# OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 24 June 1997 *

Table of Contents

I. Facts of the main proceedings ..... I - 4683
II. Production and marketing of feta cheese in the EC ..... I - 4686
III. Greek legislation concerning feta ..... I - 4692
IV. Trade names of food products: the Court's case-law and Community legislation ... I - 4697
A. Community names ..... I - 4697
B. Generic names ..... I - 4697
C. Geographical names ..... I - 4701
V. Analysis of the questions submitted ..... I - 4708
A. Application of Article 30 of the Treaty ..... I - 4709
B. Justification of the measure ..... I - 4711
1. Consumer protection and fair trading ..... I - 4712
(a) Main argument ..... I - 4712
(b) Other considerations ..... I - 4713
2. Protection of industrial and commercial property ..... I - 4718
VI. Conclusion ..... I - 4725

1. This case arises from proceedings pending before the Simvoulio tis Epikratias (Council of State) in which the Danish undertaking Canadane Cheese Trading AMBA (hereinafter 'Canadane') and the Greek undertaking Adelfi G. Kouri AEVE (hereinafter 'Adelfi Kouri') seek the annulment of a number of administrative decisions adopted by various Greek authorities which prevented them from marketing in Greece, under the name 'feta', a consignment of cheese imported from Denmark.

* Original language: Spanish.

## I. Facts of the main proceedings

2. By customs declaration No 53.130 dated 26 August 1991, the Sixth Customs Office of Piraeus was informed of the importation of 850 kg of white cheese in metal containers bearing the description 'feta cheese from Denmark made from pasteurized cows' milk'. It had been dispatched from Denmark by Canadane to Greece for importation and marketing by Adelfi Kouri.

3. Following the inspection report of 26 August 1991 by the veterinary officer of the Foodstuffs Inspectorate of the Veterinary Directorate of Piraeus, the Greek authorities seized the consignment of cheese in question. The report stated that marketing of the goods should not be authorized because the product was not suitable for consumption, pursuant to the fifth indent of Article 15 of Presidential Decree No 40/1977, as it did not meet the requirements for importation. The abovementioned metal containers bore the name 'feta' instead of 'white cheese', thus contravening Article 83, part IV, paragraph 3c, of the Foodstuffs Code, as amended by Ministerial Order No 2109/1988 of the Ministries of Finance and Agriculture.

4. Canadane and Adelfi Kouri lodged a complaint concerning the inspection report with the tripartite Committee constituted under Article 17(2) of Presidential Decree No 40/1977. By decision of 13 September 1991, the Committee rejected the complaint and accepted in full the reasoning of the inspection report.

5. Subsequently, by decision of 24 September 1991, the five-member Committee constituted under Article 17(4) of Presidential Decree No 40/1977 upheld the earlier decision concerning the unsuitability of the product for consumption on the same grounds, and added: 'The above Greek legislation, which restricts use of the name "feta" to cheese produced from sheep's milk or a mixture of sheep's and goats' milk, is not contrary to Community law. That conclusion was reached by the Commission of the European Communities as is shown by the attached document No 3953/6.3.1989 sent to the Greek authorities'.

The five-member Committee also stated in its decision that the goods could be released provided that new labels, bearing the words

'white cheese in brine made in Denmark from pasteurized cows' milk. Date of production 9.8.91. To be consumed by 9.8.92' were placed over the existing labels on the containers in question.

6. Adelfi Kouri did not agree to the Greek authorities' proposal that the cheese be sold under a different name and appealed against their decision to the Council of State. Although the consignment of cheese imported from Denmark under the description 'feta cheese from Denmark made from pasteurized cows' milk' had deteriorated, the Council of State ruled, by resolution 1873/1993, that the applicant undertakings had a particular legitimate interest in continuing the proceedings because the authorities' refusal, embodied in the contested administrative decision, to authorize the import of Danish cheese made from pasteurized cows' milk under the name 'feta', proposing as a condition for authorizing importation the description 'white cheese in brine made in Denmark from pasteurized cows' milk', affected the possibility of selling the product on the Greek market. The obligation to use a name which Greek consumers were not familiar with and did not appreciate, instead of the traditional name 'feta', made it extremely difficult to sell the Danish feta cheese on the Greek market.

7. In their application for annulment to the Council of State, the appellants contended that the Greek provisions laying down conditions relating to the composition (sheep's and/or goats' milk) and the method of production (natural straining) of feta cheese amounted to a measure having equivalent effect to a quantitative restriction, contrary to Articles 30 and 36 of the EC Treaty, because they prevented the importation and marketing of feta cheese lawfully produced and marketed in Denmark, where it is made from pasteurized cows' milk by the ultrafiltration process.

In order to determine the dispute, the Greek Council of State decided that a preliminary ruling should be sought from the Court on the following questions:

'1. Does it follow from an interpretation of Articles 30 and 36 of the EC Treaty that a Member State may refuse to allow the use of a certain commercial name for products produced by and exported from another Community country for circulation within that State where those products are so different from the point of view of their composition and method of manufacture from products which are generally known by that name in the Community that they could not be

regarded as similar products falling with the same category?

2. In that situation, should general familiarity with the product under a particular name within the Community be assessed and judged in relation to consumers within the Member States of the Community, since it is their protection that is sought? Does "products generally known under a certain name by consumers within the Community" mean similar products, the general and essential characteristics of which as regards composition and method of manufacture are familiar to consumers, even though they differ in their secondary characteristics — not, however, decisively as regards type, but simply in the determination of different national varieties and in that case the majority of those national varieties are lawfully produced and marketed primarily for domestic consumption in the Member State of their origin? Further, whenever a product is put on the market within the Community for sale for consumption exclusively or almost exclusively within one Member State where there is a demand on the part of consumers, especially when the product is known under a traditional name, then, even where the product is also produced in another Member State — not, however, for marketing primarily for domestic consumption, but with the exclusive, or almost exclusive, intention that it will be exported to the Member State where it is consumed — is the general familiarity of consumers with the product within the Community as regards its general and essential characteristics to be assessed and judged by reference to the consumers within the said Member State where that product is marketed for consumption?

3. If the answer to the previous questions is in the affirmative, in view of the information set out above contained in Communication 9539/VI/24.2.1994 from the Director General of the Directorate-General for Agriculture of the European Communities and the accompanying report and consequently the data extracted — first, as regards the proportionate relationship between total consumption within the Community of cheese under the name "feta" and consumption within the Community of cheese under the same name manufactured from sheep's and goats' milk and by the natural straining method; secondly, as regards the proportionate relationship between consumption of feta cheese from sheep's and goats' milk within the Community and consumption of the same product in Greece; and thirdly, as regards the proportionate relationship between production, domestic consumption and export in Denmark, and also in all other Community countries, of cheese under the name "feta" made from cows' milk by the ultra-filtration process — is it possible to accept that white cheese under the name "feta" may be produced in the other Community countries, in particular in Denmark, with the almost exclusive aim of exporting it, as regards intra-Community trade, to Greece which is

almost the only Community country where cheese is marketed for consumption under the name "feta"? Furthermore, should general familiarity within the Community with cheese known under the commercial name "feta", in particular as regards its general and essential characteristics, be assessed and judged by reference to consumers of feta cheese in Greece, for whom "feta" means white cheese produced from sheep's or goats' milk by the natural straining method, whereas cheese manufactured from cows' milk by the ultra-filtration process is so essentially different from the point of view of raw material and method of manufacture that it is impossible to treat it as a similar product? In consequence, is Article 83 of the Greek Foodstuffs Code, in the version in force when the contested decision was adopted, reserving the use of the name "feta" solely for cheese produced from sheep's and/or goats' milk by the natural straining method compatible, for the purposes of the case under review, with Articles 30 and 36 of the EC Treaty?'

8. Before examining these questions, I think it necessary to refer to the production and marketing of feta cheese in the EC and to give an account of the Greek provisions the compatibility of which with the EC Treaty is the issue in the main proceedings. In addition, I shall consider the Court's case-law and the Community rules relating to the trade names of food products in so far as they affect the production and marketing of feta cheese,'

## II. Production and marketing of feta cheese in the EC

9. Homer's *Odyssey* recounts how Polyphemus 'sat down to milk his ewes and bleating goats, which he did methodically, putting her young to each mother as he finished. He then curdled half the white milk, gathered it all up, and stored it in wicker baskets ...'. [1] In this way the Cyclops, Polyphemus, made the cheese which Ulysses and his men found in the cave. It is not surprising that, in using this method of making cheese, which is very similar to that traditionally used in modern Greece, Polyphemus was unaware of the legal problems which the free movement of that product in the European Community was going to cause at the end of the 20th century, not only because he could not have predicted, 27 centuries in the future, the complex stratagems of protected names, but also because of his own nature, as the

1 — Homer, *The Odyssey*, Book IX, translated by E. V. Rieu, Penguin Books, 1946, p. 145.

Cyclopes are beings with no idea of justice and the law. [2] The *Odyssey* also alludes to the story of the daughters of Pandareus, who in olden times were 'rapt away by the Demons of the Storm' after 'the gods had robbed them of their parents and left them orphaned in their home; and yet they lived, and flourished on the cheese, the sweet honey, and the mellow wine that Aphrodite brought them'. [3]

Another of Homer's poems, the *Iliad*, shows the importance of cheese in the Greece of the 8th century B.C. [4] However, references to cheese may be found even earlier in the oldest illustration of how milk is obtained and treated in the frieze of El-Obeid in the temple of the great goddess of life, Ninchursag, in Mesopotamia.

10. Cheese forms part of western food and culture. It is often mentioned in the great works of literature. It is one of the dishes enjoyed with delight in Spanish literature [5] and, of course, in *Don Quixote*, where it is regarded as a normal part of the diet of those least favoured by fortune, who seek consolation in its taste, for want of other delights with a higher content of animal proteins, [6]

2 — Ibid., p. 142: 'the Cyclopes, a fierce, uncivilized people ... have no assemblies for the making of laws, nor any settled customs, but live in hollow caverns in the mountain heights, where each man is lawgiver to his children and his wives, and nobody cares a jot for his neighbours'; p. 145: a 'being of colossal strength and ferocity, to whom the law of god and man meant nothing'.

3 — Ibid., Book XX, p. 306.

4 — Homer, *The Iliad*, Book XI, translated by E. V. Rieu, Penguin Books, 1950, p. 214: the lady Hecamede, the 'comely attendant' of Nestor and Patroclus, 'mixed them the pottage with Pramnian wine ... grating into it some goat's milk cheese with a bronze grater ...'.

