OPINION OF ADVOCATE GENERAL MISCHO
delivered on 16 May 2002 [1]

1. The Tribunal de grande instance (Regional Court), Paris (France), asks whether Articles 28 EC and 30 EC preclude national legislation which prohibits the marketing of a food supplement lawfully sold in another Member State.

I — Legal background

A — *Community law*

2. There is no Community legislation which lays down the conditions governing the addition of nutrients to common foodstuffs. Some foodstuffs intended for particular nutritional uses are covered by directives adopted by the Commission on the basis of Council Directive 89/398/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses. [2] These include products such as baby foods, meal substitutes, gluten-free foods or foods for sportsmen.

B — *National provisions*

3. The French legislation which applies to the marketing of food supplements and common foodstuffs enriched with vitamins, minerals and other nutrients such as amino acids is the Decree of 15 April 1912 implementing the Law of 1 August 1905 on fraud and falsification with respect to products or services relating to foodstuffs, and in particular meats, prepared meat products, fruits, vegetables, fish and preserved foods.

1 — Original language: French.

2 — OJ 1989 L 186, p. 27.

4. Article 1 of the Decree, as worded in Decree No 73-138 of 12 February 1973, provides:

'It is prohibited to possess with a view to sale, to make use of or to sell any goods and foodstuffs intended for human consumption to which chemical products have been added, other than those whose use is declared lawful by the orders made jointly by the Minister of Agriculture and Rural Development, the Minister of Economics and Finance, the Minister of Industrial and Scientific Development and the Minister of Public Health, on the basis of the Opinion of the Conseil supérieur d'hygiène publique de France (French public health authority, hereinafter "the CSHPF") and the Académie national de médecine (National Academy of Medicine).'

5. Decree No 99-242 of 26 March 1999 amended that decree by substituting the opinion of the Agence de sécurité sanitaire des aliments (food safety agency, the AFSSA) for those of the CSHPF and the Académie national de médecine.

6. Decree No 97-964 of 14 October 1997 was inserted into the Decree of 15 April 1912 and for the first time defines food supplements as:

'Products intended to be ingested as a supplement to traditional foods in order to make up for the real or assumed insufficiency of daily intake.'

II — The main proceedings and the question referred for a preliminary ruling

7. Mr Greenham and Mr Abel, defendants in the main proceedings and joint managers of the company NSA France SARL (hereinafter 'NSA France'), are charged with having, in Paris in 1998 and in any case on the national territory during a period in respect of which criminal proceedings are not time-barred, committed two offences. First, they are charged with having displayed and offered for sale adulterated foodstuffs by marketing food supplements ('JUICE + mélange de légumes et de fruits') to which were added the substance 'coenzyme Q10', a chemical substance whose use in human food is not authorised in France, and vitamins in amounts greater than the daily recommended intake or in excess of the safety limits set by the CSHPF. They are also charged with having misled consumers in regard to product quality by marketing meal substitutes ('JUICE + Lite, arôme chocolate et arôme vanille') which do not comply with the requirements laid down in Commission Directive 96/8/EC of 26 February 1996 on foods intended for use in energy-restricted diets for weight reduction, [3] in particular because the energy they provide is below the threshold set in the legislation and they are deficient in certain minerals.

3 — OJ 1996 L 55, p. 22.

8. Those actions follow upon a series of samples taken by the Direction générale de la concurrence, de la consommation et de la répression des fraudes (hereinafter 'the DGCCRF') of the abovementioned products, marketed in France by NSA France. The laboratories of the DGCCRF established their non-compliance.

9. The defendants in the main proceedings claimed, before the referring court, that the products in question were already in circulation in the European Union, and in particular in the United Kingdom, when they took up their posts, and that coenzyme Q10 has been in free circulation in Spain and Italy since 1995 and was still in free circulation in 2000 in Germany and the United Kingdom. They therefore maintained that the French authorities were not entitled to prevent the free movement and the marketing of those products.

10. Since it considered that the decision in the case before it required the interpretation of Articles 28 EC and 30 EC, the Tribunal de grande instance, Paris, decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Are Articles 28 EC and 30 EC to be interpreted as prohibiting a Member State from preventing the free movement and marketing of a food supplement lawfully sold in another Member State?'

III — Analysis

Preliminary observations

11. In view of certain statements or requests put forward during the proceedings before the Court, three preliminary observations are in order.

12. First, the French Government is uncertain as to the applicability, in the present case, of Article 28 EC. It considers, first, that the referring court makes no mention of Mr Greenham and Mr Abel being engaged in importing.

13. Second, it points out that it is settled case-law that a national measure falls under that article only in so far as it applies to situations connected with the importation of goods in intra-Community trade. [4]

4 — See the judgments in Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, paragraph 9; Case 98/86 *Ministère public* v *Mathot* [1987] ECR 809, paragraphs 3 and 7 to 9; Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 21.

14. Therefore, referring to the judgment in *Rombi and Arkopharma*, [5] where the Court held, in paragraph 72, that it 'is not in a position to determine whether the rules and principles relating to the free movement of goods apply to an activity of the kind at issue in the main proceedings', on the grounds that 'it is not apparent from the documents in the main proceedings that the activity carried on by Arkopharma involved either exporting or importing the products concerned', the French Government makes its observations subject to the referring court's verifying whether the abovementioned condition for the applicability of Article 28 EC is satisfied.

15. It does appear from the written observations by Mr Greenham and Mr Abel that they imported the contested products from the United Kingdom. They state that '[o]n 23 March 1998, the [DGCCRF] carried out an inspection at the premises of the Société NSA France (National Safety Association), *which distributes products coming from the Société NSA International, a British company* with its headquarters in Camberley — Surrey, 80 Park Street'. [6] In addition, it emerges from the DGCCRF's report of 30 December 1998 on the offence that 'the products are in fact stored in a Dutch warehouse'.

16. I must therefore base my reply to the question referred by the national court on the assumption that the products were imported from another Member State.

17. Second, the French Government and the Commission point out — correctly, in my opinion — that although, in the case which is the subject of the reference, the proceedings relate to both food supplements and meal substitutes, the question asked by the referring court concerns only food supplements.

18. Although the referring court does not explain the reason for this, it seems to me that the reasons lie in the fact that, as can be inferred from the order for reference, Directive 96/8 applies to the meal substitutes in issue.

19. If such is the case, Article 30 EC, to which the question referred for a preliminary ruling is specifically directed, is no longer applicable. It is settled case-law that, where Community directives provide for harmonisation of the measures necessary to achieve the specific objective laid down in Article 30 EC, that article cannot be applied. [7]

5 — C-107/97 [2000] ECR I-3367.

6 — Emphasis added by the author.

7 — Judgments in Case 148/78 *Ratti* [1979] ECR 1629, paragraph 36; Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077, paragraph 31; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 18; and Case C-102/96 *Commission* v *Germany* [1998] ECR I-6871, paragraph 21.

20. I shall therefore not take a view on the interpretation of Articles 28 EC and 30 EC in the light of national legislation such as that which applies in France to food supplements.

21. Third, Mr Greenham and Mr Abel ask the Court to rule on the application to the present case of Directive 96/8.

22. They claim that, since the inspection of meal substitutes at the premises of NSA France was carried out by the DGCCRF before France transposed Directive 96/8, it follows directly from Article 6 of that directive that the prohibition on trade in non-compliant products did not apply until after 31 March 1999, which is later than the establishment of the facts by the DGCCRF.

23. Suffice it to observe, once again, that the referring court has not submitted any question relating to the meal substitutes which are the subject of Directive 96/8, although the right to determine the questions to be put to the Court devolves upon the national court alone. [8]

24. I therefore consider that it is not for me to take a view on the interpretation of that directive.

The question referred for a preliminary ruling

25. The referring court asks whether Articles 28 EC and 30 EC are to be interpreted as prohibiting a Member State from preventing the free movement and marketing of a food supplement lawfully sold in another Member State.

26. Formulated in such absolute terms, the question calls for a negative answer. As the Greek Government has most judiciously pointed out, the mere fact that a particular food supplement is freely marketed in other Member States is not in itself sufficient for authorisation of its marketing to be imposed automatically, that is to say for that reason alone, in the Member State concerned.

