OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 16 October 1985 *

Mr President,
Members of the Court,

1. This action, brought by the Commission against the Hellenic Republic for failure to fulfil its obligations under the EEC Treaty, is concerned with the favourable credit terms which are allegedly granted by Greek banking institutions for the purchase of Greek agricultural machinery, to the detriment of similar machinery imported from the Member States. The Commission claims that such discrimination constitutes a breach of the prohibition of all quantitative restrictions on imports and measures having equivalent effect, as laid down by Article 30 of the EEC Treaty in conjunction with Article 35 of the Act of Accession, under which:

'Quantitative restrictions on imports and exports and any measures having equivalent effect shall, from the date of accession' (1 January 1981), 'be abolished between the Community as at present constituted and Greece.'

The Commission also claims that the Greek authorities infringed Article 5 of the EEC Treaty by failing to supply information which it had repeatedly requested on the agricultural machinery affected by the discrimination of which it complained.

2. In order to shed light on the facts of this dispute it is necessary to present in chronological order the measures adopted by the Greek authorities and banking services which form the basis of the parties' respective arguments.

Originally, the policy of allowing bank credits for the purpose of protecting the national agricultural industry in general was the subject of Decision 749 of 18 September 1970 (hereinafter referred to as 'Decision 749/70'), adopted by the Committee for the Coordination of Economic Policy at the Ministry for Coordination. Under Decision 749/70 the Agricultural Bank of Greece was required:

(i) in the case of certain types of machinery (of which an exhaustive list is given), to permit loans only for machinery of national manufacture; and

(ii) in the case of any other machinery, to allow credits for the purchase of imported machinery only on presentation of a certificate issued by the Ministry of Industry and valid for six months, certifying that no machinery of that kind was manufactured in Greece.

Following the accession of Greece to the European Communities on 1 January 1981, Decision 749/70 was repealed by the combined provisions of Decision 329/8 of the Monetary Committee of 20 August 1981 and Decision 1748 of the Economic Committee dated 24 Sepember 1981.

In Ministerial Directive, PH 5.3/42 of 31 March 1982, the Ministry of Industry and Energy stated, with reference to the grant of loans for the purchase of *centrifuges and*

* Translated from the French.

setting-tanks for oil mills, that presentation of the Ministry's certificate showing that no machines of that kind were manufactured in Greece was to be required by the Agricultural Bank of Greece 'for as long as Decision 749/70 of the former Committee for the Coordination of Economic Policy shall continue to be applied . . .'. The directive was distributed in the departments concerned in Circular No 96/82 of the Agricultural Bank of Greece.

Lastly, the Ministry of Economic Affairs — which in the meantime had taken over the functions of the Ministry of Industry — sent a Directive to the Agricultural Bank of Greece on 23 September 1984, revoking the directive of 31 March 1982. Accordingly, by Circular No 238 of 24 September 1984 the Agricultural Bank repealed Circular No 96/82.

3. According to the *Commission* the Ministerial Directive of 31 March 1982 and the Bank's Circular No 96/82 established credit terms which discriminated according to the origin of the machinery, giving preference to the marketing of Greek-made machinery. Whilst the measures do not compel the purchaser to choose machinery of national manufacture they strongly encourage him to do so in order to qualify for a loan from the Bank, as the main credit institution in the agricultural sector, and necessarily affect goods which would, but for them, have been imported. Thus, although the measures complained of are not expressed in mandatory terms, they have the effect of restricting trade. They are therefore measures having equivalent effect to quantitative restrictions on imports, which are prohibited by Article 30 of the EEC Treaty.

As is attested by the complaints received by the Commission, that conclusion remains valid notwithstanding the inconsistency between the measures complained of and the broader, overriding decisions adopted in 1981 for the purpose of abolishing the scheme set up by Decison 749/70.

Similarly, the assertion that most of the machinery used in Greece which qualified for a credit from the Agricultural Bank is imported machinery is, according to the Commission, quite irrelevant. It should be noted that credit is differentiated according to the *type* of machinery involved. Thus, whilst it may be that in absolute terms foreign-manufactured machinery benefits greatly from Greek bank credits, the fact remains that, wherever a *comparable* type of machinery is available, a credit policy which differentiates by reference to the origin of the goods is consistently applied.

More generally, the Commission takes the view that the specific measures mentioned above are isolated symptoms of continuing discrimination against other agricultural machinery. It alleges that the refusal on the part of the Greek authorities to supply the Commission with the relevant information in this respect has prevented it from identifying precisely the various types of machinery affected. The Hellenic Republic has thus, according to the Commission, failed to fulfil the obligations contained in Article 5 of the EEC Treaty, which requires the Member States to 'facilitate the achievement of the Community's tasks', and thereby prevented the Commission from ensuring, in the interests of 'the proper functioning and development of the Common Market . . . that the provisions of [the EEC] Treaty ... are applied' (Article 155 of the Treaty).

4. The *Greek Government* contends that in order to abide by the principles of the Treaty it expressly abolished by means of the decisions it adopted in 1981 the discrimi-

natory system created by Decision 749/70. By operation of the rules governing the order in which national legislative measures take priority, the decisions of 1981 rendered the Ministerial Directive of 31 March 1982, and hence Circular No 96/82, totally invalid. Although those instruments were therefore without force, they were expressly revoked by the Ministerial Directive of 23 September 1984 and the ensuing Circular No 238/84 of the Agricultural Bank.

The Hellenic Republic adds that there has been no further provision of that kind since the general repeals adopted by the Committees in 1981. It points out, indeed, that bank credits have largely favoured imported machinery, and that as far as oil-mill machinery is concerned most of the machines which benefited from credit terms granted by the Agricultural Bank of Greece were of foreign origin.

