OPINION OF ADVOCATE GENERAL ELMER

delivered on 2 October 1997 *

1. The Irinodikio (Small Claims Court), Echinos, Greece, has in this case referred to the Court for a preliminary ruling a number of questions on the validity of various regulations dealing with the common organisation of the market in tobacco.

The relevant rules of Community law

2. Under Regulation (EEC) No 727/70 of the Council of 21 April 1970 on the common organisation of the market in raw tobacco ('the basic regulation'), [1] premiums were granted to those persons who purchased tobacco direct from Community producers.

3. Council Regulation (EEC) No 1114/88 of 25 April 1988 amending the basic regulation ('the amending regulation') [2] added a paragraph (5) to Article 4 of the basic regulation:

'Each year and in accordance with the procedure provided for in Article 43(2) of the Treaty, the Council shall fix a maximum guaranteed quantity, in particular in the light of market requirements and the socio-economic and agricultural conditions of the regions concerned, for each variety or group of varieties of Community-produced tobacco for which prices and premiums are fixed. The overall maximum quantity for the Community shall be fixed at 385 000 tonnes of leaf tobacco for each of the 1988, 1989 and 1990 harvests.

Without prejudice to ..., for each 1% by which the maximum guaranteed quantity is exceeded per variety or group of varieties, the intervention prices and the premiums concerned shall suffer a reduction of 1%. ...

The reductions referred to in the second subparagraph shall not exceed 5% for the 1988 harvest and 15% for the 1989 and 1990 harvests.

For the purposes of applying this paragraph, the Commission shall establish before 31 July whether production exceeds the maximum guaranteed quantity for a variety or group of varieties.

...'.

* Original language: Danish.

1 — OJ, English Special Edition 1970 (I), p. 206; original reference: JO 1970 L 94, p. 1.

2 — OJ 1988 L 110, p. 35.

4. Council Regulation (EEC) No 2268/88 of 19 July 1988 fixing, for the 1988 harvest, the norm and intervention prices and the premiums granted to purchasers of leaf tobacco, the derived intervention prices for baled tobacco, the reference qualities, the production areas and the guaranteed maximum quantities and amending Regulation (EEC) No 1975/87 [3] ('the 1988 guaranteed quantities regulation') laid down maximum guaranteed quantities for each tobacco variety and group of tobacco varieties from the 1988 harvest. A maximum guaranteed quantity of 38 000 tonnes was set for the Bright variety.

5. Council Regulation (EEC) No 1251/89 of 3 May 1989 amending the basic regulation [4] ('the additional regulation') made, *inter alia*, certain additions to the first subparagraph of Article 4(5) of the basic regulation. The first recital in the preamble to the additional regulation is worded as follows:

'... pursuant to Article 4(5) of [the basic regulation] ... there is fixed within an overall Community quantity a maximum guaranteed quantity for each of the tobacco varieties or groups of varieties grown in the Community, overshooting of which gives rise to a proportional reduction in prices and premiums; ... these maximum guaranteed quantities are fixed every year, at the same time as prices and premiums, for a specific harvest; ... in order to allow planting to be planned the maximum guaranteed quantity for each variety or group of varieties should be fixed each year for the following year's harvest; ... on the present occasion the quantities for both the 1989 and 1990 harvests should therefore be fixed;'.

6. The first subparagraph of Article 4(5) of the basic regulation, with the additions highlighted, accordingly provides as follows:

'The Council, ... shall lay down every year, for each tobacco variety or group of varieties produced in the Community for which prices and premiums are fixed, a maximum guaranteed quantity *for the following year's harvest*, [5] taking into account the market situation and the socio-economic and agricultural situation in the areas concerned. *The Council shall set the maximum guaranteed quantities for the 1990 harvest at the same time as for the 1989 harvest.* The overall maximum quantity for the Community is set for each of the 1988, 1989 and 1990 harvests at 385 000 tonnes of leaf tobacco.'

