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

Mr President,
Members of the Court,

1. The Hellenic Republic has brought an action for the annulment of Council Regulation (EEC) No 3955/87 of 22 December 1987 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power-station [1] (hereinafter referred to as 'Regulation No 3955/87').

2. That regulation, based on the EEC Treaty, and 'in particular Article 113 thereof' [2] (which, it will be remembered, establishes the common commercial policy), is intended to subject the release for free circulation of certain agricultural products originating in non-member countries to compliance with maximum permitted levels of radioactive contamination. It enables the Member States to monitor compliance with those levels and establishes a system of exchange of information under the central control of the Commission. The latter, in collaboration with an *ad hoc* committee, may adopt various measures, even to the extent of prohibiting the import of products originating in the non-member country in question.

3. The regulation, which applies for a period of two years, replaces a previous regulation, Regulation (EEC) No 1707/86 of 30 May 1986, [3] containing identical provisions, the validity of which, originally expiring on 30 September 1986, was twice extended, finally expiring on 31 October 1987. [4]

4. It should also be noted that on 22 December 1987 the Council adopted Regulation (Euratom) No 3954/87 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feeding-stuffs following a nuclear accident or any other case of radiological emergency, [5] which is the subject of the proceedings in Case 70/88 brought by the Parliament against the Council.

5. The present action for annulment is based on two submissions: first, infringement of the EEC and EAEC Treaties and misuse of powers, and, secondly, the vagueness of the Commission proposal. The first submission contains two limbs, one alleging infringement by the Council of the abovementioned Treaties in so far as it relied exclusively on Article 113 of the EEC Treaty, and the other alleging misuse of powers. The application, in the section preceding the arguments expounding the first submission, also refers to the infringement of essential procedural requirements. However, it is apparent from a reading of the observations in that section that in fact the Council is criticized only for having used an incorrect legal basis and thus misusing its powers. The argument that there is a contradiction between the first

* Original language: French.

1 — OJ L 371, 30.12.1987, p. 14.

2 — First reference in the preamble to the regulation.

3 — OJ L 146, 31.5.1986, p. 88.

4 — By Regulations (EEC) Nos 3020/86 (OJ L 280, 1.10.1986, p. 79) and 624/87 (OJ L 58, 28.2.1987, p. 101).

5 — OJ L 371, 30.12.1987, p. 11.

reference in the preamble to the contested regulation, which mentions Article 113, and the measures adopted in the body of the regulation itself, which have a different legal basis, appears merely to be part of the complaint that an incorrect legal basis was adopted. The reference to an infringement of essential procedural requirements thus appears otiose.

6. Before those two submissions are considered, however, two difficulties must be resolved.

7. In its defence, the Council alleges *in limine litis* that the first submission is inadmissible in so far as it refers to the EAEC Treaty whereas the action is based only on Article 173 of the EEC Treaty, without any reference to Article 146 of the EAEC Treaty.[6] The Commission supports the Council on that point.[7]

8. I shall merely point out that pursuant to Article 173 of the EEC Treaty the Court has 'jurisdiction in actions . . . on grounds of . . . infringement *of this Treaty* or of any rule of law relating to its application . . . '.[8] Accordingly, part of the first submission, in so far as it refers to infringement of the EAEC Treaty, appears to be manifestly inadmissible. I would also observe that the applicant State did not give details in its application of the alleged infringement of the EAEC Treaty.

9. Admittedly, the Court, having had referred to it a question based only on Article 177 of the EEC Treaty, nevertheless considered — in the case of *Deutsche Babcock* — whether matters governed by an EEC regulation were the subject of provisions of the ECSC Treaty.[9] But Article 232(1) of the EEC Treaty makes a reservation regarding the application of the provisions of the ECSC Treaty and the Court interpreted that article as meaning that provisions of the EEC Treaty may, in the absence of similar provisions in the ECSC Treaty, apply to products covered by the latter Treaty. The situation being considered by the Court today is very different, and it does not seem to me that the judgment just cited should prevent a declaration that part of the first submission is inadmissible.

