OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 19 January 1994 *

Mr President,
Members of the Court,

1. Like *KYDEP* v *Council and Commission*, [1] which is still pending before the Court and on which I delivered an Opinion on 15 September 1993, the questions referred for a preliminary ruling in this case are also concerned with the consequences for a Greek undertaking of the nuclear accident which took place at Chernobyl on 26 April 1986. The Dioikitiko Efetio Athinon (hereinafter referred to as 'the Administrative Court of Appeal, Athens') has asked the Court to give a preliminary ruling (a) on the validity and legal nature of a telex message sent by the Commission to the Permanent Representatives of the Member States on 24 July 1986 and (b) on the interpretation to be given to Commission Regulations (EEC) Nos 2730/79 [2] and 3665/87 [3] laying down common detailed rules for the application of the system of export refunds on agricultural products. [4] The questions arose in proceedings between the Greek State and Ellinika Dimitriaka A. E., a public limited company.

The relevant legislation

2. Article 15 of Regulation No 2730/79, as replaced by Article 13 of Regulation No 3665/87, reads as follows:

'No [export] refund shall be granted on products which are not of sound and fair marketable quality, or on products intended for human consumption whose characteristics or condition exclude or substantially impair their use for that purpose.'

As regards cereals specifically, a similar provision is to be found in Article 2(1) and (2) of Commission Regulation (EEC)

* Original language: Dutch.

1 — Case C-146/91.

2 — Regulation of 29 November 1979, OJ 1979 L 317, p. 1.

3 — Regulation of 27 November 1987, OJ 1987 L 351, p. 1.

4 — It is not completely clear what the interpretation of Regulation No 2730/79 has to do with this case. That regulation was repealed by Article 50 of Regulation No 3665/87 with effect from 1 January 1988, that is to say, before the export transactions at issue took place. Neither do the transitional rules, under which Regulation No 2730/79 is to continue to apply 'to exports, the export declarations for which were accepted before the entry into force of [Regulation No 3665/87]' (first indent of Article 50 of Regulation No 3665/87), seem to me to be applicable in this case.

No 1569/77 of 11 July 1977. [5] That provision reads as follows:

'1. In order to be accepted for intervention, the cereals must be sound, fair and of marketable quality.

2. They shall be regarded as sound, fair and of marketable quality if they are of the typical colour of the cereal in question, free from abnormal smell and live pests (including mites) at every stage of their development and if they meet the minimum quality requirements set out in the Annex hereto.'

3. Immediately after the nuclear accident at Chernobyl on 26 April 1986 which contaminated a large quantity of agricultural products with radioactivity, the Commission and the Council took a number of provisional measures. [6] Thus, on 6 May 1986, the Commission addressed Recommendation 86/156/EEC to the Member States coordinating the measures which the Member States had already taken or were proposing to take in order to prohibit agricultural products contaminated by radioactivity from being placed into circulation. [7] That recommendation contained maximum tolerances for a number of such products (but not for wheat) and established the principle that the Member States should

'subject products they export to the same limits and, generally speaking, to the same controls regarding radioactivity as those applying to their own market' (section 2).

4. On 12 May 1986, the Council adopted Regulation (EEC) No 1388/86 suspending until 31 May 1986 the import of a number of agricultural products (with the exception, once again, of wheat) from seven eastern European countries. [8] The day before that period of suspension expired, namely 30 May 1986, the Council adopted Regulation (EEC) No 1707/86'on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power station'. [9] Unlike the previous measures, Regulation No 1707/86 also applied to wheat and took account of the degree of radioactive contamination of the agricultural products concerned. Rather than imposing a complete

5 — Commission Regulation (EEC) No 1569/77 of 11 July 1977 fixing the procedure and conditions for the taking over of cereals by intervention agencies, OJ 1977 L 174, p. 15.

6 — For a fuller account of those measures I would refer to my Opinion in *KYDEP* v *Commission and Council*, C-146/91, judgment of 15 September 1994, not yet published in the ECR, sections 4 to 11.

7 — Commission Recommendation 86/156/EEC of 6 May 1986 addressed to the Member States concerning the coordination of national measures taken in respect of agricultural products as result of radioactive fallout from the Soviet Union, OJ 1986 L 118, p. 28.

8 — Council Regulation (EEC) No 1388/86 of 12 May 1986 on the suspension of the import of certain agricultural products originating in certain third countries, OJ 1986 L 127, p. 1. The products in question originated in Bulgaria, Czechoslovakia, Hungary, Poland, Romania, the Soviet Union and Yugoslavia.

9 — OJ 1986 L 146, p. 88. The detailed implementing rules were laid down by Commission Regulation (EEC) No 1762/86 of 5 June 1986, OJ 1986 L 152, p. 41.

ban on imports from the seven countries mentioned above, it introduced maximum levels below which importation was authorized. Specifically, Articles 2 and 3 provided as follows:

'[Article 2] Without prejudice to other provisions in force, the release for free circulation of the products referred to in Article 1 shall be subject to compliance with the maximum permitted levels laid down in Article 3.

[Article 3] The maximum permitted levels referred to in Article 2 shall be as follows:

the accumulated maximum radioactive level in terms of caesium-134 and -137 shall be

— 370 Bq/kg for milk falling within headings No 04.01 and No 04.02 of the Common Customs Tariff and for foodstuffs intended for the special feeding of infants during the first four to six months of life ...;

— 600 Bq/kg for all other products concerned.'

5. The validity of Regulation No 1707/86, which was initially limited until 30 September 1986, was extended twice, first until 28 February 1987 [10] and subsequently until 31 October 1987. [11] It was not until 22 December 1987 that the Council adopted two new regulations of a more definitive nature. Council Regulation (EEC) No 3955/87 [12] extended for two years after its entry into force [13] the maximum permitted levels of 370 and 600 Bq/kg laid down by Regulation No 1388/86.