27. It is sufficient in that regard to refer to the judgment in *Rewe-Zentral*, known as the '*Cassis de Dijon*' judgment, [9] where the Court held, it is true, in the operative part, that '[t]he concept of measures having an effect equivalent to quantitative restrictions on imports' contained in Article 30 of the

8 — See, *inter alia*, Case C-337/88 *SAFA* [1990] ECR I-1, paragraph 20 and Case C-412/96 *Liikenne* [1998] ECR I-5141, paragraphs 23 and 24.

9 — Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

EEC Treaty was to be understood as meaning that 'the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned.' However, that was because the Court had first established that the requirement in question did not serve a purpose in the general interest such as to take precedence over the requirements of the free movement of goods.

28. In paragraph 8 of that judgment, the Court held that obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy overriding requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, fair trading and consumer protection.

29. However, it must above all be borne in mind that, under Article 30 EC, '[t]he provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of... the protection of health and life of humans... Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

30. In the present case, the prohibition on the marketing of the food supplements at issue appears to have been motivated specifically by a concern for 'the protection of health and life of humans' within the meaning of Article 30 EC.

31. It is clear from the order for reference that criminal proceedings were brought against Mr Greenham and Mr Abel because 'the DGCCRF laboratory established the non-conformity... of the food supplements "JUICE + mélange de légumes" and "JUICE + mélange de fruits" as the result of the addition of coenzyme Q10 and excessive amounts of several vitamins.' The referring court also makes it clear that 'the addition of [coenzyme Q10] is prohibited in food supplements'.

32. It is thus necessary to analyse in greater detail the conditions under which, according to the Court's case-law, a Member State may under Article 30 EC rely on the protection of the health and life of humans

in imposing a restriction on the free movement of goods.

33. I shall subsequently consider, in the alternative, whether the absence of a nutritional need can justify an import prohibition. Finally, I shall present some observations on two other questions which have arisen in the course of the present proceedings.

1. The protection of the health and life of persons

34. It is clear from the Court's case-law [10] that, inasmuch as there are uncertainties in the present state of scientific research with regard to the harmfulness of food additives, it is for the Member States, in the absence of full harmonisation, to decide what degree of protection of the health and life of humans they intend to assure, having regard for the requirements of the free movement of goods within the Community.

35. It is also clear from the Court's case-law, especially the judgments in *Sandoz*, cited above, *Motte*, [11] *Muller* [12] and *Commission* v *Germany*, known as the '*Beer Purity Law*' judgment, [13] that Community law does not preclude the adoption by the Member States of legislation whereby the use of additives is subjected to prior authorisation granted by a measure of general application for specific additives, in respect of all products, for certain products only or for certain uses. This is also true of the fixing of a maximum level for the use of an additive in certain products. Such legislation meets a legitimate need of health policy, namely that of restricting the uncontrolled consumption of food additives.

36. Nevertheless, the principle of proportionality which underlies the last sentence of Article 30 EC requires that the power of the Member States to prohibit imports of products from other Member States should be restricted to what is necessary to attain the objectives of protection being legitimately pursued. [14]

37. The case-law of the Court also makes clear that it is the responsibility of the competent national authorities to prove that a substance is harmful. It is for them

10 — See, *inter alia*, Case 174/82 *Sandoz* [1983] ECR 2445, Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617, Case C-293/94 *Brandsma* [1996] ECR I-3159, Case C-400/96 *Harpegnies* [1998] ECR I-5121.

11 — Case 247/84 *Motte* [1985] ECR 3887.

12 — Case 304/84 *Ministère public* v *Muller and Others* [1986] ECR 1511.

13 — Case 178/84 *Commission* v *Germany* [1987] ECR 1227.

