OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 18 April 1991 *

Mr President,
Members of the Court,

A — Facts

1. In the action for failure to fulfil obligations with which this Opinion will deal, the Commission alleges that the Hellenic Republic prevented private traders from exporting maize to other Member States of the Community during the last four months of 1985 (September to December) and that it thereby breached [1] Article 34 of the EEC Treaty and the common organization of the market in cereals. [2]

2. More precisely, the parties are in dispute over the issue whether the defendant Member State made use of a domestic administrative procedure applicable to exports in a manner which corresponds to the complaint made by the Commission. Decisions No E4/10110 and No B3.1871 of the Greek Minister of Commerce of 4 and 12 December 1980 provide that every exporter must, for purposes of exchange control, fill out an 'export declaration and invoice' form and submit it to a merchant bank for an endorsement confirming that the price indicated is correct. In the case of certain, individually specified products, endorsement is required instead by the Bank of Greece; however, this is not the case with maize exports. Notwithstanding this, a telex of 2 September 1985 from the Bank of Greece to the merchant banks required, in the case of maize exports, 'prior endorsement by the export control department' of the Bank of Greece. It is not disputed that the Greek customs authorities allowed maize to be exported during the period in question only if the procedure set out in the above telex had first been complied with.

3. According to the Commission, barriers to exports arose through the procedure which the Bank of Greece was thus required to apply, as the relevant department refused to issue the endorsement in the case of private traders or unreasonably delayed such issue, in contrast to the case of applications made by the Central Office for the Management of National Produce (hereinafter referred to as 'KIDEP'); in the Commission's opinion, KIDEP, the function of which will be familiar from other cases brought before the Court, [3] had a particular interest in this discriminatory treatment.

* Original language: German.

1 — On the allegation made at the hearing that there was a breach of Article 5 of the EEC Treaty, see also paragraph 5.

2 — Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (OJ 1975 L 281, p. 1), as subsequently amended.

3 — Judgments in Case C-281/87 *Commission* v *Greece* [1989] ECR 4015; Case C-35/88 *Commission* v *Greece* [1990] ECR I-3125; and Case C-32/89 *Greece* v *Commission* [1991] ECR I-1321.

4. The Commission claims that the Court should:

(i) Declare that, by restricting and prohibiting exports of maize by private persons during the autumn of 1985 (September to December 1985) while at the same time permitting KIDEP (Central Office for the Management of National Produce) to export maize, the Hellenic Republic has failed to fulfil its obligations under Community law, in particular under Regulation (EEC) No 2727/75 on the common organization of the market in cereals — of which Article 34 of the Treaty forms an integral part — and the corresponding implementing regulations;

(ii) Order the Hellenic Republic to pay the costs.

5. The Commission also referred during the oral procedure to the arguments set out in the application, in which it had criticized the failure of the Hellenic Republic to provide sufficient assistance in clarifying the facts in the pre-litigation procedure. In view of this attitude, which the defendant did not change during the proceedings before the Court of Justice, the Commission now also claims that the Court should declare that there has been a breach of Article 5 of the EEC Treaty.

6. The Hellenic Republic, which takes the view that the submissions on the latter point have been made out of time, contends that the application should be dismissed and the Commission ordered to pay the costs.

7. Further details of the relevant legislation, the arguments and evidence and of the procedure are provided where necessary in the following section of the opinion. For the rest, I would refer to the Report for the Hearing.

B — Opinion

8. *I.* Before presenting my views on the question whether the Commission's application is well founded, which is the central issue in the present proceedings, I wish to make two *preliminary remarks.*

9. *1.* With regard to the content and scope of the submissions to be examined, I would subscribe to the view expressed by the Hellenic Republic that the application made during the oral procedure in respect of Article 5 of the EEC Treaty cannot be taken into account on the ground that it does not comply with Article 38 of the Rules of Procedure. That article provides that an application must state the subject-matter of the proceedings and the forms of order sought by the applicant. While the Commission, in its application in the present case, did criticize the defendant's pre-litigation conduct from the perspective of Article 5, it at no point intimated that it wished the Court to rule on that matter. The present application may for that reason be examined only in the light of the claims contained in the document instituting the proceedings, which in that regard determine the subject-matter of the proceedings. [4]

4 — On this problem, see the Court's judgment in Case 232/78 *Commission* v *France* [1979] ECR 2729, in particular paragraph 3.