5 — A. de Guevara, *Menosprecio de Corte y Alabanza de Aldea*, Madrid, 1984, p. 177, praises country life in villages and small towns because, he says, their inhabitants 'have kids for eating, sheep for providing dried and smoked meat [...] bulls for fighting, mutton for ageing [...] milk for drinking, cheese for keeping [...]'. In *Rinconete y Cortadillo*, Cervantes speaks of the cheese of Flanders. Juan de la Cueva, in his comedy *El Infamador*, includes 'a piece of Majorcan cheese' in a tasty picnic. In *El Conde Lucanor*, the Infante Don Juan Manuel includes as the fifth tale 'What happened to a vixen with a crow which had a piece of cheese in its beak', where the writer shows how effective flattery is for achieving an object, ending the story with the moral:
'If anyone praises you for what you have not,
Be careful that he does not take what you have.'

6 — See M. de Cervantes Saavedra, *Don Quixote*, Penguin Books 1950: 'I have an onion here and a bit of cheese,' said Sancho, 'and a few hunks of bread. But they are not the victuals for a valiant knight like Your Worship' (Part One, Chapter X, p. 83). A little later, when Don Quixote and Sancho Panza encounter the goatherd, 'When the meat course was finished they spread a great quantity of shrivelled acorns on the skins, and set beside them half a cheese, which could not have been harder if it had been made of mortar' (ibid., Chapter 11, p. 85). Further on, when Don Quixote asks Sancho Panza what jewel Dulcinea gave him on his departure, as a reward to taking Don Quixote's message, he explained that 'It is an ancient and time-worn custom among knights errant and their ladies to reward squires, damsels, or dwarfs who bring them news of their ladies or knights with some rich jewel in gratitude for their welcome news'. Sancho replies 'They must have done that in the olden times, for nowadays the habit seems to be just to give them a bit of bread and cheese. That's what my lady Dulcinea gave me, anyhow, over the top of the yard wall when she said goodbye to me. And what's more, it was a sheep's-milk cheese' (Part One, Chapter XXI, p. 270). In another passage, 'This share of bread and cheese that I'm giving you,' replied Sancho, 'God knows whether I mayn't need it myself. For I must tell you, my friend, that we squires of knights errant are subject to great hunger and bad luck, and to other things too, which are better felt than told' (Part One, Chapter XXI, p. 276). Finally, we should remember Don Quixote's protests when whey from the curds which Sancho put in his helmet flowed down his face and into his beard (Part Two, Chapter 17, p. 571).

although on occasions cheese is described as 'excellent'. [7]

11. French literature offers proof that cheese was included in the French diet. It is strange to find that Rabelais, in the middle of the 16th century, included cheeses in the dessert course of a memorable dinner. [8] Later on, Proust uses cheese as a counterpoint to the excesses of a decadent group of individuals who consider themselves refined, and as a reflection of the true nature of one of them, M. Verdurin, whose social position, because of his wife's circumstances and ambition, is higher than his resources permit. [9]

12. This account of the close harmony between the Mediterranean diet and cheese may be completed with an example from recent Italian literature, the novel *Palomar*, in which Italo Calvino recounts in masterly fashion the experiences of his hero in a cheese shop in Paris: 'behind each cheese there is a different grass under a different sky: fields encrusted with salt deposited every day by the tides of Normandy; fields perfumed with aromas of sun and wind from Provence; there are different cattle with their cowsheds and seasonal moves to new pastures; there are secrets of production handed down over the centuries. This shop is a museum: when visiting it, Mr Palomar feels, behind every object displayed, the presence of the civilization which gave it shape, as if he were in the Louvre'. [10] The importance of the name of a cheese is also shown when the author writes that 'this shop is a dictionary; the language is the system of cheeses as a whole: a language with a morphology which records declensions and conjugations with countless variants and a vocabulary inexhaustibly rich in synonyms, idiomatic uses, connotations and shades of meaning, like all

7 — Ibid. Cervantes ends the story told by the goatherd Eugenio of the misfortune suffered by the capricious Leandra as follows: 'This is the story I promised to tell you. If I have been tedious in my tale I will make amends. Near here is my cottage, where I have fresh milk and most delicious cheese, and various fruits now in season, no less pleasant to the sight than to the taste' (Part One, Chapter LI, p. 450). Elsewhere, a reference is made to 'cheeses built up like bricks made a wall' (Part Two, Chapter XX, p. 596).

8 — F. Rabelais, *Gargantua and Pantagruel*, relates how, in the kingdom of the Fifth Essence, called Entelechy, where the queen only ate certain categories for lunch: ideas, truths, images, abstractions, concepts, dreams, ulterior motives, nightmares, antitheses, metempsychoses and transcendental anticipations (Book Five, Chapter XX), a dinner was offered at which, although the queen only ate heavenly ambrosia, all kinds of rare, tempting and exquisite dishes were served, finishing with a stew consisting of various soups, salads, fricassées, roast kid, boiled meats, large pieces of ox, pickled hams, pastries, a whole range of couscous in the Moorish fashion, cakes, curdled milk, ices and fruits of all kinds and, of course, cheeses (Part Five, Chapter XXIII).

9 — M. Proust, *A la Recherche du Temps Perdu*, Gallimard, Paris, 1988, describes the dinner given by Verdurin and his wife at La Raspelière, where Baron de Charlus is one of the guests. When everyone praises the dessert, strawberry cream, saying that it would be worth opening bottles of Château Margaux, Château Lafitte and port, the host prefers his plate of Gruyère, which he clings to with all his strength when his wife asks for the cheeses, which are 'si vilains de ton', to be taken away (III Sodom and Gomorrah, p. 330).

10 — I. Calvino, *Palomar*, Giulio Einaudi, Turin, 1983, p. 75.

languages nourished with contributions from a hundred dialects. It is a language made up of things; terminology is here only an external aspect, a tool; but for Mr Palomar, to learn a little terminology was always the first step to be taken if he wished to hold up for a moment the things passing before his eyes.' [11]

13. Consequently there is no doubt as to the importance of cheese in Mediterranean civilization, [12] from where it has passed to other areas, [13] and the identification of cheese and its names with ancestral traditions. This cultural context may to some degree be relevant to a case such as that now before the Court because, so far as cheeses are concerned, what matters is the natural element, the rest being mystery and patience: they have more to do with immemorial custom and traditional flavours than with recipes which, like the law, can be improvised. [14]

14. The word 'feta' is of Italian origin and was brought into Greece through the influence of Venice. It is derived from 'fetta', which means 'slice', 'slab' or 'chunk'. The use of the word gained acceptance in Greece in the 19th century to designate the traditional white cheese in brine, which has been made in almost the whole of Greece and other parts of the Balkans since time immemorial.

15. The ancestral cheese produced in Greece under the name 'feta' is made from sheep's milk or a mixture of sheep's and goats' milk by the traditional craft method of natural straining of the milk, without applying pressure. Specifically, the stages of production are as follows:

— The milk is coagulated with the traditional rennet or other enzymes of animal origin which act in a similar way.

— The curds are turned into perforated moulds where natural straining takes place without pressure. As the whey is strained, the curds solidify and salt is added to the surface, leading to the formation of microflora which assist the process of maturing.

11 — Ibid., pp. 75 and 76.

12 — J. Saramago, *Viaje a Portugal*, Alfaguara, Madrid, 1995, p. 150. In this work, Mr Guerra refers the traveller to a saying of Cidadelhe concerning bread, cheese and wine: 'bread with eyes, cheese without eyes, wine which brings a sparkle to the eyes'.

13 — Among Latin American writers, one example is the inclusion of the 'small iced cheese' in the desserts of the dinner included in the 'miniature menu' chapter of M. Vargas Llosa's work, *Los Cuadernos de Don Rigoberto*, Alfaguara, Madrid, 1997, pp. 191 and 192.

14 — See A. Hernández Gil in the work by S. Ortega, *Quesos Españoles*, Alianza Editorial, Madrid, 1987, p. 142. In the same passage, Hernández Gil, formerly the President of the Supreme Court and of the General Council of the Judiciary, surmises that 'the legislation on the subject must be exceptionally boring'.

— The curds are then put into wooden or metal containers and brine of 7% concentration is added. The containers are placed in maturing rooms under controlled temperature and humidity conditions.

— The cheese ripens in two months, the first two weeks in the maturing rooms and the rest of the time in cold-storage plant.

16. The main qualities of the resulting cheese are its natural white colour, its characteristic taste and smell (slightly acid, salty and greasy) and its compact texture. The production of feta was not regulated by the Greek authorities until 1988 and consequently different local or regional variants existed because it was produced in countless places.

17. The fact that there were no technical specifications at international level meant that a different, more modern and competitive method of production of feta could be developed in different Member States of the EC and other countries. The aim was to satisfy demand from communities of Greek immigrants in non-member countries and Arab countries.

Cheese described as 'feta' has been produced in Denmark since the 1960s and in Germany and the Netherlands since a later date. The type of milk and the production process differ from those used in Greece. The milk is cows' milk, which is cheaper than that of sheep and goats, and an industrial ultrafiltration process is used, which is more modern and competitive than the traditional method of straining. Feta is also made from cows' milk in France, but at the same time it is made from sheep's milk on the island of Corsica and some parts of the Massif Central, such as Roquefort, where the sheep's milk which is not used in the production of Roquefort cheese is used to make feta.

18. The statistics concerning the production, consumption and sales of the two varieties of feta cheese in the EC are not too accurate owing to the technical difficulties involved in the different methods of calculation, fluctuations in stocks held in storage and the existence of thousands of small producers in Greece who meet local or family requirements.

However, the information supplied by the Commission to the Greek Council of State in Communication 9539/VI of 24 February 1994, and the more or less identical statistics produced by Canadane and the Member

States in this case, lead to the following conclusions:

(a) In the period 1988-92 the annual consumption of feta made from sheep's and/or goats' milk in the EC varied between 125 000 and 150 000 tonnes, and that of feta made from cows' milk was between 10 000 and 25 000 tonnes. There is a significant concentration of consumption in Greece, as that country accounts for between 70% and 85% of the EC total, which gives a total of about 10 kg per inhabitant per year. In the case of feta made from sheep's and/or goats' milk, the figure is more than 90%. In the other Member States very little or no feta is consumed, and that which is consumed is almost exclusively cows' milk feta. In percentage terms, Germany is the second consumer country because of a large population of Turkish origin, and in Denmark consumption is very limited.

