that capacity in the year preceding accession gives a reason for reducing the surplus stock of the agricultural product in the operator's possession as at 1 May 2004, regardless of his economic activity, the volume of the agricultural product processed and the amount of stocks of the

agricultural product in the years of activity preceding 1 May 2004 and during the two years following 1 May 2004.

- (2) It is compatible with Regulation No 1972/2003 to describe the entire stock of an agricultural product in the operator's possession on 1 May 2004 as surplus stock, where there is evidence that stock has been piled with a view to speculation.
- (3) Neither Article 4 of Regulation No 1972/2003 nor Article 6 of Regulation No 60/2004 is infringed by a scheme under which an operator who started to deal in the goods less than one year before accession has to prove that the amount of his stock on 1 May 2004 is equivalent to the stock of the agricultural product customarily produced, sold, or otherwise transferred or acquired by him for payment or without payment.
- (4) It is compatible with Regulation No 1972/2003 and Regulation No 60/2004 to levy the surplus stock charge where the operator has a surplus stock as at 1 May 2004 but proves that he has obtained no real advantage, in terms of a price difference, from marketing it since that date.
- (5) Article 10 of Regulation No 1972/2003 does not preclude the demanding of a surplus stock charge from an operator by a tax notice which was drawn up while the regulation was applicable (30 April 2007), although under national law it became enforceable against the operator after the final date of application of the regulation and national law does not establish a time-limit for recovering the charge.