10. A second preliminary difficulty arises from that fact that, in its reply,[10] the Hellenic Republic refers for the first time to an infringement of Article 190 of the EEC Treaty on the grounds that the contested regulation does not disclose 'the conditions under which the Community institutions applied the Treaty'. When asked by the Court whether the reference to Article 190 was in fact a fresh issue within the meaning of Article 42(2) of the Rules of Procedure, the Hellenic Republic contended that it was an argument required to support the first submission, in so far as the difference in the legal bases used by Regulations Nos 1707/86 and 3955/87 'contains no objective factors enabling the Court to exercise proper judicial review' and 'the Member States and interested parties to determine under what conditions the institutions applied the provisions of the Treaty in the specific circumstances'.

6 — Council defence, p. 13 of the French translation.

7 — Commission's submissions as intervener, p. 8 of the French version.

8 — Emphasis added.

9 — Judgment of 15 December 1987 in Case 328/85 [1987] ECR 5119, in particular paragraph 11.

10 — P. 4 of the French translation.

11. That answer refers to a line of decisions of this Court starting with the judgment of 26 March 1987 in Case 45/86 *Commission* v *Council*, concerning the obligation imposed by Article 190 of the Treaty to state the reasons on which certain Community measures are based, according to which

'in order to satisfy that requirement to state reasons, Community measures must include a statement of the facts and law which led the Community institution in question to adopt them, so as to make possible review by the Court and so that the Member States and the nationals concerned may have knowledge of the conditions under which the Community institutions have applied the Treaty'. [11]

12. Those decisions criticize imprecise indications of legal basis using wording such as: 'Having regard to the Treaty'. [12]

13. A comparison of dates also reveals the indirect dialogue which took place between the Council and this Court:

(i) 30 May 1986: adoption by the Council of Regulation No 1707/86, based on the Treaty without any details being given;

(ii) 26 March 1987: judgment in *Commission* v *Council*, *supra*, imposing the obligation to indicate the legal basis of Community measures;

(iii) 22 December 1987: adoption by the Council of the contested regulation, with a specific reference to Article 113 of the EEC Treaty.

14. Although, in the judgment just referred to, the Court annulled the contested regulations, it did so for two reasons, having found that they

'do not satisfy the requirements laid down in Article 190 of the Treaty with regard to the statement of reasons and . . . moreover, they were not adopted on the correct legal basis'. [13]

15. Consequently, although Article 190 of the Treaty imposes the obligation to state the legal basis of the measure concerned, the need to choose the correct legal basis cannot be based on that article since it stems from the principle of the Community rule of law.

16. However, in its action for annulment the Hellenic Republic seeks to challenge the use of Article 113 of the Treaty as a legal basis: it does not criticize the Council for failing to say that that was the basis used.

17. Accordingly, either the reference to Article 190 in the reply relates to the absence of a statement of reasons, in which case, as a fresh issue, it would appear to be inadmissible under Article 42(2) of the Rules of Procedure, or else that reference must be linked to the criticism of the legal basis chosen by the Council, in which case it is inappropriate.

18. Furthermore, it might have been concluded that the reference to Article 190

11 — Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 5; see also the judgment of 7 July 1981 in Case 158/80 *Rewe* [1981] ECR 1805, paragraph 25.

12 — See Case 45/86, *supra*, paragraphs 8 and 9.

13 — Case 45/86, *supra*, paragraph 22.

referred to the second submission concerning the vagueness of the Commission's proposal. The Hellenic Republic is criticizing the Council for failing to indicate whether or not the measure adopted was in conformity with the Commission's proposal. It is indeed Article 190 that states that 'regulations . . . shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty'. The Hellenic Republic's reply to the written question put to it by the Court does not, however, enable such a conclusion to be drawn since it refers expressly — and only — to the first submission.

19. Let us now consider the first limb of that submission. It may be summarized as follows: Regulation No 3955/87 is concerned exclusively with the protection of the health of the people living in the Member States against the consequences of the nuclear accident at Chernobyl and should therefore have been based on Articles 130r and 130s of the EEC Treaty, possibly in conjunction with Article 235.

20. In support of that argument, the Hellenic Republic claims that Regulation No 1707/86, which contained exactly the same provisions, was adopted unanimously, for reasons of protection of public health, that Regulation No 3954/87 of the same date was based on Article 31 of the EAEC Treaty, which concerns the protection of the health of the general public and workers, and finally that the reference in the preamble to Article 113 introduces an element of confusion which prevents the Court from carrying out its review.