Regulation (Euratom) No 3954/87 [14] is of indefinite validity. It provides for a procedure for determining in a future emergency the maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs which 'may be placed on the market following a nuclear accident or any other case of radiological emergency which is likely to lead to or has led to significant radioactive contamination of foodstuffs and feedingstuffs' (Article 1). To that end, Art-

10 — By Council Regulation (EEC) No 3020/86 of 30 September 1986 extending Regulation (EEC) No 1707/86 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power-station, OJ 1986 L 280, p. 79.

11 — By Council Regulation (EEC) No 624/87 of 27 February 1987 extending Regulation (EEC) No 1707/86 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power station, OJ 1987 L 58, p. 101 (corrigendum in OJ 1987 L 62, p. 31).

12 — Council Regulation (EEC) No 3955/87 of 22 December 1987 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power-station, OJ 1987 L 371, p. 14.

13 — See Article 7. The regulation entered into force on 30 December 1987, that is to say, on the date when it was published in the Official Journal (Article 8).

14 — OJ 1987 L 371, p. 11.

icle 2 of the regulation provides, *inter alia*, that:

'1. In the event of the Commission receiving ... official information on accidents or on any other case of radiological emergency, substantiating that the maximum permissible levels in the Annex are likely to be reached or have been reached, it will immediately adopt, if the circumstances so require, a Regulation rendering applicable those maximum permissible levels.

2. The period of validity of any Regulation within the meaning of paragraph 1 shall be as short as possible ... .'

The annex to which the regulation refers is entitled 'Maximum permitted levels for foodstuffs and feedingstuffs (Bq/kg or Bq/l)'.

6. The rules described above are concerned with the *importation* into the Community of agricultural products originating in third countries. The Commission and the Council have not shown the same degree of diligence in adopting rules on the *exportation* to third countries of agricultural products originating in the Community. However, this did not inhibit the Commission from sending the following telex message — the same message which was at issue in *KYDEP* — to the Permanent Representatives of the Member States on 24 July 1986:

'The attention of Member States is drawn to the fact that under Community provisions only products of sound merchantable quality containing no matter likely to be harmful to the health of humans may be submitted for intervention. Furthermore, no agricultural product which as a result of its characteristics cannot be disposed of may be purchased for intervention.

It is also pointed out that, in accordance with Article 15 of Regulation (EEC) No 2730/79 (OJ 1979 L 317, p. 1), export refunds are granted in respect of products of sound merchantable quality which cannot be excluded from the human food supply on the basis of their characteristics or condition.

In view of the foregoing and of the provisions contained in Council Regulation No 1707/86 (OJ 1986 L 146), products in respect of which the maximum tolerances with regard to radioactivity laid down in Article 3 of the regulation are exceeded do not satisfy the conditions for intervention for buying-in or for the grant of export refunds. The relevant expenditure may there-

fore not be taken into account by the EAGGF.' [15]

7. The principle applied in the telex message that no *export* refunds can be granted where the maximum permitted levels of 370 and 600 Bq/kg applicable to *imports* are exceeded, was confirmed by Regulation (EEC) No 3494/88, which was adopted by the Commission on 9 November 1988 [16] (that is to say, after the wheat at issue had been exported). Article 3 of that regulation added the following paragraph to Article 13 of Regulation No 3665/87 (cited in section 2, above):

'No refunds shall be granted if the products display radioactivity in excess of the maximum levels permitted under Community regulations. The levels applicable to products of Community origin contaminated as a result of the accident at the Chernobyl nuclear power-station shall, irrespective of their origins, be those fixed in Article 3 of Council Regulation (EEC) No 3955/87 ...'.

8. Lastly, reference should be made to a Commission regulation which, albeit not in force when the export transactions at issue took place, nevertheless has considerable prominence in the parties' observations. Commission Regulation (EEC) No 2751/88 of 2 September 1988 [17] was adopted pursuant to Article 8 of Council Regulation (EEC) No 2727/75 of 29 October 1975, [18] under which special intervention measures may be taken where this is required by the situation on the market in some parts of the Community. It was by means of such a special measure that Regulation No 2751/88 authorized the grant of export refunds in respect of 300 000 tonnes of durum wheat to be exported from Greece. In order to qualify for refunds, 40% of the wheat had to come from the 1986 Greek harvest, the harvest which was the most badly affected by the nuclear accident at Chernobyl, and at least 30% had to consist of wheat from particular stores in Greece.

Background to the case

9. In April-May 1988, 55 000 tonnes of durum wheat were loaded on behalf of Ellinika Dimitriaka on a vessel bound for South Korea. The cargo consisted of 25 000 tonnes of Greek wheat and two consignments of 24 500 tonnes and 5 000 tonnes of wheat from France. According to an analysis car-

15 — Telex No VS-S-1/1187/86/D1/GG/G8, signed by Mr Legras, Director-General responsible for agriculture.

16 — Commission Regulation (EEC) No 3494/88 of 9 November 1988 amending Regulations (EEC) No 3154/85 laying down detailed rules for the administrative application of monetary compensatory amounts, (EEC) No 548/86 laying down detailed rules for the application of accession compensatory amounts and (EEC) No 3665/87 laying down common detailed rules for the application of the system of export refunds on agricultural products, OJ 1988 L 306, p. 24.

17 — Commission Regulation (EEC) No 2751/88 of 2 September 1988 on a special intervention measure for durum wheat in Greece, OJ 1988 L 245, p. 13.

18 — Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (OJ 1975 L 281, p. 1), repealed as from the 1993-1994 marketing year and replaced by Council Regulation (EEC) No 1766/92 of 30 June 1992 (OJ 1992 L 181, p. 21).

ried out by an agricultural expert (the findings of which are set out on the back of two of the declaration forms) and an analysis carried out by a scientific institute, the Greek wheat showed a level of radioactive contamination of 1078 Bq/kg.