14 — *Harpegnies*, cited above, paragraph 34.

to demonstrate, in each case, that their legislation is necessary in order effectively to protect the interests referred to in Article 30 EC and, in particular, that the marketing of the product in question poses a risk to public health. [15] In so doing, they are to take account of the findings of international scientific research, and in particular of the work of the Community's Scientific Committee for Food, the Codex Alimentarius Committee of the FAO [Food and Agriculture Organisation (of the United Nations)] and the World Health Organisation, and of the eating habits [16] prevailing in the importing Member State. [17]

38. In my opinion, this does not mean, however, that a Member State is required to prove with complete certainty the existence of a serious risk. It is sufficient that it provide specific and plausible arguments that the protection of public health is jeopardised. [18]

39. There are areas in which scientific research is not yet sufficiently advanced for it to be possible to determine with certainty the quantities and concentrations at which certain substances might become harmful and the exact effects to which they might give rise.

40. Scientific uncertainty, *inter alia* in the field of vitamins, [19] has, moreover, led the Court to allow the Member States considerable latitude.

41. Thus, in the judgment in *Sandoz*, cited above, although it first, in paragraph 18, set out the principle that 'national rules providing for... a prohibition [on imports] are justified only if authorisations to market are granted when they are compatible with the need to protect health', the Court subsequently recognised, in paragraph 19, that '[s]uch an assessment is, however, difficult to make in relation to additives such as vitamins...' and concluded, finally, in paragraph 20, that 'Community law permits national rules prohibiting without prior authorisation the marketing of foodstuffs lawfully marketed in another Member State to which vitamins have been added', adding merely that 'the marketing [is to be] authorised when the addition of

15 — *Muller*, cited above, paragraph 25; *Beer Purity Law*, cited above, paragraph 46; Case C-42/90 *Bellon* [1990] ECR I-4863, paragraph 16; and *Debus*, cited above, paragraphs 17 and 18.

16 — The Greek Government also pointed out that climatic conditions might also play a role; thus, Vitamin E will be absorbed differently according to the amount of sun a country receives.

17 — Judgments in *Motte*, cited above, paragraph 24; *Muller*, cited above, paragraph 24; and *Beer Purity Law*, cited above, paragraph 44.

18 — See the Opinion of 26 June 2001 in Case C-24/00 *Commission* v *France*, C-24/00, judment of 5 February 2004, ECR I-1277, I-1280, paragraph 131.

19 — See *Sandoz*, cited above, and Case 227/82 *Van Bennekom* [1983] ECR 3883, paragraphs 36 to 38.

vitamins meets a real need, especially a technical or nutritional one'.

42. Since then, that prudent approach has been confirmed by the Commission and the Council. Common Position (EC) No 18/2002 adopted on 3 December 2001 by the Council, with a view to adopting a Directive of the European Parliament and of the Council on the approximation of the laws of the Member States relating to food supplements, [20] reads as follows:

'Only vitamins and minerals normally found in, and consumed as part of, the diet should be allowed to be present in food supplements, although this does not mean that their presence therein is necessary. Controversy as to the identity of those nutrients that could potentially arise should be avoided. Therefore it is appropriate to establish a positive list of those vitamins and minerals' (point 9 of the preamble)

and

'Excessive vitamin and mineral content can have harmful effects on health and that risk justifies setting, as appropriate, maximum safety levels for those substances in food additives. Those limits must guarantee that normal use of the product according to the instructions provided by the manufacturer is without danger to the consumer' (point 13 of the preamble).

43. Until that directive has been adopted and maximum limits set by the Commission under the relevant legislation, Member States are obviously entitled to apply those criteria in their national legislation.

44. In that context, reference can also be made, as has been done by several participants in the present proceedings, to the judgment of the Court of the European Free Trade Association ('the EFTA Court') of 5 April 2001, [21] which appears to me to confirm the prudent approach advisable in the matter. In paragraphs 29 to 31 of its judgment, that court held as follows:

'The national authority must address the issue of health and life of humans. A purely hypothetical or academic consideration will not suffice. It is only the specific effects of the marketing of a single product with a set amount of additives that are relevant. It

20 — OJ 2002 C 90 E, p. 1.

21 — *EFTA Surveillance Authority/Kingdom of Norway*, E-3/00.

may be appropriate to take into account the aggregate effect of the presence in the market of a number of natural or artificial supply sources of a given nutrient, and of the possibility of future additional sources that can reasonably be foreseen.