7. Council Regulation (EEC) No 1252/89 of 3 May 1989 fixing, for the 1989 harvest, the norm and intervention prices and the premiums granted to purchasers of leaf tobacco, the derived intervention prices for baled

3 — OJ 1988 L 199, p. 20.
4 — OJ 1989 L 129, p. 16.
5 — The words 'for the following year's harvest' were mistakenly omitted from the Danish version.

tobacco, the reference qualities, the production areas and the guaranteed maximum quantities and amending Regulations (EEC) No 1577/86, (EEC) No 1975/87 and the 1988 guaranteed quantities regulation [6] ('the 1989 guaranteed quantities regulation') laid down maximum guaranteed quantities for each variety and group of varieties of tobacco for the 1989 and 1990 harvests. A joint maximum guaranteed quantity of 30 000 tonnes was set for the Tsebelia and Mavra varieties.

8. Commission Regulation (EEC) No 2158/89 of 18 July 1989 determining, for tobacco from the 1988 harvest, the quantity actually produced and the prices and premiums payable under the system of maximum guaranteed quantities [7] ('the 1988 control regulation') stated that production of the Bright variety in 1988 exceeded the maximum guaranteed quantity for that variety by 10.8%, and the premium for that variety was accordingly reduced by 5%, which was the maximum reduction in 1988.

9. Council Regulation (EEC) No 1331/90 of 14 May 1990 fixing, for the 1990 harvest, the norm and intervention prices and the premiums granted to purchasers of leaf tobacco, the derived intervention prices for baled tobacco, the reference qualities, the production areas and the guaranteed maximum quantities for the 1991 harvest and amending the 1989 guaranteed quantities regulation [8] ('the 1990 guaranteed quantities regulation') laid down maximum guaranteed quantities for each variety and group of varieties of tobacco for the 1990 and 1991 harvests.

10. Commission Regulation (EEC) No 2046/90 of 18 July 1990 determining, for tobacco from the 1989 harvest, the quantity actually produced and the prices and premiums payable under the system of maximum guaranteed quantities [9] ('the 1989 control regulation') stated that production of the Tsebelia and Mavra varieties in 1989 exceeded the maximum guaranteed quantity for those varieties by 44.1%, and the premium for those varieties was reduced by 15%, which was the maximum reduction in 1989.

11. Council Regulation (EEC) No 1738/91 of 13 June 1991 fixing, for the 1991 harvest, the norm and intervention prices and the premiums granted to purchasers of leaf tobacco, the derived intervention prices for baled tobacco, the reference qualities, the production areas and the guaranteed maximum quantities and amending the 1990 guaranteed quantities regulation [10] ('the 1991 guaranteed quantities regulation') laid down maximum guaranteed quantities for each

6 — OJ 1989 L 129, p. 17.
7 — OJ 1989 L 207, p. 15.
8 — OJ 1990 L 132, p. 28.
9 — OJ 1990 L 187, p. 23.
10 — OJ 1991 L 163, p. 13.

variety and group of varieties of tobacco for the 1991 harvest.

The proceedings before the national court and the questions submitted for a preliminary ruling

12. In July 1989 the processing undertaking Odetti Nikou Petridi Anonymos Kapnemboriki AE ('Petridi') concluded contracts with a number of tobacco producers concerning cultivation of the Tsebelia tobacco variety for the 1989 harvest.

13. Pursuant to those cultivation contracts, Petridi in May 1990 purchased the tobacco producers' 1989 Tsebelia harvest. Petridi subsequently received a 100% advance on the premium from the National Tobacco Agency in Greece in return for the lodging of security. [11] As a result of the overproduction of Tsebelia and Mavra during the 1989 harvest, as established by the 1989 control regulation, and the resultant reduction of the premium by 15%, Petridi was requested by the National Tobacco Agency in 1993 to repay 15% of the amount which it had received.

14. In those circumstances, Petridi brought proceedings before the Irinodikio, Echinos, against 15 of the tobacco producers with whom Petridi had entered into cultivation contracts for the 1989 harvest. In the definitive form of order sought, Petridi submitted that the defendants should be ordered to acknowledge that they owed Petridi certain specified amounts. Petridi argued that the tobacco producers were the real beneficiaries of tobacco aid and ought for that reason to make reimbursement in the event of a reduction in the premium. The defendants contested that claim.

15. The Irinodikio, Echinos, stayed the proceedings by decision of 24 July 1995 and requested the Court of Justice to deliver a preliminary ruling on the questions set out below. Parts of the questions are included in the outline of the facts and must therefore be reproduced in the form of excerpts from it.

