OPINION OF ADVOCATE GENERAL LÉGER

delivered on 3 February 1998 *

1. The questions referred for a preliminary ruling in this case, which come from the Giudice di Pace (Justice of the Peace), Genoa, and the Pretura Circondariale (District Magistrates' Court), Avezzano, concern the interpretation of Article 5 of Council Regulation (EC) No 3093/94 of 15 December 1994 on substances that deplete the ozone layer [1] (hereinafter 'the Regulation') and its validity in the light of, in particular, Articles 30 and 130r of the EC Treaty.

The Court is essentially asked to rule whether that provision prohibits absolutely the use, importation, release for free circulation or marketing of hydrochlorofluorocarbons (hereinafter 'HCFCs'), which are harmful to the ozone layer, and, if so, whether such prohibitions are in breach of the Treaty.

Those questions were raised in proceedings between Safety Hi-Tech Srl (hereinafter 'Safety Hi-Tech'), a company producing fire-fighting equipment in which the chemical composition of the basic material, NAF S III, includes HCFC Blend A (a particular type of HCFC), and two of its customers, the company S. & T. Srl (hereinafter 'S. & T.') and Mr Gianni Bettati, as proprietor of the firm Bettati Antincendio, of Reggio Emilia (hereinafter 'Bettati').

The relevant legislation

2. Adopted on the basis of Article 130s of the EC Treaty, the Regulation repeals and replaces Council Regulations (EEC) Nos 594/91 [2] and 3952/92. [3] It represents, at Community level, the action taken to carry out the obligations deriving from the Vienna Convention of 22 March 1985 for the Protection of the Ozone Layer (hereinafter 'the Vienna Convention'), and the Montreal Protocol of 16 September 1987 on Substances that Deplete the Ozone Layer [4] (hereinafter 'the Montreal Protocol'), as adapted by the second amendment adopted at the fourth meeting held in Copenhagen in November 1992 [5] (hereinafter 'the second amendment').

* Original language: French.

1 — OJ 1994 L 333, p. 1.

2 — Of 4 March 1991 on substances that deplete the ozone layer (OJ 1991 L 67, p. 1).

3 — Of 30 December 1992 amending Regulation (EEC) No 594/91 in order to speed up the phasing-out of substances that deplete the ozone layer (OJ 1992 L 405, p. 41).

4 — Council Decision 88/540/EEC of 14 October 1988 concerning the conclusion of the Vienna Convention for the protection of the ozone layer and the Montreal Protocol on substances that deplete the ozone layer (OJ 1998 L 297, p. 8).

5 — Council Decision 94/68/EC of 2 December 1993 concerning the conclusion of the amendment to the Montreal Protocol on substances that deplete the ozone layer (OJ 1994 L 33, p. 1).

The Member States and the Community are parties to the Vienna Convention and the Montreal Protocol.

3. The aim of the Regulation is to phase out gradually, taking account of the available technical and scientific evidence and of the existence of less harmful substitutes which can be used for the same purposes, [6] substances that deplete the ozone layer [7] and, as we shall see, in accordance with the Vienna Convention and the Treaty, to introduce control measures which are more severe than those of the second amendment. [8]

4. By virtue of Articles 1 and 2 thereof, the Regulation applies to the production, importation, exportation, supply, use and recovery of a series of substances referred to as 'controlled substances', among which are HCFCs.

5. Article 2, twelfth indent, of the Regulation defines HCFCs as any of the controlled substances listed in Group VIII of Annex I, including their isomers. [9]

6. Article 5 of the regulation provides essentially that the use, importation, release for free circulation and placing on the market of HCFCs are to be progressively prohibited in certain types of use. It is worded as follows:

'1. From the first day of the sixth month following that of the entry into force of this Regulation, [10] the use of [HCFCs] shall be prohibited except:

— as solvents,

— as refrigerants,

...

2. From 1 January 1996 the use of [HCFCs] shall be prohibited:

— in non-contained solvent uses including ... when not employed in closed equipment ... where [HCFCs] are not recovered and aerosols, apart from use ...

6 — Fourth to eighth recitals in the preamble to the regulation.

7 — Ibid., third and fourth recitals.

8 — Ibid., sixth recital.

9 — A term used to denote two chemical compounds formed from the same constituents in the same proportions, but with different properties.

10 — Under Article 21, the Regulation entered into force on 23 December 1994. Article 5 has therefore been effective since *1 June 1995*.

— in equipment produced after 31 December 1995 for the following uses:

...

(c) in car air conditioning;

(d) in road public-transport air conditioning.

3. From 1 January 1998 the use of [HCFCs] in equipment produced after 31 December 1997 for the following uses shall be prohibited:

— in rail public-transport air conditioning,

...

4. From 1 January 2000 the use of [HCFCs] in equipment produced after 31 December 1999 for the following uses shall be prohibited:

— as refrigerants in public and distribution cold stores and warehouses,

...

except where codes, safety regulations or other such constraints prevent the use of ammonia.

5. The importing, release for free circulation and placing on the market of equipment for which a use restriction is in force under this Article shall be prohibited from the date on which that use restriction comes into force. Equipment shown to be manufactured before the date of that use restriction shall not be covered by this prohibition.

6. The Commission may, in accordance with the procedure laid down in Article 16 [11] and in the light of technical progress, add to, delete items from or amend the list set out in paragraphs 1 to 4.'

7. In addition, Article 4 of the regulation determines, in particular, the quantity of HCFCs which producers and importers are authorised to place on the market or use for their own account over the period from 1 January 1995 to 31 December 2014. Article 4(8), final indent, of the regulation makes it clear that after 2014 such marketing and use will no longer be possible.

