OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 14 November 1990 *

Mr President,
Members of the Court,

1. The Tribunale Civile di Genova has referred two questions to the Court for a preliminary ruling on the interpretation and validity of Article 16 of Council Regulation No 1562/78/EEC, [1] or more precisely Regulation No 136/66/EEC of the Council, [2] as amended by the former regulation. That article concerns the fixing, by means of a tendering procedure, of the amount of import levies on olive oil from Greece for the years 1979 and 1980.

2. The facts are very simple. On 18 December 1981 the Società Agricola Fattoria Alimentare (hereinafter referred to as 'SAFA') instituted proceedings before the national court against the Italian Ministry of Finance in order to recover import levies paid on imports of extra-virgin olive oil from Greece in 1979 and 1980. Before that court SAFA contended that recourse could be had to the tendering procedure for fixing the amount of import levies only in specific cases, failing which there would be a breach of fundamental rights recognized by the Community legal order. Consequently, the Tribunale Civile di Genova put two questions to the Court.

3. The first concerns the *interpretation* of Article 16 of Regulation No 136/66 as amended. However, as the Commission has correctly observed in its written observations, that regulation concerns imports of olive oil from non-member countries in general, and not specifically from Greece. Imports from Greece were covered by Council Regulation No 2749/78/EEC of 23 November 1978 on trade in oils and fats between the Community and Greece. [3] Nevertheless the provisions of Article 5 of the latter regulation are wholly similar to those of the aforesaid Article 16, except that the latter refers to 'the world market' and the former to 'the Greek market'. The dividing line between the two measures is laid down in Article 10 of Regulation No 2749/78, which provides that: 'When the products imported into the Community have not been entirely produced in Greece or not transported directly from Greece into the Community, Articles 14, 15, 16, 17 and 20b of the basic regulation shall apply . . .'. [4]

4. It is not for the Court to determine the regulation applicable to the facts of the case pending before the national court. It is indeed unnecessary to remind the Court of the principle to which the Court has consistently adhered in preliminary-ruling cases, namely that:

* Original language: French

1 — Regulation of 29 June 1978 amending Regulation No 136/66/EEC on the establishment of a common organization of the market in oils and fats (OJ L 185, p. 1).

2 — Regulation of 22 September 1966 on the establishment of a common organization of the market in oils and fats (OJ, English Special Edition 1965-1966, p. 221).

3 — OJ 1978 L 331, p. 1.

4 — By 'basic regulation' is meant Regulation 136/66, as amended.

'The question whether the provisions or concepts of Community law, whose interpretation is requested, are in fact applicable to the case in question lies outside the jurisdiction of the Court of Justice and falls within the jurisdiction of the national court'. [5]

At most it may be said that the interpretation accorded to Article 16 of Regulation No 136/66 as amended is equally applicable to Article 5 of Regulation No 2749/78, having regard to the similarity of their provisions.

5. I now turn to the question itself. Under the system of import levies for olive oil, the Council adopts before 1 October each year a representative market price and a threshold price for the following marketing year. [6] If on the importation of untreated olive oil from non-member countries the threshold price is higher than the cif price ('cost, insurance, freight'), a levy equal to the difference between the two prices is charges. [7] The cio price is determined on the basis of the most favourable purchasing possibilities on the world market. However, as is provided for by Article 16(1), 'where the real trend on the world market in untreated olive oil cannot be determined from the offers on that market, the import levy . . . shall be fixed by tendering procedure'. To that end 'the Commission shall periodically fix the rate of the minimum levy, having regard among other things to the rates of levy indicated by the tenderers. Any tenderer having indicated a rate of levy equal to or higher than the minimum rate shall be declared a successful tenderer and shall be obliged to import the quantity of the product specified in his application at the rate of levy indicated by him'. [8] For the sake of completeness I should mention finally that 'imports involving quantities which have no effect on the market situation shall not be subject to the abovementioned tendering procedure. In that case, the levy to be charged shall be the latest minimum levy fixed before importation'. [9]

6. It is apparent from a reading of that article that, other than in the specific case of imports involving in quantities which have no effect on the market, the levy may be fixed by tendering procedure where — that is to say, in my view, for as long as — the real trend on the world market cannot be determined from the offers on that market.

7. In its written observations [10] the Commission indicated that in 1979 and 1980 there was no world price for untreated olive oil, a situation which remains the same today. Morocco and Turkey had gradually withdrawn from the export market; other States prefer to sell treated oil. Tunisian exports were under the control of a State body; finally, in Spain and Greece, which were not yet members of the Community, traders were few and engaged in concerted action.

