OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 11 February 1988 *

Mr President,
Members of the Court,

1. In a standing invitation to tender for the sale of olive oil held by the Greek intervention agency, the Inter-Kom company was awarded some 8 000 tonnes of oil. A consignment of 2 423 tonnes of lampante oil was awarded to it by decision of 7 September 1983. The intervention agency called upon the applicant to withdraw the consignment by no later than 6 December 1983, in accordance with Article 13 (1), as amended,[1] of Regulation No 2960/77 on detailed rules for the sale of olive oil held by intervention agencies,[2] which provides that where the purchaser has been awarded a quantity in excess of 3 000 tonnes, withdrawal is to be completed not later than the 90th day following receipt of the information concerning the result of his participation in the tender.

2. Article 15 of the same regulation provides as follows:

'If the withdrawal of the oil is not completed by the date stipulated in Article 13 (1):

(a) the oil remaining in storage shall be held at the purchaser's own risk;

(b) the purchaser shall pay to the intervention agency a storage charge calculated by reference to the quantity to be withdrawn plus an amount to be determined for each period of 30 days of additional storage or part thereof'.

3. Loading of the consignment of 2 423 tonnes began on Friday, 2 December 1983. It was stopped on the same day at 3.30 p. m. because of 'an unforeseen deterioration in the weather'. No work was done on Saturday, 3 December, and Sunday, 4 December 1983. On Monday, 5 December, between 4 and 8 p. m., delivery was suspended because of a power cut. Both the electricity company and the undertaking on whose premises the oil was stored are controlled by the Greek State. There was a further power cut lasting four hours on 6 December 1983. Thus, 882 642 tonnes of oil were withdrawn only on the following day, 7 December 1983, that is to say, after the expiry of the prescribed time-limit.

4. On that ground, the Greek intervention agency charged Inter-Kom an amount of DR 1 371 620 by way of storage charges on the basis of Article 15 of Regulation No 2960/77.

* Translated from the French.

1 — Article 13 of the regulation was amended by Commission Regulation No 883/79 of 3 May 1979 amending Regulation No 2960/77 (Official Journal L 111, 4.5.1979, p. 16) and by Commission Regulation No 2041/83 of 22 July 1983 amending for the sixth time Regulation No 2960/77 (Official Journal L 200, 23.7.1983, p. 25).

2 — Official Journal L 348, 30.12.1977, p. 46.

5. An action was brought against that decision before the national courts. At first instance, the Greek State was ordered to release the amount retained on the ground that the delay in the loading and acceptance of the goods was due to unforeseeable events beyond the control of Inter-Kom and because the Greek State was unable to deliver the goods sold to the purchaser through the company appointed to execute the contract. On appeal against that decision, the First Chamber of the Efeteio Athinon (Court of Appeal, Athens) referred four questions to the Court of Justice the wording of which I will recall as and when I consider them.

6. My examination will be based on the assumption that the time-limit was in fact exceeded. That was so if the decision of the Greek intervention agency of 7 September 1983 awarding Inter-Kom the consignment of 2 423 tonnes reached that company on the same day. Since the 90-day time-limit then began to run at 00.00 hours on 8 September 1983, it expired at midnight on 6 December 1983. That follows from Article 3 (1) and (2) (b) of Regulation No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time-limits (Official Journal, English Special Edition 1971 (II), p. 354). The problem of the difference that appears to exist between the Greek language version and the other language versions of that regulation as regards the point of time from which time-limits run must, in my opinion, be resolved by opting for the other versions. First, the different language versions are all equally authentic and an interpretation of a provision of Community law thus involves a comparison of the various language versions (judgment of 6 October 1982 in Case 283/81 *Cilfit* v *Ministry of Health* [1982] ECR 3415, at p. 3430, paragraph 18). Secondly, Greece joined the Community only after the adoption of that regulation. Thus, in so far as the Greek language version differs from the text as published in 1971 and since then maintained in the other languages, it can only be a translation error.

First question

7. First of all the Efeteio Athinon asks the Court what is the meaning of the expression 'at the purchaser's own risk' in Article 15 (a) of Regulation No 2960/77.

