trative authorities only if it does not meet any genuine need, in particular a technological need, or presents a danger to public health.

Accordingly, a Member State which prohibits, except with authorization, the importation of a given foodstuff from other Member States on the ground that it contains a specific additive, may be regarded as having failed to fulfil its obligations under Articles 30 and 36 of the Treaty only if it has failed to set up a procedure complying with those requirements or its authorities have rejected for no good reason an application from one or several traders for inclusion of the substance concerned on the list of permitted additives.

REPORT FOR THE HEARING
in Case C-293/89 *

I — Facts and legal background

Article 7(1) of Decision No 3000/1970 of the Chemistry Council on the Food, Drinks and Commodities Code (*Official Gazette of the Hellenic Republic* of 24 August 1971, No 677, B series) provided:

'Food products imported for retail sale and any substance or preparation intended to improve their quality must comply with the conditions and provisions of the present Code and Greek law in general applicable to products of Greek origin.'

Article 29 provided:

'1. Pursuant to the definition in Article 2, "additives", shall include substances serving generally (apart from colorants) to preserve the products to which they are added either directly (as for example microbicidal or antioxidant preservatives) or indirectly by improving or stabilizing certain natural properties or the natural state of products, or regulating their acidity so as to prevent the development of micro-organisms or other changes and having generally a beneficial effect on their organoleptic properties and on their preservability in an unchanged state during storage or processing.

* Language of the case: Greek.

2. Depending on their action and the precise objective of their use a distinction shall be made between the following types of additive:

(a) preservatives; (b) anti-oxidants; (c) emulsifiers, stabilizers and gelling agents; (d) acids and bases; (e) improving agents for flours; (f) colorants; (g) other additives.

...

4. The addition to a foodstuff of an additive mentioned in the present chapter and not expressly mentioned in the articles of the present Code concerning that foodstuff may be authorized only after approval by the Chemistry Council and in the absence of any such approval it shall be regarded as a dangerous practice from the point of view of public health and shall be prosecuted as such.'

Finally, Article 83 of the Code defines cheese as:

'1. ... the product obtained from milk, partly skimmed-milk, cream or their mixture, by refining strained curd to the desired proportion and resulting from the action of rennet or other active enzymes (or from acidification) to which nothing has been added apart from kitchen salt, sodium sorbate, as a preservative to a maximum of 0.2%, and certain substances specially provided for in the manufacturing process of each type of cheese, such as:

(a) the following harmless colouring agents: saffron, curcuma, carotene, Rocou or Annato;

(b) cultures of bacteria or moulds specific to each type, which give cheeses their specific organoleptic characteristics;

(c) chlorophyll, which may be added only to cows' milk intended for the manufacture of cheese.'

Decision No 3000/1970 was replaced by Decision No 1100/1987 of the Chemistry Council (*Official Gazette of the Hellenic Republic* of 31 December 1987, No 788, B series). The latter decision contains provisions similar to those of Decision No 3000/1970.

Subsequently Article 83 of Decision No 1100/1987 was amended by Decision No 2109/1988 of the Chemistry Council

(*Official Gazette of the Hellenic Republic* of 13 December 1988, No 892, B series). Article 83 is worded as follows:

'Cheese products

A. Cheeses

1. Cheeses obtained by refining milk

1.1. Definition:

Such cheeses are products obtained by refining, strained curd to the desired proportion and prepared with rennet or other enzymes acting on the milk (fresh or pasteurized from cows, sheep, goats, buffalo, or mixture thereof) or on partially skimmed milk or a mixture thereof and/or a mixture of the latter with the cream of milk (cream).

NB: The presence of nitrates or nitrites is justified and allowed only as natural substances and within the following limits:

sodium and potassium nitrate (E 251, E 252)	10 mg/kg (expressed as nitrate ions)
sodium and potassium nitrite (E 249, E 250)	2 mg/kg (expressed as nitrous ions)

(Decision No 1853/86 of the Chemistry Council, *Official Gazette of the Hellenic Republic* of 25 June 1987 No 319 B series).

It is clear from those provisions that the importation and marketing of cheeses containing nitrate additives is banned in Greece. However, in spite of that ban, imports were tolerated until May 1986. From that date cheeses from other Member States were subjected to health inspections intended to detect any presence of nitrates. Those inspections led to the blocking of a certain number of lorries at frontier posts. The importation of cheeses was prohibited if analysis revealed any amount of nitrate, even if it were only natural residue. The Commission thereupon requested the Greek Government to provide certain information.

On 28 July 1986, the Greek Government informed the Commission that its law banned the use of nitrates on the ground that they were carcinogenic. Furthermore it stated that as regards the consignments which had recently arrived in Greece, the cheeses had been placed in cold storage until the question had been settled by the competent ministries.