The context of Case C-284/95

8. Safety Hi-Tech sold to S. & T. some fire-fighting equipment containing a product of its own manufacture, NAF S III, the chemical composition of which included HCFCs. An order from S. & T. dated 20 July 1995, the confirmation of that order dated 24 July 1995, and the corresponding invoice of 4 August 1995 are among the documents before the Court.

9. S. & T. disputed the validity of that contract of sale, asserting that sales of the HCFC-based product had been prohibited since 1 June 1995 pursuant to Article 5(1) of the Regulation.

10. On 8 August 1995, Safety Hi-Tech applied to the Giudice di Pace, Genoa, for a summary payment order. It asked that court to order S. & T. to pay to it the amount stipulated in the contract plus incidental costs and fees and, in the alternative, to refer the matter to the Court of Justice for interpretation and determination of the validity of the Regulation in the light of the Treaty.

11. Taking the view that the outcome of the case depends on an assessment of the validity and the interpretation of Article 5 of the Regulation, the national court has referred the following questions to the Court for a preliminary ruling:

'(1) Is Council Regulation No 3093/94 to be interpreted (given that it must comply with Article 130r of the Treaty) as permitting the free use of halons (that is, products which have a serious impact on the environment), subject only to limitations on their production or on their use by producers, and not on their importation, but as prohibiting absolutely the use (and hence both the production and the importation) of HCFCs (that is, of products which have little

11 — The 'management committee' procedure.

impact on the environment) for purposes not stated in Article 5?

(2) Is not the provision in point in Regulation (EC) No 3093/94 in substance a measure having equivalent effect to a quantitative restriction in so far as, in the absence of any of the grounds of justification under Article 36 of the Treaty, it restricts the free movement of a product throughout the Community?

(3) Does not the conduct of the Community and of its institutions, in adopting Regulation (EC) No 3093/94, and particularly at the stages subsequent to its adoption, constitute action of a public-law nature designed to reinforce the dominant position of certain operators, such action constituting in itself an instance of serious abuse for the purposes of Article 86 of the Treaty?

(4) May legislation for the protection of the environment — and particularly Regulation (EC) No 3093/94 — derogate (be interpreted as derogating) from the Community rules on competition (by thus permitting or facilitating restrictive agreements or the abuse of a dominant position) or are the prohibitions under those rules unconditional and not subject to derogation, precluding derogations or restrictions, whether introduced by the Community or by individual Member States?'

The context of Case C-341/95

12. On 31 July 1995, the Pretore di Avezzano made an order against Bettati to pay to Safety Hi-Tech the sum corresponding to the selling price outstanding for the fire-fighting equipment supplied by it, also containing NAF S III, plus interest and costs.

13. By a document lodged on 26 September 1995, Bettati objected to that decision, contending that the equipment purchased had been found, after conclusion of the contract, that is, on 12 May 1995, to be unsuitable and unusable, so as to justify termination of the contract pursuant to Article 1497 of the Italian Civil Code: the equipment in question was not marketable, its use having been prohibited, as from 1 June 1995, by virtue of Article 5 of the Regulation.

14. Safety Hi-Tech intervened in the proceedings, claiming that the Regulation was unlawful to the extent to which it prohibited the use of HCFCs for fire-fighting purposes, since it was in breach of Articles 3, 5, 30, 86, 92 and 130r of the Treaty.

15. The Pretore di Avezzano, doubting the validity of Article 5 of the Regulation, has asked the Court:

'Whether or not, having regard to Articles 3, 5, 30, 86, 92 and 130r of the Treaty of Rome, Article 5 of Council Regulation (EC) No 3093/94 of 15 December 1994, in so far as it unconditionally prohibits as from 1 June 1995 the use of HCFCs in the fire-fighting sector, is valid in the light and on the basis of the considerations set out in the grounds of this judgment?'

Preliminary observation

16. The Commission and the Council contend primarily that the question of the validity of the prohibitions of HCFCs provided for in Article 5 of the Regulation — *and therefore the disposal of the cases before the national courts* — does not depend on the validity of the restrictions on other 'controlled substances' such as halons. Consequently, they ask the Court to declare inadmissible the questions which concern the body of rules applicable to those other substances.

17. It is true that, as the Court has consistently held, [12] under Article 177 of the Treaty the Court's function is to 'contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions' [13] and that '[i]t is in the light of that function that the Court [considers] that it has no jurisdiction to give a preliminary ruling on a question raised before a national court where the interpretation of Community law has no connection whatever with the circumstances or purpose of the main proceedings'. [14] In other words, under Article 177 of the Treaty, the Court's function is *to provide answers which are helpful for reaching a decision in the main proceedings*. On that basis, the Court has declared certain questions referred to it [15] inadmissible.

18. However, the Court has equally consistently pointed out [16] that '... Article 177 of the Treaty, which is based on a distinct separation of functions between national courts and the Court of Justice, does not allow the latter to criticise the reasons for the reference. Consequently, a request from a national court may be rejected only if it is *quite obvious* that the interpretation of Community law or the examination of the

12 — See, in particular, Case 16/65 *Schwarze* [1965] ECR 877 in which the Court ruled that '... judicial cooperation under Article 177 which requires the national court and the Court of Justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, *to make direct and complementary contributions to the working out of a decision*' (paragraph 7 of the judgment, emphasis added).

13 — See, for example, Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraph 12.

14 — Ibid., paragraph 13.

15 — For circumstances comparable to those of this case, see, for example, Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 8.