8. Nothing permits the conclusion to be drawn that that expression has a different meaning in Community law than the one it has in the national legal systems. It means therefore that if the oil awarded perishes or deteriorates after the expiry of the time-limit laid down for its withdrawal, the purchaser must none the less pay the full agreed price.

9. Since it has not been claimed that an event of that kind occurred in his case, the provision in question cannot be relevant in the resolution of the dispute in the main proceedings.

10. I therefore propose that the Court should reply to the first question as follows:

'The expression "at the purchaser's own risk" in Article 15 (a) of Regulation No 2960/77 means that if the goods perish or deteriorate after the expiry of the time-limit laid down for their withdrawal, the

purchaser will still be required to pay the full agreed price'.

11. The question whether the rule laid down in Article 15 (a) could apply even if the purchaser is not liable at all for the late withdrawal of the goods concerns the interpretation of the introductory sentence of Article 15 ('If the withdrawal of the oil is not completed by the date stipulated . . .') and not of paragraph (a). That problem is the subject of the second and fourth questions, which I would like to consider now.

Second and fourth questions

12. The national court asks secondly whether the purchaser is 'liable even if events occur for which he is not responsible, such as, in this case, bad weather or a power failure at the premises of the agent designated to carry out the "Eleouryiki" contract'. In its fourth question, it seeks to ascertain to which of the two parties delay must be attributed under those circumstances and what are the consequences of that default.

13. In order to reply to those questions I think it is necessary to consider first the purpose for which Article 15 of the abovementioned regulation was adopted. That purpose is set out as follows in the 14th recital in the preamble to Regulation No 2960/77:

'. . . in order to ensure the rapid disposal of the oil sold the time at which the oil must be placed at the purchaser's disposal and the final date for completion of the withdrawal of the oil should be laid down; . . . it should also be provided that any consequences of delay in withdrawal should be borne by the purchaser;'

14. The purpose therefore is to induce successful tenderers, by means of the sanctions provided for in Article 15, to withdraw the oil within the prescribed time-limit. However, at the same time and for the same purpose, the Community legislature wanted to fix the time at which the oil *must* be made available to the purchaser. To that end, the second sentence of Article 13 (1) provides that 'withdrawal may begin as soon as the provisional amount referred to in Article 12 (1) has been paid'. From that moment, the body in charge of the sale must therefore be in a position to deliver the goods.

15. It follows that in so far as delivery can be made only by means of technical installations such as pumps, the body in charge of the sale must be able to make such installations work in order that the purchaser can effectively exercise his *right* to withdraw the goods.

16. During periods in which those installations cannot function, as a result of a power failure, for example, it is the seller who is not in a position to fulfil his obligation to 'make the goods available'. It is therefore the seller who is liable for any delay due to such incidents.

17. That liability is particularly clear where, as has been shown, the management of the cooperative were informed in advance of

the electricity cuts and consented to them but failed to inform Inter-Kom of them.

18. With regard to the cessation of loading due to bad weather, I suppose, in the absence of more precise information, that that incident did not give rise to an electricity cut, but that the sea became so rough that the resultant movements of the ship made loading impossible.

19. If that is what happened, that event did not therefore prevent the seller from delivering the goods but prevented the purchaser from continuing to withdraw them.

20. Two points therefore arise:

May *force majeure* be taken into consideration in the context of Article 15 of Regulation No 2960/77?

May the storm which occurred be regarded as a case of *force majeure*?

21. With regard to the first point, I share the view expressed by the Commission in section B, paragraph 2, of its observations according to which *force majeure*, even if a provision referring to it is not included in the text, can be accepted if it is not in contradiction with the purpose of the text at issue.

22. In my view, the Commission is right when it states that in this case, the *ratio legis* of the provision at issue is to ensure the normal disposal of goods in storage in order to avoid the overfilling of warehouses. An exceptional delay on the part of one successful tenderer among many is not of such a nature as to seriously endanger that objective. In principle, therefore, it must be possible for account to be taken of *force majeure*. It would certainly not have been possible to refuse to take it into account if the ship which was to take delivery of the goods had been destroyed by fire after its arrival in the port of Elefsis.