Ellinika Dimitriaka realized that the Greek wheat exceeded the radioactivity standards laid down by the Commission in its telex message of 24 July 1986 and shipped in from France wheat uncontaminated or only slightly contaminated by radioactivity. The French wheat was stored in separate silos. The Greek and French wheat was loaded separately (but alternately). In all, four different customs declarations were drawn up and the customs issued four separate loading authorizations. [19]

10. The Greek and French consignments were then mixed on the vessel. It seems to have been found as a fact that the average level of radioactivity of the total quantity of wheat shipped was 470 Bq/kg and therefore below the tolerance threshold of 600 Bq/kg laid down by the Council in Regulation No 1707/86 for *imports* into the Community of agricultural products originating in third countries. This appears from analyses carried out by the Landwirtschaftskammer Weser-Ems using samples taken by the British inspection company Caleb Brett in the holds of the ship at the request of Ellinika Dimitriaka. Without contesting the analyses carried out by the British company, the Greek authorities observed that they were not present when the checks were carried out and were therefore not in a position to verify what cereals were analysed or the way in which the checks were organized.

11. After receiving a notice from the Greek Ministry for Foreign Affairs dated 6 February 1989 containing a recommendation to that effect, the competent Greek authorities refused to grant export refunds to Ellinika Dimitriaka for the 25 000 tonnes of Greek wheat whose radioactivity exceeded the standard of 600 Bq/kg at the time when the vessel was loaded. They took the view that the standard of 600 Bq/kg which was applicable to *imports* from third countries should be applied analogously to *exports* from the Community to third countries, and considered that that view was corroborated by the aforementioned telex message of 24 July 1986 from the Commission. Since Ellinika Dimitriaka did not lodge one but four separate customs declarations, the Greek authorities argue that the consignments of Greek and French wheat ought to have been analysed separately: the French wheat satisfied the applicable standards and therefore qualified for export refunds, whilst the Greek wheat did not satisfy those standards and therefore could not qualify for export refunds.

19 — According to the national court's order, 14 000 tonnes of Greek wheat was loaded between 12 and 18 April 1988 (Declaration No 502/88); 7 000 tonnes of French wheat was loaded between 18 and 20 April 1988 (Declaration No 503/88); a mixture of 11 000 tonnes of Greek wheat and 17 500 tonnes of French wheat was loaded between 20 April and 5 May 1988 (Declaration No 536/88), followed, finally, by 5 500 tonnes of French wheat (Declaration No 643/88). The requisite loading authorizations were dated 18 April, 20 April, 6 May and 9 May 1988 respectively.

12. Ellinika Dimitriaka then asked the Commission to intervene. In a telex message sent from Brussels on 19 April 1989, the Commission guaranteed the Greek authorities that the EAGGF would bear the expense of the full grant of export refunds for both the Greek and the French wheat, provided that the Greek authorities were prepared to correct the customs declarations lodged by Ellinika Dimitriaka in accordance with the provisions of Council Directive 81/177/EEC of 24 February 1981. [20] However, the Greek authorities did not accept the Commission's suggestion, and informed the Commission that neither Directive 81/177/EEC nor the Greek law implementing that directive authorized the *replacement* of the four original customs declarations by a single document. The Commission answered in a letter dated 22 October 1990 that, on closer inspection, such replacement did not appear to it to be necessary in order to disburse export refunds.

13. After exhausting all administrative procedures, Ellinika Dimitriaka brought an action in the Administrative Court of First Instance, Athens, which ordered the Greek State to pay it the export refunds which it sought and to release the sureties which it had given in respect of the exportation of the wheat at issue. The Greek State appealed against that judgment to the Administrative Court of Appeal, Athens, which requested the Court to give a preliminary ruling on four questions.

20 — Council Directive 81/177/EEC of 24 February 1981 on the harmonization of procedures for the export of Community goods, OJ 1981 L 83, p. 40.

The national court's first question. Is the telex message of 24 July 1986 valid and binding?

14. The first question reads as follows:

'Is the Commission's telex of 24 July 1986, according to which the maximum permitted levels of radiation laid down in Regulation (EEC) No 1707/86 for imports of goods into the Community also apply to exports of such goods to non-member countries, valid and binding on the Member States?'

In order to answer that question, I shall draw a distinction between the binding nature of the telex message of 24 July 1986 and its validity.

15. All the parties (namely the Greek State, Ellinika Dimitriaka and the Commission) agree that the telex message is *not binding*. In their written observations, they stress that the telex message is 'informal', 'interpretative' or 'explanatory' and therefore indicate that it was not capable of constituting a source of obligations for the Member States (or *a fortiori* for persons such as Ellinika Dimitriaka and the party with which it concluded a contract in South Korea). That view

is also taken by thenational court, which stated that the telex message had to be 'regarded as a declaration of the Commission interpreting the provisions of Regulation No 2730/79, and in particular Article 15'.

I am also of that opinion. In my Opinion in *KYDEP*, I agreed with the Commission's statement that 'from a legal point of view the telex report must be regarded as a declaratory or interpretative note addressed by the Commission to the Member States in the framework of their mutual administrative cooperation in which it reminded the Member States of the rules on the financing of agricultural expenditure by the EAGGF'. Such a note, which, as the Greek Government rightly points out, is not a binding measure within the meaning of Article 189 of the EEC Treaty, cannot bind the Member States.

Moreover, this is clear from that which the Court has consistently held since the judgment of 27 March 1980 in *Sucrimex*. [21] That judgment was concerned with a claim for the annulment of a telex (likewise signed by the Director-General for Agriculture at the time) which the Commission had sent on 3 July 1979 to a French body responsible for paying export refunds. The Court held that the application was inadmissible in particular on the following ground:

'It is established case-law that the application of Community provisions on export refunds is a matter for the national bodies appointed for this purpose and that the Commission has no power to take decisions on their interpretation but may only express its opinion *which is not binding upon the national authorities*' (paragraph 16). [22]

16. Opinions are divided, however, about the *validity* of the telex. The Commission maintains that it is valid, Ellinika Dimitriaka claims that it is not and the Greek Government expresses no view on the matter.