(b) Community production of feta between 1988 and 1992 was around 240 000 tonnes. Greece is the main Community producer of feta cheese, almost 50% of which is made from sheep's and goats' milk. Virtually the whole of Greek production is for domestic consumption. Denmark is the second Community producer, with around 40% of Community production. Its feta made from cows' milk is intended basically for export to other Member States of the EC and, to a greater degree, to non-member countries. Germany, France and the Netherlands account for the rest of production, with feta made from cows' milk clearly predominating and a large percentage of exports to other EC States and non-member countries. The volume of cows' milk feta exported to Greece from Denmark and other Community producer countries is quite small, although in the period in question the restrictive Greek legislation was already having an effect.

19. Feta is also produced and consumed outside the EC. Although there are no global statistics, studies carried out on behalf of the UN Food and Agriculture Organization ('FAO') and the World Health Organization ('WHO') concerning the possibility of drawing up an international standard for feta show that relatively large volumes are produced and consumed in countries such as Iran and Saudi Arabia, where feta made from sheep's and/or goats' milk predominates, and New Zealand and the United States, where

there is an overwhelming preference for cows' milk.

## III. Greek legislation concerning feta

20. Greece had no legislation governing production conditions for feta cheese until 1988. In that year the Greek authorities began a process of gradual regulation of the conditions of production and marketing which culminated in feta becoming a protected designation of origin in 1994.

21. Although a first restrictive measure was adopted earlier, [15] the abovementioned process began with Ministerial Order No 2109/1988 [16] of the Ministries of Finance and Agriculture and continued with two other Ministerial Orders of the same departments, Nos 688/1989 [17] and 565/1991, [18] which amended Article 83 of the Foodstuffs Code.

15 — Ministerial Order No 15294/1987 of the Ministries of Finance and Agriculture, FEK B 347.

16 — FEK B 892.

17 — FEK B 663.

18 — FEK B 667.

At the material time, that provision was worded as follows:

'I. [...] IV.Traditional Greek cheeses. Specific standards. 1. Hard cheese [...] 3. Soft cheese. a) [...] c) Feta [...] 1 a) [...] 3 c) [...] Specific standards for feta cheese.

1. Name: feta.

2. Place of production: Macedonia, Thrace, Epirus, Thessaly, Mainland Greece, Peloponnese and the island of Lesbos.

3. Definition: Feta cheese is a product made from sheep's milk or a mixture of sheep's and goats' milk which is matured and preserved in brine until it reaches the consumer, and which meets the following requirements:

4. Raw materials:

4.1 Milk: sheep's or a mixture of sheep's and goats' milk produced in the abovementioned geographical areas.

5. Permitted additives and processing aids:

5.1 Essential:

a) traditional rennet or other enzymes of animal origin producing a similar effect;

b) non-pathogenic bacterial cultures (lactic rennets), if the milk is pasteurized;

c) edible sodium chloride (salt).

5.2 Optional:

a) calcium chloride, up to 20 g per 100 kg of milk;

b) preservatives: not permitted;

c) colouring matter: not permitted.

6. Principal characteristics of the mature cheese:

6.1 External appearance:

6.1.1 Consistency: soft white cheese which may be cut into slices.

6.1.2 Shape: wedge or rectangular parallelepiped.

6.1.3 Dimensions: variable.

6.1.4 Weight: variable.

6.2 Rind: none.

6.3 The cheese itself:

6.3.1 Compact, with some fractures of mechanical origin.

6.3.2 Colour: pure white.

6.4 Holes: few or none.

6.4.1 Distribution: throughout.

6.4.2 Shape: irregular.

6.5 Minimum fat content: 43% (calculated on the basis of dry matter).

6.6 Maximum moisture content: 56%.

6.7 Other main characteristics: It is a cheese which is matured and preserved in brine. It has a fatty, pleasant, slightly acid taste and is very aromatic. It is preserved in wooden barrels or metal containers.

7. Method of preparation:

7.1 Method of curdling milk: with traditional rennet or other enzymes of animal origin which have a similar effect.

7.2 Technical treatment of milk:

7.2.1 Heat treatment of pasteurized or fresh milk.

7.2.2 Heat treatment of curds: none.

7.3 Fermentation process: acidification.

7.4 Maturing process: in wooden barrels or metal containers in brine for at least two months.

7.5 Other traditional characteristics: straining of the curds in perforated moulds, without pressure. Salted on surface when dry.'

22. After the date of the events giving rise to this case, Presidential Decree No 81/1993 of 19 March 1993 [19] laid down the conditions and the procedure for the recognition of designations of origin and geographical indications of agricultural products until the entry into force, on 24 July 1993, of Regulation (EEC) No 2081/92. [20] The abovementioned Greek measure was amended by Presidential Decree No 291/1993, [21] which extended the validity of the previous Decree for six months and, by adding a new subparagraph to paragraph 1 of Article 1 of Presidential Decree No 81/1993, conferred the status of designations of origin on 'all traditional names, whether geographical or not, which describe a Greek agricultural product enjoying a good reputation, which is widely known, at least in the domestic market of the country'.

19 — FEK A 36.

20 — Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1).

21 — FEK A 130.

23. Finally, Article 83 of the Foodstuffs Code was amended by Ministerial Order No 313025/1994 of the Ministry of Agriculture of 11 January 1994 concerning the recognition of the designation of origin 'feta'. [22] That Order defines 'feta', specifies the area of production and the requirements relating to the milk which may be used in its production, describes the method of production of the cheese, lists its characteristics, specifies the particulars to be shown on the product and generally prohibits the production, import, export and marketing of cheese bearing the name 'feta' which does not meet the requirements of the Order.

Ministerial Order No 596/1995 of the Ministries of the Economy and Agriculture [23] codified the previous rules in the new Article 83 of the Foodstuffs Code, which includes 'feta' under the title 'Cheeses with protected designation of origin'.

24. When Greece began in 1988 to adopt measures regulating the production and marketing of feta, the Commission examined their compatibility with Community law. By Communication No 3935 of 6 March 1989,

22 — FEK B 8.

23 — FEK B 624.

the Director General of the Directorate-General of Agriculture informed the Greek authorities that, after careful examination of the methods of production and marketing of feta, he considered that the Greek legislation was compatible with Community law. The Commission maintained that view in response to complaints by the national federations of producers of milk products in various Member States since, according to the Commission, the *Cassis de Dijon* judgment [24] concerning the mutual recognition of goods lawfully produced and marketed in a Member State was not applicable, owing to the fundamental differences between the feta made in Greece (sheep's and/or goats' milk and the natural straining method) and that produced in other Member States from cows' milk by the ultra-filtration process.

The Commission discovered — and notified Greece — that a fairly substantial quantity of feta was being produced in that country with the addition of cows' milk, which could affect the legality of the Greek measures. After the introduction of stricter controls by the Greek authorities, the Commission concluded that the addition of cows' milk to 5.9% of feta production was a deception which did not affect the efficacy of the new Greek rules.

25. Subsequently the Commission initiated proceedings against Greece under Article 169 of the Treaty for failure to fulfil its obligations, because of the restrictive consequences of the Greek measures arising from the geographical limitation on the production of feta and other traditional Greek cheeses. On 18 May 1992 the Commission sent the Greek Government a reasoned opinion in which it stated that the measures in question were contrary to Article 30 of the Treaty because they restricted the use of the name 'feta', which is a generic term, to cheese produced in certain parts of Greece.

The Commission did not bring an action before the Court of Justice because the question was connected with procedures under way for the recognition by the Community of geographical indications and designations of origin of food products, as provided for by Regulation No 2081/92, concerning the protection of geographical names at Community level.

24 — See the judgment in Case 120/78 *Rewe-Zentrale AG* [1979] ECR 649, 'Cassis de Dijon'.

## IV. Trade names of food products: the Court's case-law and Community legislation

26. In Community law there are no general provisions regulating the trade names of food products. There are certain measures affecting this question, but they do not regulate it directly, such as Directive 79/112/EEC, [25] relating to the labelling and advertising of food products. Article 15(2) of that Directive permits national measures of that kind which are justified on grounds of the protection of public health, the prevention of fraud, the protection of industrial and commercial property rights, indications of provenance and registered designations of origin, and prevention of unfair competition.

In the light of the Community law relating to this subject and the relevant case-law of the Court, the following types of selling names of food products may be distinguished according to their effect on intra-Community trade in goods:

### A. *Community names*

27. These are names which are regulated by Community secondary law and define the characteristics and method of production of the product for the whole of the Community. These 'eurofoods' (for example, honey [26] and chocolate [27]) can be marketed without restriction in all Member States and do not give rise to problems in relation to intra-Community trade.

### B. *Generic names*

28. Generic names are common names used to designate agricultural or food products. They form part of the general cultural and gastronomic stock and may, in principle, be used by any producer. The Court's case-law does not define what is meant by 'generic

25 — Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1).

26 — Council Directive 74/409/EEC of 22 July 1974 on the harmonization of the laws of the Member States relating to honey (OJ 1974 L 221, p. 10).

27 — Council Directive 73/241/EEC of 24 July 1973 on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption (OJ 1973 L 228, p. 23).

name', but the following have, *inter alia*, been held to be generic names: vinegar, [28] geneva, [29] beer, [30] pasta, [31] yoghurt, [32] Edam cheese, [33] cheeses, [34] meat products ('Fleischwaren'), [35] and bread. [36]

29. In many cases, the Member States have adopted national measures requiring certain conditions of production for the use of a generic name. If those requirements are similar in the Member States, imported products may use the generic name in the importing State and no obstacles will arise to intra-Community trade. However, the production conditions normally differ from one State to another; in this case, partly differing products are sold under the same generic name in different Member States. For the free movement of goods in the Community, the problem arises when a product is marketed under a generic name used in one State after being imported from another State where it is lawfully produced and marketed under the same name, but with characteristics which differ in some respects. [37]

The Court of Justice has always considered that obstacles to intra-Community trade resulting from differences in national law concerning the use of generic names for agricultural and food products are measures having equivalent effect and are contrary to Article 30 of the Treaty. A national measure which restricts the use of a generic name to a national variety to the detriment of varieties imported from other Member States where they are lawfully produced and marketed is incompatible with the fundamental principle of the free movement of goods. [38]

30. With regard to the possible justification of restrictions arising from differences between national laws on the use of generic names, the grounds put forward as essential requirements have been, basically, the protection of consumers and fair trading and, to

28 — See the judgment in Case 193/80 *Commission* v *Italy* (the '*Vinegar*' case) [1981] ECR 3019.

29 — See the judgment in Case 182/84 *Miro* [1985] ECR 3731.

30 — See the judgment in Case 178/84 *Commission* v *Germany* (the '*Beer*' case) [1987] ECR 1227.

31 — See the judgments in Case 407/85 *3 Glocken and Another* v *USL Centro Sud and Another* [1988] ECR 4233, and Case 90/86 *Criminal proceeding against Zoni* [1988] ECR 4285.

32 — See the judgment in Case 298/87 *Smanor* [1988] ECR 4489.

33 — See the judgment in Case 286/86 *Déserbais* [1988] ECR 4907, paragraph 12.

34 — See the judgments in Case C-210/89 *Commission* v *Italy* [1990] ECR I-3697, paragraph 12, and Case C-196/89 *Nespoli and Crippa* [1990] ECR I-3647.

35 — See the judgment in Case C-269/89 *Bonfait* [1990] ECR I-4169, paragraph 13.

36 — See the judgments in Case 130/80 *Kelderman* [1981] ECR 527, Case C-17/93 *Van der Veldt* [1994] ECR I-3537, and Case C-358/95 *Morellato* [1997] ECR I-1431.

37 — See the *Nespoli and Crippa* judgment, cited above, paragraph 13.

38 — See the judgments in *Commission* v *Italy*, the '*Vinegar*' case, paragraph 27, and *Miro*, paragraph 22, both cited above.

a lesser extent, the protection of public health provided for by Article 36 of the Treaty. The case-law on the subject shows that the Court has applied two principles in these situations.

31. Generally, the Court has applied the principle of mutual recognition and has not taken the view that the grounds relied upon as essential requirements justify obstacles to the sale, under the generic name of the State of destination, of partly different products produced and marketed in the State of origin under the same name. The Court considers that the State of destination can protect its consumers and ensure fair trading by requiring the labelling of the imported product to show all its characteristics. This labelling requirement is a less restrictive alternative which takes more account of the principle of proportionality than a prohibition on imports or an obligation to market the product under an invented name.

In such famous cases as those relating to German beer and Italian pasta, the Court implicitly took the view that beer and pasta produced in other Member States were sufficiently similar, in spite of differences in composition, for adequate labelling to prevent the risk of confusion on the part of German and Italian consumers and to permit them to be sold under the generic names 'beer' and 'pasta'.

32. However, in the *Déserbais* judgment and, to a greater extent, in the *Smanor* judgment, the Court envisaged, as an exception to the general rule of mutual recognition of generic sales descriptions subject to adequate labelling, the possibility that the State of destination might prevent the sale in its territory of a product imported from another Member State under a generic name, if its characteristics were substantially different from those of national products marketed under the same name.

In the *Smanor* case, the Court considered in principle that the imported product could be marketed in France under the generic name 'yoghurt', provided that the labelling described it as 'deep-frozen' so as to inform consumers of the treatment undergone by the product. Nevertheless, added the Court, the characteristic feature of the product marketed as 'yoghurt' is the presence of live lactic bacteria in a large quantity, and it concluded that the labelling might be inadequate if the imported deep-frozen yoghurt displayed characteristics substantially different from those expected by French consumers

when buying a product with the generic name 'yoghurt'. The *Smanor* judgment leaves to the national court the task of determining whether the different characteristics of deep-frozen yoghurt in relation to the requirements of national law for fresh yoghurt are so significant as to justify a different name. [39]

In the *Déserbais* judgment, delivered shortly afterwards, the Court considered that hypothesis in an *obiter dictum*, [40] but ruled that an Italian provision which prevented the marketing, under the name 'Edam', of cheese with a fat content below 40% did not fall within that category.

33. This exception to the mutual recognition of generic names does not appear to be clearly demarcated in the *Smanor* and *Déserbais* judgments. It is accepted that a Member State may prevent the sale under a generic name of an imported product which is marketed under that name in the Member State of origin, if it differs substantially from national products and may mislead consumers, even after adequate additional labelling. However, the criteria which must be taken into account to determine whether there are substantial differences have not been properly clarified. [41] The *Smanor* judgment mentions consumer expectations in the State of destination, the provisions of the FAO/WHO *Codex Alimentarius* and the national law of the State of destination, while the *Déserbais* judgment refers only to the production and composition of the products. Furthermore, no order of priority is laid down for those criteria and, if they are applied to a particular product, they may lead to conflicting conclusions. Nor is any indication given of the degree of difference which must exist between the imported product and national products sold under the generic name for it to be considered that there is a substantial difference between them which will not be discovered by consumers even where there is adequate labelling.

34. In a communication of 1991, [42] the Commission examined the *Smanor* and *Déserbais* judgments and proposed criteria for identifying the 'characteristics of a product' which may make it unsuitable for selling under a generic name in the State of destination. The Commission proposes that account should be taken of the essential features of products lawfully produced and fairly marketed in the Community under that generic

39 — See the *Smanor* judgment, cited above, paragraphs 19 to 24.

40 — Paragraph 13 of that judgment, cited above, is as follows: 'The question may arise whether the same rule must be applied where a product presented under a particular name is so different, as regards its composition or production, from the products generally known by that name in the Community, that it cannot be regarded as falling within the same category.'

41 — See the interesting observations of C. Lister, 'The Naming of Foods: the European Community's rules for Non-brand Food Product Names', *European Law Review* 1993, p. 186 ff.

42 — Commission interpretative communication on the names under which food products are sold (OJ 1991 C 270, p. 2).

name, without regard to characteristics known only to consumers in the importing country. This test must be carried out in each case on the basis not only of consumer expectations but also of objective factors such as the definitions in the FAO/WHO *Codex Alimentarius*, the rules and regulations of Member States, the composition or method of manufacture of the products, and references in Community acts, including the tariff nomenclature used in implementing the Common Customs Tariff. In the Commission's opinion, only a substantial difference in one of those respects from national products would permit the importing State to prevent the marketing of the imported product under the generic name. Likewise the Commission does not lay down the degree of difference necessary for the difference between products to be regarded as substantial, nor does it give an order of priority of the criteria to be used for making the comparison. It offers only three examples of the use of generic names: vinegar, yoghurt and caviar.

The second subparagraph of Article 3(1) of Regulation No 2081/92 for its part states that '"a name that has become generic" means the name of an agricultural product or a foodstuff which, although it relates to the place or the region where this product or foodstuff was originally produced or marketed, has become the common name of an agricultural product or a foodstuff'. The third subparagraph provides that account must be taken of all the factors for establishing whether a name has become generic and, in particular, the situation in the Member State in which the name originates and areas of consumption, the situation in other Member States and the relevant national or Community laws. Under the first subparagraph of Article 3(1), names which have become generic cannot be registered and do not enjoy Community protection, and the third subparagraph provides that the Commission will publish in the *Official Journal of the European Communities* a guide list of names of agricultural products and foodstuffs which are considered generic.

C. *Geographical names*

35. Geographical names are names used to designate food products which allude to their origin from a particular geographical area. [43] Such reference to the geographical origin of the product may be direct, where the name includes the geographical reference (e. g. Manchego Cheese, Parma Ham, Faba Asturiana and Normandy Camembert) or

43 — The Agreement on Trade-related Aspects of Intellectual Property Rights (GATT *Uruguay Round)* annexed to the Agreement establishing the World Trade Organization (OJ 1994 C 336, p. 213) refers to geographical indications, a term equivalent to 'geographical names', and defines them as follows in Article 22(1): 'Geographical indications, for the purposes of this Agreement, are indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin'.

indirect, if the name does not include a place-name (tetilla cheese, reblouchon, grappa, ouzo, cava). Geographical names have the following characteristics: [44]

— They guarantee the geographical origin of the product and, to a greater or lesser degree, its type: in other words, that it has specific qualities and characteristics arising from its geographical origin. [45]

— They are also proof of the quality of the product, which is, in most cases, made under strict and precise conditions. [46]

— They impart a good reputation to products amongst consumers because the geographical name guarantees the specific provenance, the type and the prescribed quality of the product. [47]

— The legal protection of geographical names safeguards producers' interests against unfair competition and protects consumers against information which may mislead them. [48]

However, sales descriptions which contain place-names cannot always be considered direct or indirect geographical names. A name embodying a place-name may be a generic term or may have become one in the course of time, and is thus no longer a geographical name which may enjoy legal protection. This applies to the names 'eau de Cologne', 'Parmesan cheese', [49] 'Edam cheese' and 'Emmenthal cheese', which have become generic.

44 — See, among others, F.-K. Beier and R. Knaak: 'The Protection of Direct and Indirect Indications of Source in Germany and the European Community', *International Review of Industrial Property and Copyright Law*, 1994, No 1, p. 1; P. Jiménez Blanco, *Las denominaciones de origen en el derecho del comercio internacional*, Eurolex, Madrid, 1996, and G. Salignon, 'La jurisprudence et la réglementation communautaires relatives à la protection des appellations d'origine, des dénominations géographiques et des indications de provenance', *Revue du Marché Unique Européen*, 1994, No 4, p. 107.

45 — See Case 12/74 *Commission* v *Germany* the ('*Sekt*' case) [1975] ECR 181, paragraph 7, and Joined Cases C-321/94, C-322/94, C-323/94 and C-324/94 *Pistre and Others* [1997] ECR I-2343, paragraphs 35 and 36. In the latter judgment the Court found that the description 'mountain', the use of which was regulated by French law, was not a geographical indication as it was 'quite general in character and transcends national frontiers', nor did it indicate a specific geographical origin.

46 — See the *Sekt* case, cited above, paragraph 9; Case 13/78 *Eggers* [1978] ECR 1935, paragraph 16; and Case C-47/90 *Delhaize et Le Lion* [1992] ECR I-3669, paragraphs 22 and 23. In the last-mentioned judgment the Court considered that the prohibition of bottling outside the territory of origin did not affect the quality of Rioja wines.

47 — See Case C-3/91 *Exportur* [1992] ECR I-5529, paragraph 11.

48 — See the '*Sekt*' case, cited above, paragraph 7.

49 — The Annex to Regulation No 1107/96 shows 'Parmigiano Reggiano' as a designation of origin protected in favour of Italy and there is no footnote stating that protection is not being sought for the name 'Parmesan'. Nevertheless, I consider that 'Parmesan cheese' has become a generic name.

36. The national laws of the Member States, based on existing international agreements, [50] distinguish various types of geographical name and differ significantly with regard to the degree of protection for such names.