'1. Is [the basic regulation] valid, inasmuch as, in Article 1 thereof, the Council laid down for the whole of the Community a maximum guaranteed quantity of 385 000 tonnes of leaf tobacco for the 1988, 1989 and 1990 harvests, while at the same time it was provided that for every 1% by which the maximum guaranteed quantity was exceeded per variety or group of varieties there would be a corresponding reduction of 1% in the intervention prices and premiums, where such reductions, in particular for the 1989 harvest, could not exceed 15% and, in light particularly of the fact that

11 — Under Article 6(1) of Regulation (EEC) No 1726/70 of the Commission of 25 August 1970 on the procedure for granting the premium for leaf tobacco (OJ, English Special Edition 1970 (II), p. 587; original reference: JO 1970 L 191, p. 1), the right to the premium accrued (only) when the tobacco left the place in which it was under supervision. For a more detailed examination, see my Opinion of 15 May 1997 in Case C-244/95 *P. Moskof* v *Ethnikos Organismos Kapnou* [1997] ECR I-6441, I-6444.

no distinction was made on the basis of tobacco varieties and producers concerned, the price reduction was imposed generally, without distinction and without specification of the reduction to show whether a producer had overrun or not?

2. (a) Since the defendant tobacco producers had, however, not merely on 11 May 1989 (publication of [the 1989 guaranteed quantities regulation]) but even on 3 May 1989 [the date on which the regulation was adopted] already planted the Tsebelia tobacco variety for the 1989 harvest, the question arises as to how the objective which the preamble to [the additional regulation] confers on the maximum guaranteed quantities, namely to allow planting to be planned, could have been attained.

(b) ... the Irinodikio is unsure whether [the additional regulation and the 1989 guaranteed quantities regulation] are valid so far as regards the fixing of the maximum guaranteed quantities for tobacco of the Tsebelia variety for the 1989 harvest and whether their application is contrary to the general principles of the prohibition concerning retroactive application of Community legislation, of the protection of the legitimate expectations of producers and purchasers and processors of tobacco, and of legal certainty.

3. If the reply to the preceding question is affirmative, then in view of the finding by the Commission of actual overproduction and an exceeding by 44.1% of the maximum guaranteed quantities of the Tsebelia and Mavra varieties in the 1989 harvest [Annex I to the 1989 control regulation], and the imposition for that reason of a reduction in the premium and intervention price in the maximum amount of 15% [Annex II to the 1989 control regulation], which with regard to the Tsebelia variety came to ECU 2.304 and ECU 2.037 respectively, is [the 1989 control regulation] valid and may we apply, as the applicant contends, the clause of the cultivation contracts entered into on the basis of Commission Regulation No 4263/88 concerning a reduction in the agreed prices, featuring in the annex (clause 8, second paragraph and in particular the third paragraph) to that regulation and which features in the cultivation contracts concluded by the defendants with the applicant undertaking, and which provides as follows: "Notwithstanding the provisions of the preceding subparagraph, if the prices or the premium for the tobacco variety indicated in paragraph 1 are adjusted by a Community Regulation, the purchaser and the vendor shall renegotiate the contract price. Where those prices or premiums are adjusted pursuant to Article 4(5) of [the

basic regulation], the contract price shall be adjusted in line with the change in the price and premiums."?

4. In order to reply to the foregoing questions, the consequential question finally arises as to whether the factors which in 1991 led the Court of Justice in Case C-368/89 to annul the regulation laying down maximum guaranteed quantities for the 1988 harvest of the Bright variety are likewise present in this case in view of the fact that the Commission made the same mistake in delaying the determination of maximum guaranteed quantities for the 1989 harvest, such that it was also not possible to meet the specified objective of planning planting in good time by reason of the special climatic conditions obtaining in the tobacco region in which Tsebelia is cultivated or the more general objective of fixing maximum guaranteed quantities, which was solely to prevent overproduction of problematic varieties such as Tsebelia and Mavra.

5. Finally, in the event that the Court of Justice should rule that the (Council and Commission) regulations in question are valid, how are they to be construed in regard to the question whether the processing undertaking Odetti Nikou Petridi Anonymos Kapnemboriki AE or the defendant tobacco producers should be liable to repay the amount by which the premium was reduced?'