Ellinika Dimitriaka puts forward two arguments *against* the validity of the telex message. In the first place, it bases itself on the annex to Regulation No 3954/87 (see section 5, above), which, under the title 'Maximum permitted levels for foodstuffs and feedingstuffs', lays down a level of radiation

21 — Case 133/79 *Sucrimex and Westzucker* v *Commission* [1980] ECR 1299.

22 — My emphasis. Confirmed by the judgments in Case 217/81 *Interagra* [1982] ECR 2233, paragraph 8, and in Case 109/83 *Eurico* [1984] ECR 3581, paragraph 20. See also the orders in Case 151/88 *Italy* v *Commission* [1989] ECR 1255, paragraph 22, in Case C-50/90 *Sunzest* [1991] ECR I-2917, paragraph 13, and in Joined Cases C-66/91 and C-66/91 R *Emerald Meats* [1991] ECR I-1143, paragraph 30.

of 1250 Bq/kg. [23] Ellinika Dimitriaka considers that if such levels of radiation are regarded as permissible within the Community, it is unreasonable that, in its telex message of 24 July 1986, the Commission should require a maximum permitted level of 600 Bq/kg to be complied with for the exportation of Community products to third countries. Ellinika Dimitriaka goes on to argue that, by sending the telex message of 24 July 1986, the Commission exceeded its powers, on the ground that only an express decision of the *Council* could have laid down maximum permissible levels for the exportation of goods.

17. In my Opinion in *KYDEP*, I stated that the transmission of the telex did not constitute an unlawful act in any respect, quite the contrary.

'It is entirely normal for the Commission, in the performance of its task of guardian of Community law and manager of the EAGGF, to remind the Member States of the Community rules which they are obliged to apply. Likewise it is normal for the Commission, in the framework of the administrative cooperation with the Member States, to give its interpretation on the application of the rules on financing by the EAGGF, which the Commission is obliged to apply in the framework of the annual approval of the EAGGF accounts. [24]

Moreover, the contested telex report ... seems to me to be an acceptable interpretation of the provisions contained or referred to therein'. [25]

18. Ellinika Dimitriaka's arguments rehearsed above are not such as to persuade me to take the opposite view. As regards its first argument, it is sufficient to point out that Regulation No 3954/87 was not adopted until 22 December 1987, that is to say, about a year and half after the telex message was sent. Consequently, Ellinika Dimitriaka cannot base an argument on the regulation in order to show that on 24 July 1986 there was 'unequal treatment' as between (a) products intended for consumption in the Community and (b) products intended for exportation to third countries. But even if that aspect is left out of account, the level of contamination of 600 Bq/kg laid down by the telex message cannot be compared to the level of 1250 Bq/kg mentioned in the annex to Regulation No 3954/87. Those two standards are of completely different kinds. The standard of 600 Bq/kg sought to determine in a *specific situation*, namely the situation resulting from the nuclear accident at Chernobyl, what agricultural products could be put into free circulation and qualify for

23 — Cf. the item 'all other nuclides of half-life greater than 10 days, notably Cs-134, Cs-137' under the heading 'other foodstuffs except minor foodstuffs'. The other items falling under that heading set out maximum permitted levels of between 80 and 2000 Bq/kg.

24 — See Article 5(2)(b) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition, 1970 (I), p. 218).

25 — See section 20 of the Opinion.

refunds. In contrast, the ceiling of 1250 Bq/kg is intended to sound alarm bells in the event of a *possible emergency in the future*: if that ceiling is exceeded or is likely to be exceeded anywhere in the world (and hence not necessarily within the Community), the Commission and the Council are to fix, 'if the circumstances so require', new limits for contamination in accordance with the procedure laid down by Regulation No 3954/87 which agricultural products must not exceed if they are to be marketed (see section 5, above). [26]

19. As for Ellinika Dimitriaka's second argument by which it claims that the Commission was not empowered to send the telex message of 24 July 1986, [27] I would make the following observations. Once it is admitted, as all the parties (including Ellinika Dimitriaka) do, that the telex message in question imposed no obligation on the Member States and simply gave an interpretation — which was in no way binding — of legal rules whose validity is not contested, there is no reason, in my view, to consider that the Commission had no such power. On the contrary, it was open to the Commission, as I have already observed, to provide, in the context of its administrative collaboration with the Member States, its interpretation as to how the rules on EAGGF financing should be applied. I shall subsequently consider whether the interpretation given by the Commission (and applied by the Greek Government) is justified.

20. I therefore consider with regard to the national court's first question that the Commission's telex message of 24 July 1986 on the maximum permitted levels of radioactivity to be applied on the exportation of products to third countries is an interpretative document which did not bind the Member States and did not exceed the Commission's powers.

The national court's second question. Were the Member States justified in applying to export transactions by analogy the rules laid down for imports?

21. According to the reply which I suggest should be given to the national court's first question, the Member States were not bound by the Commission's telex message of 24 July 1986 and were therefore not *under an obligation* automatically to declare that the maximum levels of radioactivity for import transactions were applicable to exports. What the national court seeks to establish by its second question is whether the Member States *were entitled* to apply to

26 — Under Article 5 of Regulation No 3954/87, the maximum permitted levels laid down in the annex, including the threshold of 1250 kg/Bq, may be revised or supplemented at the request of a Member State or the Commission.