16 — Starting with Case 13/68 *Salgoil* [1968] ECR 453.

validity of a rule of Community law sought by that court bears no relation to the actual nature of the case or to the subject-matter of the main action' [17] and also that '... it is for the Court, when faced with questions which are not framed in an appropriate manner or which go beyond its functions under Article 177, to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of Community law which require interpretation or whose validity is at issue, *having regard to the subject-matter of the dispute*'. [18]

19. On that basis, the Court has thus reformulated certain questions referred to it. [19]

20. It is true that, in the disputes in the main proceedings, the sole point at issue is the exclusion from the internal market of fire-fighting equipment containing HCFCs. That is why, if the questions submitted by the national courts concerned the validity of restrictions on 'controlled substances' other than HCFCs, the Court would not be able to answer them. However, I am of the opinion that they refer to such other substances solely in order to illustrate their line of reasoning and that, accordingly, *their questions concern only the provisions relating to HCFCs.*

21. Analysis of the grounds of the orders for reference and of the actual wording of the requests from the Italian courts allows us to identify six questions on which a preliminary ruling is sought.

22. *As regards the first question*, which is framed in identical terms in Cases C-284/95 and C-341/95, the national courts cast doubt on the validity of the *absolute exclusion from the internal market of HCFCs in the fire-fighting sector*, as provided for by Article 5 of the Regulation, having regard to Article 130r of the Treaty. [20]

23. According to those courts, the objective of protecting the environment, as it appears from Article 130r, presupposes a global approach to protection of the ecosystem which implies taking into account, for each harmful substance, certainly its *ozone-depleting potential* (hereinafter 'ODP'), but also its *atmospheric life-time* (hereinafter

17 — Case 126/80 *Salonia* [1981] ECR 1563, paragraph 6, emphasis added.

18 — Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9, emphasis added. Settled case-law since Case 13/61 *De Geus* [1962] ECR 45.

19 — See, in particular, *Tissier*, cited above, paragraph 10.

20 — In Case C-284/95, see, in the third paragraph of the grounds of the order for reference, the phrase 'it is apparent that efforts to protect the environment must ...' and the reference to Article 130r of the Treaty in the first question submitted. Similarly, in Case C-341/95, see paragraph 2.1, sixth subparagraph, of the order for reference.

'ALT') and, finally, its *global warming potential* (hereinafter 'GWP'). [21] Those three parameters, expressed as ODP, ALT and GWP values, are the subject of regular scientific estimates. Very broadly reproducing the arguments put forward by Safety Hi-Tech, [22] the national courts consider that, by taking into account the ODP value alone, and therefore focusing only on protection of the ozone layer, the Regulation *diverges from the aims of Article 130r of the Treaty* and that the legislature's action is *ultra vires*. In the same way, [23] they contend that that exclusion is disproportionate since the legislature has not adopted such a sanction against, in particular, similar equipment containing gases even more harmful to the environment (for example, halons). [24]

24. *Secondly*, the national courts are uncertain whether, in the event that Article 5 of the Regulation cannot be justified either for reasons connected with protection of the environment or by Article 36 of the Treaty — a question raised in particular by the Giudice di Pace, Genoa —, it should be considered invalid in the light of Article 30 of the Treaty [25] (second question).

25. *In addition*, they wish to know whether, in view of the factual information provided by Safety Hi-Tech, the Community's legislative conduct constitutes action of a public-law nature having the effect of favouring a restrictive agreement or an abuse of a dominant position by the producers and sellers of other controlled substances such as, for example, halons, [26] which is prohibited by the Treaty (third question).

26. Reproducing only the arguments put forward by Safety Hi-Tech, they assert that Article 5 of the Regulation might conflict with Articles 86 and 92 of the Treaty since its practical effect is to reinforce the dominant position of undertakings using halons and, in particular, the British Williams Holdings group, which holds more than 40% of the European market, and the Silvani company which represents the aforementioned group in Italy and controls more than 80% of the Italian market.

27. *In the alternative*, if that third question is answered in the affirmative, in Case C-284/95, the Giudice di Pace, Genoa, asks the Court whether such conduct may be justified for reasons connected with environmental protection (fourth question).

21 — Case C-284/95, third paragraph of the order for reference, and Case C-341/95, paragraph 2.1, third, fourth and fifth subparagraphs, of the order for reference.

22 — See points 59 to 61 of this Opinion.

23 — Ibid., points 80 and 81.

24 — See, in Case C-284/95, the third paragraph of the order for reference and, in Case C-341/95, paragraph 2.1, third, fourth and fifth subparagraphs, of the order for reference.

25 — Case C-284/95, fourth paragraph of the order for reference: 'In the light of the above considerations, it cannot be ruled out that the limitation ... [is contrary to Article 30 of the Treaty]', and Case C-341/95, paragraph 2.2 of the order for reference.

26 — Case C-284/95, fifth paragraph of the order for reference, and Case C-341/95, paragraph 2.3 of the order for reference.

28. *In addition*, in Case C-341/95, the Pretura Circondariale di Avezzano asks the Court whether Article 5 of the Regulation is compatible with Articles 3 and 5 of the Treaty (fifth question).

29. *Finally*, the answer to the questions raised by the Giudice di Pace, Genoa, presupposes that the Court confirms that, as the national court believes is the case, Article 5 of the Regulation must indeed be interpreted as meaning that it absolutely excludes from the internal market HCFCs used in the fire-fighting sector (sixth question).

