OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 9 November 1989 *

Mr President,
Members of the Court,

1. By an order for reference registered at the Court Registry on 22 November 1988, the tribunale civile (Civil District Court), Genoa, has asked the Court to give a preliminary ruling on the validity of Article 20 of Commission Regulation (EEC) No 49/81 [1] and Article 6 of Commission Regulation (EEC) No 57/81, [2] inasmuch as those articles provide for the retroactive application as from 1 January 1981 of the regulations in question, published in the *Official Journal of the European Communities* of 1 January 1981, which was, however, not distributed until 23 January 1981.

2. The facts underlying the main proceedings occurred in the period between the end of 1980 and the beginning of 1981, the year of entry into force of the Act concerning the conditions of accession of the Hellenic Republic to the European Communities [3] (hereinafter referred to as the 'Act of Accession').

3. The relevant provisions are as follows. Article 41(1) of the Act of Accession, in Title II relating to the free movement of goods, provided that the Commission was to determine the methods of administrative cooperation designed to ensure that goods fulfilling the requisite conditions were to benefit from 1 January 1981 (the date of entry into force of the Act of Accession) from the abolition of customs duties and charges having equivalent effect and quantitative restrictions and measures having equivalent effect.

On 12 September 1980 the Commission undertook to adopt on 1 January 1981 a series of regulations based on Article 41 of the Act of Accession.

In order to bring the texts of the draft regulations to the notice of the national authorities and traders, the Commission published them in the Official Journal of 6 October 1980. [4]

The first of the abovementioned texts subsequently became Regulation (EEC) No 49/81 on methods of administrative cooperation to safeguard during the transitional period the free movement of goods between Greece and the other Member States.

Article 1 in conjunction with Article 18 of that regulation provide that goods in respect of which an AG 1 or AG 3 movement certificate has been issued and which on 1 January 1981 were either in transit or had been placed in the Community in temporary storage, in a customs warehouse or a free zone were to benefit from the abolition of customs duties and charges having equivalent effect envisaged in the Act of Accession. It should be pointed out that the AG 1 and AG 3 certificates were the documents provided for in the Association Agreement between Greece and the

* Original language: Italian.
1 — OJ 1981, L 4, p. 1.
2 — OJ 1981, L 4, p. 43.
3 — OJ L 291, 19.11.1979, p. 17.
4 — OJ 1980, C 259, p. 1.

Community of Nine for the purpose of qualifying for the conditions specified in that agreement.

Article 20 of Regulation No 49/81 provided that the regulation entered into force on 1 January 1981.

It is however undisputed that Official Journal L 4, of 1 January 1981, in which the regulation was published actually became available at the Office for Official Publications of the European Communities only on 23 January 1981.

4. Article 73(1) of the Act of Accession, in Title IV relating to agriculture, provides that:

'If transitional measures are necessary to facilitate the passage from the existing arrangements in Greece to those resulting from the application of the common organization of the markets as provided for in this title, particularly if for certain products the implementation of the new arrangements on the scheduled date meets with appreciable difficulties, such measures shall be adopted in accordance with the procedure provided for in Article 38 of Regulation No 136/66/EEC or, as the case may be, in the corresponding articles of the other regulations on the common organization of agricultural markets. Such measures may be taken during the period up to 31 December 1982, but their application may not extend that date.'

A brief reminder of the legislative and economic background to trade in agricultural products between Greece and the Community in the period preceding accession will enable a better understanding to be obtained of the objective pursued by Regulation (EEC) No 57/81, which was adopted on the basis of the abovementioned article.

Prior to accession, Greek agricultural products, including olive oil, were subject, on importation into the Community, to the arrangements provided for in the Association Agreement between the EEC and Greece. A characteristic feature of those arrangements was the application of levies.

Agricultural products exported from Greece before accession in fact benefited in that country from export refunds and other advantages, such as those deriving from sales at low prices of intervention stocks, as in the case of olive oil.

With effect from accession and during the transitional period, imports into the Community of agricultural products originating in Greece were no longer subject to levies but to the accession compensatory amounts provided for in Article 61(1) of the Act of Accession.

However, the Commission considered that it would not be equitable to apply the more favourable provisions resulting from accession to agricultural products exported from Greece before accession, but imported into the Community afterwards. That would, in fact, have conferred upon the traders concerned an unjustified dual benefit, on the one hand, the premium on exportation from Greece and, on the other hand, the abolition of the levy.

The Commission therefore adopted Regulation (EEC) No 57/81 on transitional measures to be taken, on account of the accession of Greece, in respect of trade in agricultural products, Article 2 of which provides that, notwithstanding the

provisions of Regulation No 49/81, agricultural products exported from Greece before 1 January 1981 and imported into the Community of Nine on or after that date are, if the products in question are accompanied by a movement certificate AG 1 or AG 3, to be subject to the arrangements applicable to trade between the Community of Nine and Greece on 31 December 1980, in other words, to the arrangements applicable under the Association Agreement.

