OPINION OF MR ADVOCATE GENERAL LENZ
14 March 1985 *

Mr President,
Members of the Court,

A. In this action for a declaration that a Member State has failed to fulfil its obligations under the Treaty the Commission claims that the Court should:

(1) Declare that by refusing without proper justification to approve postal franking machines from another Member State and thereby obstructing their importation the French Republic has failed to fulfil its obligations under the EEC Treaty and in particular Article 30 thereof;

(2) Order the French Republic to pay the costs.

The facts of the case are as follows:

In general the users of the postal services in the Member States may use franking machines to frank their correspondence. Since those machines are used to collect postal charges, their use is usually made subject to the grant of a general type approval.

Such type approval is also required in France under Article 2 of the Interministerial Decree of 22 February 1980.[1] However, Article 3 of that decree also contains a provision concerning the origin of the franking machines:

'The machines, including the components and spare parts, must be exclusively of French manufacture, subject to any provisions of international agreements which may be applicable.'

In the Commission's view, the requirement that the machines had to be of French manufacture was contrary to Article 30 of the EEC Treaty, whilst the proviso concerning obligations arising under international agreements seemed insufficient to place machines from other Member States in the same position as machines manufactured in France. The Commission based its view in particular on the practice of the French postal authorities. Since 1971 a United Kingdom undertaking, whose franking machines are used in 120 countries and by the institutions of the European Communities, has tried unsuccessfully to obtain approval for its machines in France.

The Commission describes the history of that undertaking's attempts to obtain approval in France as follows:

— 12 December 1972 to July 1975: delays in replying to letters and abortive contacts;

— July 1975 to December 1976: correspondence resulting in various requests by the Centre national d'études techniques (the National Technical

* Translated from the German.

1 — *Journal Officiel de la République Française* 1980, p. 1990 N.C.

Research Centre) for technical modifications to be made to the machines submitted for testing:

— 12 February 1977: final rejection of the application for approval because of 'latent design faults', although the applicant company was in the process of carrying out the modifications to the machines requested by the Centre national d'études techniques;

— October 1977: rejection of a fresh application, submitted in August, on the ground that the French market was already adequately supplied with franking machines;

— 10 October 1980: the authorities rejected a further application, stating that the French Government's position had not changed but that the application might be reconsidered once electronic equipment had been developed.

In the course of the pre-litigation procedure the French Republic pointed out that it had relied on the origin requirement in Article 3 of the interministerial decree to reject such applications only in 1971 — before the United Kingdom's accession to the EEC. Subsequent applications were rejected on purely technical grounds. Moreover, in the same period two machines from the Federal Republic of Germany had been approved.

In the procedure before the Court the French Republic made no further reference to the practice of its postal administration. It merely stated that under the Interministerial Decree of 28 January 1980 it was entirely possible to grant approval for franking machines from other Member States. However, in order to satisfy the Commission, the interministerial decree was amended and Article 3 is now worded as follows:

'The machines, including the components and spare parts, must be manufactured in France or imported from other Member States of the European Economic Community . . .' [2]

Following that amendment, on 25 May 1984 the United Kingdom undertaking concerned submitted — in English — two further applications for type approval. The undertaking sent three more letters on the same matter to the French postal authorities. It received a reply from the Ministry of Posts and Telecommunications on 26 September 1984 in which it was stated that the conditions and procedure for type approval remained unchanged and that therefore the application for testing could be accepted and that to carry out the tests a franking machine of each type had to be submitted to the Service de recherche technique des postes (Technical Research Department of the Post Office).

According to statements made by the Commission, which have not been contested, the procedure for type approval in France usually lasts about 18 months. Questioned on that point, the representative of the French Republic expressed the view that, since tests had already been carried out for three months in this particular case, the approval procedure could be limited to a period of less than one year.

B. My views on this case are as follows:

Article 30 of the EEC Treaty prohibits quantitative restrictions on imports and all measures having equivalent effect. The Court has consistently held that the concept of a measure having equivalent effect covers any measure which is 'capable of hindering,

2 — Interministerial Decree of 7 March 1984, *Journal Officiel de la République Française* of 31 March 1984, p. 3091 N.C.

directly or indirectly, actually or potentially, intra-Community trade ...'. [3]

It follows that even the requirement of type approval may constitute a measure having an effect equivalent to a quantitative restriction on imports, since without type approval the machines concerned may not be marketed in the country in question. However, on the basis of the judgment of the Court of 20 February 1979 [4] I consider general type approval to be justified by the need to ensure that postal charges are correctly levied. Resultant obstacles to trade in the Community must be accepted in so far as they are necessary to satisfy imperative requirements. In my view, the requirements of levying postal charges are to be put in the same category as the requirements of effective fiscal supervision, which the Court has already recognized. [5]

Although the provisions on general type approval, including the origin requirement set out in Article 3 of the Decree of 28 January 1980, could still be interpreted and applied in conformity with Community law — which is proved by the fact that approval was granted for two types of franking machine from Germany — the question remains as to whether the French administration's conduct towards the British undertaking was in conformity with Community law.

In the proceedings before the Court the French Government has not discussed the attitude shown towards the British undertaking. In particular, it has not suggested any reason which could have justified the delay in the administrative procedure. It has made no statement to explain why the applications for type approval submitted in February 1977 were rejected, although the undertaking in question was in the very process of carrying out the modifications to its machines demanded by the French authorities. It has given no reasons to justify the rejection of further applications in October 1977 and in October 1980 without a technical examination.

On the other hand, after the amendment of the contested decree in March 1984 the French postal authorities took the view that the testing procedure for general type approval could then be resumed. That conduct of the postal authorities convinces me that it was essentially not technical reasons but a restrictive interpretation of the origin provision which led the postal authorities to act in the way described.

Although these proceedings concern the conduct of the French authorities towards only one undertaking and although that undertaking has not brought proceedings in the French administrative courts, I consider that the practice adopted by the French authorities constitutes a breach of the principles of Article 30 of the EEC Treaty. The French Government's arguments about the possible interpretation of the Decree of 28 January 1980 cannot shake that conclusion since at least the French postal authorities must have applied a different, more restrictive interpretation of that provision. The French postal authorities conducted an examination procedure, in itself lawful, in a manner which was

3 — Judgment of 11 July 1974 in Case 8/74, *Procureur du Roi* v *Dassonville* [1974] ECR 837.

4 — Judgment of 20 February 1979 in Case 120/78, *REWE-Zentral AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

5 — See 4 — *Ibid.* paragraph 8 of the decision, p. 662.

incompatible with the principles of the free movement of goods. They refused type approval for a machine from a Member State without a final technical examination and thereby excluded that product from the French market.

Finally, I would like to point out that, according to the information available to the Court, the type-approval procedure in question has still not been terminated although a full year has passed since the adoption of the Decree of 7 March 1984.

C. For all those reasons I propose that the Court should grant the Commission's application and order the French Republic to pay the costs.