10. *2.* So far as concerns the admissibility of the application with its subject-matter thus defined, doubts can arise solely from the fact that, even according to the Commission's application, the alleged breach had already been ended when the formal letter of notice was issued (11 November 1986) and that it could for that reason be argued that the conditions set out in the second paragraph of Article 169 of the EEC Treaty were not satisfied. It suffices in this regard to point out that the defendant has consistently contested the breach of which it is accused (since the beginning of the pre-litigation procedure and before the Court up to the conclusion of the oral procedure). According to the judgment in Case 199/85, [5] the purpose of the procedure provided for in Article 169 of the EEC Treaty is, *inter alia*, to avoid a situation in which a Member State's conduct is put at issue before the Court when, following the commencement by the Commission of the infringement procedure, the State admits the breach of obligations with which it is charged and remedies that breach within the period fixed by the Commission. In the present case, however, as I have already demonstrated, the first of those two conditions has not been satisfied. In the light of this interpretation of Article 169 of the EEC Treaty, the present application is therefore admissible. [6]

11. *II.* With regard to the issue whether the application is *well founded*, it is necessary to recapitulate in brief the legal framework (which is not in dispute) and then to examine the question whether the Commission has substantiated its complaint.

12. *1.* So far as concerns the legal framework with which the Commission's complaints are concerned, it must first be pointed out that obstruction of exports of the products here at issue constitutes a measure having equivalent effect within the meaning of Article 34 of the Treaty, since it is directly and actually capable of hindering intra-Community trade [7] and has in addition the specific effect of restricting patterns of exports in such a way as to provide a particular advantage for the domestic market. [8]

13. The Greek Government has not sought to rely on any exceptions to this system of freedom to export (which, according to Article 21 of Regulation No 2727/75, also applies to goods coming under the common organization of the market in cereals) either under Article 36 or pursuant to other imperative grounds recognized by Community law, and has limited itself to contesting the facts alleged by the Commission.

14. However, acceptance of the facts as argued by the Commission results in the conclusion that there has been a breach not only of Article 34 but also of Regulation No 2727/75. The Court has, however, ruled on several occasions that once the Community has adopted regulations under Article 40 of the EEC Treaty establishing a common organization of the market in a given sector, Member States are under an

5 — Judgment in Case 199/85 *Commission* v *Italy* [1987] ECR 1039, at paragraph 7.

6 — On the problem here dealt with, I would also refer to my Opinions in the following cases: Case 103/84 *Commission* v *Italy* [1986] ECR 1759, at 1761; Case 240/86 *Commission* v *Hellenic Republic* [1988] ECR 1835, at 1843; and Case C-247/89 *Commission* v *Portugal* [1991] ECR I-3659, at I-3670.

7 — See judgment in Case 8/74 *Procureur du Roi* v *Benoît and Gustave Dassonville* [1974] ECR 837, at paragraph 5.

8 — See the judgment in Case 15/79 *Groenveld BV* v *Produktschap voor Vee en Vlees* [1979] ECR 3409.
With the exception of one case, in which the Commission suspects that KIDEP was able to export a quantity of maize in place of a private trader on the ground that the corresponding 'export licence' (see footnote 14 below) of that trader had been withdrawn a short time previously, the Commission does not appear to be proceeding on the basis that exports were (systematically) transferred from private traders to KIDEP. In general, it suggests only that KIDEP was not subject to those obstacles.