27 — Ellinika Dimitriaka argues at the same time that the Commission had no competence to adopt Regulation No 3494/88. Since none of the questions referred for a preliminary ruling relate to that regulation, which, moreover, was not in force at the time when the export transactions at issue were carried out, I shall not consider this argument further.

export transactions by analogy the rules applicable to import transactions. Specifically, it asks the following question:

'In the absence of any express provision, do the Commission or the competent organizations of the Member States have the power to interpret Article 15 of Regulation (EEC) No 2730/79 (now Article 13 of Regulation No 3665/87), which was applicable at the material time, and to subject exports to similar rules on what constitutes goods which are sound, fair and of marketable quality as apply to imports, *or*, conversely, with regard to refunds, in order for the national organization to decide that the exporter is not entitled to Community aid ... must there be a binding Community provision defining precisely the circumstances in which refunds cannot be granted? *More specifically*, in order for exports of goods contaminated with radiation above the level laid down for imports of the same goods to be refused refunds, was the adoption of Regulation No 3494/88 essential?' (my emphasis)

22. Since the Community had never before been faced with a nuclear accident on the scale of Chernobyl, it is understandable that at the time when the accident took place there was no harmonized provision within the Community laying down maximum rates of radioactive contamination, and that there was no procedure for adopting such standards. For the same reasons, it is understandable that the legal lacuna resulting from that situation could be filled only gradually by Community provisions and that, since the Community's prime responsibility was for its own territory, the first such provisions related to the importation of products into the Community and it was only after that that provisions were adopted on the exportation of Community products to third countries.

This means that, pending binding Community rules also covering export transactions, it was for the Member States themselves — as the Commission and the Greek Government rightly observe — to lay down the maximum tolerances for the grant of refunds in respect of exports of agricultural products to third countries. [28] In the absence of binding Community rules, it is for the Member States and — as the Court has consistently held (see section 15) — not for the Commission to lay down a binding definition of what is to be understood by 'sound and fair marketable quality' within the meaning of Article 15 of Regulation No 2730/79 and Article 13 of Regulation No 3665/87 which are mentioned in the national court's question.

23. Moreover, the Greek authorities' interpretation that the maximum tolerances already in force for imports into the Com-

28 — See section 17 of my Opinion in *KYDEP*.

munity could be applied by analogy to exports of agricultural products to third countries seems more than reasonable to me, also from the point of view of its substance. At the time when the Greek authorities had to take a decision, it was clear that identical treatment could be applied to exports and to products (imported or not) intended for consumption on the domestic market, since the principle of such equal treatment was already embodied in section 2 of Recommendation 86/156/EEC of 6 May 1986 (see section 3, above) and in the Commission's telex message of 24 July 1986, which I have already discussed (in other words, that principle was already set out in the interpretation which the Commission had given of the relevant provisions). Moreover, that principle was subsequently confirmed, after the export transactions in question had been carried out, by Regulation No 3494/88 of 9 November 1988 (see section 7, above).

In any event, is that interpretation not reasonable? I cannot see how a Member State could authorize the exportation (and hence consumption on another market) of agricultural products which were not considered fit for consumption on its own market.

24. Accordingly, I consider that the reply to be given to the national court's second question should be that, in the absence of binding Community rules on the matter, the competent authorities in the Member States were entitled, at the time when the export transactions in question were carried out, to apply, by analogy, to exports of agricultural products to third countries the rules applicable to imports of such products from third countries which are set out in Article 15 of Regulation No 2730/79 and in Article 13 of Regulation No 3665/87.

The national court's fourth question. Could the original declarations be rectified after the event?

25. For reasons of logic I shall discuss the fourth question before I tackle the third. If it is placed in the context of the questions as a whole, the national court's fourth question essentially asks whether a public authority, such as the Greek Government, can rely on Article 7 of Directive 81/177/EEC in order to refuse to replace the four original customs declarations by a single document in circumstances such as those at issue.

If it should appear that such refusal is unjustified, Ellinika Dimitriaka should be paid export refunds. If the refusal is unjustified, however, it would still not necessarily mean that Ellinika Dimitriaka could not assert a claim to refunds: payment of refunds could still be justified on the basis of other factors, *even if the customs declarations were not corrected*. This is what is raised in the third

question, whose significance therefore depends on the answer given to the fourth and will therefore be considered after I have dealt with that question.

26. The national court's fourth question reads as follows:

'Do the provisions of Article 3 of Regulation (EEC) No 3665/87 relate exclusively to the calculation of the export refunds and thus not affect Article 13 of Regulation (EEC) No 3665/87, according to which the aforementioned Community aid is not granted when the goods being exported are unsound, with the consequence that it is unnecessary to change the relevant declarations?'

Article 3 of Regulation No 3665/87 appears under the heading 'General Provisions' and provides as follows:

'1. The day of export means the date on which the customs authority accepts the export declaration in which it is stated that a refund will be applied for.

2. The date of acceptance of the export declaration shall determine:

(a) the rate of the refund ...;

(b) any adjustments to be made to the rate of the refund ...;

3. Any other act having the same effect in law as the acceptance of the export declaration shall be deemed to be equivalent to such acceptance.

4. *The day of export shall be used to establish the quantity , nature and characteristics of the product exported.*

5. The document used for export to enable products to qualify for a refund must include all information necessary for the calculation of the amount of the refund, and in particular:

... .

If the document mentioned in this paragraph is the export declaration, this document must also include these references and the reference "refund code".

6. At the time of such acceptance, or of such equivalent act, the products shall be placed under customs control until they leave the customs territory of the Community.' (My emphasis)

27. As it stands, the national court's fourth question can, to my mind, be answered only in the negative. Article 3, which is described by Regulation No 3665/87 as a 'general provision', does not relate only to the calculation of export refunds (dealt with in paragraph 2 of that article) but also is to be used to 'establish the quantity, nature and characteristics of the product exported' (paragraph 4). This is precisely what Article 13 of Regulation No 3665/87 covers, namely the 'nature and characteristics of the product exported'; if it is read in conjunction with Article 3(1) and (4) of that regulation, it prohibits the grant of export refunds for products which were not of sound and fair marketable quality on the day when they were exported.

