OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 13 January 1988

My Lords,

The Commission contends, pursuant to Article 169 of the EEC Treaty, that the Hellenic Republic is in breach of its obligations in that its legislation relating to the provision of certain forms of education is contrary to Articles 48, 52 and 59 of the Treaty.

The first category concerns coaching establishments ('frontistiria') where a single group of five persons or more or, whatever the number of groups, where ten people or more receive weekly, for a maximum of three hours a day, instruction to supplement their primary, secondary or higher education or are taught foreign languages, music or extra-curricular activities such as shorthand, typing and book-keeping.

The establishment of such a frontistirion, other than for foreign languages, is by Article 68 of the Emergency Law No 2545/1940 authorized only for natural persons who hold the qualifications necessary to occupy a public service post as a teacher under the State education system. By Article 18 of the Public Service Code such qualifications include the possession of Greek nationality.

The establishment and administration of frontistiria for the teaching of foreign languages was authorized for legal as well as natural persons (Decision No 158379/A 1025 of 4 November 1967 of the Ministry of Education and Ecclesiastical Affairs as confirmed by Emergency Law No 284/1968) but it is accepted by Greece that the provisions of Emergency Law No 2545/1940 apply so that natural persons must have Greek nationality and that legal persons must have their registered office in Greece.

Teaching in frontistiria is limited to persons of Greek nationality save that by Decree No 46508/1976 a foreign national may be employed for teaching foreign languages if there are four Greek nationals teaching foreign languages in the same establishment, or if there are more than four then one foreign national may be employed for each five Greek nationals employed.

There are thus clearly (and this is not denied) legislative rules which restrict the possibility of nationals of other Member States establishing, administering or teaching in these frontistiria. Whether these restrictions amount to a breach of the Treaty depends on arguments of principle advanced by Greece which I consider later as they apply to all the categories involved.

The second category is that of giving private lessons at home which by virtue of Law No 2545/1940 includes primary, secondary and higher education and foreign language courses not given in a frontistirion. Again it is clear that the giving of such lessons is restricted to Greek nationals to the exclusion of nationals of other Member States.

The third category is that of private technical and vocational training schools. The defence here is that the establishment and running of such schools is prohibited for all private persons. Thus this form of education is limited to public bodies acting on behalf of the State. If this is right then there is clearly no discrimination or restriction on the grounds of nationality. The Court has been referred in summary to a complex set of legislative measures. The Greek Government says that they clearly prohibit private individuals from giving such instruction. The Commission began by denying that this was currently the law. At one stage during the oral arguments, I thought the Commission accepted the Greek Government's position but later it seems that all it was conceding was that if the Greek Government's construction of the subordinate legislation was right then there is no breach of the Treaty.

Article 16 (7) of the Constitution provides that 'vocational training and any other specialized training shall be provided by the State'. This is said to exclude private schools. As a matter of construction (since this is a question of Greek law) it does not seem to me to follow necessarily that private establishments cannot be authorized to give such training. On this argument I am not satisfied by the Greek Government's reply.

So far as concerns the legislation as explained to the Court, briefly the position seems to be that a decree of 9 October 1935 permits the establishment by Greek citizens of certain categories of private technical and vocational schools; and that Decree No 685/1972 permits private professional schools at secondary level or below to be established (upon authorization) by natural persons who enjoy the civic and political rights of Greek citizens or by legal persons of Greek nationality. It is said by the Greek Government that the latter was repealed by Law No 576/1977 which appears in Article 49 (9) to prohibit the establishment of new private vocational and training schools of all kinds at all levels until such time as legislation has been enacted. Law No 1404/1983 then made provision for the organization of higher education and by Article 51 (1) repealed Law No 576/1977 with the exception of certain articles not including Article 49. The Commission says that the result is that Article 49 was repealed so that the ban on private schools is removed. Greece says it has not repealed the law except in respect of establishments which provide higher technical and vocational training. Both sides appear to agree that Law No 576/1977 was repealed in its entirety by Law No 1566/1985 concerning the structure and functioning of primary and secondary education but the resulting position is in issue. It seems to be agreed that higher technical and vocational training can be given only in State schools but what

is the level of higher vocational training and what overall is the position under the secondary legislation is in dispute.

At the end of the day, this is a matter which depends entirely on the construction of existing Greek legislation. There is plainly serious argument as to its meaning and effect. For my part I do not think that a declaration should be made under Article 169 unless the Commission has shown that the breach is clear. Whilst in no way criticizing the Commission for including this aspect in the case (since initially it looked as if there was a breach) the arguments of the Greek Government raise sufficient doubts that I am not satisfied that the breach is clearly established. I would accordingly refuse this part of the application. This is not because the legislation has been shown not to be in breach of the Treaty but because the breach has not been clearly established and if on further investigation the Commission can show clearly the effects of the legislation it would be open to it to do so.

