Case 132/85

Commission of the European Communities
v
Hellenic Republic

(Removal from the register)

Opinion of Mr Advocate General Darmon delivered on 29 September 1987 5293
Order of the Court, 16 December 1987 5298

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 29 September 1987 *

Mr President,
Members of the Court,

1. In the present action for failure by a Member State to fulfil its obligations the Court is asked to declare:

first, that by virtue of Articles 2, 143 and 145 of the Act of Accession of the Hellenic Republic [1] that State was obliged to put into effect from 1 January 1981 'the measures necessary for it to comply ... with the provisions of directives and decisions within the meaning of Article 189 of the EEC Treaty' [2] (first claim),

secondly, that by not authorizing the Banque de Paris et des Pays-Bas (Belgium) (hereinafter referred to as 'Paribas') to repatriate or transfer to a convertible account the proceeds of the liquidation of funds invested in bonds of the Hellenic Industrial

* Translated from the French.

1 — Official Journal 1979, L 291, 19.11.1979.

2 — First Council Directive for the implementation of Article 67 of the Treaty of 11 May 1960 (Official Journal, English Special Edition 1959-62, p. 49); Second Council Directive of 18 December 1962 adding to and amending the First Directive of 18 December 1962 (Official Journal, English Special Edition 1963-64, p. 5).

Development Bank, (second claim) or to repatriate the accrued interest, that is to say the interest resulting from that investment, including the sum deposited in a frozen account from 1984 to 1986 (third claim), the Hellenic Republic has failed to fulfil its obligations under the Act of Accession, the EEC Treaty and Article 2 of the Council Directive of 11 May 1960 as amended by the Directive of 18 December 1962.

2. During the oral proceedings the Commission acknowledged:

that the two directives were transposed by Presidential Decree No 170/86, published on 19 May 1986,

that during the proceedings the Paribas affair had been the subject-matter of decisions by the competent Greek authorities, which were satisfactory with regard to their obligations under Community law.

However, referring to the Court's case-law, the Commission submits that it is important that the Court should give judgment on the alleged failure to fulfil obligations, since the Commission has an interest in the Member States being made to face up to their responsibilities both to other Member States and to individuals. As regards the second and third claims, the problem whether the provisions of the directives which have been transposed in the mean time and Articles 67 (2) or 106 (1) of the Treaty are directly applicable remains to be dealt with, inasmuch as the Hellenic Republic has submitted that Paribas could not rely directly on the provisions of those directives since they were not clear or unconditional and the Member States therefore retained the right to examine the nature and legality of the transactions. Furthermore, Presidential Decree No 170/86 did not state that its provisions were to be retroactive to 1 January 1981. A new draft decree re-enacting the 1986 decree but making it retroactive is being published at present but since there is no certainty as to its content or whether it will be brought into force the Commission considers that it cannot discontinue the proceedings totally or in part.

3. The Court has recognized that the Commission has an interest in continuing an action for failure to fulfil obligations even if satisfactory amendments have been introduced into the legislation of the defendant Member State after the expiry of the period mentioned in the reasoned opinion since:

'a judgment by the Court under Articles 169 and 171 of the Treaty may be of substantive interest in establishing the basis of a responsibility that a Member State can incur as a result of its default, as regards other Member States, the Community or private parties'. [3]

3 — Judgment of 7 February 1973 in Case 39/72 *Commission* v *Italian Republic* [1973] ECR 101, at paragraph 11, confirmed by the judgment of 5 June 1986 in Case 103/84 ECR 1759; the judgment of 20 February 1986 in Case 309/84 ECR 599 and most recently by the judgment of 17 June 1987 in Case 154/85 *Commission* v *Italian Republic* [1987] ECR 2717.

4. As regards the first claim, the Hellenic Republic does not dispute that the two directives should have been transposed as soon as the Act of Accession came into force. It has therefore failed to fulfil its obligations in that respect. In the light of the statement of the law to which I have just referred it is of substantive interest that there should be a judgment to that effect.

5. In the other two claims, the Commission has questioned the practice followed by the Hellenic Republic with respect to Paribas alone. In its replies to the questions which were asked by the Court and at the hearing the Commission indicated that the purpose of its application was not solely to obtain a declaration that Greece had failed to fulfil its obligations by not authorizing Paribas to export the funds in question (in the event, Paribas was successful), but also to sanction a practice of the Hellenic Republic which had been extended to other cases and in particular to establish that the provisions of the directives in question were directly applicable.