obligation to refrain from taking any measure which might undermine or create exceptions to it. [9] According to this case-law, it is necessary to proceed on the basis that the common organizations of the markets are based on the concept of an open market to which every producer has free access and the functioning of which is regulated solely by the instruments provided for in those organizations. [10] Since the restriction on exports complained of in the present case had a unilateral effect on the operation of the market different from that provided for by Regulation No 2727/75, the Commission is correct in its contention that the conduct which it imputes to the defendant amounts to a breach not only of Article 34 but also of that regulation. [11]

15. In so far as the Commission takes the view that the obstacles at issue were not applied to KIDEP and also expresses that opinion in the arguments set out in its application, there cannot be any objection to this limitation of the subject-matter of the proceedings. Moreover, I do not believe it is necessary to examine the accuracy of those views, since such treatment accorded to KIDEP would correspond only to the provisions of the Treaty and the common organization of the market without in any way affecting the alleged breach in respect of exports effected by private traders. [12]

16. 2. Let us now turn to the issue of whether the Commission, which bears the burden of proof in this regard, [13] has proved the breach of the Treaty which it alleges and which Greece denies.

17. (a) I wish to begin my examination of this matter by taking a look at the two letters sent to the Bank of Greece by the Cargill company on 12 December 1985 and 14 January 1986 and which the Court allowed the Commission to produce out of time in the context of the procedural application. It appears from those letters that Cargill applied on 22 November 1985 for an 'export licence' [14] but that this had not been issued by the date of the second letter (14 January 1986). According to the Commission's arguments, which were not contested, such a long period of time, considered in the light of normal practice in the grain trade, not only amounts to a delay, but is also tantamount to a complete obstruction of export trade.

18. The Greek Government has not disputed the contents of those letters in its comments on them or in its reply to the relevant question put by the Court. It has merely submitted that the company concerned provided an incomplete version of the facts. It also added during the oral procedure that it was significant that Cargill had failed to seek redress before the Greek courts. In my opinion, that argument cannot

9 — See, for example, the judgments in Case 111/76 *Officier van Justitie* v *Van Den Hazel* [1977] ECR 901; in Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347; in Case 124/85 *Commission* v *Greece* [1986] ECR 3935; and in Case 272/86 *Commission* v *Greece* [1988] ECR 4875.

10 — See the above judgments in Case 83/78 *Pigs Marketing Board* v *Redmond* (at paragraph 57) and in Case C-35/88 *Commission* v *Greece* (at paragraph 29).

11 — See in this connection the judgments in Cases 83/78 and 272/86, cited in footnote 9; in a more recent judgment in Case C-205/89 *Commission* v *Greece* [1991] ECR I-1361, at paragraph 13, the Court left the problem unresolved.

12 — See the second paragraph of footnote 8.

13 — See the basic judgments in Cases 96/81 and 97/81 *Commission* v *Netherlands* [1982] ECR 1791 and 1819, most recently confirmed in the judgment in Case C-244/89 *Commission* v *France* [1991] ECR I-163, at paragraph 35.

14 — This presumably refers to the disputed endorsement. In reply to a question put by the Court, the Greek Government stated, without being contradicted, that exports required no administrative authorization other than endorsement of the export declaration and invoice form.

alter my views based on the letters whose late submission the Court has accepted. The important point in this regard is that these events took place with the participation of the Greek authorities, and as a result the contents of the letters submitted may be treated as disproved only if the defendant Member State makes *substantiated* comments concerning the matters at issue and puts forward a different version of the facts, if necessary by producing the relevant documents. [15]

19. It follows that the Commission's complaint is well founded in so far it relates to the case of the Cargill company and that the duration of the alleged breach is in any event proved by that case.

20. (b) Furthermore, in my opinion, the information available also justifies the conclusion that the situation just outlined is not an isolated case but is rather typical of the general practice in Greece during the period in question.