On 20 August 1986 the Commission sent the Hellenic Republic a letter of formal notice. The Commission considered that the systematic inspection of cheeses naturally containing nitrates and the blocking of lorries constituted measures equivalent to quantitative restrictions prohibited by Article 30 of the Treaty and not justified under Article 36.

As regards cheeses to which nitrates had been added, however, the Commission requested the Greek Government to show, having regard to national eating habits and the results of international scientific research, that the banned substance, even though it met a technological need, presented a risk to human health.

On 22 September 1986 the Greek Government replied that it had not undertaken any deliberate action to obstruct the free movement of the products in question. It nevertheless admitted that certain lorries had been delayed for the purposes of inspections intended to detect the presence of nitrates in cheeses. In the Government's opinion a distinction should be made between cheeses naturally containing nitrate and those to which nitrate had been added. The former could be imported provided their nitrate content did not exceed that allowed in domestic production. The latter, however, could not be imported for reasons of public health. There was a link between the consumption of nitrate and cancer of the stomach.

On 10 June 1988 the Hellenic Government forwarded the Commission a table showing that in Greece the average daily intake of nitrate was 1720.23 mg. It nevertheless observed that that figure could not be determined precisely, because there were no data on the nitrate content of all foodstuffs or on the consumption of the reference products.

On 25 October 1988 the Commission issued a reasoned opinion in which it withdrew its complaint regarding the marketing ban on cheeses containing natural residues of nitrate on the ground that such products had been allowed by Decision No 1853/86 of the Chemistry Council (*Official Gazette of the Hellenic Republic* of 24 June 1987, No 319 B series). On the other hand it maintained its complaint in relation to the import ban on cheeses to which nitrates had been added during manufacture. Such a ban constituted a measure equivalent to a quantitative restriction prohibited by Article 30 of the Treaty and not justified by Article 36. In the absence of any effective measures to reduce the intake of nitrate, especially that contained in vegetables, the ban also constituted arbitrary discrimination prohibited by the second sentence of Article 36.

On 10 January 1989 the Greek Government stated that Decision No 1853/86 fixed the level of nitrate regarded as natural residue in all categories of cheese as 10 mg/kg; in fact the content was 15 mg/kg since the Chemistry Council had, in individual cases, granted marketing licences in respect thereof. Since it was impossible to determine the source of nitrate there was no longer any obstacle to the importation of cheeses with a low nitrate content.

The Greek Government stated that the ban on nitrate as an additive fulfilled a requirement for the protection of public health, since nitrate was transformed into nitrite and then into carcinogenic nitrosamines. In reply

to a parliamentary question the Commission acknowledged that situation since it had a report drawn up on the use of the additive.

The Commission maintained its point of view and brought the present action.

II — Procedure

The Commission's application was registered at the Court Registry on 21 September 1989.

The procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. It did, however, decide to put a question to the Hellenic Republic. The reply to that question is set out in Point IV of this Report.

The *Commission* claims that the Court should:

— declare that, by banning the importation of cheeses lawfully produced and marketed in other Member States, to which nitrate has been added during the production process within the limits permitted by international scientific opinion (50mg per kg), the Hellenic Republic has failed to fulfil its obligations under Article 30;

— order the Hellenic Republic to pay the costs.

The *Greek Government* contends that the Court should:

— dismiss the application;

— order the Commission to pay the costs.

III — Arguments of the parties

The *Commission* states that the contested rules allow a 10 mg/kg nitrate content as natural residue. It has three observations with regard thereto. In the first place such acceptance does not remove the obstacle to trade referred to by the Commission. In the second place the Greek Government may not claim that in practice 15 mg/kg is accepted when it is fixed at 10 mg/kg. Thirdly, only nitrate residues are accepted and not nitrate as an additive. Although they are impossible to distinguish by analysis, it is nevertheless possible to determine their source. The addition of nitrate to cheese must be indicated on the labelling pursuant to Article 6 of 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). The addition of nitrate may also be checked by requesting the manufacturer for information or by inspections carried out by the national authorities where the cheese is made.

The Commission states that, according to the case-law of the Court, Member States may, by a measure of general scope, authorize on their territory the use of particular additives either in all products, in certain products, or for certain purposes.

Having regard to the results of international scientific research and the eating habits in the importing Member State, the use of an additive must be authorized if it meets a genuine technological need and presents no danger to public health.

As regards technological need, the addition of nitrate is justified by the need to inhibit certain anaerobic organisms which cause the formation of gas and unpleasant odours. Furthermore the Greek Government implicitly admits that the substitution methods to which it refers, namely the use of lysozymes and bactofugation, do not constitute as effective a remedy as nitrate in respect of the problem of late blowing of cheeses.