30. Since consideration of the questions raised by the Giudice di Pace, Genoa, is dependent on the answer to the sixth question, I shall examine the latter first. I shall then explain why the third question submitted by the two national courts seems to me to be inadmissible. Since the question submitted in the alternative by the Giudice di Pace, Genoa, — the fourth question — is dependent on the answer given to the first and third questions, I shall then examine the first question before answering the fourth. I shall then conclude my examination by considering the second and fifth questions.

The answers to the questions referred for a preliminary ruling

The sixth question (interpretation of Article 5 of the Regulation)

31. The Giudice di Pace, Genoa, is of the opinion that Article 5 of the Regulation must be interpreted as meaning that it has the effect of prohibiting absolutely the use, production, importation and placing on the market of HCFCs in the fire-fighting sector.

32. The Council and the Commission point out that the prohibitions affecting HCFCs come into effect gradually and are not absolute since Article 5(1) to (4) of the Regulation provides for a number of exceptions. In addition, according to the Commission, Article 4(8) of the Regulation authorises further derogations.

33. *As a preliminary point*, it should be noted that, as the Court has consistently held, the European Community must respect international law in the exercise of its powers. [27] Consequently, Article 5 of the Regulation must be interpreted in the light of the

27 — Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraph 9. See also the judgment in Case C-405/92 *Mondiet* [1993] ECR I-6133, paragraph 12, and, by contrary inference, *Peralta*, cited above, paragraph 16.

relevant rules of the Vienna Convention, the Montreal Protocol and the second amendment, to which the Community is a party.

34. Prior to the adoption of the second amendment, [28] the use of HCFCs was not controlled. [29] Those substances are now included in Group I of Annex C to the Montreal Protocol. Under the second amendment, the use of HCFCs is not prohibited, but only limited. [30] However, *Article 2(3)* of the Vienna Convention allows the '... Parties to adopt, in accordance with international law, domestic measures additional to those referred to in paragraphs 1 and 2 above ... provided that these measures are not incompatible with their obligations under this Convention'.

35. The obligations of the contracting parties are laid down in Articles 2(1) and 3(1) of the Vienna Convention.

36. Article 2(1) of the Vienna Convention provides that the parties undertake to take '... appropriate measures ... to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer'.

37. To that end, Article 2(2)(b) of that convention states that the parties 'shall ... adopt appropriate legislative or administrative measures ... to control, limit, reduce or prevent human activities under their jurisdiction or control should it be found that these activities have or are likely to have adverse effects resulting from modification or likely modification of the ozone layer'.

38. Under Article 3(1) of the same convention, they undertake 'to initiate and cooperate in, directly or through competent international bodies, the conduct of research and scientific assessments on:

...

(f) alternative substances and technologies'.

28 — See, in particular, Article 1 of, and Annex A to, the Montreal Protocol.

29 — See, in particular, Article 1(A) and (EE) of the second amendment.

30 — Ibid., Article 1(G) and (Q).

39. Under Article 1(4) of the Vienna Convention 'alternative substances' means substances which reduce, eliminate or avoid adverse effects on the ozone layer.

40. Accordingly, it follows from a combined reading of Articles 1(4), 2(1), 2(2)(b), 2(3) and 3(1)(f) of the Vienna Convention that the parties to that convention are allowed to adopt measures more stringent than those provided for by the convention, provided that they are justified by the intention to require the use of substitutes with less adverse effects on the ozone layer.

41. It is clear from a careful reading of Article 5(1) to Article 5(4), first subparagraph, of the Regulation that the *use of HCFCs in the fire-fighting sector* has been prohibited since 1 June 1995.

42. The first sentence of Article 5(1) of the Regulation lays down the principle of prohibition of the use of HCFCs, subject to certain exceptions specified in the various indents of Article 5(1) to (4). However, the use of HCFCs in the fire-fighting sector is not included among those exceptions.

43. In addition, it should be noted that Article 5(5) provides: 'The importing, release for free circulation and placing on the market of equipment for which a use restriction is in force under this article shall be prohibited from the date on which that use restriction comes into force'. Since the use of HCFCs in the fire-fighting sector has been prohibited since 1 June 1995, it must be concluded that the other prohibitions imposed by Article 5(5) also enter into force on the same date.

44. Finally, the production of controlled substances is strictly limited and Article 3 lays down the manner in which production of those substances is to be controlled. However, it is clear from the actual wording of Article 3 of the Regulation that producers of HCFCs are given no opportunity whatsoever of scaling down their production. It must therefore be concluded that the production of all HCFCs is prohibited.

45. Nevertheless, as the Commission points out, the principle of the absolute prohibition of HCFCs has been tempered in, among others, the sector affected by Article 4(8) of the Regulation. That provision lays down the principle that the supply of HCFCs is to be limited to a certain quantity — and not prohibited — provided that they are placed on the market or used by producers or importers for their own account. In addition, it specifies both the method adopted for the calculation of the permitted quantity and the procedure for assigning that quantity to the

persons concerned. [31] However, in the light of the facts described by the national court, that provision does not appear to be relevant at present. It should be borne in mind that, in the main proceedings, the products at issue were not intended for Safety Hi-Tech, a producer of HCFCs, but were sold to third parties and that those third parties do not seem to have imported those goods for their own account.

46. It follows from the foregoing that Article 5 of the Regulation must be interpreted as meaning that the use, placing on the market, production and importation of HCFCs have been prohibited in the fire-fighting sector since 1 June 1995.

47. I shall now examine the compatibility of the measures in question with the Treaty.

The third question (compatibility of Article 5 of the Regulation with Articles 86 and 92 of the Treaty)

48. The national courts wish to know whether, in the light of the factual information provided by Safety Hi-Tech, Article 5 of the Regulation has the effect of favouring a restrictive agreement or an abuse of a dominant position by the producers and sellers of other controlled substances such as, for example, halon.