In any case, geographical names are legally protected by national laws on industrial and commercial property. The legal protection of a geographical name confers a collective monopoly over its commercial use upon a particular group of producers by reference to their geographical location — in contrast, a trade mark can only be used by the owner. From the viewpoint of the movement of goods within the Community, the protection of geographical names by the national laws of Member States creates obstacles to intra-Community trade which amount to restrictions having equivalent effect within the meaning of Article 30 of the Treaty because they prevent the marketing of products imported under the geographical name which is protected in the importing State. As the Court observed in the *Exportur* judgment, [51] such protection of geographical names is governed by the principle of territoriality, whereby the law of the country of importation, the factual circumstances and the current conceptions in that country are applicable to those names. [52] The grant of protection is independent of the law of the country of origin because a name may be generic in the country of origin and a protected geographical name in the importing country.

According to the Court's case-law, restrictions on the movement of goods within the Community deriving from national laws protecting geographical names may be justified where they are intended to safeguard the rights constituting the specific subject-matter of such names, which are industrial and commercial property rights the protection of which is permitted by Article 36 of the Treaty, although they give rise to restrictions contrary to Article 30. [53]

37. In the *Exportur* judgment concerning geographical names, the Court distinguishes

50 — The most important multilateral treaties in this field are: the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 31 October 1858, revised at Stockholm 14 July 1967, U. N. Treaty Series Vol. 923, No. 13172, p. 205; the Paris Convention for the Protection of Industrial Property, 20 March 1883, revised at Stockholm 14 July 1967, U. N. Treaty Series Vol. 828, No. 11851, p. 305; the Madrid Agreement for the repression of false or deceptive indications of source on goods, 14 April 1891, revised at Stockholm 14 July 1967, U. N. Treaty Series Vol. 828, No. 11848, p. 163, and the Agreement establishing the World Trade Organization Agreement on Trade-related Aspects of Intellectual Property Rights, cited above (footnote 43).

51 — See the judgment in Case C-3/91, cited above, paragraph 12.

52 — See the comments of L. A. Fuentes Núñez, 'La protección de las denominaciones de origen en el derecho comunitario', *Boletín de la Gaceta Jurídica de la C. E. y de la Competencia*, B-101 February/March 1995, p. 31.

53 — See the judgment in Case C-3/91 cited above, paragraph 25.

between designations of origin and indications of provenance.

With regard to *designations of origin*, the Court states that they guarantee, 'not only the geographical provenance of the product, but also that the goods have been manufactured according to quality requirements or manufacturing standards prescribed by an act of public authority and thus that they have certain specific characteristics [...]. They are protected under special rules laid down in the statutes or regulations by which they are established. Such rules generally exclude the use of terms such as "kind", "type" or "style" and prevent such designations from becoming merely generic so long as that regime remains in force.' [54]

So far as *indications of provenance* are concerned, in the *Exportur* judgment the Court observed that their purpose was 'to inform the consumer that the product bearing that indication comes from a particular place, region or country. A more or less considerable reputation may attach to that geographical provenance [...] Indications of provenance are protected by the operation of rules designed to suppress misleading advertising, or indeed the abusive exploitation of another's reputation'. [55] The *Exportur* judgment did not follow the judgment in the *'Sekt'* case and found that indications of provenance are not only names of products the flavour, qualities and characteristics of which are due to the geographical location of the place of production, but are also names which, without fulfilling that requirement, may enjoy a high reputation amongst consumers and constitute for producers established in the places to which such names refer an essential means of attracting custom. [56] Indications of provenance are the type of geographical name closest to generic names because it is not essential for the origin of the product to imbue it with special characteristics and because the requirements concerning quality and reputation are less strict, given that a supervisory body is unnecessary. The indirect indications of provenance which have been examined by the Court are 'Sekt'/'Weinbrand' [57] and 'Bocksbeutel' [58] and the direct indications of provenance examined are 'Turrón de Alicante' and 'Turrón de Jijona'. [59]

38. In the area of Community law, measures have recently been adopted for protecting geographical names. For example, rules have been adopted specifically for wines and alcoholic beverages, which are not relevant to the present subject, and general rules have been laid down on the use of names for agricultural products and foodstuffs in Regulation

54 — See Case C-3/91, cited above, paragraph 11, and Case C-47/90, cited above, paragraphs 17 and 18.

55 — See Case C-3/91, cited above, paragraph 11.

56 — Ibid., paragraphs 27 and 28.

57 — See the *'Sekt'* case, cited above, paragraphs 3 and 4.

58 — See Case 16/83 *Prantl* [1984] ECR 1299, paragraph 35, and *Exportur*, cited above, paragraph 34.

59 — See the *Exportur* judgment, cited above.

No 2081/92, further implemented by Regulation No 2037/93. [60] Regulation No 2081/92 sets up a Community system of names which permits their protection in all the Member States, with the object of reducing the problems affecting the free movement of goods which arise from the coexistence of different national systems of protection.

39. Regulation No 2081/92 establishes Community protection for certain agricultural products and foodstuffs for which a link between their characteristics and their geographical origin exists, using for that purpose geographical references of two different levels, protected geographical indications ('PGI') and protected designations of origin ('PDO'). [61]

40. Article 2(2) of Regulation No 2081/92 gives the following definitions:

'a. *designation of origin:* means the name of a region, a specific place, or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

— originating in that region, specific place or country, and

— the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and the production, processing and preparation of which take place in the defined geographical area;

b. *geographical indication*: means the name of a region, a specific place, or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

— originating in that region, specific place or country,

60 — Commission Regulation (EEC) No 2037/93 of 27 July 1993 laying down detailed rules of application of Council Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1993 L 185, p. 5).

61 — See recitals 9 and 10 in the preamble to Regulation No 2081/92.

and

— which possesses a specific quality, reputation or other characteristics attributable to that geographical origin and the production and/or processing and/or preparation of which take place in the defined geographical area.'

Article 2(3) also regards as designations of origin 'certain traditional geographical or non-geographical names designating an agricultural product or a foodstuff originating in a region or a specific place, which fulfil the conditions referred to in the second indent of paragraph 2(a)'.

41. It can be seen that the definition of 'designation of origin' is very similar to that laid down by the Court's case-law, but Regulation No 2081/92 identifies a new type of name, the *geographical indication*, not appearing in the case-law, which referred to indications of provenance. The Regulation defines *geographical indications* in a similar way to designations of origin, but the requirements are less strict. The conditions relating to quality, type and reputation are alternative in the case of geographical indications, but they must all be met in the case of designations of origin. 'Navarra Asparagus', 'Sobrasada de Mallorca' and 'Scottish Beef' are deemed to be geographical indications.

42. The registration of agricultural products and foodstuffs by means of the procedure laid down by Regulation No 2081/92 has important consequences. Firstly, Article 8 provides that the indications PDO, PGI or equivalent traditional national indications may appear only on them. Secondly, Article 13(1) protects registered names against any direct or indirect commercial use of the name for products not covered by the registration; against misuse, imitation or evocation; against any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned; and against any other practice liable to mislead the public. Thirdly, under Article 13(3), protected names cannot become generic. Finally, Article 14 does not permit the registration of trade marks which relate to products covered by protected names and meet one of the situations provided for in Article 13.

43. Articles 4 to 11 of Regulation No 2081/92 govern the procedure for registering a PDO or a PGI. Associations and natural or legal persons must submit applications for registration to the Member State where the geographical area is situated, conforming with specifications which must include details of all the characteristics of the product, as laid down in Article 4(2). If the application is justified, the Member State will forward it to the Commission, which will within six months verify, by means of a formal investigation, whether the conditions required in the Regulation are fulfilled. If the result of the examination is positive, an announcement giving the details of the application will be published in the *Official Journal of the European Communities* and, if there is no objection on the part of a Member State or a legitimately concerned natural or legal person, the Commission will enter the PDO or PGI in the 'Register of Protected Designations of Origin and Protected Geographical Indications', with subsequent publication of such entries and any amendments in the *Official Journal of the European Communities*.

Article 17(1) of Regulation No 2081/92 laid down a registration procedure for existing geographical names in the Member States: Member States could, within six months of the entry into force of the Regulation, inform the Commission which of their legally protected names or names established by usage they wished to register. Article 17(2) expressly excludes the registration of generic names.

44. The Commission initiated the procedure laid down by Article 17 to facilitate registration of existing names and, after examining the applications, agreed to register the PDOs and PGIs included in the annexes to Regulations (EC) Nos 1107/96, [62] 1263/96 [63] and 123/97. [64]

In the paragraph relating to cheeses in the Annex to Regulation No 1107/96 the name 'feta' is recognized as a PDO in favour of Greece. This means that, after the expiry of the transitional period laid down in Article 13(2) of Regulation No 2081/92, cheese with the name 'feta' may be produced in the EC only in Greece and only in accordance with the Greek rules. The five-year transitional period ended on 25 July 1997, but was extended by Regulation (EC) No 535/97, [65] which provided that the five-year period

62 — Commission Regulation No 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92 (OJ 1996 L 148, p. 1).

63 — Commission Regulation No 1263/96 of 1 July 1996 supplementing the Annex to Regulation (EC) No 1107/96 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92 (OJ 1996 L 163, p. 19).

64 — Commission Regulation No 123/97 of 23 January 1997 supplementing the Annex to Commission Regulation (EC) No 1107/96 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92 (OJ 1997 L 22, p. 19).

65 — Council Regulation (EC) No 535/97 of 17 March 1997 amending Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1997 L 83, p. 3).

would begin on the date of registration of the names, in order to facilitate adjustment by the producers concerned.

## V. Analysis of the questions submitted

Three Member States where feta cheese is produced have brought actions for the annulment of Regulation No 1107/96. The cases in question are C-289/96 *Denmark* v *Commission*, C-293/96 *Germany* v *Commission*, and C-299/96 *France* v *Commission*, now pending before the Court of Justice. At the same time, undertakings producing feta in France, Germany and Denmark have brought three similar actions before the Court of First Instance (Cases T-139/96, T-140/96 and T-141/96) which, by three orders of 20 February 1997, declined jurisdiction in favour of the Court of Justice.

45. The Greek Council of State has referred to the Court three questions concerning the compatibility of the Greek legislation on feta cheese with Articles 30 and 36 of the EC Treaty. The first question is asked in the abstract and refers to the compatibility with those Community rules of national measures which prevent the marketing, under a particular name, of a product different from the products normally sold under that name in the Community. The second question seeks clarification as to whether the products which can be sold in the Community under a particular name must be ascertained having regard to consumers in all the Member States, those of the importing State or those of the State of origin. The third question relates to the differences between Danish feta and Greek feta and to the possible greater weight of the viewpoint of Greek consumers for assessing the matter, given the characteristics of the production and consumption of feta in the Community.