In many cases, the assessment of such questions will show that there is a great measure of scientific and practical uncertainty linked to the issue under consideration. A proper application of the precautionary principle presupposes, firstly, an identification of potentially negative health consequences arising, in the present case, from a proposed fortification, and, secondly, a comprehensive evaluation of the risk to health based on the most recent scientific information.

When the insufficiency, or the inconclusiveness, or the imprecise nature of the conclusions to be drawn from those considerations make it impossible to determine with certainty the risk or hazard, but the likelihood of considerable harm still persists were the negative eventuality to occur, the precautionary principle would justify the taking of restrictive measures.'

45. It follows from all the foregoing considerations that it is for the referring court to determine whether the competent national authorities have demonstrated, in light of prevailing national eating habits and of the results of international scientific research, whether prohibiting the addition of coenzyme Q10 and of excessive vitamin content (within the meaning of the applicable national legislation) in the food supplements at issue is necessary in order to protect the health and life of persons.

46. In carrying out that assessment, the national court must take into consideration the fact that the national authorities are entitled to refer to the precautionary principle. That means that a Member State may have recourse to Article 30 EC where it has serious suspicions but no certainty as to the danger posed by a substance, but where serious harm could occur if the suspicion proved to be correct.

47. Mr Greenham and Mr Abel also refer to several factual elements which they claim demonstrate that the prohibition at issue is not justified by the protection of public health, and they ask the Court to find that such is the case.

48. However, such an assessment goes beyond the framework of the present reference, which concerns only the interpretation of the Community provisions on which the national court has put its ques-

tion to this Court. In any case, the referring court has not provided us with any information which would enable us to take a view on the question of whether, in concrete terms, the contested prohibition is justified by the protection of public health.

2. The absence of nutritional need

49. Until now, my analysis has dealt with the exception relating to the protection of the health and life of persons laid down in Article 30 EC.

50. The Commission, however, also touches on the question whether a restriction on the free movement of a foodstuff may be justified by the absence of nutritional need relating to one or more of the substances incorporated in that foodstuff, and it proposes that the Court should rule on that point in its reply to the question referred for a preliminary ruling.

51. Referring to the judgment of the EFTA Court, cited above, the Commission considers that only the existence of a risk to public health, and not the mere fact that the addition of the substances at issue do not respond to a nutritional need, can justify a restrictive measure such as that at issue in the main proceedings under Article 30 EC.

52. I would note, in that regard, that the order for reference contains no indication that the prohibition on marketing the foodstuffs at issue was justified by the absence of a nutritional need for coenzyme Q10 or the vitamin content of those foodstuffs. It thus appears to me that it is not necessary for the Court to deal with that problem in its judgment. For what it is worth, however, I should like to make the following observations on that matter.

53. In its judgment, cited above, the EFTA Court stated as follows:

'The need to safeguard public health has been recognised as, and remains, a primary concern, and the level of protection chosen by the Contracting Parties should not be placed in question. However, the principle of proportionality must be respected. In that process, the *question of nutritional need* with regard to additives to foodstuffs in any given population *may have a proper place*. Indeed, the most authoritative definition of "fortification and enrichment" is directly linked to this element (See Codex Alimentarius General Principles for the Addition of Essential Nutrients to Food...). However, under the requirement of proportionality, the need to safeguard public

health must be balanced against the principle of the free movement of goods. The *mere finding by a national authority of the absence of nutritional need will not justify an import ban*, a most restrictive measure, on a product which is freely traded in other EEA States'. [22]

54. The EFTA Court thus accepts that nutritional need can play a role, but that that role is to be assessed in the context of the principle of proportionality.

55. In the case before it, the EFTA Court finally held that the Kingdom of Norway had failed to fulfil its obligations for the following two reasons:

— its approach was inconsistent because, while prohibiting the marketing of 'corn flakes' fortified with iron, it permitted a type of cheese to which a sizeable amount of iron had been added to be sold freely in the country;

— it did not carry out a comprehensive assessment of the risk which the addition of iron to foodstuffs might entail.