21. It should be observed at the outset that the dispute regarding the legal basis is not concerned merely with a matter of form, since Article 113(4) provides for voting within the Council by a qualified majority, whereas on environmental questions it is apparent from Articles 130r and 130s, read in conjunction, that as a general rule the Council is required to decide unanimously. As the Court has held *expressis verbis*:

'the choice of the legal basis could thus affect the determination of the content [of the contested regulation]'. [14]

22. The essential question is therefore whether or not the measures introduced by the contested regulation form part of the common commercial policy. Curiously, although most commentators on the Single Act have drawn attention to the likely difficulties of classification as between Article 100a and Articles 130r and 130s of the Treaty, no reference has been made to such difficulties in the case of Article 113. [15]

23. It will be remembered in that connection that, before the adoption of the Single Act, this Court had already held that environmental protection was one of the Community's objectives [16] and that

14 — Case 45/86, *supra*, paragraph 12, see also judgments of 23 February 1988 in Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph 6, of 2 February 1989 in Case 275/87 *Commission* v *Council* [1989] ECR 259, paragraph 4, of 16 November 1989 in Case C-131/87 *Commission* v *Netherlands* [1989] ECR 3743, paragraph 8, and of 16 November 1989 in Case C-11/88 *Commission* v *Council* [1989] ECR 3799, paragraph 7.

15 — European Council on environmental law, Report by R. Kromarek: 'Commentaire de l'Acte unique europeen en matière d'environnement', *Revue juridique de l'environnement*, 1/1988, p. 76; F Roelants de Vivier and J P Hannequart 'Une nouvelle stratégie europeenne pour l'environnement dans le cadre de l'Acte unique', *Revue du marché commun*, No 316, April 1988, p. 205; L Kramer 'L'Acte unique europeen et la protection de l'environnement', *Revue juridique de l'environnement*, 4/1987, p. 450; J P Jacqué 'L'Acte unique européen', *Revue trimestrielle de droit européen*, 1/1986, p. 576, H J Glaesener 'L'Acte unique européen', *Revue du marché commun*, No 298, June 1986, p 307

16 — Judgment of 7 February 1985 in Case 240/83 *Procureur de la Republique* v *Adbhu* [1985] ECR 531.

'it is by no means ruled out that provisions on the environment may be based on Article 100 of the Treaty'. [17]

Before the Single Act, therefore, action on environmental matters could be taken within the framework of another Community policy.

24. The Single European Act explicitly created Community competence in environmental matters, by inserting Articles 130r to 130t in the Treaty. But environmental protection is also linked with the attainment of the internal market since it is referred to in Article 100a(3) and (4) with respect, on the one hand, to the level of protection that the Commission must attain in its proposals and, on the other, to the safeguard clauses. Accordingly, as we have seen, commentators have drawn attention to the difficulties of classification as between Articles 100a and 130s. [18]

25. However, that express obligation to take account of environmental protection in attaining the internal market is accompanied by a similar obligation inherent in every Community policy since Article 130r(2) provides that 'environmental protection requirements shall be a component of the Community's other policies'. Although it must be inferred from that provision that 'the possibility is not to be ruled out that decisions adopted in the context of such policies will not be confined to the matters specific to them but may be modified, or indeed adopted, having regard to environmental problems', [19] it must also be concluded, in my opinion, that a measure having environmentally protective effects, or even objectives, may have been adopted on a basis other than Article 130r.

26. By explicitly providing for Community action on environmental matters, even though the Court had already held that environmental protection was one of the objectives of the Community, the Single Act did not restrict the power of intervention of the Community institutions. The introduction into the Treaty of a new sphere of Community competence, having as its corollary the rule that decisions should in principle be unanimous, could not have had the effect of transferring to that new field of action measures previously coming within areas of Community competence, such as those based on Articles 43, 100 or 113, the adoption of which may be governed by different rules. The position would be different only if the Member States had expressly decided, by amending the Treaties, to restrict the Community's areas of competence, and they did not do so by means of the Single Act.

27. That analysis of the relevant provisions of the Treaty seems to me to be supported by the decisions of this Court as a whole.

28. In its Opinion 1/78 [20] given under Article 228 of the EEC Treaty, the Court stated that:

17 — Judgment of 18 March 1980 in Case 91/79 *Commission* v *Italy* [1980] ECR 1099, paragraph 8.

18 — For example, P. Kromarek, *supra*, who considers that 'the entire law on pollution could come within the scope of Article 100a', RJE 1-1988, p. 87; L. Krämer, *supra*, who considers that the directives which were previously based on Article 100 and the regulations relating to products could come within the scope of Article 100a, whereas the directives previously based on Article 235 would come within the scope of Article 130s(1), and those based both on Article 100 and on Article 235 would come within the scope of Article 130s(2), cited above, p. 463.