The subject-matter of those actions is not the same as that of the questions referred in the present case since it might be possible for the name 'feta,' although not fulfilling the conditions laid down by Regulation No 2081/92 for a PDO at Community level, to meet the criteria laid down by Community case-law relating to geographical names and therefore to be justified under Article 36 of the Treaty.

46. The need to give a reply which is conducive to determination of the main proceedings means that the questions must be reworded. In my opinion, the questions referred by the Greek Council of State seek from the Court a ruling as to whether national legislation which prevents the marketing in a Member State, under the name

'feta', of a cheese lawfully produced and marketed under that name in another Member State is a measure having equivalent effect, contrary to Articles 30 to 36 of the Treaty.

To answer that question it is necessary, first, to ascertain whether national legislation of that kind is a measure having equivalent effect, contrary to Article 30. If so, the next question is whether such a measure is justified on grounds of public interest covered by Community law and is therefore compatible with it, even though it creates an obstacle to intra-Community trade.

A. *Application of Article 30 of the Treaty*

47. At the time when this dispute arose, there were no common or harmonized rules in Community law in relation to the production and marketing of feta cheese. Directive 79/112 refers only to the labelling and presentation of foodstuffs for sale to the ultimate consumer and Regulation No 1898/87 restricts the name 'cheese' to milk products, although relying basically on national rules. Therefore, each Member State was entitled to lay down in its territory the requirements for the production and marketing of feta. [66]

After the events to which the main proceedings relate, the situation was altered by Regulations Nos 2081/92 and 1107/96, which made 'feta' a PDO in favour of Greece. This means that, from the entry into force of both regulations, the production of that kind of cheese in Community territory was to be limited to certain parts of Greece and was to be in accordance with Greek national provisions.

48. However, the Member States' power to regulate the production and marketing of feta must be exercised within the limits laid down by the Treaty rules on the free movement of goods, particularly Article 30, which prohibits measures having equivalent effect to quantitative restrictions on imports. According to the famous wording of the

66 — The judgment in Case 237/82 *Jongeneel Kaas* [1984] ECR 483, paragraph 13, observes that, 'in the absence of any rule of Community law on the quality of cheese products, the Member States retain the power to apply rules of that kind to cheese producers established within their territory. That power extends not only to rules considered necessary for the protection of the consumer or public health, but also to rules which a Member state may wish to enact for the purpose of promoting the quality of domestic production. Such rules cannot however discriminate against imported cheeses or hinder the importation of products from other Member States.'

*Dassonville* judgment, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having equivalent effect to quantitative restrictions. [67]

With regard to measures applying to national and imported products alike, the scope of the concept of measures having equivalent effect was delimited by the *Keck and Mithouard* judgment, [68] which distinguishes between rules relating to the characteristics of products and rules relating to selling arrangements, in order to identify measures applying without differentiation which have a restrictive effect capable of converting them into measures having equivalent effect. With regard to rules relating to the characteristics of products, the Court followed the case-law beginning with the *Cassis de Dijon* [69] judgment, by observing that 'in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.' [70]

In short, the Court considers that measures applying without differentiation, relating to the characteristics of products, are measures of equivalent effect prohibited by Article 30 if they are not justified by one of the public-interest objectives specified in Article 36 of the Treaty or regarded as an essential requirement by Community case-law. [71]

The *Keck and Mithouard* judgment did not affect the Court's case-law relating to discriminatory measures or measures which distinguish between national and imported products, as these measures are always regarded as having an effect equivalent to quantitative restrictions. [72]

49. The rules in question in this case relate to the characteristics of feta cheese because

67 — See the judgment in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

68 — See the judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

69 — Cited above.

70 — See the *Keck and Mithouard* judgment, cited above, paragraph 15.

71 — This interpretation is confirmed by the judgments after *Keck and Mithouard* concerning measures relating to characteristics of products. See Case C-315/92 *Verband Sozialer Wettbewerb* [1994] ECR I-317; Case C-317/92 *Commission v Germany* [1994] ECR I-2039; *Van der Veldt*, cited above; and Case C-470/93 *Mars* [1995] ECR I-1923.

72 — See the judgments in Case 13/78 *Eggers* [1978] ECR 1935, paragraph 25, and *Pistre and Others*, cited above, paragraph 49.

they regulate its composition, method of production and area of production. The application of those rules has a clearly restrictive effect on intra-Community trade in that product because they impede the marketing in Greece, under the name 'feta', of cheese lawfully produced and marketed under that name in other Member States.

The restrictive effect which the Greek rules have on the free movement of goods is maintained even though they permit feta cheese made in other Member States to be marketed in Greece under a different name, as in the case of cheese made in Denmark from cows' milk by means of the ultra-filtration process. The description 'white cheese in brine made in Denmark, from pasteurized cows' milk', proposed by the Greek authorities in order to permit the marketing in this case of feta cheese imported from Denmark, is a sales description which is not known to or favoured by Greek consumers, so that it would be almost impossible to sell the Danish cheese on the Greek market. The Court's case-law makes it perfectly clear that national measures which require the sales description of an imported product to be changed, by imposing on it a name which is unknown or less favoured by consumers, [73] make the product more difficult to market and, consequently, create obstacles to trade between Member States. [74] I therefore consider that provisions such as those at issue in the main proceedings constitute measures having equivalent effect within the meaning of Article 30 of the Treaty.

B. *Justification of the measure*

50. Rules which constitute measures having equivalent effect are permissible under the Treaty only if, within the framework of Article 30, they are intended to satisfy mandatory requirements relating, in particular, to consumer protection or fair trading, or are justified on one of the public-interest grounds listed in Article 36 of the Treaty, such as the protection of industrial and commercial property. [75] In addition, the rules in question must be proportionate to the desired objective, so that the Member State must choose, from among the possible measures, that which restricts intra-Community trade least.

51. In this case, the public-interest grounds capable of justifying the measures in ques-

73 — See the *Smanor* judgment, cited above, paragraphs 12 to 14, which found that a provision whereby the French authorities only permitted the marketing of an imported product under the name 'deep-frozen fermented milk' instead of 'deep-frozen yoghurt' was a measure having equivalent effect.

74 — See the *'Sekt'* judgment, cited above, the judgment in Case 27/80 *Fietje* [1980] ECR 3839, and the *Miro* and *Exportur* judgments, cited above.

75 — See *Nespoli and Crippa*, cited above, paragraph 14.

tion vary according to whether the name 'feta' is classified as a generic or a geographical name. In the former case, the issues of consumer protection and fair trading would come into play, whereas the protection of industrial and commercial property would be the ground of public interest capable of justifying protection for the geographical name 'feta'. All those grounds have been invoked and discussed in the observations submitted by the plaintiff undertakings in the main proceedings, the Commission, and the intervening Member States (Greece, Denmark, Germany, Finland and Austria).

1. Consumer protection and fair trading

(a) Main argument

52. Consumer protection and fair trading are regarded by the Court's settled case-law as essential requirements capable of justifying domestic legislation which constitutes a measure having equivalent effect. Essential requirements may be relied upon only to justify measures applying without distinction to national goods and goods imported from other Member States. [76]

53. In the present case, the Greek rules in question permit feta cheese to be made only from sheep's and/or goats' milk obtained in certain parts of Greece, namely Macedonia, Thrace, Epirus, Thessaly, Mainland Greece, the Peloponnese and the island of Lesbos. The rules are therefore undoubtedly discriminatory because the sales description 'feta' can be used only for cheese made in particular parts of the national territory with domestic raw materials from those regions.

This means that the legislation in question also prevents the marketing in Greece, under the name 'feta', of cheese made from the same raw materials (sheep's and/or goats' milk) and by the same process (natural straining) in any other Member State and in any part of Greece other than those specified by law. For example, feta made from sheep's milk in Corsica and the French Massif

76 — According to the Court's settled case-law, domestic legislation of that kind, since it is discriminatory in character, may be justified only on one of the grounds mentioned in Article 36 of the Treaty. See the judgments in Case 113/80 *Commission* v *Ireland* [1981] ECR 1625, paragraphs 8 and 11, and in *Pistre and Others*, cited above, paragraph 52.

Central, which is similar to traditional Greek feta, could not be marketed under the name 'feta' in Greece.

54. As the legislation in question is discriminatory, in that the use of the name 'feta' is restricted to cheese produced in certain parts of Greece, it is not justified on the grounds of consumer protection or fair trading which, according to the Court's case-law, are essential requirements that can be relied upon only in relation to measures applying to national and imported products alike.

(b) Other considerations

55. The reasons given above completely rule out the possibility of pleading consumer protection and fair trading in order to justify measures such as those in the present case, so that no further consideration is necessary. However, the terms in which the questions are put and the written observations which have been submitted indicate that the following hypothesis should be examined: if the domestic legislation did not restrict the production of feta to certain parts of Greece and merely required compliance with conditions relating to composition and production for the use of the name 'feta', would the rules be justified on the grounds of consumer protection and fair trading? In that case, clearly, 'feta' would be a generic name.

56. Starting from that hypothesis, the Commission, the Austrian Government and, to some extent, the Greek Government state that there are substantial differences between feta produced in Greece and that made in other Member States, such as Denmark. With regard to the raw material, cows' milk is used in Denmark and the other Member States, whereas in Greece sheep's milk or a mixture of sheep's and goats' milk is used. So far as the production process is concerned, in Greece the traditional method of natural straining without pressure is used, whereas in Denmark and the other Member States the modern ultra-filtration process is used.

Given the existence of these substantial differences between the two cheeses, the authorities of the importing State, Greece in this case, could prevent the marketing within its territory, under the name 'feta', of cheese lawfully produced and marketed in another Member State (Denmark) under the same name in order to protect consumers against

the risk of confusion and to uphold fair trading. In their opinion, this option is supported by the *Déserbais* and the *Smanor* judgments.

57. In my view, those arguments must be dismissed.

58. In many judgments the Court has consistently applied the principle of the mutual recognition of products lawfully produced and marketed in different Member States under the same generic name, provided that the characteristics of the national varieties are properly specified on the labelling of the goods. Adequate labelling protects consumers and upholds fair trading without the need for measures which are more restrictive of intra-Community trade, such as the prohibition of imports or an obligation to market the goods with an unknown name. [77]

59. Nevertheless, in the *Smanor* judgment and an *obiter dictum* in the *Déserbais* judgment, the Court observed that if the imported product differed substantially from those marketed in the Member State of destination under the same name, that State could make the marketing of the product subject to the use of a different name. [78] Neither of those judgments sets out clearly the principles for determining whether there is a substantial difference between two products marketed under the same generic name in different Member States. The *Smanor* judgment mentions the expectations of consumers in the recipient State, the FAO/WHO *Codex Alimentarius* and the law of the recipient State, whilst the *Déserbais* judgment refers to the composition and the manufacture of the products.