56. In its own case-law, the Court of Justice has approached the problem of nutritional needs in two different contexts.

57. In Case 216/84 *Commission* v *France*, [23] the Court considered the case of a Member State which had invoked public-health grounds in order to prohibit the importation of a product, [24] its reasoning being that nutritional value for that product was lower or its fat content higher than another product already available on the market in question. [25]

58. The Court held that public-health grounds could not be invoked in such a case, since '... it is plain that the choice of foodstuffs available to consumers in the Community is such that the mere fact that an imported product has a lower nutritional value does not pose a real threat to human health. Moreover, as the Commission has pointed out without being contradicted by the French Government, there are

22 — Paragraphs 27 and 28. Emphasis added.

23 — Case 216/84 *Commission* v *France* [1988] ECR 793.

24 — It concerned a powdered milk substitute composed of vegetable fats.

25 — Classic powdered milk.

products on the market in France which are also of lower nutritional value or are composed substantially of the same fats used in milk substitutes yet there is no ban on marketing them...'. [26]

59. At issue in that case was a product obtained from natural substances whose nutritional value was simply lower than that of competing products. It was totally inconceivable that that could constitute a valid ground for prohibiting imports.

60. In a whole series of other cases, in contrast, the Court was confronted with chemical substances which had been *added* to foodstuffs on the ground that this met a real need, in particular a technological or dietary need.

61. It should be recalled that, in particular in *Debus*, cited above, the Court held that 'Community law does not preclude the adoption by the Member States of legislation whereby the use of additives is subjected to prior authorisation granted by a measure of general application for specific additives, in respect of all products, for certain products only or for certain uses. This is also true of the fixing of a maximum level for the use of an additive in certain products. Such legislation meets a *legitimate need* of health policy, namely that of *restricting the uncontrolled consumption of food additives*'. [27]

62. It unquestionably follows from that case-law that the Member States are entitled to control and, in so far as is necessary, restrict the use of additives in foodstuffs and that they can do so by means of a system based on the principle that everything which is not authorised is prohibited.

63. In addition, as regards chemical substances, it appears to follow from the Court's case-law that the existence of a genuine threat to public health is not the only factor which a Member State can take into account. In paragraph 17 of *Debus*, cited above, the Court made clear that '... the use of a specific additive which is authorised in another Member State *must*

26 — *Commission* v *France*, cited above, paragraph 15.

27 — *Debus*, cited above, paragraph 14. Emphasis added. See also the judgments cited above in *Sandoz*, paragraph 17 and *Beer Purity Law*, paragraph 42.

be authorised in the case of a product imported from that Member State where... the additive in question does *not* present a risk to public health and meets a real need, especially a technological one'. [28]

64. In Case C-344/90 *Commission* v *France*, [29] concerning the addition of nitrate to cheese, the Court held that 'an application to have an additive included on the list in question *may be rejected* by the competent administrative authorities *only if the additive does not meet any genuine need, in particular* a technological need, *or* presents a danger to public health'. [30]

65. The Court therefore appears to consider that, even if a substance does not present a risk to public health, the marketing of the foodstuff in which it is incorporated can nevertheless be prohibited if that substance does not meet a genuine need.

66. There is no doubt that the concept of 'real need' also covers that of 'nutritional need'. In paragraph 20 of the judgment in *Sandoz*, cited above, the Court explicitly referred to 'a real need, especially a technical or *nutritional* one'. [31]

67. It also seems to me that the approach taken in Case C-344/90 *Commission* v *France*, cited above, according to which a health threat is not the only criterion to be taken into account, finds an echo in paragraph 11 of the preamble to Common Position No 18/2002, in which it is stated that '[t]he chemical substances used as sources of vitamins and minerals in the manufacture of food supplements should be safe and also be available to be used by the body'.

68. Finally, it should be observed that the concept of 'nutritional need' is no stranger to the positive law of the Community now in force. Article 1(3) of Directive 2001/15/EC of the Commission of 15 February 2001 on substances that may be added for specific nutritional purposes in foods for particular nutritional uses [32] reads as follows:

28 — Emphasis added. See also the judgments in *Muller*, cited above, paragraph 25, *Beer Purity Law*, cited above, paragraph 44 and *Bellon*, cited above, paragraph 14.

29 — Case C-344/90 *Commission* v *France* [1992] ECR I-4719.

30 — *Commission* v *France*, cited above, paragraph 10. Emphasis added.