5 — Judgment in Case 10-69 *Portelange* [1969] ECR 309, at paragraph 6; see also judgment in Case 13/68 *Salgoil* [1968] ECR 453, judgment in Case 28/68 *Torrekens* [1969] ECR 125 (subparagraphs 7 and 8), judgment in Case 35/76 *Simmenthal* [1976] ECR 1871 (at paragraph 8), judgment in Case 5/77 *Tedeschi* 1977 ECR 1555 (at paragraph 19).

6 — Article 4(1) of Regulation No 1562/78.

7 — Article 14(1) of Regulation No 1562/78.

8 — Article 16(2) of Regulation No 136/66 as amended.

9 — Article 16(3) of Regulation No 136/66 as amended.

10 — Page 9 of French translation.

8. Where such a market structure persists for a number of years, there is nothing in the wording of Article 16 of Regulation No 136/66 as amended which prevents the levy from being fixed by the tendering procedure throughout the entire period. I propose that the Court's reply to the first question be to that effect.

9. I now turn to the second question, which concerns the *validity* of Article 16. SAFA claims that Article 16 is contrary to fundamental rights recognized by the Community legal order. In the absence of written observations on its part, it is necessary to refer to the grounds of the order for reference and to the explanations given at the hearing. It appears that the company puts forward essentially two complaints concerning, first, the existence of excessive discretion on the part of the Commission and, secondly, breach of the principle of non-discrimination.

10. The first complaint seems inapposite in the light of the Court's decisions concerning [11] the implementing powers accorded to the Commission in the sphere of the common agricultural policy. In its judgment of 11 March 1987 in *Rau* v *Commission* the Court held:

'Since only the Commission is in a position to keep track of agricultural market trends and to act quickly when necessary, the Council may confer on it wide powers of discretion and action in that sphere, and when it does so the limits of those powers must be determined in the light of the essential general aims of the market organization'. [12]

11. According to the ninth recital in the preamble to Regulation No 136/66, 'in order to stabilize the Community market at the desired level, notably by ensuring that fluctuations in world market prices do not affect prices within the Community, provision should be made for charging an import levy corresponding to the difference between the threshold price derived from the market target price and prices ruling on the world market'.

12. The Commission's discretion must therefore be appraised in the light of the essential general objective of stabilizing the Community market. In so far as the structure of the world market in untreated olive oil does not allow a market price to be established, recourse to the tendering procedure for fixing the amount of the import levy seems to be only means of ensuring the stability of the Community market.

13. As I have stated, the second complaint concerns a breach of fundamental rights and more particularly the principle of non-discrimination. It is difficult to see, from a reading of the order for reference, why recourse to the tendering procedure should disrupt the equal treatment of traders. Where there is no market price on the world market in olive oil each trader may acquire quantities of olive oil at very

11 — Judgment in Case 23/75 *Rey Soda* [1975] ECR 1279, paragraph 11; judgment in Joined Cases 279, 280, 285 and 286/84 *Rau* v *Commission* [1987] ECR 1869, paragraph 14; Case C-350/88 *Société française des biscuits Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 2.

12 — Joined Cases 279, 280, 285 and 286/84, cited above, at paragraph 14.

different prices and consequently propose different levies having regard to the requirements of profitability. The Commission, by fixing a minimum levy, ensures that import prices are maintained at a certain level so as not to disrupt the Community market. Traders who propose levies higher than or equal to that threshold may well obtain the same profit from imports subject to different levies. The complaint is therefore untenable.

14. At the hearing SAFA's representative put forward arguments concerning the discretionary use by the Commission of a power which is already in itself discretionary, arguing that the Commission could prevent any imports of virgin olive oil from Greece by fixing the minimum levy at an extremely high level.

15. It is sufficient to point out in this connection that the national court has sought a ruling on the validity of *Article 16 of Regulation No 136/66 as amended* in so far as it confers certain powers on the Commission, and not of a decision adopted in pursuance of that provision having regard to the allegedly incorrect *manner* in which it was applied. In other words, it is not necessary for the Court to examine the case — which is not envisaged by the national court — of a manifest error of appraisal, a misuse of power or a manifest exceeding of the limits of its discretion [13] by the Commission in implementing the provision in question.

16. I therefore propose that the Court rules as follows:

'(1) Article 16 of Regulation No 136/66/EEC of the Council of 22 September 1966 on the establishment of a common organization of the market in oils and fats, as amended by Council Regulation No 1562/78/EEC of 29 June 1978, must be interpreted as authorizing the use of the tendering procedure to determine the import levy on untreated olive oil for the years 1979 and 1980.

(2) Consideration of the preliminary question has disclosed no factor of such a nature as to affect the validity of Article 16 of that regulation.'

13 — Judgment in Case 29/77 *Roquette* [1977] ECR 1835, at paragraph 20; judgment in Case 136/77 *Racke* [1978] ECR 1245, at paragraph 4.