For my part, I think those judgments are borderline cases and, if it is found expedient to follow them, they should be construed restrictively. To that end, it is necessary to establish the criteria for determining whether there is a substantial difference between products marketed under the same generic name in different Member States. In that connection the scope of the *Smanor* and *Déserbais* judgments may be extended in the light of the Commission interpretative communication and the references in Regulation No 2081/92 to names which have become generic.

77 — See paragraphs 29 to 34 above.

78 — At a later date there was only a passing reference to this question in paragraph 3 of Advocate General Van Gerven's Opinion in the *Nespoli and Crippa* case, cited above. In footnote 13 Mr Van Gerven distinguishes the measure in question in that case, relating to the use of the generic term 'cheese', from situations in which the name used necessarily presupposes the existence of a typical ingredient or method of production and the product offered for sale is substantially different. He goes on to mention the name 'feta', which was referred to at the hearing.

60. In accordance with the foregoing reasoning, the similarity or substantial difference between Greek feta and Danish feta must, in view of the *Smanor and Déserbais* judgments, be determined by reference to the following criteria:

— Composition and method of production

61. Greek feta is made from sheep's milk or a mixture of sheep's and goats' milk, which are the predominant types of milk in Greece. The raw material used in Denmark for making feta is also milk, but cows' milk, which is the type mainly produced in that country.

Sheep's and goats' milk, which are very similar to each other, have different chemical and organoleptic characteristics from cows' milk, as demonstrated by the Greek Government, Canadane and Adelfi Kouri in their respective observations. Those differences are manifested in feta in the following ways:

— Feta made from sheep's milk is pure white, whereas that from cows' milk is a yellowish white, which can be made pure white only by the use of chemical substances.

— Sheep's milk feta has an oily, salt, slightly acid taste and a strong aroma, whereas cows' milk feta has less aroma and a sweeter taste.

— Cows' milk feta has fewer holes than that made from sheep's milk because the effect of the brine is different.

62. With regard to the production method, Danish feta is made by the industrial ultra-filtration process, while Greek feta is made by the traditional method of natural straining without pressure. The cheese matures faster with ultra-filtration because the whey is removed before the curds are formed. However, it does not appear that ultra-filtration has a very different effect on feta from that produced by the natural straining process, apart from the retention of the proteins in the whey.

— International standards

63. In 1988, under the FAO/WHO *Codex Alimentarius*, Greece applied for the adoption of a technical standard for the production of feta cheese which would have permitted it to be made only from sheep's and goats' milk. Enquiries showed that in most producer countries feta was made from cows' milk and that in countries where sheep's and goats' milk predominated in the composition of feta, cows' milk feta also existed. This inconsistent situation led to the rejection of Greece's application. [79]

— Legislation and consumer expectations in the importing country

64. In 1987 the Greek Government adopted restrictive measures relating to feta, permitting the marketing only of feta made from sheep's milk or a mixture of sheep's and goats' milk, using the method of natural straining without pressure. Those rules purport to protect the traditional Greek method of producing feta, although before they were adopted cows' milk feta could also be marketed in Greece. Consequently Greek consumers normally identify feta with the cheese traditionally produced from sheep's and/or goats' milk by the method of natural straining without pressure.

— Legislation and consumer expectations in the other Member States

65. Greece is the only Member State of the EC which has restrictive national legislation concerning the production and marketing of feta. There are provisions relating to this type of cheese in Denmark, Germany and the Netherlands which permit it to be made from cows' milk, sheep's and/or goats' milk, or a mixture of these by means of ultrafiltration or straining, but those rules have not created restrictions on the sale of feta produced in other Member States. France merely requires the type of milk used to be specified. In the other Member States there is no specific legislation and no restrictions apply to the sale of feta, whichever type of

79 — See the report adopted at the 22nd session of the Joint FAO/WHO Committee of Government Experts on the Code of Principles concerning Milk and Milk Products, held in Rome from 5 to 9 November 1990.

milk is used. Therefore consumers in all the Member States of the EC, except Greece, regard feta as being made with cows' milk or sheep's and/or goats' milk.

67. The application of most of the criteria leads to the conclusion that there is no substantial difference between sheep's and/or goats' milk feta and feta made from cows' milk. The situation in international law, the references in Community legislation and the domestic legislation of all the Member States, except Greece, and the expectations of consumers in all the Member States show that feta may be made from sheep's, goats' or cows' milk without giving rise to differences in the individual varieties of feta which would be so substantial that they could not be brought to consumers' attention by means of adequate labelling.

— References in Community legislation

66. In 1975 the Community began to grant refunds on the export of feta to non-member countries, irrespective of the kind of milk used to make the cheese. Since Greece joined the Community, the nomenclature of agricultural products for export refunds has distinguished various types according to the milk used. [80] The nomenclature of the Common Customs Tariff distinguishes between feta made from sheep's milk or buffalo milk and others, [81] although the same customs duties are laid down for both.

The Commission contends that the Greek concept of feta is the best known in the Community and therefore considers that it is compatible with the principle of proportionality for the Greek authorities to prevent the marketing in Greece under the name 'feta' of cheese which is marketed under that name in other Member States but differs substantially from Greek feta in that it is made from cows' milk by the ultra-filtration process. The arguments put forward by the Commission contradict the Court's settled case-law to the effect that consumers' conceptions may vary from one Member State to another and are also likely to evolve in the course of time within the same Member State, one of

80 — See Commission Regulation (EEC) No 3846/87 of 17 December 1987 establishing an agricultural products nomenclature for export refunds, OJ 1987 L 366, p. 1.

81 — Commission Regulation (EC) No 3009/95 of 22 December 1995 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1995 L 319, p. 1). The nomenclature refers to feta as follows:
'Feta:
0406 90 31 — of sheep's milk or buffalo milk in containers containing brine, or in sheep or goatskin bottles [...]
0406 90 33 — other [...]'.

the factors in that development being the establishment of the Common Market. Thus, the Court has observed that, 'the legislation of a Member State must not crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them'. [82]

68. The legislation in issue in the main proceedings restricts the use of the name 'feta' to cheese made in accordance with the rules in force in the importing Member State. The protection of consumers against the risk of confusion and the upholding of fair trading do not justify such a restriction, according to the Court's case-law, because adequate labelling permits those objectives to be attained in a way which has less effect on intra-Community trade.

Labelling clearly showing the characteristics of the feta made in Denmark would have given Greek consumers exact information on the type of feta they were buying, thus enabling them to decide, in full knowledge of the facts, whether they wished to give preference to the national variety of feta. In a recent judgment concerning a German law which required the ingredients differing from those used in Germany to be shown beside the trade description, although they were mentioned in the list of ingredients, the Court observed that 'consumers, whose purchasing decisions depend on the composition of the products in question, will first read the list of ingredients [...]. Even though consumers may sometimes be misled, that risk remains minimal and cannot therefore justify the hindrance to the free movement of goods created by the requirements at issue'. [83] In addition, it is open to Greek producers to include on the labelling of feta made from sheep's and/or goats' milk the details necessary to draw the attention of Greek consumers to the quality of their product with the object of neutralizing the competitive advantage of imported feta, owing to the lower price of cows' milk and the use of the ultrafiltration process. [84]

2. Protection of industrial and commercial property

69. Before considering whether 'feta' is a geographical name and whether its preservation is justified by the protection of industrial and commercial property referred to by

82 — See the judgments in Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417, and Case 178/84 *Commission* v *Germany* (the '*Beer*' case), cited above, paragraph 32.

83 — See the judgment in Case C-51/94 *Commission* v *Germany* [1995] ECR I-3599, paragraph 34.

84 — See the judgment in Case C-51/94, cited above, paragraph 36.

Article 36, two very important points must be stressed:

— The only issue in the present case is whether the sales description 'feta' in the framework of the domestic law of a Member State, Greece in this case, is generic or geographical in character. The registration of the sales description 'feta' as a PDO in favour of Greece, as laid down by Regulation No 1107/96, and the resulting monopoly, in favour of Greek producers, of that name throughout the Community are the subject of dispute in a number of actions pending before the Court. [85]

— As the Court observed in the *Exportur* judgment, [86] the protection of geographical names is governed by the principle of territoriality, so that the law of the importing country is applicable, together with the factual circumstances existing in it. The law of the country of origin is irrelevant for this purpose and therefore a name may be generic in the country of origin and constitute a protected geographical name in the importing country. In the present case, regard must be had to the Greek legislation and the circumstances of the production and marketing of feta in Greece.

70. Having made these points, I find that, with the exception of Greece, the Member States which have submitted observations, and the undertakings Canadane and Adelfi Kouri, consider that the name 'feta' has become a generic term which designates the white cheese in brine made from sheep's, goats' and/or cows' milk. Therefore they take the view that the Greek provisions at issue in the main proceedings unlawfully reserve use of the generic term 'feta' for national producers and therefore constitute a measure contrary to Article 30 that is not justified on grounds of the protection of industrial and commercial property.

The Commission took the same view in the reasoned opinion which it sent the Greek Government on 18 May 1992. According to the Commission, 'feta' was a generic name and the cheese made in Greece could not be protected by means of a designation of origin or indication of provenance because it had no specific characteristics originating in the geographical location of production. The Commission did not bring an action before

85 — The outcome of these actions will not necessarily be the same: 'feta' may be found to be a geographical name in Greece at the material time, and it is possible that Regulation No 1107/96 might be annulled by the Court on the ground that the name 'feta' does not fulfil the conditions laid down by Regulation No 2081/92 to constitute a PDO at Community level.

86 — See the judgment in Case C-3/91, cited above, paragraph 12.

the Court for failure to fulfil Treaty obligations because that question was bound up with procedures that were under way for recognition by the Community of the geographical indications and designations of origin of foodstuffs provided for by Regulation No 2081/92. Those procedures culminated in the adoption of Regulation No 1107/96, in which the Commission changed its mind and concluded that 'feta' was a protected designation of origin belonging to Greece.

In reply to a written question from the Court, the Greek Government, for its part, contended that the legislation in question restricts feta production to a particular geographical part of Greek territory, the characteristics of which determine the properties of that type of cheese, from which it follows that 'feta' is a geographical indication.