21. So far as concerns the interests involved, which the Commission believes led Greece to engage in the conduct complained of, I would refer to the minutes of the 36th general meeting of KIDEP, with which the Court will already be familiar from Cases C-35/88 [16] and C-32/89 [17] and the content of which, as appears from the document produced by the Commission, has not been contested. Those minutes indicate that KIDEP was under an obligation, irrespective of the quantities collected by it, to make available the amounts of maize needed to meet domestic requirements, but also that private grain traders were able during that period (from September 1985) to offer to producers higher prices than KIDEP as they exported all quantities at even higher prices. The Court found in Cases C-35/88 and C-32/89 that the Greek State has since 1981 made up the losses incurred by KIDEP by reason of its interventions on the market in cereals and that purchase and sales prices were also set for KIDEP by the Greek authorities. [18] With particular regard for the desire not to increase sales prices, taking account of Greek cattle breeders, there arose an interest under the circumstances described in blocking the demand at higher prices connected with the export business of private trading companies. Had this not been done, it would have been necessary to increase the purchase price, a development which, in the absence of any alteration to the sales price, would have increased the requirements of KIDEP for compensatory payments from the State or, in the absence of any alteration to the purchase price, would have called in question KIDEP's ability to fulfil its function as a supplier. Finally, if there had been an increase in both the purchase *and* sales prices, the purpose of intervention at prices fixed by the State, namely to support Greek cattle breeders, [19] would itself have been placed in jeopardy.

22. In view of this situation, I do not believe that any importance attaches to the question whether, as the Commission

15 — For a similar case, see the judgment in Case 272/86 (cited above at footnote 9), at paragraph 21.

16 — See footnote 3 above: at paragraph 20.

17 — See footnote 3 above: at paragraph 13 et seq.

18 — See the judgments in Case C-35/88, cited above, at paragraphs 22 to 25, and in Case C-32/89, also cited above, at paragraphs 15 and 16.

19 — See the uncontested submissions made on page 10 of the application, where it is pointed out that KIDEP is engaged in providing the market with subsidized maize.

appears to think, KIDEP had any interest in exporting in the place of private traders (such as the interest in using for its own ends advantages accruing from differences in the prices of Greek and imported maize). It is also not important to ascertain whether the situation just described was aggravated during the period in question by reason of a devaluation in the drachma on 19 October 1985 — the Hellenic Republic apparently wishes to deduce from this date that there was previously no particular interest in preventing exports.

23. The procedure for endorsement by the export control department of the Bank of Greece, which in the Commission's opinion was used to block maize exports during the period in question, cannot satisfactorily be explained by currency control requirements or on the other grounds put forward by the Greek Government as justification in the present case.

24. With regard first of all to currency control, this was already ensured through the procedure by which the acting merchant bank confirmed through the use of the endorsement that the commercial operation in question complied with currency exchange requirements. This ties in with the fact, to which the Commission rightly drew attention, that it was the export control department of the Bank of Greece which was competent in this case, rather than a department responsible for currency matters.

25. It was for that reason that the defendant Member State did not rely on the grounds of currency control in order to justify the procedure here at issue, but rather submitted that that procedure was intended to improve statistical tracking and control over the movement of goods. However, those reasons do not deal satisfactorily with the complaint made by the Commission. So far as concerns the statistical tracking, a simple export declaration would have been sufficient to guarantee it, without any need for an endorsement, on the issue of which the export operation depended. The argument based on supervision of the movement of goods can be understood in two ways. Either it relates to statistical requirements, in which case the above considerations apply; or it means that the procedure was designed to make it possible, where appropriate, to obstruct exports, in which case the Commission's complaint would only be confirmed.

26. The fact that articles from the newspapers *Ta Nea* (of 7 November 1985) and *To Kerdos* (of 8 November 1985), which the Commission initially quoted and subsequently produced before the Court, refer to a public statement by the Minister for Commerce that exports were to be banned from 2 September 1985, supports in general the accuracy of the Commission's argument. The above article from the newspaper *Ta Nea* also states that the Bank of Greece was to be given the task of applying the ban. While the defendant Member State has pointed out that the Minister for Commerce did not impose a ban on exports, it has not attempted to explain how those press articles (which form an essentially consistent picture) could have come about. [20] Rather, it confined itself to making two observations. In the first place,

20 — To the same end, see the article of 6 November 1985 in the newspaper *I Vradyni* produced by the Commission.

it has cast general doubt on the credibility of press articles; secondly, it states — in response to the Commission's argument that pressure was put on the Minister for Agriculture to impose a ban on exports — that the Minister of Agriculture was not competent to take such a decision and that the Commission's submission does not establish that the Minister of Commerce actually adopted the disputed measure.