Regulation No 57/81, which, in accordance with Article 6 was intended to enter into force on 1 January 1981, was also published in Official Journal L 4, of 1 January 1981, which, as has been said, became available only on 23 January 1981.

Advance notice of the adoption of that regulation was not however given directly to traders, since the Commission merely communicated the draft regulation to the customs authorities of the Member States by telex message on 23 December 1980.

5. The facts of the case are as follows. Società agricola fattoria alimentare SpA (hereinafter referred to as 'SAFA') had before 31 December 1980 exported from Greece and placed in a customs warehouse in Genoa a number of consignments of olive oil. On 2 January 1981, the day after the entry into force of the Act of Accession, SAFA declared that olive oil for home use. Pursuant to Regulation No 57/81, the Italian customs authorities claimed payment of the levies in force on 31 December 1980. However, SAFA alleged that the aforementioned regulation was unlawful and further submitted that Regulation No 49/81 should be applied to it; it therefore brought proceedings against the Amministrazione delle finanze (State Finance Administration) before the tribunale civile (Civil District Court) of Genoa in order to recover the amounts paid.

In SAFA's view, Regulation No 57/81, which was published in the Official Journal on 1 January 1981 and actually became available only on 23 January 1981, could not be applied retroactively as from 1 January 1981.

6. In order to give a decision on the dispute, the tribunale civile considered it necessary to refer two questions to the Court of Justice for a preliminary ruling, the first concerning the validity of Article 6 of Regulation No 57/81, inasmuch as it entails that regulation's having retroactive effect from 1 January 1981, and the second — if the Court were to hold the aforementioned article to be unlawful — relating to the validity of Article 20 of Regulation No 49/81, inasmuch as it entails that regulation's having retroactive effect from 1 January 1981.

7. Since the national court has raised the question of the lawfulness of the retroactive application of Regulation No 49/81 only in the event that the Court should hold Article 6 of Regulation No 57/81 to be invalid, I shall first focus my attention on the latter point.

In that connection I would make the preliminary observation that the national court rightly refers to Regulation No 57/81 as having retroactive effect from 1 January 1981, since it appears undisputed that the Official Journal in which that regulation was published became available only on 23 January 1981.

It is in fact clear from the Court's case-law that, should evidence be produced that the date on which an issue of the Official Journal was in fact available does not correspond to the date which appears on that issue, regard must be had to the date of actual publication. [5]

5 — See judgments of 25 January 1979 in Case 98/78 *Racke* v *Hauptzollamt Mainz* [1979] ECR 69, paragraph 15, and of 25 January 1979 in Case 99/78 *Decker* v *Hauptzollamt Landau* [1979] ECR 101, paragraph 3.

The Court has, moreover, had occasion to state that, although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. [6]

8. On that basis, it is necessary to verify whether in the present case the two abovementioned conditions are satisfied.

As to the first, it seems to me sufficiently clear from the general context in which the contested regulation was adopted that the intended result was to fill a gap in the system and to prevent certain importers from obtaining an unjustified enrichment from that situation which would have given them an advantage over other traders.

The objective pursued meant that it was essential for the provisions in question to be made applicable as from 1 January 1981, notwithstanding the delay in the publication of the regulation caused by practical difficulties (a large accumulation of annually renewable texts to be published in a brief space of time, in addition to the many texts necessitated by the accession of Greece).

That was, in fact, the only way of ensuring the continuity and consistency of the arrangements applicable, whilst at the same time avoiding any speculation.

As the Commission has rightly pointed out, it was necessary in the present case to deal with a quintessentially transitional problem, which was particularly acute precisely in the days immediately following accession. If the rules in question had not been made applicable as from 1 January 1981, they would have lost their practical ability.

It is also appropriate to point out that since the regulation in question was based on the Act of Accession, it could be adopted only after the entry into force of the Act of Accession on 1 January 1981.

9. As regards the second condition of respect for the legitimate expectations of individuals, I will say straight away that I do not consider that principle to have been infringed by the retroactive application of the regulation in question.