71. The Court has consistently held that the protection of industrial and commercial property provided for by Article 36 of the Treaty may justify restrictions on the free movement of goods, deriving from national rules protecting geographical names, provided that those rules are intended to safeguard rights which constitute the specific subject-matter of such names. [87]

In my opinion, the national rules in the present case are justified by Article 36 because they aim to safeguard the rights which constitute the specific subject-matter of the name 'feta', a geographical indication which can be protected by law.

72. It seems to me that the name 'feta', as it appears to be regulated by the Greek legislation, fulfils the conditions laid down by Community case-law for a trade name of a food product to be regarded as a geographical name. [88] Since the *Exportur* judgment, I consider that a name is geographical if it indicates directly or indirectly the origin of the product, if the product has special characteristics or a quality and reputation peculiar to it, if the use of the name is protected by law and if the name has not suffered an irreversible process of generalization. In the present case, the use of the name 'feta' in Greece meets those conditions.

73. Firstly, the name 'feta' indicates indirectly the geographical origin of the cheese marketed in Greece under that name. In the same way that the names 'grappa', 'ouzo' and 'cava' allude indirectly to the Italian, Greek and Spanish origins of those products made in specific regions, although none of them is a place name, the name 'feta' is

87 — See the judgment in Case C-3/91, cited above, paragraphs 23 to 25.

88 — See paragraphs 35 to 37 above.

associated with a cheese made in Greece, even though the word 'feta' is of Italian origin. Consequently it is an indirect geographical name. [89]

The geographical area where feta is produced covers Macedonia, Thrace, Epirus, Thessaly, mainland Greece, the Peloponnese and the island of Lesbos. It accounts for the greater part of Greek territory as it excludes only Crete, the Cyclades, the Northern Sporades, the Dodecanese and the eastern islands of the Aegean, where sheep's and/or goats' milk is used to make traditional cheeses other than feta.

The size of the area where feta is produced does not preclude classifying it as a geographical name because the restrictive approach originally taken by the Court in the *Sekt* [90] judgment was modified in the *Exportur* judgment, by virtue of which a geographical name may extend to the entire territory of a country. [91]

74. Secondly, feta cheese produced in those regions of Greece has certain specific characteristics and a quality which gives it a high reputation among Greek consumers. In reply to a written question from the Court, the Greek Government stated that the specific characteristics (smell, flavour, aroma, texture) of traditional Greek feta are attributable to the following factors:

— the climatic conditions common to the area of production, and the richness and variety of its vegetation;

89 — Article 2(3) of Regulation No 2081/92 permits the protection of indirect geographical names by providing that 'certain traditional geographical or non-geographical names designating an agricultural product or a foodstuff originating in a region or specific place, which fulfil the conditions referred to in the second indent of paragraph 2(a), shall also be considered as designations of origin'.

90 — In the *Sekt* judgment, cited above, paragraph 8, the Court took the view that the area of origin of a geographical name 'must show homogeneous natural features which distinguish it in contrast to adjacent areas, so that an area of origin which is defined on the basis either of the extent of national territory or a linguistic criterion cannot justify an indication of origin'. This was found to apply to the names 'Sekt' and 'Weinbrand', deemed by the German legislation to be indirect indications of origin which designate products originating from the whole of the Federal German Republic or from countries where German is an official language.

91 — See the *Exportur* judgment, cited above, paragraph 11. Article 2(2) of Regulation No 2081/92 also accepts that a designation of origin or a geographical indication may, in exceptional cases, cover the whole territory of a State.
For the significance of this change in the case-law, see O. W. Brouwer, 'Annotation of Case C-3/91 *Exportur SA* v *LOR SA and Confiserie du Tech*', *Common Market Law Review*, 1993, p. 1209 ff.

— the milk used for making feta, obtained from sheep and goats in the area of production, reared and fed by traditional methods;

— the method of producing feta, which still uses the traditional system of natural straining without pressure, and is applied by experienced producers.

75. In their observations, the undertakings Canadane and Adelfi Kouri, and the German, Austrian and Danish Governments consider that the Greek rules relating to feta conflict with the Court's case-law in the *Sekt* judgment, because Greek feta does not possess characteristics and qualities originating from the geographical location of the place of production. [92] They contend that its geographical origin does not endow it with specific characteristics which permit feta to be distinguished as a typical product of the Greek regions indicated in the contested legislation.

That argument cannot succeed, because in the *Exportur* judgment the Court clarified the implications of the *Sekt* judgment and accepted that designations of provenance may be used for products in relation to which it could not be shown that their flavour, qualities and characteristics were attributable to the geographical location of the place of production, but that they may enjoy a high reputation amongst consumers and constitute, for producers established in the places to which such names refer, an essential means of attracting custom. [93] This clarification of Community case-law seems to me entirely correct because the requirement of an express link between the product and the '*terroir*' would preclude protection for many geographical names because modern production techniques enable almost any product to be made anywhere. It would be perfectly possible to make 'Turrón de Jijona' in Perpignan or Stockholm, but that is a traditional name successfully used by the producers of a particular region and it is therefore a geographical name which may be protected by law, in accordance with the *Exportur* judgment. The situation is rather similar with regard to the name 'feta'. Although it is open to debate whether Greek feta has specific characteristics attributable to its place of production and whether cheese of that kind can be produced only in certain parts of Greece, it seems to me beyond doubt that in Greece the name 'feta' has a high reputation among consumers and enables the cheese producers who have been using it for a long time to keep a great many customers.

76. Thirdly, use of the name 'feta' was protected by Greek domestic law. The measures

92 — See the '*Sekt*' judgment, cited above, paragraph 7.

93 — See the *Exportur* judgment, cited above, paragraphs 27 and 28.

adopted in 1987 laid down technical conditions for the production and marketing of feta in Greece and compliance with them was subject to administrative supervision. Those measures safeguarded producers' interests against unfair competition and protected consumers against the use of names which might have misled them.

At the material time, the Greek legislation protecting the name 'feta' regarded it as a traditional name and, subsequently, Presidential Decree 81/1993 protected it expressly as a designation of origin. In view of the considerable diversity of the terminology relating to the different kinds of geographical name, I take the view that the Greek measures in force at the material time protected the name 'feta' as an indirect indication of provenance, in accordance with the terminology used in the Court's case-law. [94]

77. Fourthly, in Greece the name 'feta' has not undergone an irreversible process of erosion which might have changed it into a generic name.

In their observations, Canadane, Adelfi Kouri and the German, Austrian and Danish Governments submit that 'feta' has become a generic name, even in Greece itself. In their opinion, the legislation in question artificially converted 'feta' into a geographical name with the object of favouring national producers; before that time, it was used generically in Greece to refer to the various types of white cheese in brine made throughout Greece from sheep's, goats' or cows' milk. The name 'feta' was also used for marketing various types of cheese imported from other Member States. The plaintiffs in the main proceedings consider that the Greek State had allowed use of the name 'feta' to become generalized and that it was too late to adopt measures to protect the geographical character of the name, which had become generic.

I am not persuaded by those arguments. I do not think that the name 'feta' has undergone 'erosion' like that suffered by the sales descriptions of other cheeses produced and consumed in large quantities in almost all the Member States of the EC. For example, the names 'parmesan', 'edam', 'gouda' and 'mozzarella' have become generic terms for different kinds of cheese and only certain regional varieties may be protected by law as geographical names, such as 'Mozzarella di Bufala Campana', 'Parmigiano Reggiano' and 'Noord-Hollandse Gouda'. My reasons

94 — See the account of indications of provenance in the *Exportur* judgment, cited above, paragraphs 11 and 28.

for reaching this conclusion include the following:

— In 1987 Greece began to enact legislation designed to protect the name 'feta' as a geographical name. Furthermore, Regulation No 1107/96 lays down the same criterion and confers the status of PDO on 'feta' at Community level in favour of Greece, although several actions are pending before the Court for the annulment of the regulation on that ground. One of the factors taken into account by the Commission in drafting Regulation No 1107/96 was a Community consumer survey in 1994. That survey [95] shows that most Greek consumers consider 'feta' to be a geographical name designating a cheese originating from Greece. In addition, surveys in all the Member States aware of the existence of feta, except Denmark, show that most people think that it is a cheese of Greek origin.

— The consumption of feta in the EC is overwhelmingly concentrated in Greece, which accounted for between 70% and 85% of the total in the period 1988-92. Furthermore, most Greek consumers buy feta made in Greece from sheep's and/or goats' milk. In the other Member States feta is little known and consumption is rather limited.

— Greece is the principal feta producer in the EC (almost 50%), although production is intended mainly for domestic consumption. The last three decades have seen the development of large-volume production of feta made from cows' milk in other Member States, particularly Denmark (approximately 40% of Community production), most of which is exported to non-member countries and has not generated any appreciable domestic consumption in the Member States concerned. Producers in Denmark and the other Member States cannot contend that their feta production constitutes an existing, long-standing, fair and traditional practice within the meaning of the *Prantl* judgment, [96] which must be respected by Greece, because in those countries 'feta' was not an indirect geographical name. [97]

95 — In the '*Sekt*' judgment, cited above, paragraph 12, the Court stressed the difficulties inherent in surveys of that kind and was circumspect as regards the weight to be attached to them for determining the existence of a geographical name.

96 — See the judgment in Case 16/83, cited above, paragraph 30.

97 — The *Exportur* judgment, cited above, paragraph 34, made it clear that the *Prantl* judgment referred to situations where an indirect indication of national provenance coexisted with an indirect indication of foreign provenance.

For these reasons I am persuaded that the name 'feta' has not undergone a process of generalization similar to that affecting the names of other types of cheese. The production, in other Member States of the EC, of a variety of feta different from that which predominates in Greece may have converted the name 'feta' into a generic term in those States, but it cannot be said that this has had any repercussions on the Greek domestic market, where consumers have preferred the traditional feta made in various parts of Greece.

78. Therefore I consider that legislation of a Member State intended to protect the rights which constitute the specific subject-matter of a geographical name, such as 'feta', are justified on the ground of protection of industrial and commercial property referred to in Article 36 of the Treaty.

## VI. Conclusion

79. Accordingly I propose that the Court reply as follows to the questions referred to it by the Greek Council of State:

(1) Legislation of a Member State which prevents the marketing, under the sales description 'feta', of a cheese lawfully produced and marketed under that name in another Member State is a measure having equivalent effect to a quantitative restriction, contrary to Article 30 of the EC Treaty.

(2) Legislation of a Member State which restricts to national products the use of the name 'feta' is not justified on the grounds of consumer protection or fair trading.

(3) Legislation of a Member State intended to protect the rights which are the specific subject-matter of a geographical name, such as the name 'feta', is justified on the ground of protection of industrial and commercial property referred to in Article 36 of the EC Treaty.