I can therefore only reply to the fourth question as it is formulated by the national court that Article 3 of Regulation No 3665/87 also relates to Article 13 of that regulation, and that hence it cannot be stated that paragraph 4 of Article 3 is irrelevant to the assessment of the 'sound and fair marketable quality' of the products concerned on which Article 13 makes the grant of refunds conditional.

28. Nevertheless I consider that the national court's fourth question, and my reply to it, ought to be seen in a broader perspective. It appears from the order for reference that that question is connected with the refusal by the competent Greek authorities to correct, as the Commission suggested, the four original customs declarations lodged by Ellinika Dimitriaka and to replace them by a single declaration in order to allow them to be taken into consideration for the purpose of the grant of export refunds (see section 11, above). The question is whether, as the Greek Government submits, Article 7 of Directive 81/177/EEC, which places very strict conditions on the correction of export customs declarations, makes such a correction impossible.

Clearly, that issue also underlies the national court's fourth question. Since all the parties gave their views on this point in their written observations (see section 30, below), I shall consider it more closely.

29. Article 7 of Directive 81/177/EEC reads as follows:

'1. The declarant shall, at his request, be authorized to correct declarations accepted by the customs authority ... subject to the following:

(a) the correction shall be requested before the goods are released from the customs

office or place designated for that purpose, unless the request relates to details which the customs authority can check as being correct without the goods being present;

(b) the correction may no longer be allowed where the request is made after the customs authority has informed the declarant that it intends to examine the goods or that it has itself established that the particulars in question are incorrect;

(c) the correction shall not result in the application of the declaration to goods other than those to which it originally related.

2. The customs authority may allow or require that the corrections referred to in paragraph 1 be made by the lodging of a new declaration intended to replace the original declaration. In that event, the date for determining the export duties relating to the goods in question and for the application of any other export provisions shall be that of the acceptance of the original declaration.'

30. The view taken by the *Greek Government* on the application of that provision in this case is sufficiently well-known: it maintains that the provision precludes the correction of the customs declarations suggested by the Commission, in particular on the ground that Ellinika Dimitriaka did not request the correction to be made 'before the goods [were] released from the customs office or place designated for that purpose' (as required by Article 7(1)(a)).

According to *Ellinika Dimitriaka*, Article 7 of Directive 81/177/EEC authorizes declarations to be corrected under Article 7(1)(a) so long as the correction does not entail changes relating to the goods themselves. No more could the Greek authorities rely on the provisions of Article 7(1)(b) in order to refuse to correct the declarations. They could have done so only if they contested the accuracy of the statements made by Ellinika Dimitriaka in the declarations.

For its part, the *Commission* considers that the conditions to be met in order for declarations to be corrected have to be strictly interpreted in order to obviate abuses. Nevertheless, having regard to the particular features of the case at issue, it considers that a pragmatic solution should be found in order to enable the refunds to be paid. It considers that the Greek Government could possibly have regarded the four separate customs declarations as a single declaration, even without actually amending them.

31. I also consider that the conditions to which Article 7(1) makes the correction of customs declarations subject must be interpreted restrictively in order to minimize fraud.

It is common ground in this case that Ellinika Dimitriaka *did not* request the declarations to be corrected 'before the goods [were] released from the customs office or place designated for that purpose'. Consequently, the requirement set out in Article 7(1)(a) of Directive 81/177/EEC could be satisfied only if the request for the declaration to be corrected 'relate[d] to details which the customs authority [could] check as being correct without the goods being present'.

32. The Commission seems to consider that that was the case. Its representative stated at the hearing that the radioactivity of a mixture of contaminated Greek wheat and uncontaminated or less contaminated wheat could be determined purely 'mathematically'. In practice, the radioactivity of such a mixture is invariably deemed to be the average radioactivity of each of the consignments of wheat which were mixed, regardless as to how and to what extent a mixture was achieved.

If that approach is applied in this case, it would mean in the first place that the Greek customs authorities which checked the radioactivity of the various consignments of Greek and French wheat could have calculated the radioactivity of the mixture of those consignments mathematically and hence checked, even in the absence of the mixture, the accuracy of the figures provided in support of the request to correct the declarations. The condition set out in Article 7(1)(a) of Directive 81/177/EEC would then be met.

The Commission goes on to argue that such a 'mathematical' calculation would comply with the provisions of Regulation No 2751/88 — which generalized the rules by virtue of which contaminated Greek wheat mixed with uncontaminated wheat could be exported to third countries (see section 8, above) — with the result that following the entry into force of that regulation on 4 September 1988 there would be no objection to Ellinika Dimitriaka's asserting its right to the refunds which are now being refused it because the material facts occurred before that date.

33. I am unable to see what the basis is for the Commission's statement at the hearing. On the contrary, Article 6(3) of Regulation No 2751/88 to which it refers (and which was not applicable at the material time) seems to me to preclude any purely mathematical check of a mixture of radioactive and uncontaminated wheat. The first and second paragraphs of Article 6(3) provide as follows:

'Refunds, once awarded shall not be paid unless ... the durum wheat exported is of at

least intervention quality as defined in Regulation (EEC) No 1569/77. However, the maximum percentage of broken grains shall be 8%, that of miscellaneous impurities 5% and the minimum specific weight 75 kilograms per hectolitre.

The competent agency shall have an analysis made of the loaded goods and shall hold at the Commission's disposal an additional sample from each consignment, taken and sealed in the presence of the tenderer or his representative.'