49. It must be observed that the national courts merely allude in very general terms to the provisions of the Treaty without specifying the grounds on which the prohibition referred to in Article 5 of the Regulation might be invalid. The national courts also fail to provide any detail which would enable me to undertake a useful analysis. In particular, the information needed to identify the relevant market or assess the effect of the prohibition at issue on the operation of that market is lacking. [32]

50. The Court has consistently held that '... the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based'. [33]

31 — Establishment of a quota system.

32 — A fact acknowledged by Safety Hi-Tech at the hearing.

33 — Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 5. For an even more recent example, see also the order in Case C-66/97 *Banco de Fomento e Exterior* [1997] ECR I-3757, paragraph 7.

51. Accordingly, I can only propose that the Court should declare that question inadmissible.

The first question (compatibility of Article 5 of the Regulation with Article 130r of the Treaty)

52. Under the Maastricht Treaty, protection of the environment became a priority. Consequently, in the interests of effectiveness in particular, legislation based on Article 130r is adopted by a qualified majority and no longer unanimously.

53. Articles 130r and 3b of the Treaty specify the tasks and objectives assigned to the Community in this context. They make Community competence subject to adherence to four objectives, six principles and four criteria.

54. The objectives are set out in Article 130r(1) of the Treaty. They are preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems. It should be noted that the reference to 'worldwide environmental problems' was inserted by the Maastricht Treaty. This new objective assigned to Article 130r of the Treaty specifically applies to protection of the ozone layer.

55. The principles listed in Article 130r(2) and (4) and in the second and third paragraphs of Article 3b of the Treaty are those of precaution and preventive action, rectification — at source as a priority — of environmental damage, 'polluter pays', proportionality, subsidiarity and, finally, integration. The latter principle, under which environmental requirements are regarded as a component of the Community's other policies, underlines the importance which must now be attached to the environment in the context of other Community policies embarked upon. That principle has not in fact been applied for the benefit of any other Community policy.

56. The criteria laid down by Article 130r(3) of the Treaty are those of available scientific and technical data, environmental conditions in the various regions of the Community, the potential benefits and costs of action or lack of action, the economic and social development of the Community as a whole and the balanced development of its regions.

57. Safety Hi-Tech does not dispute the legal basis on which the Community legislature adopted the Regulation, [34] but maintains that it fails to adhere to the objective pursued by Article 130r of the Treaty. In addition, it is in breach of the principle of proportionality.

The purpose of Article 130r of the Treaty

58. Safety Hi-Tech argues that the Regulation would have been justified only if it had enabled *absolute priority to be given to the highest possible level of environmental protection*, [35] as required by Article 130r of the Treaty.

59. According to Safety Hi-Tech, implementation of the Community's environmental policy requires that account be taken of all the scientific and technical data *currently* available. It also presupposes a global approach to protection of the ecosystem, which implies that the ODP, ALT and GWP values of substances harmful to the environment should be considered *together*. That method of assessment is, moreover, advocated by the United Nations Technology and Economic Assessment Panel.

60. By merely decreeing measures to combat thinning of the ozone layer without adopting, as it should have done in the same legislation, measures to combat global warming, the Community legislature was in breach of Article 130r of the Treaty. Basing its argument on the Court's case-law, [36] Safety Hi-Tech concludes that the legislature misused its powers. The Italian Government concurs with that view.

61. The Council, for its part, submits that Articles 130r and 130s of the Treaty confer on it a discretion in choosing its environmental policy and that consequently the decision to deal as a priority with the risk posed to the environment by the destruction of the ozone layer rather than with that of global warming is not actionable. Moreover, it points out that there is provision for dealing with the problem of global warming under international agreements on climate change. [37]

34 — With regard to the choice of the legal basis in environmental action taken by the Community legislature, see, in particular, Cases C-300/89 *Commission* v *Council* [1991] ECR I-2867 and C-155/91 *Commission* v *Council* [1993] ECR I-939. See also the article by X. Debroux, 'Le choix de la base juridique dans l'action environnementale de l'Union européenne', in *Cahiers de droit européen*, 1995, Nos 3-4, p. 256.

35 — See, in particular, paragraph 2(a), second subparagraph, of Safety Hi-Tech's observations in Case C-284/95.

36 — Case C-323/88 *Sermes* [1990] ECR I-3027, paragraph 33.

37 — Council Decision 94/69/EC of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change (OJ 1994 L 33, p. 11). A protocol to that convention, aimed at reducing emissions of greenhouse gases, was adopted on 11 December 1997 at the end of the conference on climate change, in which the Community and the individual Member States participated (*Agence Europe* No 7121 of 14 December 1997).

62. In addition, the Council — supported on this point by the Commission — considers that, in the context of a freely determined environmental policy, Articles 130s and 130r of the Treaty confer on it a wide discretion as to the choice of measures to be adopted in order to implement such a policy. Accordingly, only the manifestly inappropriate character of such measures in relation to the objective pursued could affect their lawfulness.

63. The first ground of challenge relied on by Safety Hi-Tech necessitates determining the margin of discretion available to the Community legislature within the scope of the legislative authority conferred on it by Articles 130s and 130r of the Treaty.

64. I share the view held by the Council and the Commission for essentially four reasons.

65. *First*, the objectives established in Article 130r(1) of the Treaty are formulated as follows: 'Community policy on the environment shall contribute to pursuit of the following objectives:

— preserving, protecting and improving the quality of the environment;

— protecting human health;

— prudent and rational utilisation of natural resources;

— promoting measures at international level to deal with worldwide or regional environmental problems'.