The validity of the amending regulation

16. By its first question, the national court is seeking to ascertain whether the amending regulation is invalid on the ground that it lays down a maximum guaranteed quantity of 385 000 tonnes for each of the years 1988, 1989 and 1990 and also provides that in cases where the guaranteed quantity is exceeded there should be a general percentile reduction in the intervention price and premium corresponding to the percentage by which the guaranteed quantity is exceeded, irrespective of the individual producer's volume and without distinguishing the different tobacco varieties.

17. In the *Crispoltoni II* judgment, [12] a similar question arose as to the legality of the system established by the amending regulation. The Court concluded that consideration of the questions raised in that case disclosed no factor of such a kind as to affect the validity of the amending regulation or the regulations implementing it. In my view, the Court thereby addressed the same objection as that raised in the present case to the validity of the amending regulation. For that

12 — Judgment in Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* v *Fattoria Autonoma Tabacchi and Donatab* [1994] ECR I-4863.

reason I propose that the Court's answer to the first question should be that consideration of the amending regulation, in light of the order for reference and the other information in the case, has disclosed no factor of such a kind as to raise doubts as to its validity.

The validity of the 1989 guaranteed quantities regulation and the additional regulation

18. By headings (a) and (b) of the second question, the national court is seeking to determine whether the 1989 guaranteed quantities regulation and the additional regulation are invalid.

19. Supported by the Greek Government, Petridi has argued, *inter alia*, that the 1989 guaranteed quantities regulation was adopted and published after the 1989 harvest had been planted out and thus applies retroactively. Producers were for that reason unable to plan the 1989 harvest, as intended by the additional regulation. The objective of the 1989 guaranteed quantities regulation, namely to limit production of the least sought-after varieties, could for that reason not be attained.

20. The Council and Commission argue that, in light of the fact that the total maximum guaranteed quantity of 385 000 tonnes was the same for the years 1988, 1989 and 1990, it must have been obvious to producers that the guaranteed quantity for the 1989 harvest in respect of the Mavra and Tsebelia varieties would be similar to that for the 1988 harvest in respect of the same varieties. Producers knew that the guaranteed quantity for the Mavra and Tsebelia varieties in 1988 was 33 000 tonnes, and the Commission had on 3 April 1989 published a proposal for a 1989 guaranteed quantity of 30 000 tonnes. The reduction by 3 000 tonnes is insignificant and, even without that reduction, exceeding of the guaranteed quantity in 1989 would also have triggered the maximum premium reduction of 15%.

21. Petridi states in its pleadings that sowing of Greek tobacco varieties, including Tsebelia, takes place from the end of January to early February in southern regions and during the first ten days of March at the latest in northern regions of Greece. Transplanting of the young plants takes place in March in southern regions and in April in the northern regions. Harvesting is carried out two to three months after transplanting, that is to say, from the end of June to 15 August.

22. The order for reference further states that Tsebelia producers carried out transplanting in March 1989.

23. Both the additional regulation and the 1989 guaranteed quantities regulation, however, were published in the *Official Journal of the European Communities* only on 11 May 1989. In my opinion, the additional regulation and the 1989 guaranteed quantities regulation thus have retroactive effect in so far as they lay down maximum guaranteed quantities for tobacco of the Tsebelia variety harvested in 1989.

24. The present case has significant points of similarity with the judgment in *Crispoltoni I*, [13] which concerned the validity of the amending regulation and the 1988 guaranteed quantities regulation. In that case, transplanting had taken place before the end of April, whereas the amending regulation and the 1988 guaranteed quantities regulation were not published until 29 April 1988 and 26 July 1988 respectively. The Court for that reason found that the amending regulation and the 1988 guaranteed quantities regulation had retroactive effect inasmuch as they laid down a maximum guaranteed quantity for tobacco of the Bright variety harvested in 1988. The Court then stated that, although in general the principle of legal certainty precludes retroactive application, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. The Court then went on to state as follows:

'As the first recital in the preamble to [the amending regulation] states, the purpose of setting a maximum guaranteed quantity is to curb any increase in the Community's tobacco production and at the same time to discourage the growing of varieties which are difficult to dispose of. That purpose could not be achieved, with respect to the 1988 harvest of tobacco of the "Bright" variety, by the regulations published at the end of April and July of that year. By then the decisions regarding the extent of the area to be cultivated had been made, the planting out had already taken place and, according to the order for reference, the harvest had begun long before the publication of [the 1988 guaranteed quantities regulation]. [paragraph 18]

Furthermore, the Council realised that it was impossible to limit production by measures adopted in such circumstances. By [the additional regulation], it provided that the maximum guaranteed quantities would be fixed each year for the following year's harvest, in order, according to the first recital of the preamble thereto, to allow planting to be planned. [paragraph 19]

In the absence of any other reason indicated in the preambles to [the amending regu-

13 — Judgment in Case C-368/89 *Crispoltoni* v *Fattoria Autonoma Tabacchi di Città di Castello* [1991] ECR I-3695.

lation] and [the 1988 guaranteed quantities regulation], it must therefore be held that the first condition for the retroactivity of those regulations to be permitted, namely that the purpose to be achieved so demands, is not fulfilled and, consequently, those regulations are invalid in so far as they lay down a maximum guaranteed quantity for tobacco of the "Bright" variety harvested in 1988. [paragraph 20]

Furthermore, the contested rules have infringed the legitimate expectations of the economic operators concerned. Although those operators must have considered that measures to limit any increase in tobacco production in the Community and to discourage the production of varieties which were difficult to dispose of were foreseeable, they were entitled to expect that they would be notified in good time of any measures having effects on their investments. However, that was not the case. [paragraph 21]

The answer to the national court's question must therefore be that [the amending regulation] and [the 1988 guaranteed quantities regulation] are invalid in so far as they lay down a maximum guaranteed quantity for tobacco of the "Bright" variety harvested in 1988. [paragraph 22]'.

25. The purpose of setting a maximum guaranteed quantity, namely to curb any increase in the Community's tobacco production and at the same time to discourage the growing of varieties which are difficult to dispose of, could not be achieved, with respect to the 1989 harvest of tobacco of the Tsebelia variety, in a similar fashion to the case just cited, since the planting out had already taken place on 11 May 1989, the date on which the 1989 guaranteed quantities regulation was published.

26. On the other hand, the present case involves only the setting of the maximum guaranteed quantity, whereas the *Crispoltoni I* judgment also involved the introduction of the actual system of maximum guaranteed quantities. When producers in the present case were planning the 1989 harvest, they had already been familiar for several years with the system of maximum guaranteed quantities and were aware that guaranteed quantities would, for each of the 1989, 1990 and 1991 harvests, be set for the individual varieties within the parameters of the same maximum guaranteed quantity of 385 000 tonnes. Producers were also aware of the guaranteed quantities for individual varieties for the 1988 harvest when planning the 1989 harvest.

27. In paragraph 21 of its judgment in *Crispoltoni I*, the Court stated that, although those operators must have considered it foreseeable that measures would be taken to limit production of varieties which were difficult to dispose of, they were entitled to expect that they would be notified in good time of any measures having effects on their investments.

28. In *Crispoltoni II*, it was argued that the amending regulation infringed the principle of the protection of legitimate expectations. The Court ruled on this point, *inter alia*, as follows:

'The system at issue, whose distinguishing features are that for a given variety MGQs [maximum guaranteed quantities] are set and known in advance by the producers, that support is guaranteed for their entire production and that a ceiling is set for the reduction of prices and premiums, satisfies the requirements of the principle of the protection of legitimate expectations' (paragraph 61).

29. The Court thus emphasised in that judgment how important it was that the guaranteed quantities for individual varieties should be set in advance.

30. It was further argued in *Crispoltoni II* that the 1991 guaranteed quantities regulation was invalid in that it had been published on 26 June 1991, whereas transplanting had taken place in April 1991. The Court stated as follows in this regard:

'In answer to the points raised by the court making the reference, it suffices to note, as the Council and the Commission have pointed out, that the MGQ for the 1991 harvest for the "Burley I" variety had already been fixed by Annex V to [the 1990 guaranteed quantities regulation]. [paragraph 71]

Although Annex V to [the 1991 guaranteed quantities regulation], pursuant to Article 4 thereof, replaced for the intervening period Annex V to [the 1990 guaranteed quantities regulation], it did not alter the MGQ for the 1991 harvest for the "Burley I" variety. [paragraph 72]

The latter regulation was published in the *Official Journal of the European Communities* of 23 May 1990, that is to say, well before the producers in question had to take their decisions concerning the 1991 harvest. [paragraph 73]

The alleged breach of the principle of the protection of legitimate expectations has therefore not been established. [paragraph 74]'

31. When the producers in *Crispoltoni II* were planning the 1991 harvest, they had for several years been familiar with the system of maximum guaranteed quantities and knew that guaranteed quantities for individual varieties would, for each of the 1989, 1990

and 1991 harvests, be set within the parameters of the same maximum guaranteed quantity of 385 000 tonnes. Producers also knew the guaranteed quantities for individual varieties for the 1990 harvest at the time when they were planning the 1991 harvest. As mentioned above, however, the Court emphasised that the guaranteed quantity for the 1991 harvest for the Burley I variety had been published on 23 May 1990, that is to say, well before the tobacco producers in question had to take their decisions concerning the 1991 harvest.

32. The conclusion, in my opinion, must accordingly be drawn that, not only for the 1988 harvest, in which the maximum guaranteed quantity system was applied for the first time, but also for the subsequent harvests, it was of fundamental importance for compliance with the prohibition of retroactive effect and the protection of legitimate expectations that maximum guaranteed quantities should be set and published before producers made plans for the harvest which the Community wished to influence by setting the same maximum guaranteed quantities. The Council ought therefore to have ensured that it set the maximum guaranteed quantities well before producers planned the 1989 harvest.

33. The first recital in the preamble to the additional regulation provides: '... on the present occasion the quantities for both the 1989 and 1990 harvests should therefore be fixed'. This is given effect by the inclusion of the following text in the first subparagraph of Article 4(5) of the basic regulation: 'The Council shall set the maximum guaranteed quantities for the 1990 harvest at the same time as for the 1989 harvest'.

34. The additional regulation was adopted on 3 May 1989 and published on 11 May 1989, that is to say, after the transplanting had taken place in March 1989. The provision that the maximum guaranteed quantities for the 1989 and 1990 harvests should be set at the same time therefore implies that the maximum guaranteed quantity for 1989 is to be set after transplanting. The additional regulation thus has retroactive effect in the same way as the 1989 guaranteed quantities regulation. In my view, the additional regulation is therefore invalid for the same reasons and to the same extent as the 1989 guaranteed quantities regulation.

35. I accordingly propose that the Court's answer to headings (a) and (b) of the second question should be that the 1989 guaranteed quantities regulation and the additional regulation are invalid in so far as they involve the fixing of a maximum guaranteed quantity for tobacco of the Mavra and Tsebelia varieties harvested in 1989.

The remaining questions

36. In light of the reply to headings (a) and (b) of the second question, I consider it unnecessary to reply to the fourth question. The third and fifth questions, according to their wording, require to be answered only if the answer to the second question were to be that the additional regulation and the 1989 guaranteed quantities regulation are valid. I therefore propose that the Court need not answer the third, fourth and fifth questions.

Conclusion

37. I accordingly propose that the Court reply as follows to the questions referred by the Irinodikio, Echinos:

(1) Consideration of Council Regulation (EEC) No 1114/88 of 25 April 1988 amending Regulation (EEC) No 727/70 on the common organisation of the market in raw tobacco, in the light of the order for reference and the other information in the case, has disclosed no factor of such a kind as to raise doubts as to its validity.

(2) Council Regulation (EEC) No 1252/89 of 3 May 1989 fixing, for the 1989 harvest, the norm and intervention prices and the premiums granted to purchasers of leaf tobacco, the derived intervention prices for baled tobacco, the reference qualities, the production areas and the guaranteed maximum quantities and amending Regulations (EEC) No 1577/86, (EEC) No 1975/87 and (EEC) No 2268/88 and Council Regulation (EEC) No 1251/89 of 3 May 1989 amending Regulation (EEC) No 727/70 on the common organisation of the market in raw tobacco are invalid in so far as they involve the fixing of a maximum guaranteed quantity for tobacco of the Mavra and Tsebelia varieties harvested in 1989.