31 — Emphasis added.

32 — OJ 2001 L 52, p. 19.

'The use of nutritional substances in foods for particular nutritional uses shall result in the manufacture of *safe products that fulfil the particular nutritional requirements* of the persons for whom they are intended as established by generally accepted scientific data.' [33]

69. The two texts which I have just cited tend to confirm the conclusion which I think can be drawn from the Court's judgment in Case C-344/90 *Commission* v *France*, cited above: namely, that artificial substances incorporated in foodstuffs must not only be risk-free but must also serve a useful purpose.

70. That rather contradicts the argument of the Commission that the absence of nutritional need can never in itself justify a prohibition on imports.

71. One has the distinct impression that, for the Community legislature, as for the Court, the incorporation of chemical substances in foodstuffs must, as far as possible, be avoided, even if the harmfulness of a given substance is not proven. It is as if they were all potentially dangerous.

72. One might, therefore, be tempted to conclude that, until a positive list of authorised substances has been drawn up at Community level, national authorities are entitled to prohibit not only dangerous substances (including those to be treated as such in the application of the precautionary principle) but also those which can be proved not to satisfy any genuine nutritional need.

73. For my part, I would prefer an intermediate solution inspired by *Sandoz*, cited above, whereby, in the presence of scientific uncertainty as to the harmfulness of a 'nutrient' [34] and apart from cases where the precautionary principle might apply, Member States must authorise the 'nutrient' in question when it meets a genuine nutritional need and may, conversely, prohibit it when it does not meet such a need.

33 — Emphasis added.

34 — As opposed to an 'additive', the term 'nutrient' is used in Common Position No 18/2002.

3. Easily accessible procedure

74. Mr Greenham and Mr Abel also request the Court to find that the national legislation at issue infringes Articles 28 EC and 30 EC in that traders cannot obtain an authorisation under a procedure which is easily accessible and which can be concluded within a reasonable time.

75. It does indeed follow from the case-law of the Court that authorisation to market products is to be granted according to a procedure which is easily accessible to traders, can be completed within a reasonable period and which, if it leads to a rejection, enables that rejection to be challenged before the courts. [35]

76. Nevertheless, as can be inferred from the order for reference and as the French Government confirms in the present case, Mr Greenham and Mr Abel marketed the products at issue without having first lodged an application which could have been investigated by the French competent authorities.

77. The detailed rules of the French authorisation procedure are thus not at issue in the main proceedings and it is therefore not necessary to go more closely into that question.

4. The mutual recognition clause

Conclusion

78. Finally, Mr Greenham and Mr Abel, referring to Case C-184/96 *Commission* v *France*, [36] request the Court to find that the French Republic has failed to include in its legislation any mutual recognition clause which would allow the marketing on French territory of food supplements freely marketed in other Member States.

79. In that regard, I should like to refer to my Opinion of 26 June 2001, cited above, where I concluded that Articles 28 EC and 30 EC do not impose the inclusion of a mutual recognition clause in national legislation such as Decree No 73-138, which refers to 'all goods and foodstuffs intended for human consumption to which chemical products have been added'. [37]

35 — Judgments cited above in *Muller*, paragraph 26, *Bellon*, paragraphs 16 and 17 and Case C-344/90 *Commission* v *France* [1992] ECR I-4719, paragraph 9.

36 — Case C-184/96 *Commission* v *France* [1998] ECR I-6197.

37 — See points 27 to 64.

V — Conclusion

80. In the light of the foregoing considerations, I propose the following reply to the question on which the Tribunal de grande instance, Paris, seeks a preliminary ruling:

Articles 28 EC and 30 EC are to be interpreted as precluding national legislation which prohibits the free movement and marketing of a food supplement lawfully sold in another Member State, unless an overriding requirement can justify restricting or even prohibiting the marketing of the product. In that case, the measures taken must be necessary and proportionate to the objective. In assessing whether those measures can be justified on the ground of the protection of the health and life of persons laid down in Article 30 EC, the national court must determine whether the national authorities have carried out a risk assessment relating to the substances at issue in accordance with the latest scientific information available and with the eating habits prevailing in the Member State in question.