In my view, the only possible inference to be drawn from those words is that the Community's policy on environmental protection is subject to precise limits which must be strictly adhered to since the function of that policy is to 'contribute to [the] pursuit' of objectives stated in general terms.

66. I do not think that the Treaty has specified the extent of its requirements in this connection or that it is necessary to interpret Article 130r(2) of the Treaty, which provides that 'Community policy on the environment shall aim at a high level of protection ...', to that effect.

67. Those words are incorporated in Article 130r(2) of the Treaty, which is devoted to the

principles by which the Community legislature is to be guided in pursuing its environmental policy and must therefore be interpreted as a recommendation addressed to the Community legislature, under which the latter is called upon to ensure that the policy already being pursued is constantly improved. The Community's environmental policy is therefore necessarily a long-term process.

68. *Second*, I do not think that the substitution by Article 130r of the EC Treaty of the phrase 'Community policy' for the phrase 'action by the Community' in Article 130r of the EEC Treaty is neutral. [38]

69. The term 'policy', as opposed to 'action', presupposes the taking into account of a set of facts, practices or actions. That is why, although the choice of a specific action can sometimes prove difficult, the choice of a policy *necessarily* implies the assessment of complex and generally conflicting situations, which confirms the analysis of the actual content of Article 130r of the Treaty.

70. Article 130r(2) of the Treaty thus lays down the principle that the Community must observe the principle of preventive action in the context of that policy. The first subparagraph of that article therefore requires the Community legislature to assess the future effects of legislation which it introduces.

71. Moreover, Article 130r(3) specifically provides that, in preparing that policy, the Community is to take account of a series of parameters, in particular the available scientific and technical data, as well as the potential benefits and costs of action or lack of action.

72. It is obvious that observance of that principle and those criteria necessarily presupposes that the Community legislature will assess complex situations, a process which consists in weighing the respective merits and drawbacks of any given action.

73. However, faced with such situations, the Court has always refrained from substituting its own assessment for that of the Community legislature as regards the appropriateness of measures adopted [39] unless the applicant adduces proof that, in the light of the information provided at the time of the

38 — In support of this, see Cloos, J., Reinesch, G., Vignes, D. and Weyland, J.: *Le traité de Maastricht: Genèse, analyse, commentaires*, Bruylant, 1993, p. 320, paragraph 1, second subparagraph.

39 — See, in particular, Case 29/77 *Roquette Frères* [1977] ECR 1835, paragraphs 19 and 20.

adoption of the rules in question, [40] the legislature committed a manifest error of assessment, a misuse of powers, [41] or manifestly exceeded the limits of its discretion. [42]

74. *Furthermore*, it is clear from Article 130t of the Treaty that: 'The protective measures adopted pursuant to Article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission.'

75. It undoubtedly follows from that provision that the purpose of Article 130r of the Treaty is not to ensure absolute, immediate and global protection of the environment.

76. *Finally*, in *Peralta*, cited above, the Court has already held [43] that:

'*Article 130r is confined to defining the general objectives* of the Community in the matter of the environment. Responsibility for deciding what action is to be taken is conferred on the Council by Article 130s. Moreover, *Article 130t states* that the protective measures adopted pursuant to *Article 130s are not to prevent any Member State from maintaining or introducing more stringent protective measures* compatible with the Treaty'.

77. It follows that the Treaty does not require the Community legislature to implement *immediately*, in relation to the environment, a policy under which the level of *protection is the highest possible*, and that the purpose of a regulation which consists in improving appreciably the protection of the environment within the Community is perfectly consistent with the purpose of Article 130r of the Treaty. [44]

78. However, the aim of the Regulation, as we have seen, [45] is to phase out progressively, in the light of available scientific and technical evidence and of the existence of substitutes — *substances less harmful and capable of being employed for the same uses* —, substances which deplete the ozone layer and, in accordance with the Vienna Convention, to introduce control measures more

40 — See, in particular, Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraph 14, and Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 90.

41 — See, in particular, the *Sermes* judgment, cited above.

42 — See, for example, as regards health policy, Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 58; as regards economic policy, Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraphs 55 and 56, and, finally, as regards the common agricultural policy, Case 23/75 *Rey Soda* [1975] ECR 1279, paragraph 11.

43 — Paragraph 57.

44 — See, by analogy, *Germany* v *Parliament and Council*, cited above, paragraph 48, in which the Court acknowledged that Article 3(s) of the Treaty, which provides that 'the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein ... a contribution to the strengthening of consumer protection', cannot be interpreted as obliging the Community legislature to 'to adopt the highest level of protection which can be found in a particular Member State'.

45 — See point 3 of this Opinion.

severe than those of the second amendment. The Regulation therefore appreciably improves protection of the ozone layer within the Community.

79. Consequently, the purpose of the regulation is perfectly compatible with the objectives pursued by Article 130r of the Treaty.

The compatibility of Article 5 of the Regulation with the principle of proportionality

80. Accepting that Article 130r of the Treaty does not require the Community legislature to adopt only legislation under which the highest possible level of environmental protection can be ensured and that the legislature is free to choose whatever policy for protection of the environment it intends to pursue (in this case, the protection of the ozone layer), Safety Hi-Tech maintains that Article 5 of the Regulation does not provide a means of achieving the objective thus construed.