Before turning to the general Greek defences it is to be noted that both in its reasoned opinion and in the body of the application (p. 11, fourth complete paragraph), the Commission limits its claim under Article 48 of the Treaty in respect of teachers employed in frontistiria to those nationals of other Member States already occupying a post in Greece. It does not allege a breach of the Treaty (at any rate prior to 1 January 1988) in respect of persons wishing to enter Greece for the purposes of teaching in such establishments prior to that date. The claim in paragraph 1 of the prayer is clearly, in my view, limited to, and to be read only as covering, persons already in posts in Greece.

In my view, the exclusion by Article 45 (1) of the Treaty of Accession of Articles 1 to 6 and 13 to 23 of Regulation (EEC) No 1612/68 during the transitional period does not affect the rights of persons already occupying a post in Greece. The Commission's argument on this point, in my view, should be upheld.

The setting-up and administration of a frontistirion, teaching by the proprietors thereof and teaching in a private home, if they are within the ambit of the Treaty at all, seem more likely to fall within Community rules on rights of establishment under Article 52 *et seq.* than under the rules relating to the provision of services under Article 59 *et seq.* They may in particular cases constitute the provision of services though the same activity cannot simultaneously fall into both categories.

The Greek Government contended at the hearing, first, that these activities, be they establishment or services, cannot fall within the Treaty at all as education is not within the Treaty. Not being part of economic life but being closely linked with the traditional and cultural life of a Member State, education was deliberately excluded.

This is, in my view, an untenable argument. Work performed or services rendered for remuneration are subject to the provisions of Articles 48 and 59 whatever the sphere in which they are performed (Case 36/74

Walrave v *Union cycliste internationale* [1974] ECR 1405, at p. 1417, and Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121). The same must, in my view, be true *mutatis mutandis* in respect of establishment where a service is to be provided for reward on a continuing basis.

The definition given by the Court in Case 2/74 *(Reyners* v *Belgium* [1974] ECR 631) and Case 149/79 *(Commission* v *Belgium* [1980] ECR 3881 and [1982] ECR 1845) indicates that the provisions respectively of Article 55 (1) and Article 48 (4) are to read in a limited sense.

Secondly, it is said that such activities are excluded from the provisions of Articles 52 and 58, on the one hand, and Article 59, on the other, in that they are 'activities which in [the Member State] are connected, even occasionally, with the exercise of official authority'. It is for each Member State to decide what constitutes the exercise of official authority. By Article 16 (2) of the Greek Constitution, education is a fundamental duty of the State which remains an activity connected with the exercise of official authority even if carried out by private institutions. It is so carried out only with the authorization and under the control of the State and does no more than supplement the activities of public institutions. Foreigners cannot fully carry out this activity, one of the aims of which is to increase Greek consciousness and responsibility.

An activity connected with the exercise of official authority does not, in my view, include the setting-up and administering of private education institutions or the giving of lessons, even if these activities are authorized and controlled by the State. In no sense can they be said to be activities connected with the exercise of official authority. I would reject this argument.

It is plainly not for each Member State to define what is capable of constituting the exercise of public authority or a coach and horses would be driven through Articles 52 and 59, as through Article 48 (4) which excludes employment in the public service.

Finally, the fact, as the Court was told at the hearing, that a ministerial decision has been adopted permitting nationals of other Member States to set up schools to teach music and dancing does not take away any defect in the legislation (such as, for example, Article 2 (1) of Presidential Decree No 457/1983 which provides that authorization to establish and administer such schools may only be granted to natural persons who are Greek nationals and legal persons where the majority of the administration is in the hands of Greek nationals). The legislation must be repealed or brought into line (Case 159/78 *Commission* v *Italy* [1979] ECR 3247; Case 102/79 *Commission* v *Belgium* [1980] ECR 1473; Case 168/85 *Commission* v *Italy* [1986] ECR 2945).

In my view accordingly the Commission is entitled to a declaration that in refusing to allow persons, including legal persons, having the nationality of a Member State of the European Economic Community other than Greece, to set up, administer and to give teaching services in coaching establishments ('frontistiria') or to give private lessons at home as a self-employed person on the same terms as Greek nationals, the Hellenic Republic is in breach of Articles 52 and 59 of the EEC Treaty, and in refusing to allow nationals of other Member States to take employment as teachers at all in frontistiria not engaged in language teaching or to give private lessons at home, and in limiting the number of nationals of other Member States than Greece who may be employed in frontistiria engaged in language teaching, the Hellenic Republic is in breach of Article 48 of the EEC Treaty.

Although the Commission has in my view not made out one of its contentions, it seems to me that in all the circumstances the appropriate order is that the Hellenic Republic should pay the Commission's costs.