It is clear from that provision that the national authorities are required to take active steps with regard to the analysis of the loaded goods: *they* have to order an analysis to be carried out in presence of the tenderer or his representative in order to check whether the quality standards for intervention — and hence also the standards applicable with regard to radioactive contamination [29] — are met; they are also to hold an additional sample at the Commission's disposal. Since the regulation requires the goods to be analysed, there can be no question of a purely 'mathematical' calculation of the radioactivity of a mixture of cereals. Besides, this seems to me to be perfectly normal: if the Commission were to allow a mixture of different consignments of wheat to qualify for intervention or refunds on the basis simply of mathematical calculations without checking whether a mixture was actually made, there would be nothing to guarantee with a sufficient degree of probability that the various consignments had been sufficiently mixed in their entirety so as to remain below the maximum permitted levels of radioactivity.

34. Regulation No 2751/88, which entered into force after the material time, therefore affords no argument for the mathematical calculation of the degree of contamination of mixed consignments of wheat. On the contrary, that regulation also seems to require the degree of contamination to be calculated on the basis of an analysis commissioned by the competent national authorities. This also appears in my view to be the implication of the words 'details which the customs authority can check as being correct without the goods being present' in Article 7(1)(a) of Directive 81/177/EEC, which was applicable at the material time. Indeed, if the degree of contamination of mixed consignments of wheat may not be calculated mathematically, the correctness of the calculation carried out by the customs without the goods being present can be checked only on the basis of an analysis carried out under their supervision by an independent institution.

Accordingly, I consider that in circumstances such as those at issue the conditions to which Article 7(1) of Directive 81/177/EEC

29 — The rules applicable with regard to radioactivity are an integral part of the criteria for cereal quality for intervention purposes laid down by Regulation No 1569/77: cf. section 21 of my Opinion in the *KYDEP* case.

submits the correction of customs declarations after the event are not satisfied.

The national court's third question. Is the payment of refunds nevertheless justified in this case, even if the original declarations are not replaced?

35. By its third question — which has particular significance in view of my answer to the fourth question (see section 25, above) — the national court seeks to establish whether factors other than the customs declarations are to be taken into consideration in order to determine whether, in circumstances such as those at issue, export refunds should nevertheless be paid. The question reads as follows:

'If it is accepted that an interpretative prohibition on the granting of refunds may be imposed when the goods are not sound according to the criteria laid down for imports of the same goods into the Member States, is the only evidence that can be used to establish the characteristics of the cargo the customs declaration on the date of acceptance by the customs authority, pursuant to Article 3 of Regulation (EEC) No 3665/87, and consequently is the subsequent mixing of the cargo inside the holds of the ship so that the resulting indivisible product being exported does not exceed the maximum permitted levels of radiation immaterial for the payment of Community aid or, on the contrary, does it mean that the export declarations must be changed after they have been accepted by the customs authority?'

36. After the Greek authorities informed Ellinika Dimitriaka that, in view of Article 7(1) of Directive 81/177/EEC, they considered that it was impossible to replace its four original customs declarations by a single document, the *Commission* informed them by letter dated 22 October 1990 (see section 12, above) that, on closer consideration, such replacement did not, in its view, seem necessary in order to pay export refunds. Moreover, this is the view which it has argued before the Court by reference to the 'particular features of the export transactions in question'.

For its part, the *Greek Government* considers that the payment of export refunds is impossible without correcting the customs declarations. Obviously, *Ellinika Dimitriaka* disagrees. It considers that it is entitled to the refunds in any event pursuant to the principles of legitimate expectations and proportionality.

37. The principle of protection of legitimate expectations and the principle of proportion-

ality form part of the Community legal order. [30] Failure to comply with them constitutes an infringement of the Treaty. [31] This is also true of the principle of proportionality, which prohibits, *inter alia*, the imposition on commercial undertakings of burdens greater than those which are required to achieve the aim which the (Community or national) authorities are to accomplish, such as in this case the protection of public health. [32] Those principles may therefore in principle result in Ellinika Dimitriaka's also being entitled to export refunds for the Greek cereals, even though no prior correction was made of the original customs declarations.

38. As the Court has consistently held, in proceedings for a preliminary ruling under Article 177 of the EEC Treaty, it is for the national court, and not the Court of Justice, to apply Community law and the general principles forming an integral part of it to all the actual facts of the case before it. [33] In so doing, it may happen that the national court finds that the self-same general principle is recognized both in the Community legal order and in its own legal system, but does not afford the same degree of legal protection in the two systems. The Court's judgment of 21 September 1983 in the *Deutsche Milchkontor* case affords an illustration of this. [34] That judgment was concerned with a German legal provision which, on the basis of the principles of legitimate expectations and legal certainty, threatened to make it impossible to recover amounts of Community aid unduly paid. After finding that the principles of legitimate expectations and legal certainty are part both of the Community legal order and of the legal systems of the Member States, the Court ruled as follows:

'Community law does not prevent national law from having regard, in excluding the recovery of unduly-paid aids, to such considerations as the protection of legitimate expectations ..., provided however that the conditions laid down are the same as for the recovery of purely national financial benefits and the interests of the Community are taken fully into account' (paragraph 33).

39. That judgment of the Court makes it possible to apply the principle of legitimate expectations under national law even if the legal protection afforded thereby goes beyond the legal protection which Community law would afford (and even if this detracts to some extent from the Community's financial interests).

30 — See the judgments in Case 112/77 *Töpfer* v *Commission* [1978] ECR 1019, paragraph 19, in Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* v *Germany* [1983] ECR 2633, paragraph 30, and in Case C-163/90 *Legros* [1992] ECR I-4625, paragraph 30. In addition to the principle of legitimate expectations, the Court also applies the 'general principle of respect for acquired rights', as appears from, for example, the judgment in Case 84/78 *Tomadini* v *Amministrazione delle Finanze dello Stato* [1979] ECR 1801, paragraph 25.

31 — Judgment in *Töpfer* v *Commission*, paragraph 19, at 1033.