23. However, all cases of *force majeure* are not as clear as that and it is therefore necessary to consider the criteria laid down in that regard by the Court. It has been held that 'although the concept of *force majeure* does not presuppose complete impossibility, it none the less requires that the fact at issue failed to occur because of abnormal and unforeseeable circumstances outside the control of the person relying upon them the consequences of which could not have been avoided notwithstanding the care taken' (see, most recently, the judgment of 27 October 1987 in Case 109/86 *Ioannis Theodorakis* v *Greek State* [1987] ECR 4319, paragraph 7).

24. Bad weather is of course a circumstance outside the control of the person relying upon it, but to what extent is it unforeseeable?

25. Should a prudent trader intending to have a ship loaded in the Bay of Elefsis at the beginning of December have taken account of the possibility of a storm so serious as to make loading impossible and therefore have allowed a little more time for loading? Or are such storms quite exceptional in that region and at that time of the

year, so that it would be unreasonable to require a trader to allow for such a possibility?

26. Obviously it is not for the Court of Justice of the European Communities to decide that question but for the Efetio Athinon, which has jurisdiction to rule on the substance of the case.

27. However, it is not ruled out that the national court might arrive at the conclusion that the two power failures by themselves lasted as long as the period by which the time-limit was exceeded and that it is not therefore necessary to consider whether the storm constituted in the circumstances of the case an abnormal and unforeseeable event.

28. On the basis of the aforegoing considerations, I propose that the Court should reply to the second and the fourth questions as follows:

'The purchaser does not have to bear the consequences of a delay in the withdrawal of the goods where that delay is due to a power failure which temporarily prevented the seller from delivering the goods to him or to a period of bad weather which may be regarded as a case of *force majeure*.'

Third question

29. The national court also asks 'what are the consequences for the purchaser under those provisions of the fact that he began to load the goods only four days before the expiry of the time-limit of 90 days.'

30. In that regard, the Commission is undoubtedly right when it says that 'time-limits are laid down in order to be used to the full and traders may have legitimate reasons for fulfilling their obligations very shortly before the expiry of the time-limits granted to them'.

31. However, it is for the purchaser to calculate very carefully the time which he requires in order to withdraw the goods without exceeding the time-limit.

32. The resolution of the dispute before the Efetio Athinon therefore depends on the question of whether, under normal circumstances, that is to say in the absence of the power failures and the storm (in so far as the national court accepts that the storm was responsible for part of the delay and that it was not foreseeable), the period of four days which the successful tenderer left himself was sufficient to withdraw such a quantity of oil.

33. At first sight, it seems that such was the case. It is common ground that in the course of 6 December 1983, notwithstanding a four hour power failure, the cooperative delivered 713 086 kg of oil to Inter-Kom. At the end of that day, there remained in the tank, according to the Greek Government, 882 642 kg of oil which were withdrawn the following day, that is to

say, 7 December 1983. Technically, it thus was possible in any event to withdraw 882 tonnes of oil per day. It follows that a quantity of 2 423 tonnes could be loaded in a little less than three days.

34. However, since the Court, in the context of a reference for a preliminary ruling, cannot rule on a specific point of the main proceedings, I propose that it should reply as follows to the third question:

'For the purposes of Article 13 (1) of Regulation No 2960/77, it is sufficient for the purchaser to begin withdrawal of the oil at a time when loading may, under normal conditions, be completed before the expiry of the time-limit.'

Conclusion

35. To recapitulate, I would propose that the Court reply as follows to the Efeteio Athinon:

'(1) The expression "at the purchaser's own risk" in Article 15 (a) and Regulation No 2960/77 means that even if the goods perish or deteriorate after the expiry of the time-limit laid down for their withdrawal, the purchaser will still be required to pay the whole of the agreed price.

(2) The purchaser does not have to bear the consequences of a delay in the withdrawal of the goods where that delay was due to a power failure which temporarily prevented the seller from delivering the goods to him, or to a period of bad weather which may be regarded as a case of *force majeure.*

(3) For the purposes Article 13 (1) of Regulation No 2960/77, it issufficient for the purchaser to begin withdrawal of the oil at a time when loading may under normal conditions, be completed before the expiry of the time-limit.'