19 — H. J. Glaesener, op. cit., p. 316.

20 — Of 4 October 1979 [1979] ECR 2871.

'it is not possible to lay down, for Article 113 of the EEC Treaty, an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade' [21]

and added that

'the enumeration in Article 113 of the subjects covered by commercial policy ... is conceived as a non-exhaustive enumeration', [22]

and finally that

'a restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries'. [23]

29. Moreover, the Court has already recognized, in its judgment of 26 March 1987 in Case 45/86, *supra*, that

'the link with development problems does not cause a measure to be excluded from the sphere of the common commercial policy as defined by the Treaty'. [24]

30. It should also be observed that that statement is wholly in line with the reasoning which the Court developed regarding Article 43 of the Treaty and the common agricultural policy. In the 'hormones' case the Court stated that:

'efforts to achieve objectives of the common agricultural policy ... cannot disregard requirements relating to the public interest such as the protection of consumers or the protection of the health and life of humans and animals, requirements which the Community institutions must take into account in exercising their powers', [25]

and concluded

'that the directive at issue falls within the sphere of the common agricultural policy and that the Council had the power to adopt it on the basis of Article 43 alone'. [26]

31. The Court's recent judgments of 16 November 1989 confirmed that view. [27] The Court stated in that regard:

'efforts to achieve objectives of the common agricultural policy cannot disregard requirements relating to the public interest, such as, in particular, the protection of health, and that the fact that measures adopted in the context of the common agricultural policy pursue at the same time objectives which, in the absence of specific provisions, are pursued on the basis of Article 100 of the Treaty, does not remove those measures from the field of application of Article 43'. [28]

21 — Case 1/78, cited above, paragraph 44.

22 — Opinion 1/78, *supra*, paragraph 45; see also the judgment of 27 September 1988 in Case 165/87 *Commission* v *Council* [1988] ECR 5545, paragraph 15.

23 — Opinion 1/78, *supra*, paragraph 45.

24 — Case 45/86, *supra*, paragraph 20.

25 — Case 68/86, *supra*, paragraph 12

26 — Case 68/86, *supra*, paragraph 22

27 — Cases 131/87 and 11/88, *supra*. See also the judgment of 23 February 1988 in Case 131/86 *United Kingdom* v *Council* [1988] ECR 905.

28 — Case 131/87, *supra*, paragraph 25; see also Case 11/88, *supra*, paragraph 10; and Case 131/86, *supra*, paragraph 21.

32. It seems to me that those dicta can be transposed fully to the area of the common commercial policy. In order to avoid any change in patterns of trade and any distortion of competition in dealings with non-member countries, the Community must be able, under the common commercial policy, to adopt uniform rules regarding the conditions under which products from non-member countries may be imported into its territory. Those conditions may include in particular compliance with maximum permitted levels of radioactivity without the measure in question thereby being of a different nature or not capable of adoption under Article 113. The contested regulation thus seems to me by its very nature to come within the scope of the common commercial policy.

33. It should also be observed that it is not certain that the protection of public health falls entirely within the concept — not defined by the Treaty — of environment. The fact that Article 130r(1) provides that 'action by the Community relating to the environment shall have the following objectives: ... to contribute towards protecting human health' does not mean in any way that preoccupations of that kind are exclusively reserved to the sphere of environmental matters. Moreover, the precautions concerning importation into the Community of products to be used for human foodstuffs reflect the concern to protect public health much more than to prevent any damage to the environment. It will be remembered that public health is among the exceptions provided for by Article 36 of the Treaty in relation to the free movement of goods.

34. All the foregoing considerations lead me to conclude therefore that the Council properly based Regulation No 3955/87 on Article 113 of the EEC Treaty.