81. Safety Hi-Tech bases that argument on the view that that provision prohibits the use of HCFCs in the fire-fighting sector, whereas other substances with a considerably higher ODP value are permitted. That is the case with halons, which are also used in the fire-fighting sector, or an HCFC-based product such as 141b, which is used as a solvent.

82. The Council and the Commission contend that the implementation of a policy to protect the ozone layer necessarily involves controlling only those substances which deplete it. That is why substances with a zero ODP value, such as 'HFCs' and 'PFCs', for example, do not come within the scope of the Regulation.

83. In addition, they argue that the principle of the existence or non-existence, from a scientific point of view, at the time of the adoption of the Regulation, of adequate substitutes, entailing less significant depletion of the ozone layer for the same type of use, justifies the measures adopted by the Regulation.

84. They claim that that principle has been strictly observed. Thus, the absolute prohibition on using HCFCs in the fire-fighting sector is justified by the fact that there already existed, at the time of the adoption of the Regulation, substitutes with an ODP

value close to zero, such as water, powder and inert gases, for the same type of use. [46]

85. In the case of halons, on the other hand, they point out that, at the time of the adoption of the Regulation, no appropriate substitutes — namely, substances with the same fire-extinguishing capacity and equally mild toxic effects for humans — in the context of so-called 'essential' uses [47] — that is, extinguishing fires in confined spaces such as cars, operating theatres, aircraft or submarines — and, therefore, not even HCFCs, existed. [48] The Council and the Commission stress, moreover, that that is still the case. [49]

86. Consequently, they maintain that the measures adopted by the Regulation are fully in conformity with the principle of proportionality.

87. In the context of its environmental policy based on Articles 130r and 130s of the Treaty, the Community is expressly obliged, by virtue of the principle of proportionality set out in the third paragraph of Article 3b of the Treaty, not to take any action beyond what is necessary and appropriate to achieve the objectives assigned to it.

88. It should be borne in mind that that general principle of Community law requires that acts of Community institutions do not go beyond what is appropriate and necessary for the purpose of achieving the objectives legitimately pursued by the provisions in question, it being understood that, where a choice arises between several appropriate measures, recourse should be had to the least restrictive and that the disadvantages caused must not be disproportionate to the desired objective. [50]

89. In response to the complaint made by Safety Hi-Tech, it is necessary to ascertain whether, in the light of the scientific and technical data supplied to the Council at the time of adoption of the Regulation, the measure at issue — which consists in excluding from the internal market fire-fighting equipment containing HCFCs on account of the existence of substitutes which are less harmful to the ozone layer, are equally effective and have an ODP value close to zero — is *manifestly inappropriate* to the objective pursued by the Community legislature, whether it is *necessary* for the purpose of achieving that objective and whether

46 — The Danish, German, Spanish, Austrian, Portuguese, Finnish and Swedish Governments also maintain that the use of HCFCs in the fire-fighting sector is not justified scientifically.

47 — Under Commission Decision 98/67/EC of 16 December 1997 on the allocation of quantities of controlled substances allowed for essential uses in the Community in 1998 under Council Regulation (EC) No 3093/94 (OJ 1998 L 10, p. 31), a use of a controlled substance should qualify as essential only if it is necessary for health or safety, or if it is of critical importance for the functioning of society and there are no technically and economically feasible alternatives or substitutes that are acceptable from the standpoint of environment and health.

48 — To that effect, see the observations of the Danish, German, Spanish, Austrian, Portuguese, Finnish and Swedish Governments.

49 — Ibid.

50 — See, for example, *Germany* v *Parliament and Council*, cited above, paragraph 54.

recourse to *other, less restrictive means* was possible.

90. In my view, such an examination does not involve finding an answer to a scientific or technical problem. Not only do I not have the results of the expert analyses carried out at the time of the adoption of the provision at issue and submitted to the Council, [51] but, even if those data had been made available to me, I doubt whether I would be competent to resolve such problems without the enlightened assistance of experts. My task is to verify, *in the light of the available procedural documents*, that the legislature did not make any gross and obvious errors.

91. It is apparent — and at any event it has not been disputed either by all the governments which have lodged observations or even by Safety Hi-Tech or the Italian Government — from an examination of those documents that, in order to ensure protection of the ozone layer in the light of the scientific data available at the time of adoption of the Regulation:

— controlling only the substances likely to deplete the ozone layer was the appropriate means of protecting it;

— taking into account only the ODP value of those substances appeared suitable for that purpose;

— HCFCs were rightly regarded as substances harmful to the ozone layer;

— HCFCs in the fire-fighting sector could be replaced by much less harmful substances.

92. Furthermore, virtually everyone, with the exception of Safety Hi-Tech, agrees that HCFCs are not better suited than halons for employment in essential uses.

93. It follows that it is not manifestly apparent that the measure at issue was adopted 'in an inappropriate and unreasonable manner' and that, in conclusion, Article 5 of the Regulation complies with Article 130r of the Treaty.

51 — In this connection, it should be noted that the tables of ODP values of controlled substances such as halons and NAF S III, which were submitted to the Court, do not specify on what date those results were obtained. They are therefore unusable.

The fourth question

94. By this question, the Giudice di Pace, Genoa, asks the Court to rule whether a regulation based on Article 130r of the Treaty, such as the regulation at issue, can justify exceptions to Articles 86 and 92 of the Treaty and, if so, on what conditions.

95. In so far as I do not consider myself able to answer the question concerning the compatibility of Article 5 of the Regulation with Articles 86 and 92 of the Treaty (third question) [52] in the absence of sufficient available factual data and since, as I have pointed out, [53] under Article 177 of the Treaty the Court's function is merely to provide answers conducive to a decision in the main proceedings and not to formulate opinions on general or hypothetical questions, I propose that the Court declare this question inadmissible.