32 — See, in particular, the judgments in Case 5/73 *Balkan Import-Export* [1973] ECR 1091, paragraph 22, in Joined Cases 154/78, 205/78, 206/78, 226/78 to 228/78, 263/78 and 264/78, 39/79, 31/79, 83/79 and 85/79 *Ferriera Valsabbia* v *Commission* [1980] ECR 907, paragraph 118, and in Joined Cases 26/79 and 86/79 *Forges de Thy-Marcinelle and Monceau* v *Commission* [1980] ECR 1083, paragraph 6.

33 — See, in particular, the judgment in Case 204/87 *Criminal proceedings against Guy Bekaert* [1988] ECR 2029, paragraph 5.

34 — Cited in footnote 30.

In the instant case, it is, in my view, worth emphasizing that *the converse is also true*. In other words, if it should appear that the principle of legitimate expectations and/or the principle of proportionality as enshrined in the Community legal order afford an undertaking such as Ellinika Dimitriaka legal protection exceeding that afforded it under national law, the national court should take account of those principles of Community law in full where, as in this case, it is called upon to assess a measure taken by a national authority on the basis of and pursuant to Community law. [35]

40. Although, under the division of responsibilities resulting from Article 177 of the EC Treaty, it is not for the Court to review the consistency with Community law of the Greek authorities' refusal to grant export refunds to Ellinika Dimitriaka, it may nevertheless provide the national court with every information of potential use to it in carrying out such review. In that connection, I should like to point to a number of circumstances specific to the instant case.

In the first place, none of the parties, not even the Greek Government, claims that Ellinika Dimitriaka did not act in *good faith*. Secondly, I would point out that one of the four declarations originally lodged by Ellinika Dimitriaka related to a mixed consignment of Greek and French wheat, and that that declaration was accepted without difficulty by the Greek customs authorities, without their having analysed the radioactivity of the mixture of wheat in question. It might moreover appear from the fact that the Greek customs authorities accepted, without entering any reservation or requesting an analysis, the declaration relating to the consignment which Ellinika Dimitriaka mixed on its own initiative before the day on which it was exported that they implicitly renounced requesting all the consignments to be analysed, *a fortiori* since, in view of the origin of the wheat and the link between the four separate declarations relating to them, the Greek authorities could in fact have realized that Ellinika Dimitriaka intended to mix the three other consignments as well, on the vessel.

41. The *principle of proportionality* is another aspect of Community law which may be useful to the national court.

More specifically, this concerns Ellinika Dimitriaka's claim — which was not challenged by the Greek Government — that the Greek authorities, which considered that the 25 000 tonnes of Greek wheat were too radioactive to qualify for export refunds, took no steps themselves in order to ensure that wheat with the same degree of radioactive contamination was not consumed in

35 — This is by analogy with the Court's ruling in its judgment of 18 June 1991 in Case C-260/89 *ERT* [1991] ECR I-2925, paragraphs 42 to 45, in which it recognized that the national court has the power and the duty to review the compatibility with all the rules of Community law, including general principles of law, of national rules coming within the field of application of Community law.

Greek territory. If that claim should prove correct, it raises the question as to whether the constraint imposed on Ellinika Dimitriaka in the name of health protection should not be regarded as disproportionately severe.

In addition, I would point out in that connection that, as appears from the preamble to Regulation No 2751/88 (see section 8, above), the Community provided a financial incentive, in the form of a special intervention measure, for mixing radioactive Greek cereals with other cereals:

'Whereas production of durum wheat in Greece exceeds that country's requirements and substantial stocks still remain from previous harvests, including that of 1986;

Whereas, unless adequate measures are taken, the situation on the Greek market may be expected to deteriorate, possibly giving rise to a serious storage problem ...;

whereas, furthermore, such a [special intervention] measure should take the form of a direct export incentive, which would avoid the high cost to the Community budget of buying in and storing [the] products [concerned] ...'. [36]

If the national court should come to the conclusion that the refusal to pay export refunds was not based on the intention of protecting health, that refusal would appear all the more incompatible with the principle of proportionality since, by that refusal, the Greek authorities would have disregarded Member States' obligation to safeguard the Community's financial interests. [37]

42. In view of the foregoing, I consider that it is for the national court to consider — while taking fully into account the general Community principles of legitimate expectations and proportionality — whether the Greek authorities were bound to pay refunds to Ellinika Dimitriaka in respect of the consignments of Greek wheat which it exported, even though the original customs declarations were not corrected after the event.

36 — The quotations are from the first and fifth recitals in the preamble to Regulation No 2751/88.

37 — In my view, that obligation is enshrined in Article 5 of the EC Treaty and is more explicitly defined with regard to fraud in Article 209a of the EC Treaty and in indent 5 of Article K.1 of the Treaty on European Union.

Conclusion

43. To conclude, I propose that the Court should answer the questions referred to the Court for a preliminary ruling by the Administrative Court of Appeal, Athens, in the following terms:

1. The Commission's telex message of 24 July 1986 concerning the maximum permitted levels of radioactivity of products exported to third countries is an interpretative measure which does not bind the Member States and which the Commission had the power to take.

2. In the absence of binding Community rules on the matter, the competent authorities in the Member States were entitled, at the time when the export transactions at issue were carried out, to apply by analogy to exports of agricultural products to third countries the measures adopted pursuant to Article 15 of Regulation (EEC) No 2730/79 and Article 13 of Regulation (EEC) No 3665/87 with regard to imports of such products from third countries.

3. The provisions of Article 3 of Regulation (EEC) No 3665/87 also relate to Article 13 of that regulation. In circumstances such as those of the instant case, the conditions set out in Article 7(1) of Directive 81/177/EEC for the correction of customs declarations after the event are not fulfilled.

4. It is for the national court to assess, while taking fully into account the Community principles of legitimate expectations and proportionality, whether export refunds should nevertheless be granted in circumstances such as those at issue in the instant case.