5. For the purpose of defining the precise scope of the dispute, three points should be noted:

(i) It is quite clear from the chronology of the successive measures dealing with the credit terms available for the purchase of agricultural machinery that the Hellenic Republic, albeit after some delay, repealed the provisions which, before its accession to the European Community, had sought generally to protect Greek-made agricultural machinery by means of a credit policy which differentiated according to geographical origin;

(ii) Those measures did not quite have the anticipated effect, because Directive PH 5.3/42 of 31 March 1982 from the Ministry of Industry and Circular No 96/82 from the Agricultural Bank of Greece reintroduced the requirement of the prior presentation of a certificate attesting that there was no threat of competition in respect of one particular type of machinery, namely centrifuges and settling-tanks for oil mills;

(iii) Admittedly, that revived practice was the subject of a special repeal adopted by the Ministry of Economic Affairs on 23 September 1984 while these proceedings were pending and followed by Circular No 238 of the Agricultural Bank. However, the fact remains that in the meantime the granting of loans for the purchase of oil mill centrifuges and settling-tanks imported from another Member State was governed by Circular No 96/82, issued in pursuance of the directive of 31 March 1982.

It cannot seriously be denied, as is indeed indicated by the general measures originally introduced by the Hellenic Republic and the special repeal subsequently adopted, that the requirement imposed by the provisions in question was liable to hinder the free movement of goods, which is guaranteed by the Treaty and which the Greek Government was obliged to observe on entry into the European Economic Community, pursuant to Article 35 of the Act of Accession.

What, indeed, are the repercussions on intra-Community trade of a credit policy defined by the authorities and implemented by the banking services which makes the grant of credit for the purchase of imported machinery subject to evidence that no Greek-made machinery of the same kind is available? To use the examples given by Commission Directive 70/50 '... on the abolition of measures which have an effect equivalent to quantitative restrictions on imports ...' (Official Journal, English Special Edition 1970 (I), p. 17), a policy

such as that is tantamount to laying down conditions of payment in respect of imported machinery only (Article 2 (3) (h)), thereby encouraging or giving preference to the purchase of domestic machinery only (Article 2 (3)(k)); in so far as it imposes a discriminatory condition, the policy should therefore be classified amongst 'measures .... which hinder imports which could otherwise take place' by making 'importation more difficult or costly than the disposal of domestic production' (Article 2 (1)).

The Ministerial Directive of 31 March 1982 and Circular No 96/82 therefore constitute measures having equivalent effect to a quantitative restriction on imports, which are prohibited between Member States by Article 30 of the EEC Treaty.

6. That conclusion is not rebutted by the defendant's attempts to demonstrate that, in practice, the measures in question were not applied.

In that connection the import statistics are not conclusive. Being expressed in absolute figures, they do not in any way rule out the possibility that the provisions complained of affected the particular type of machinery under consideration. It may further be pointed out that the existence of a hindrance to trade is not determined by the degree to which commerce between Member States is affected; in this instance there are grounds for concluding that a discriminatory policy on agricultural credits, based on the requirement of a certificate stating that there are no domestic products in competitionwith the imported product, was laid down by the authorities and followed by the leading agricultural bank. Such a policy is *ipso facto* 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' (Case 8/74 *Dassonville* [1974] ECR 837, at paragraph 5 of the decision).

It is thus equally irrelevant that the provisions complained of were not mandatory, as may, indeed, clearly be seen from the judgment of the Court in Case 249/81 (*Commission* v *Ireland* [1982] ECR 4005, particularly paragraph 28 of the decision). The same is true of the argument that the provisions in question are invalid a result of the general repeals of 1981; the order of priority amongst national rules does not mean that the measure repealed, although in principle rendered inoperative, did not find application. Moreover, it must be recalled that the Court has consistently held that a Member State cannot plead the provisions, practices or circumstances existing in its internal legal order to justify a failure to comply with Community obligations (see *inter alia* the judgment of 28 March 1985, in Case 275/83 *Commission* v *Belgium* [1985] ECR 1103 at paragraph 10 of the decision).

7. Whilst failure on the part of the defendant State to comply with its Treaty obligations appears to be established as regards the Ministerial Directive of 31 March 1982 and Circular No 96/82, the documents laid before the Court do not bear out the Commission's claim that they indicate a comprehensive policy in that area.

In the context of the procedure under Article 169 of the EEC Treaty, it is for the Commission to adduce evidence of the failure to fulfil a Treaty obligation of which it accuses a Member State. However, in this

instance the Commission has not established that the general repeals of 1981 were disregarded in other respects than the one discussed above.

Is that absence of proof attributable to lack of cooperation on the part of the Hellenic Republic? There are no grounds for supposing that it is. Admittedly, the defendant State failed to forward to the Commission the Ministerial Directive and the circular of 1982. The Commission would therefore have been entitled, on that one specific point, to maintain that Article 5 of the Treaty had been infringed. However, that provision is not pleaded against the defendant except in relation to 'other categories of machinery' — that is, in a vague and general manner. Here, the reticence of the Hellenic Republic cannot in the circumstances be construed as a withholding of information. Thus the second allegation of a failure to fulfil a Treaty obligation cannot be considered to have been established.

8. For all those reasons, I propose that the Court should simply declare that, by making the grant of credits for the purchase of imported agricultural machinery — in this instance, settling-tanks and centrifuges for oil mills — conditional on the production of a ministerial certificate showing that no Greek-made machinery of the same kind is available, the Hellenic Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty.