OPINION OF ADVOCATE GENERAL GULMANN

delivered on 15 September 1992 *

Mr President,
Members of the Court,

1. The Commission has brought this case against the Hellenic Republic pursuant to Article 169 of the EEC Treaty.

2. The Community rules necessary for an understanding of the legal background to this action for infringement of the Treaty are to be found in Council Regulation (EEC) No 3599/82 of 21 December 1982 on temporary importation arrangements [1] and in the Council's Seventeenth VAT Directive of 16 July 1985. [2] The relevant rules are set out in the Report for the Hearing. It is clear that

— persons can import *personal effects* temporarily without having to pay tax and other duties when the person in question intends to *re-export* those effects;

— the national authorities are not entitled to demand a written statement of effects but they may question the traveller for the purpose of checking that the conditions for tax exemption are satisfied.

3. In its application the Commission set out the facts giving rise to the case as follows:

'As a result of a petition addressed to the European Parliament the Commission's attention was drawn to the following facts:

On 22 March 1988 a German citizen crossed in his motor vehicle the frontier between Yugoslavia and Greece at the Evzoni checkpoint. When he entered Greece a customs officer asked him in English and German (according to the officer's statement) whether he had anything to declare, mentioning in particular electronic or video material and binoculars. The traveller replied in the negative. The officer nevertheless proceeded to search the car and its contents. He then discovered a video camera, the customs status of which (non-member country or Community product) it was not possible to establish. The German tourist claims that the camera was quite visible, lying in the back of the car, whereas the customs officer believes that it was "carefully disguised".

The Greek customs regarded this conduct by the tourist to be a customs offence (a false declaration). On the basis of the camera's value it assessed customs duty and tax applicable at DRS 197 070. Accordingly it fined the tourist double that amount. The

* Original language: Danish.

1 — OJ 1982 L 376, p. 1.

2 — Directive 85/362/EEC on the harmonization of the laws of the Member Stes relating to turnover taxes — Exemption from value added tax on the temporary importation of goods other than means of transport (OJ 1985 L 192, p. 20).

doubling of the taxes and duties applicable constitutes the minimum penalty under Greek law for a false declaration. The German tourist was obliged to pay the fine which, after stamp duty was added, amounted to DR 404 800. He appealed to the European Parliament because he considers the fine imposed on him to be unwarranted.'

4. On that basis the Commission claims that the Court should

'declare that by imposing on a tourist entitled to benefit from the Community temporary import arrangements in respect of the personal effects which he was carrying in his car a fine calculated on the basis of the taxes and duties applicable to an item which he had failed to declare, even though the false declaration of which he was guilty could not have deprived the State of any taxes and duties in view of the fact that the video camera was among the personal effects of the person in question, the Hellenic Republic has failed to fulfil its obligations under the EEC Treaty.'

5. The Commission has claimed that the case in question is the result of an administrative practice. That submission should, however, be rejected. The submission was first made in the application and according to the Court's settled case-law no submission can be taken into account which was not made in the preceding administrative procedure. [3] Furthermore, the Commission's claim clearly concerns the legality under Community law of a specific legal act and the Commission does not otherwise seek to substantiate it.

6. Accordingly the question for the Court to decide is solely whether the Greek authorities' conduct in the specific case constitutes a failure on the part of Greece to fulfil its obligations under Community law.

The Commission founds its claim on the fact that the video camera formed part of the tourist's personal effects and could therefore be imported without payment of any taxes or duties; hence the incorrect declaration was not intended to avoid payment of those taxes. Accordingly in the Commission's opinion the declaration was 'a purely technical infringement' of the Greek rules in force. On that basis the Commission claims that the fine imposed constitutes a breach of the principle of proportionality which, under Community law, applies when national authorities exercise the powers of control and sanction which they enjoy in connection with the administration of the applicable Community rules.

3 — See, for example, the judgment of the Court in Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 23.

At first sight it appears correct that the Greek customs authorities were in breach of the principle of proportionality if they conducted themselves in the way the Commission describes in the application. [4]

The question is, however, whether the Commission has shown that the offence committed was solely 'a purely technical infringement' of the tourist's duty to provide information.

7. The Greek Government claims that the Commission's argument is based on a misconception of the actual facts of the case, because the Greek authorities imposed the fine on the basis that the tourist in question intended to avoid payment of taxes and duties.

8. In my opinion the Commission's argument must be accepted in that the national authorities' opinion as to whether the traveller satisfies the conditions for temporary tax exempt importation of personal effects must be fair so as not to lose sight of the objective of the system.

However, I must agree with the Greek Government that the Commission has not shown that the Greek customs authorities misjudged the intentions of the tourist in question in the case in point.

The Commission argued on the basis of some general comments concerning the unlikelihood of the tourist in question intending to avoid the payment of customs and duties.

That is not a sufficient basis for stating that the Greek customs authorities' assessment was incorrect. [5] Such a finding would require a far stronger evidential basis than that which the Commission has been able to adduce. Certain evidence which could be important in the assessment of the subjective state of the person in question is disputed and other relevant information is completely missing.

Consideration might be given to the question of whether it is appropriate at all to accept an action under Article 169 of the Treaty where a decision on whether the Treaty has been infringed requires a prior assessment of the evidence relating to a person's subjective state. I do not, however, think that the present case in a suitable basis for deciding that question of principle. It need merely be stated that the Commission has not discharged its burden of proof as it is required to do in cases where it alleges infringement of the Treaty.

4 — The fine imposed, which was approximately ECU 2000 and higher than the camera's value, would thus indeed appear to be disproportionate to the gravity of the offence. That view would find strong support in the case-law of the Court, see for example the judgment in Case C-203/80 *Casati* [1981] ECR 2595, in which it stated in paragraph 27: '... administrative measures or penalties must not go beyond what is strictly necessary, the control procedures must not be conceived in such a way as to restrict the freedom required by the Treaty and they must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom.' See also the judgment in Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377.

5 — The assessment may in fact have been wrong and the person in question must, of course, have the possibility of having that question reviewed by the competent authorities in the Member State concerned; it is their task, on the basis of the information available, including if need be the testimony of those involved, to decide whether that assessment was correct. From the information available it would seem that the person in question did not avail himself of that possibility.

9. It may accordingly be concluded that the evidence required to prove that there was only 'a purely technical infringement' of the relevant Greek rules has not been produced and therefore there is no conclusive basis for upholding the Commission's claim.

Conclusion

10. For that reason I suggest that the Court should dismiss the case against the Hellenic Republic and order the Commission to pay the costs.