6. It is apparent from the Court's case-law that the Commission may be presumed to have an interest in bringing an action for failure to fulfil obligations when that failure has not been remedied at the expiry of the period fixed in a reasoned opinion [4] and that it is for the Commission alone to assess whether it is appropriate to continue or to withdraw its action. It follows that the Commission's interest in bringing proceedings with regard to the case of Paribas cannot be challenged. As for the reference which was made to other similar examples, I understand it as meaning that the Court's decision in the present case may be applied to any practices of the same kind, not as an application for a decision on those practices.

Moreover, any such application would be inadmissible in so far as only the case of Paribas was mentioned in the reasoned opinion.

7. As regards the Commission's interest in obtaining a declaration that certain provisions of the directives are directly applicable, the Court has held that:

'the aim [of Articles 169 to 171] of the Treaty is to achieve the practical elimination of infringements and the consequences thereof, past and future,' [5]

and that

'the purpose of judgments given under Articles 169 to 171 is primarily to lay down the duties of Member States when they fail to fulfil their obligations.' [6]

In the present case the Court is called on solely to rule on an alleged failure to fulfil obligations contained in acts binding the defendant Member State, irrespective of the effect of those acts in its domestic law. The question of direct effect is not relevant to proceedings for failure to fulfil obligations.

4 — See the judgment of 4 April 1974 in Case 167/73 Commission v French Republic [1974] ECR 359 at paragraph 15: 'the Commission, in the exercise of the powers which it has under Articles 155 and 169 of the Treaty, does not have to show the existence of a legal interest, since, in the general interest of the Community, its function is to ensure that the provisions of the Treaty are applied by the Member States and to note the existence of any failure to fulfil the obligation deriving therefrom, with a view to bringing it to an end'.

5 — Judgment of 12 July 1973 in Case 70/72 Commission v Germany [1973] ECR 813, at paragraph 13.

6 — Judgment of 14 December 1982 in Joined Cases 314 to 316/81 and 83/82 *Procureur de la République et Comité national de défense contre l'alcoolisme* v *Alex Waterkeyn and Others; Procureur de la République* v *Jean Cayard and Others* [1982] ECR 4337, at paragraph 15.

It follows that as regards the first two claims the present proceedings must be confined to examination of the Hellenic Republic's obligations concerning authorization for the repatriation or convertibility of the funds invested by Paribas in securities and the interest thereon.

8. There is no doubt that the second claim is well founded. During the procedings the competent Greek authorities implicitly admitted as much and they finally authorized the free convertibility of all the funds resulting from the liquidation of Paribas' investment in securities. Similarly, in its rejoinder the defendant State abandoned the main line of argument which it originally set out in its defence, namely that the operations in question were not covered by the two directives; it submitted that authorization had been issued late owing to a review of the legality and genuine nature of the transaction, a requirement which can not excuse the alleged failure to fulfil obligations.

9. Finally, the accrued interest on both the investment and the deposit in the frozen account must be regarded as 'current payments' within the meaning of Article 67 (2) of the Treaty. The Commission's reliance in the alternative on Article 106 (1) of the Treaty reflects the practical difficulty of distinguishing between payments covered by Article 67 (2) and 'payments connected with transfers of capital' falling under Article 106 (1). The application of the latter provision is more restricted than that of Article 67 (2) since it only applies 'to the extent that the movement of goods, services, capital and persons between Member States has been liberalized pursuant to the Treaty', whereas Article 67 (2) does not contain that restriction. Although Article 106 (1) appears sufficient to cover the present case, which concerns interest connected with an unconditionally liberalized operation, Article 67 (2) should, in my view, be relied on as the provision having more extensive effects concerning liberalization of capital movements.

10. Consequently, I propose that the Court should

(1) declare that

the Hellenic Republic has failed to fulfil its obligations under Articles 2, 143 and 145 of the Act concerning the conditions of accession of the Hellenic Republic to the European Communities and under the Treaty establishing the European Economic Community, in particular Article 67 (2),

(i) by not bringing into force from 1 January 1981 the national measures necessary to comply with the provisions of the directive of 11 May 1960 for the implementation of Article 67 of the Treaty, as added to and amended by Directive 63/21 of 18 December 1962,

(ii) by refusing to authorize the Banque de Paris et des Pays-Bas (Belgium) freely to repatriate or to credit to a convertible account in Greece the proceeds of the liquidation of investments in national securities traded on the stock exchange,

(iii) by failing to authorize the free transfer from Greece of all interest connected with those investments, and

(2) order the Hellenic Republic to pay the costs of the hearing.