JUDGMENT OF THE COURT
16 July 1992 *

In Case C-293/89,

Commission of the European Communities, represented by E. White, of its Legal Service, assisted by S. Karalis, a member of the Greek Council of State, seconded to the Commission's Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic, represented by A. Ampariotou, Advocate, Legal Adviser Class A in the Ministry for Foreign Affairs, Community Contentious Matters, acting as Agent, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix

defendant,

APPLICATION for a declaration that, by banning imports of cheeses lawfully manufactured and marketed in other Member States, to which nitrate has been added in the course of the production process within the limits accepted in international scientific circles (50 mg per kg), the Hellenic Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty,

* Language of the case: Greek.

THE COURT,

composed of: O. Due, President, R. Joliet, F. A. Schockweiler, F. Grévisse and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, G. C. Rodriguez Iglesias, M. Diez de Velasco and M. Zuleeg, Judges,

Advocate General: C. Gulmann,
Registrar: D. Triantafyllou, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 26 February 1992, at which the Commission was represented by X. Giataganas, of its Legal Service, and the Hellenic Republic by D. Raptis, State Legal Adviser, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 April 1992,

gives the following

Judgment

By application lodged at the Court Registry on 21 September 1989 the Commission of the European Communities brought an action, pursuant to Article 169 of the EEC Treaty, for a declaration that, by banning imports of cheeses lawfully manufactured and marketed in other Member States, to which nitrate had been added within the limits accepted in international scientific circles (50 mg per kg), the Hellenic Republic had failed to fulfil its obligations under Article 30 of the EEC Treaty.

2 In some Member States nitrate is added to various types of cheeses in the course of their manufacture in order to eliminate certain bacteria which would make the cheeses swell up abnormally.

3 Decision No 1100/1987 of the Greek Chemistry Council on the Food, Drinks and Commodities Code (*Official Gazette of the Hellenic Republic* of 31 December 1987, No 788, B series) provides that no chemical additives whatsoever may be used in the preparation of foodstuffs and that no foodstuffs containing such additives may be made available for consumption without authorization granted by that body. No authorization pursuant to that decision has been given by that body for the use of nitrate in the manufacture of cheeses. Consequently neither the use of nitrate in the preparation of cheeses nor the marketing of cheeses containing nitrate is authorized in Greece.

4 In Community law nitrate is mentioned in Point II of the list of additives annexed to Council Directive 64/54/EEC of 5 November 1963 on the approximation of the laws of the Member States concerning the preservatives authorized for use in foodstuffs intended for human consumption (OJ, English Special Edition 1963-1964, p. 99), as amended by Council Directive 67/427/EEC of 27 June 1967 on the use of certain preservatives for the surface treatment of citrus fruit and on the control measures to be used for qualitative and quantitative analysis of preservatives in and on citrus fruit (OJ, English Special Edition 1967, p. 169)

5 The inclusion of nitrate on the list in question indicates that it is one of the additives whose use in foodstuffs may be authorized by the Member States and that it is for them to determine the conditions governing such use.

6 Reference is made to the Report for the Hearing for a fuller account of the national legislation, the procedure, the forms of order sought by the parties and their arguments, which are mentioned hereinafter only in so far as is necessary for the reasoning of the Court.

7 In this case the Commission complains that the Hellenic Republic prohibits the importation of cheeses from other Member States on the ground that they contain nitrate. According to the Commission, the importation of foodstuffs manufactured in another Member State containing an additive included on the Community list must be authorized provided it does not present any danger to public health and meets a genuine need, in particular a technological need. The results of international research show that nitrate fulfils those requirements.

8 In deciding on this action it should be recalled that according to the case-law of the Court (see Case 247/84 *Motte* [1985] ECR 3887, at paragraph 25; Case 304/84 *Muller* [1986] ECR 1511, at paragraph 26; and Case C-42/90 *Bellon* [1990] ECR I-4863, at paragraphs 16 and 17), rules making the use of an additive subject to authorization are in compliance with Community law if two conditions are satisfied.

9 First, the rules must make provision for a procedure enabling traders to have the additive included on the national list of authorized additives. The procedure must be one which is readily accessible, can be completed within a reasonable period, and, if it leads to a rejection, that rejection must be open to challenge before the courts.

10 Secondly, an application to have an additive included on the list in question may be rejected by the competent administrative authorities only if the additive does not meet any genuine need, in particular a technological need, or presents a danger to public health.

11 As far as technological need is concerned, according to the Court's consistent case-law (see the 'Purity requirement for beer case' Case 178/84 *Commission* v *Germany* [1987] ECR 1227, at paragraph 52), in evaluating the need to use an additive account must be taken of the findings of international scientific research and the assessment made by the authorities of the other Member States.

12 It is not sufficient, for the purpose of showing that an additive does not meet a genuine need, to rely on the fact that a product could be manufactured using another substance. Such an interpretation of the concept of technological need could result in favouring national production methods, which would constitute a disguised means of restricting trade between Member States (see the 'Purity requirement for beer case', cited above, at paragraph 51, and Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617, at paragraph 28).

13 With regard to the safeguarding of public health, the Court has held (see in particular *Muller*, at paragraph 26, and *Bellon*, at paragraph 17) that the existence of a risk arising from the use of an additive must be assessed in the light of international scientific research, in particular the work of the Scientific Committee for Food, and the eating habits in the Member State concerned.

14 It follows from the judgments cited above that in a case such as this a Member State may be regarded as having failed to fulfil its obligations in the matter of additives pursuant to Articles 30 and 36 of the Treaty only if it has failed to set up a procedure complying with the requirements set out in paragraph 9 above or its authorities have unjustifiably rejected an application for inclusion of a substance on the list of authorized additives.

15 In the present case it should be noted that the abovementioned Greek decision introduced for additives a system comprising a ban, subject to the possibility of authorization, that applied equally to additives in foodstuffs from Member States where they were lawfully manufactured and marketed.

16 The Commission has not claimed either that the procedure set up by that decision was contrary to Community law or that, before it brought the present action, the Greek authorities had rejected an application from one or more traders for inclusion of nitrate on the list of authorized additives.

17 In the circumstances the Commission's action must be dismissed.

Costs

18 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the Commission's action;

2. Orders the Commission to pay the costs.

Due Joliet Schockweiler Grévisse

Kapteyn Mancini Kakouris

Moitinho de Almeida Rodríguez Iglesias Diez de Velasco Zuleeg

Delivered in open court in Luxembourg on 16 July 1992.

J.-G. Giraud — Registrar

O. Due — President