# JUDGMENT OF THE COURT

29 June 1995 *

In Case C-391/92,

**Commission of the European Communities**, represented initially by R. Pellicer, of its Legal Service, and V. Melgar, a national civil servant on secondment to the Legal Service, acting as Agents, and subsequently by H. Van Lier, of its Legal Service, and V. Melgar, assisted by N. Dontas, of the Athens Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

**Hellenic Republic**, represented by P. Kamarineas, State Legal Adviser, P. Athanassoulis, Legal Assistant, and C. Sitara, Legal Assistant at the State Legal Council, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

* Language of the case: Greek.

APPLICATION for a declaration that, by requiring that processed milk for infants should be sold exclusively by pharmacies under Article 10 of Ministerial Decision No A2/οικ.361 of 29 January 1988, the Hellenic Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, F. A. Schockweiler (Rapporteur), P. J. G. Kapteyn, C. Gulmann and P. Jann (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch and H. Ragnemalm, Judges,

Advocate General: C. O. Lenz,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 14 February 1995,

after hearing the Opinion of the Advocate General at the sitting on 4 April 1995,

gives the following

## Judgment

1 By application lodged at the Court Registry on 6 November 1992, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by requiring that processed milk for infants

should be sold exclusively by pharmacies under Article 10 of Ministerial Decision No A2/οικ.361 of 29 January 1988, the Hellenic Republic has failed to fulfil its obligations under Article 30 of the Treaty.

2 Article 10 of Ministerial Decision No A2/οικ.361 of 29 January 1988 on the sale of infant formulae and follow-on formulae provides that, in the Hellenic Republic, processed milk for infants may be sold only in pharmacists' shops except in municipalities possessing no pharmacists' shop, in which case that product may be marketed in other shops.

3 Following a complaint brought in April 1988 by the Greek Association of Infant Formulae, the Commission took the view that the Greek legislation constituted a measure having equivalent effect to a quantitative restriction on imports, prohibited by Article 30 of the Treaty, and exceeded what was necessary to achieve the aims of protecting the health of infants and promoting breast feeding. Accordingly, by letter of 10 August 1989, the Commission, in accordance with Article 169 of the Treaty, gave the Greek Government notice to submit within one month its observations on the alleged failure to fulfil its obligations.

4 The Greek Government replied, in a letter of 5 March 1990, that the exclusive sale in pharmacies of milk for infants did not affect importation of that product from other Member States and therefore did not constitute a measure having equivalent effect within the meaning of Article 30 of the Treaty. Moreover, it considered that measure to be justified under Article 36 of the EEC Treaty, inasmuch as it was necessary and appropriate in order to protect the health and life of infants during the critical first five months of life.

5 Since it considered that the Greek legislation constituted a serious restriction on the free movement of goods within the Community and was not justified by protection of health in accordance with Article 36 of the Treaty, the Commission, on

28 October 1991, issued a reasoned opinion pursuant to Article 169 of the Treaty. In that opinion, the Commission considered that the Hellenic Republic, by prohibiting the sale other than in pharmacists' shops of processed milk for infants, had failed to fulfil its obligations under Article 30 of the Treaty and requested it to take the necessary steps within two months in order to comply with that opinion.

6 Since the Hellenic Republic neither replied to the reasoned opinion nor amended the legislation of which the Commission complained, the Commission brought the present action.

7 In support of its action, the Commission maintains that national legislation which reserves the sale of a certain category of product in principle solely to pharmacies constitutes a measure having equivalent effect prohibited by Article 30 of the Treaty on the ground that the prohibition of certain forms of marketing channels sales and is consequently likely to hinder, albeit indirectly, intra-Community trade in the product concerned. In reply to a question put to it by the Court, the Commission stated that the legislation at issue did not constitute a mere restriction of certain selling arrangements within the meaning of the judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 but entailed a restrictive effect on trade by making the importation of the product concerned from the other Member States more difficult and more onerous: if that product could be sold in large stores their price would drop, which would lead to an increase in demand and therefore in the volume of imports.

8 The Greek Government denies that its legislation constitutes a measure having equivalent effect within the meaning of Article 30 of the Treaty. According to the Greek Government, the only effect of the measure called in question by the Commission is to restrict the commercial freedom of traders and fulfils the conditions which the Court in *Keck and Mithouard*, cited above, stated as having to be satisfied for a measure to fall outside the scope of Article 30. It points out, moreover, that the measure has entailed neither a fall in the consumption of infant milk dur-

ing the year in which the measure was introduced by comparison with the preceding year, nor an increase in the price of the product concerned, nor problems of supply for consumers.

9 Under Article 30 of the Treaty, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States.

10 The Court has consistently held that any measure which is capable of, directly or indirectly, actually or potentially, hindering intra-Community trade constitutes a measure having an effect equivalent to a quantitative restriction (judgment in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5).

11 National legislation which reserves the sale of processed milk for infants solely to pharmacies is not designed to regulate trade in goods between Member States.

12 Such legislation may, admittedly, restrict the volume of sales and hence the volume of sales of processed milk for infants originating in other Member States inasmuch as it deprives traders other than pharmacists of the possibility of marketing that product. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports, within the meaning of Article 30 of the Treaty.

13 In that respect it should be observed that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, cited above, so long as those provisions apply to all relevant traders operating

within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty (see, in particular, the judgments in *Keck and Mithouard*, cited above, paragraphs 16 and 17, in Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 21, and in Case C-412/93 *Société d'Importation Édouard Leclerc-Siplec* [1995] ECR I-179, paragraph 21).

14 So far as concerns the Greek legislation called in question in this case by the Commission, those conditions are fulfilled.

15 Thus, that legislation, the effect of which is to limit the commercial freedom of traders irrespective of the actual characteristics of the product referred to, concerns the selling arrangements of certain goods, inasmuch as it prohibits the sale, other than exclusively by pharmacies, of processed milk for infants and thus generally determines the points of sale where they may be distributed.

16 Moreover, the legislation objected to by the Commission, which applies, without distinction according to the origin of the products in question, to all of the traders operating within the national territory, does not affect the sale of products originating in other Member States any differently from that of domestic products.

17 The fact, invoked by the Commission, that the Hellenic Republic does not itself produce processed milk for infants does not undermine those findings. The applicability of Article 30 of the Treaty to a national measure for the general regulation

of commerce, which concerns all the products concerned without distinction according to their origin, cannot depend on such a purely fortuitous factual circumstance, which may, moreover, change with the passage of time. If it did, this would have the illogical consequence that the same legislation would fall under Article 30 in certain Member States but fall outside the scope of that provision in other Member States.

18 The situation would be different only if it was apparent that the legislation at issue protected domestic products which were similar to processed milk for infants from other Member States or which were in competition with milk of that type.

19 In this instance, the Commission has not shown that that was the case.

20 It follows from the foregoing considerations that the Greek legislation called in question by the Commission is confined to limiting the places where the product concerned may be distributed by regulating the marketing of that product, without thereby preventing access to the market of products from other Member States or specifically placing them at a disadvantage.

21 That being so, the Greek legislation reserving the sale of processed milk for infants in principle exclusively to pharmacies falls outside the scope of Article 30 of the Treaty. The Commission's application must therefore be dismissed.

## Costs

22 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

**1. Dismisses the application;**

**2. Orders the Commission to pay the costs.**

Rodríguez Iglesias Schockweiler Kapteyn

Gulmann Jann Mancini

Kakouris Moitinho de Almeida Murray

Edward Puissochet Hirsch Ragnemalm

Delivered in open court in Luxembourg on 29 June 1995.

R. Grass
Registrar

G. C. Rodríguez Iglesias
President