As regards public health, the Commission maintains that nitrate intake in Greece is far from reaching the acceptable daily intake laid down by the Food and Agriculture Organization (300 mg/day). In that respect it relies on a report of the Italian Health Council of November 1980 which assesses nitrate intake at 245 mg/day in Italy, a country with consumer habits and climate similar to those of Greece. In any event the consumption of cheese containing nitrate involves a negligible (less than 1%) increase in the daily consumption of nitrate.

The Greek authorities have assessed the average daily intake of nitrate as 1720.23 mg/kg. There are four grounds to indicate that that figure is not based on genuine scientific data. First the Greek Government admits that it has no analytical data concerning the nitrate content of all the reference foodstuffs or their consumption. Secondly the statistics on which it relies relate to total sales of products intended for consumption divided by head of population and not to actual consumption. Thirdly the nitrate content taken for each of the foodstuffs in the index is not a genuine average but maximum values based on the limit fixed by the national rules for the products in question. Fourthly the average nitrate content of vegetables (2500 mg/kg) is very much exaggerated.

The import ban is thus a completely disproportionate and unjustified obstacle to trade from the point of view of Article 36 of the Treaty. In the absence of any measure to reduce the natural intake of nitrates, in particular those found in vegetables in the production of which fertilizers have been used, the ban also constitutes discrimination prohibited by the second sentence of Article 36.

The *Greek Government* states that the Decision No 1853/85 of the Chemistry Council authorizes a residual nitrate content of 10 mg/kg. However since analysis cannot determine the source of nitrate, the accepted level also includes additives. The limit is moreover in practice increased to 15 mg/kg. The Greek Government points out that the Commission is not seeking the removal of all rules on a maximum nitrate content in cheese since it allows the limit of 50 mg/kg accepted by the legislation of several Member States. It is only in so far as the limit laid down by a State causes obstacles to imports that it is prohibited under Community law. That is not so in the present case since the limit provided for by the Greek rules allows the import of most cheeses.

The addition of nitrate is not justified by a technological need. There are other harmless substances and other methods which enable the same result to be achieved. If lysozyme is used, or in certain cases if it is used in conjunction with a small quantity of nitrate, it will prevent the late blowing of cheese. Alternatively, bactofugation destroys up to 90% of the spores in milk.

The rules in question are based on considerations relating to the protection of health. The toxicity of nitrate is not contested in scientific circles or by the World Health Organization. Three factors confirm that point of view. First, the absence of harmonization of legislation on the subject indicates the circumspection of the Community legislature. Secondly the Council recently referred the problem to the Scientific Committee for Food. Thirdly, it is accepted that nitrates are responsible for the formation of carcinogenic nitrosamines. It is, in general, contrary to the spirit of the Treaty for States which ban the use of an additive to have to harmonize their legislation with that of States which have adopted a more lax position in relation to the protection of health.

As regards the quantity of nitrate consumed, the Hellenic Republic considers that the Commission has not taken into account to a sufficient degree the actual situation in Greece. The acceptable daily intake of 300 mg is exceeded because of the presence of nitrate in vegetables, meat and water. The figure of 1720.23 mg of nitrate is in no way an over-estimate. First, it is based on Eurostat data that are used by the Community. Secondly, the figures supplied by the Greek Ministry of Agriculture to Eurostat take account of the quantities lost during marketing. Thirdly the assessment is not based on maximum values since it is accepted that certain vegetables, such as beetroot, celery or melon, have a nitrate content appreciably higher than that of vegetables as a whole.

Lastly, there are no coherent and exhaustive rules in relation to nitrate at Community

level. In such a situation and in so far as uncertainty persists in the present state of scientific research, it is for the Member States to decide the level at which they intend to ensure the protection of health. National authorities may thus adopt different preventative measures for the protection of public health on the basis of the eating habits of the population in question, provided they comply with the principle of proportionality underlying the last sentence of Article 36 of the Treaty. The contested rules comply with that principle since they do not ban nitrates in general but are confined to what is necessary to achieve the objective of the protection of health.

IV — Reply to the question put by the Court

The Court requested the Greek Government to state the measures which it has adopted to limit the daily consumption of nitrate, which it estimates to be 1720.23 mg.

The Government replied that a programme had been established to reduce the quantity of nitrate in fertilizers used in agriculture; that quantity is responsible for the high figure cited by the Court. It observed that Greece already uses far less nitrogen in fertilizers than many Member States.

The Greek Government referred, in addition, to a programme in relation to the manuring of crops and the setting up of regional laboratories intended to advise farmers on certain matters, in particular in relation to manuring and the use of fertilizers.

R. Joliet

Judge-Rapporteur