52 — See points 48 to 50 of this Opinion.
53 — Ibid., point 17.

The second question (compatibility of Article 5 of the Regulation with Article 30 of the Treaty)

96. I do not think that the answer to this question need go into any great detail.

97. Reference need merely be made to settled case-law:

'The Court has already held in its judgment of 7 February 1985 in Case 240/83 *Association de défense des brûleurs d'huiles usagées* [1985] ECR 531 that the protection of the environment is "one of the Community's essential objectives", which may as such justify certain limitations of the principle of the free movement of goods. That view is moreover confirmed by the Single European Act.

In view of the foregoing, it must therefore be stated that the protection of the environment

is *a mandatory requirement* which may limit the application of Article 30 of the Treaty'. [54]

98. The Court made it clear that restrictions based on the mandatory requirement of protection of the environment which are imposed on the free movement of goods must be necessary to achieve the objectives pursued by those rules. [55] In other words, the principle of proportionality must be observed.

99. Accordingly, even before the adoption of Article 130r of the EEC Treaty, although Articles 2 and 3 of the original EEC Treaty did not expressly mention protection of the environment as one of the Community's express objectives, the Court implicitly acknowledged it as such in its judgment in *Association de défense des brûleurs d'huiles usagées*, cited above. [56]

100. Moreover, after the entry into force, on 1 July 1987, of the Single European Act, the Court held, in paragraph 21 of its judgment in Case C-155/91 *Commission* v *Council*, cited above, that Article 130s of the EEC Treaty constituted the correct legal basis of a directive aimed essentially at protecting the environment, and necessarily confirmed, in paragraph 13 of that judgment, that '... imperative requirements relating to the protection of the environment justify *exceptions* to the free movement of waste'. [57]

101. There is therefore all the more reason to conclude, since the entry into force of the Maastricht Treaty which attaches even more importance to the objective of protecting the environment, that the Court's answer should be the same on this occasion. In so far as it is proportional to the objective pursued, the Regulation, which is based on Article 130r of the EC Treaty, authorises the Community legislature to derogate from the principle of free movement of goods on account of the imperative requirement of protection of the environment.

102. Article 3b of the Treaty specifically requires any action by the Community not to go beyond 'what is necessary to achieve the objectives of this Treaty', that is, to observe the principle of proportionality.

103. It is clear in this case that fire-extinguishers are goods and that, by excluding them completely from the internal market, Article 5 of the Regulation inevitably

54 — Case 302/86 *Commission* v *Denmark* [1988] ECR 4607, paragraphs 8 and 9, emphasis added. See also the article by N. De Sadeleer, 'La question du choix juridique des actes communautaires ayant trait à la protection de l'environnement: symbiose ou opposition entre la politique d'établissement du marché interne de l'environnement?', in *Revue juridique de l'environnement*, 1993, p. 597.

55 — Ibid., at paragraph 12.

56 — See, in particular, paragraph 13.

57 — Emphasis added.

has the effect of preventing their free movement in the Community.

104. However, it is not disputed that protection of the ozone layer is an 'imperative requirement', within the meaning of the Court's judgment in Case C-155/91 *Commission* v *Council*, cited above, relating to the protection of the environment. I have also shown that Article 5 of the Regulation observes the principle of proportionality.

105. In conclusion, the answer to be given to the national courts should be that Article 5 of the Regulation is not contrary to Article 30 of the Treaty.

106. Since the legislation in question is justified by 'an imperative requirement', there is no need to consider whether it may also be justified under Article 36 of the Treaty, as the Court is expressly asked to do by the Giudice di Pace, Genoa.

The fifth question (compatibility of Article 5 of the Regulation with Articles 3 and 5 of the Treaty)

107. Article 3 of the Treaty sets out the objectives of the Community. I have already shown, when considering the first question, that the Regulation was adopted for the purpose of achieving one of those objectives.

108. Article 5 of the Treaty '... lays down the principle of sincere cooperation in relations between the Member States and the Community institutions. That principle not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law but also imposes on the Member States and the Community institutions mutual duties of sincere cooperation ...'. [58]

109. It need merely be pointed out that the Court has held that '[t]he adoption of a legislative measure by the Council cannot constitute ... a breach of the duty of sincere cooperation attaching to the Council as an institution'. [59]

58 — See, in particular, Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council* [1992] ECR I-5073, paragraph 52.

59 — Ibid., paragraph 53.

110. In conclusion, the answer to be given to the national courts should be that Article 5 of the Regulation is not contrary to Articles 3 and 5 of the Treaty.

111. It follows from all the foregoing considerations that the answer to be given to the national courts must be that consideration of the question raised has not disclosed any factor of such a kind as to affect the validity of Article 5 of the Regulation.

Conclusion

112. For the reasons set out above, I propose that the Court should answer as follows the questions referred to it by the Giudice di Pace, Genoa, and the Pretura Circondariale di Avezzano:

(1) In Case C-284/95

Article 5 of Council Regulation (EC) No 3093/94 of 15 December 1994 on substances that deplete the ozone layer must be interpreted as meaning that, in the fire-fighting sector, the use, placing on the market, production and importation of hydrochlorofluorocarbons have been prohibited since 1 June 1995.

Examination of that provision has not disclosed any factor of such a kind as to affect its validity.

(2) In Case C-341/95

Examination of Article 5 of Council Regulation (EC) No 3093/94 of 15 December 1994 on substances that deplete the ozone layer has not disclosed any factor of such a kind as to affect its validity.