It is in fact clear from the abundant and well-founded case-law that legitimate expectations meriting protection are something essentially different from any aspiration or any hope on the part of the person concerned. [7]

For there to be an infringement of that principle it is necessary that the amendment made to the regulation be unforeseen and unexpected, such as to cause specific harm

6 — See judgments of 14 July 1983 in Case 224/82 *Meiko-Konservenfabrik* [1983] ECR 2539, paragraph 12, of 30 September 1982 in Case 114/81 *Tunnel Refineries* [1982] ECR 3189, paragraph 4, of 30 September 1982 in Case 110/81 *Roquette Frères* [1982] ECR 3159, paragraph 5, of 30 September 1982 in Case 108/81 *Amylum* [1982] ECR 3107, paragraph 4, of 19 May 1982 in Case 84/81 *Staple Dairy Products Ltd* v *Intervention Board for Agricultural Produce* [1982] ECR 1763, paragraph 12, of 12 November 1981 in Joined Cases 212 to 217/80 *Salumi* [1981] ECR 2735, paragraph 10, and the judgments in *Decker* mentioned above, paragraph 8, and *Racke*, paragraph 20.

7 — See in particular judgments of 28 October 1982 in Case 52/81 *Faust* v *Commission* [1982] ECR 3745, paragraph 27, of 15 July 1982 in Case 245/81 *Edeka* [1982] ECR 2745, paragraph 27, the abovementioned *Staple Dairy Products* judgment, paragraph 15, of 13 June 1978 in Case 146/77 *British Beef Company Ltd* v *Intervention Board for Agricultural Produce* [1978] ECR 1347, paragraph 13, of 1 February 1978 in Case 78/77 *Lührs* v *Hauptzollamt Hamburg-Jonas* [1978] ECR 169, paragraph 6, and of 8 June 1977 in Case 97/76 *Merkur Aussenhandel Gmbh and Co. KG* [1977] ECR 1063, paragraph 9.

to the expectations of individuals and to their right to operate within a secure legislative framework.

To borrow an apt expression used by Mr Advocate General Mayras, the measure adopted by the authority must supervene like a 'clap of thunder in a clear sky'. [8]

In other words there can be no legitimate expectation that the Community institutions will not amend a given set of rules — even retroactively where necessary — when the possibility of a legislative amendment is reasonably foreseeable by an informed trader.

The foregoing remarks as to the economic and legislative context of Regulation No 57/81 show, it seems to me, sufficiently clearly that the measure adopted, far from being unforeseeable, was in perfect conformity with the logic of the arrangements, and I would say necessary in order to ensure the proper conduct of commercial transactions.

An informed trader could not but consider strange at the very least a situation in which he would have been able to acquire a product on particularly advantageous terms, such as those existing in Greece before accession, and then import it into the Community free of levy under the more favourable measures provided for by the Act of Accession. That is particularly so in a sector, namely the agricultural products sector, in which public intervention measures are of particular importance in price formation and in which trade liberalization cannot proceed without more general harmonization of those measures.

8 — See Opinion in Cases 44 to 51/77 (judgment of 26 January 1978) *Union Malt* v *Commission* [1978] ECR 57, at p. 91.

SAFA was therefore not properly entitled to consider that the Community institutions would not be prompted to adopt measures, even retroactively, in order to remedy an abnormal situation which would have enabled it to obtain an unjustified advantage at the same time as distorting the proper conduct of commercial transactions.

10. In my opinion, even the advance notice of the adoption of Regulation No 49/81 on methods of administrative cooperation to safeguard during the transitional period the free movement of goods between Greece and the other Member States, based on Article 41 of the Act of Accession and having general scope, was not capable of giving individuals a legitimate expectation that the Commission would not in respect of certain products adopt specific measures justified by a particular economic context and based on different provisions of the Act of Accession.

Certainly, it cannot be ruled out that SAFA might have entertained hopes that the system which seemed in some way to be taking shape at the beginning of January would remain unaltered and would not be amended with retroactive effect. However, I do not think that a hope that the Commission will overlook or fail to deal with the situation can constitute at law a legitimate expectation worthy of protection.

11. Finally, as regards SAFA's submission that the Court should in the alternative rule on the merits of the question of repayment in pursuance of Article 13 of Council Regu-

lation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties[9] of amounts paid by way of levy, it is sufficient to recall that it is clear from the Court's case-law that by virtue of the division of jurisdiction provided for in Article 177 in preliminary-ruling proceedings, it is for the national court alone to determine the subject-matter of the questions which it wishes to submit to the Court. The Court cannot therefore, at the request of a party to the main proceedings, examine questions which have not been referred to it by the national court.[10]

12. In conclusion, and on the grounds set out above, I propose that the Court should reply to the question referred to it for a preliminary ruling by the tribunale civile, Genoa, by declaring that consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Article 6 of Regulation (EEC) No 57/81, in so far as that provision confers on that regulation retroactive effect from 1 January 1981.

9 — OJ 1979, L 175, p. 1

10 — Judgments of 14 November 1985 in Case 299/84 *Neumann* v *BALM* [1985] ECR 3663, paragraph 12, and of 3 October 1985 in Case 311/84 *CBEM* [1985] ECR 3261, paragraph 10.