35. For the sake of completeness, I must mention that the Hellenic Republic also referred in its application to the possibility that — in its view — the contested regulation could have been based on Article 235 of the EEC Treaty. That argument — which, moreover, it did not develop subsequently — cannot be upheld. Even in the context of the applicant's own argument, regardless of whether or not it is well founded, it need merely be pointed out that Article 130r provides special competence for the Community regarding the environment, and therefore Article 235 cannot be relied on here since, as the Court has held, and as is apparent from the very terms of that provision,

'its use as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question'. [29]

36. The second limb of the first submission, concerning misuse of power, will not detain us so long. The Hellenic Republic seeks to show that the Council used Article 113 as the basis for the adoption of the contested regulation solely in order to avoid the need for the unanimous decision required by Article 130s. The Court has already defined the concept of misuse of powers. In its judgment of 14 July 1988, the Court held that

'the powers conferred on the Commission by the ECSC Treaty would be diverted

29 — Case 45/86, *supra*, paragraph 13; see also Case 275/87, *supra*, paragraph 5; judgments of 30 May 1989 in Case 56/88 *United Kingdom* v *Council* [1989] ECR 1615, paragraph 5, and Case 242/87 *Commission* v *Council* [1989] ECR 1425, paragraph 6.

from their lawful purpose if it appeared that the Commission had made use of them for the exclusive, or at any rate the main, purpose of evading a procedure specifically prescribed by the Treaty for dealing with the circumstances with which it is required to cope'. [30]

37. In effect, this complaint is wholly linked with the first limb of the submission. If the appropriate legal basis had been Article 130s the question could have been asked whether the use of Article 113 was not motivated by a wish to circumvent the rule requiring a unanimous decision. But that is not the case. Accordingly, it is difficult to see in what way the Council misused its powers by resorting to the procedure under Article 113 when, in my opinion, that article constitutes the correct legal basis in this matter.

38. I would also point out that Article 130s itself (second paragraph) provides for the possibility of a majority decision since it states that 'the Council shall . . . define those matters on which decisions are to be taken by a qualified majority'. Furthermore, some authors consider that measures adopted earlier on the dual basis of Articles 100 and 235 of the EEC Treaty should now be adopted by a qualified majority, on the basis of the second paragraph of Article 130s. [31]

39. I conclude therefore that the second limb — and thus the submission as a whole — should be dismissed.

40. That brings us to the second submission. The Hellenic Republic objects to the words 'having regard to the proposal from the Commission' in so far as they do not make clear whether or not the measure adopted is in conformity with that proposal, a matter which, by virtue of Article 149(1) of the EEC Treaty, is not without influence on the rules for voting within the Council. Such a lack of precision, according to the applicant, offends against legal certainty since the citizens concerned are unable to verify whether, prima facie, measures adopted by the Council are legal.

41. Let me point out straight away that, in its application, the Hellenic Republic refers to 'citizens' and not to the Member States. The latter take part in the Council's deliberations and cannot therefore be unaware whether or not the measure adopted is in conformity with the Commission's proposal. In that regard the Court has consistently held that

'the extent of the duty to state reasons, laid down by Article 190 of the Treaty, depends on the nature of the act in question and on the context in which it is adopted', [32]

referring to the fact that the applicant government was closely involved in the process of making the contested decision. The Hellenic Republic cannot therefore claim for its own benefit that the contested measure contained an inadequate statement of reasons.

42. As far as citizens are concerned, I shall merely point out that Commission proposals

30 — Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86 *Stahlwerke and Hoogovens* v *Commission* [1988] ECR 4309, paragraph 23, see also the judgment of 21 February 1984 in Joined Cases 140, 146, 221 and 226/82 *Walzstahl-Vereinigung and Thyssen AG* v *Commission* [1984] ECR 951.

31 — L. Krämer, op. cit., p. 463.

32 — Judgment of 11 January 1973 in Case 13/72 *Netherlands* v *Commission* [1973] ECR 27, paragraph 11; see also the judgment of 14 January 1981 in Case 819/79 *Germany* v *Commission* [1981] ECR 21, paragraph 20.

are published in the *Official Journal of the European Communities* and that both a comparison of the proposal with the measure adopted and a reading of the articles of the Treaty mentioned as the legal basis of the measure enable a private individual to determine whether the measure in question should be adopted by the Council unanimously or could be adopted by a qualified majority. It thus seems that the complaint of lack of legal certainty should not prosper. Moreover, Article 190 merely requires reference to the proposals from the Commission and the opinions which are required to be obtained in implementation of the EEC Treaty; it imposes no obligation to state whether a Council measure is in conformity with the Commission proposal. It seems to me therefore that the second submission must also be dismissed.

43. For the foregoing reasons, I conclude that the present action should be dismissed and that the costs, including those incurred by the interveners, should be paid by the Hellenic Republic.