27. During the pre-litigation procedure and before the Court, the Hellenic Republic produced the following information and documentation for the purpose of refuting all of the Commission's complaints:

(a) a list detailing applications for endorsements submitted in *1986*;

(b) information on the *total* weight of the quantities of maize exported during the period in question by private traders *and* KIDEP (approximately 69 000 tonnes);

(c) information on quantities exported during the *whole* of 1985 by private traders and KIDEP;

(d) information on quantities *produced* in Greece in 1984 and 1985;

(e) documents relating to three export operations carried out by *KIDEP* during the period in question on the basis of endorsements issued *prior* to that period;

(f) (in the rejoinder and the reply to a question put by the Court) a table [21] listing the exports *effected* during the period in question by private traders, but giving *no indication* of the dates on which *endorsements* were applied for or issued.

28. The last point requires an additional observation. The table submitted by the Greek Government lists three export operations, two of which were carried out by the Cargill undertaking on 14 October 1985 and came to 5 500 tonnes each, while the third was carried out by the Kadinopoulos undertaking on 27 September 1985 and amounted to 20 000 tonnes. So far as Cargill is concerned, there is no indication that the two export operations were based on endorsements issued during the period in question. On the contrary, the documents submitted by the Commission in its replies to the questions put by the Court — copies of a letter sent by Cargill on 23 April 1990 to the Commission and of the export declaration and invoice forms relating to the above exports — would tend to suggest that the endorsements for both operations were issued on 16 August 1985. So far as concerns Kadinopoulos, the Commission drew attention, in its formal letter of notice

21 — This has, however, already been mentioned in the statement of defence.

and — before the Court — through the production of extracts from newspapers, to the fact that that undertaking had received 'by mistake' an endorsement issued by a branch of the Bank of Greece on 27 September 1985 for the export of a specific quantity of maize, but that it was requested by the Greek authorities to refrain from using it and that it complied with that request. This circumstance could operate in favour of the defendant only if it had demonstrated that the export of 27 September 1985 had been completed on the basis of the endorsement issued the same day. However, the Hellenic Republic, in reply to the question expressly put by the Court, merely stated that it did not know whether the two events related to the same case. There is nothing else in the relevant documents which would suggest that the two events relate to the same case, apart from a (late) statement made by the Hellenic Government during the oral procedure, which, however, does no more than imply that the above endorsement of 27 September 1985 also related to a quantity of 20 000 tonnes and which consequently does not make a closer identification possible.

29. For those reasons, none of the information or documents already referred to is capable of affecting the probative value of the evidence produced by the Commission. This is all the more the case when one considers that, at the conclusion of the written procedure, the Court expressly requested the defendant Member State to produce a table listing all endorsement applications lodged during the relevant period, along with information on the outcome of those applications, specifying in each case the names of traders, dates of application and decision, and quantities and destinations; the Hellenic Republic, however, failed to reply to that question, thereby demonstrating a lack of cooperation with the Community authorities and a failure to make use of the opportunities offered to defend itself in an effective manner.

C — Conclusion

30. For all the above reasons, I propose that the Court should:

(1) Declare that, by obstructing exports of maize by individuals to other Member States during the autumn (September to October) of 1985, the Hellenic Republic has failed to fulfil its obligations under Article 34 of the EEC Treaty and Regulation (EEC) No 2727/75;

(2) Order the Hellenic Republic to pay the costs pursuant to Article 69 of the Rules of Procedure.