OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 1 March 1988

My Lords,

The present proceedings are concerned with the question whether Greece has failed to comply with Commission Decision 86/187/EEC (Official Journal 1986, L 136, p. 61: the 'Decision'), the validity of which is in issue in *Greece* v *Commission*. I refer to my Opinion in that case (where I come to the conclusion that the Decision does not fall to be annulled) for full details of the aid scheme concerned. However, for the purposes of these proceedings, the Decision's validity is presumed by virtue of Article 185 of the Treaty which provides that 'actions brought before the Court of Justice shall not have suspensory effect'. The Decision must therefore be taken as valid from the date of its adoption and enforceable against Greece upon notification by virtue of Article 191. Its continuing validity is underlined by the fact that the President of the Court refused to suspend its operation by his Order of 30 April 1986 in Case 57/86 R [1986] ECR 1497. Even if the Court should strike it down in its final judgment in Case 57/86, Greece would be in breach of its Treaty obligations if it had failed to comply with the Decision up until that date whatever it did thereafter.

The interest rebate system was introduced in April 1983. The Decision was taken on 30 November 1985 and sent to the Greek authorities under cover of a letter from Commissioner Andriessen dated 23 December 1985. The Commission seems to take that date as the date of notification. Since the letter was despatched apparently to Athens on the day before Christmas Eve, that is open to doubt. However, Greece takes no point on that and on the facts of this case it is not necessary for the Court to decide on what precise date the Decision was notified to the Greek authorities.

Greece's application in Case 57/86 was lodged with the Court on 26 February 1986 and its request for interim measures on 13 March 1986, rejected by the Order of 30 April 1986.

On 23 May 1986, the Commission sent a telex to the Greek authorities asking for information within two weeks of the measures taken to comply with the Decision, in particular following the President's Order. No formal reply has ever been sent, although the Commission was unofficially aware of two decisions adopted by the Governor of the Bank of Greece in purported compliance with the Decision, namely Decision No 790 of 5 June 1986 which reduced the rebate rate to 5% with effect from 9 June 1986 and Decision No 936 of 29 January 1987, reducing the rate from 5 to 3% for the period 1 February to

31 December 1987 inclusive and abolishing the rebate with effect from 1 January 1988.

The Commission brings this application under Article 93 (2) for a declaration that Greece has failed to fulfil its Treaty obligations by not complying with the Decision 'within the prescribed period'.

But for the Court's judgment of 2 February 1988 in Case 213/85 *Commission* v *Netherlands* [1988] ECR 281, I should have considered that the Decision should not reasonably be construed as prescribing a time for compliance. Article 1 ordered the Greek authorities to abolish the interest rebates without specifying a deadline; Article 2 required Greece to inform the Commission of the measures taken to comply with the Decision within one month of notification. For the same reasons as I give in my Opinion in Case 213/85, I should have read the Decision as obliging the Greek authorities to take those measures 'with the required speed' as the Court put it in Case 173/73 *Commission* v *Italy* [1974] ECR 709 and to inform the Commission within a month of the measures taken by that time to implement the Decision (an obligation which has apparently not been performed although the Commission seeks no declaration in that respect). At the hearing in the present proceedings, the Commission conceded that the Decision was ambiguous on this point. There was, as I see it, no good reason why the Commission did not specify clearly that Greece was to take the necessary measures within one month, if that is what the Commission intended.

However, in paragraph 19 of the judgment in Case 213/85 the Court held that to specify a date by which the Commission had to be informed of compliance measures taken implied that the measures had to be taken by that date. On that basis, in the present proceedings it will be necessarily established that Greece did not comply with the Decision within the prescribed period.

The Court's case-law seems to admit of two defences for failure to comply with Commission decisions in this field. The first is that the decision is unclear or ambiguous. In Case 70/72 *Commission* v *Germany* [1973] ECR 813, the Court dismissed the Commission's application for a declaration that the Federal Republic had failed to comply with a decision taken under Article 93 (2) because the obligation imposed was indeterminate. That case was distinguished in Case 52/83 *Commission* v *France* [1983] ECR 3707 in which the Court held that the decision addressed to France imposed a clear obligation. The Commission relies on the French case but ambiguity is not pleaded by Greece, and I do not see how it could successfully do so.

The second defence is impossibility. The relevant authority is Case 52/84 *Commission* v *Belgium* [1986] ECR 89 in which the Court said at paragraph 14 on p. 104: '. . . the only defence left to the Belgian Government in opposing the Commission's application for a declaration that it failed to fulfil its Treaty obligations would be to plead that it was absolutely impossible for it

to implement the Decision properly .... The Decision demands the withdrawal ... of a capital holding ... effected by a public regional company; that demand is sufficiently precise to be complied with. The fact that, on account of the undertaking's financial position, the Belgian authorities could not recover the sum paid does not constitute proof that implementation was impossible, because the Commission's objective was to abolish the aid, and, as the Belgian Government itself admits, that objective could be obtained by proceedings for winding up the company ... '.

In this case, Greece clearly had to abolish the rebate scheme within one month of notification of the contested Decision. Equally, I think it is clear that only the last of the three stages of the phasing-out of the rebate implemented by the two decisions of the Bank of Greece constitutes full compliance with the Decision.

Therefore the case hinges on whether it was absolutely impossible for Greece to comply with the contested Decision. Impossibility may be as to substance and/or as to timescale. In other words, a Member State may plead that compliance was impossible either at all or within the 'prescribed period'.

Greece asks the Court to recognize that the measures taken were appropriate in all the circumstances and therefore constituted proper compliance with the Decision. It argues that it was impossible to comply 'within the deadline' because the rebates were linked to medium- and long-term commitments entered into by Greek exporters and withdrawal would have had exceptionally disastrous and unforeseen consequences for those commitments and, by extension, to Greek economic, monetary and export policy. Since the rebate system was an integral part of an overall monetary system instituted in April 1983, it was not possible to abolish it without completely overhauling that system which would have required a considerable amount of time for evaluation.

The Commission's reply is essentially that it was not impossible to comply with the Decision, even if difficult or inconvenient. The Governor's second decision shows that it was possible to comply with the Decision.

As I see it, compliance in substance was clearly possible; the Commission can rely on the Governor's second decision in support of that proposition.

The Commission says also that it was possible not only to comply with the Decision as to the substance but also within a month.

The scheme at issue is self-contained, whether or not it forms part of a set of measures implementing Greek economic and monetary policy. Greece has not pleaded any technical reasons (for example, relating to the way in which decisions of the Governor of the Bank of Greece are taken) why the scheme could not have been abolished within a month or any other period. The scheme could in my view have been abolished sooner than it was and I am

not satisfied by Greece that it could not have been abolished within one month or within a reasonable period much shorter than the period actually taken. The exporters' difficulties are those usually suffered by recipients of illegal aid and there has been no argument that the Decision was invalid because legitimate expectations were frustrated (Case 52/83, *supra*, at p. 3715).

The Commission further contends that Greece's arguments have already been rejected by the President in his order. That contention is incorrect. As to the monetary policy argument, the President held that the Greek Government had not made out a prima-facie case (paragraph 11); the harm to the exporters was recognized but balanced against the interests of competitors in other Member States (paragraph 12).

Although the shortness of the period prescribed for compliance (in the light of the Court's decision in Case 213/85, cited above) may be said in future cases: (a) to render an order to discontinue aid invalid, or at any rate, (b) to provide a defence of impossibility, I do not consider that it has been respectively (a) raised or (b) made out in these cases.

The only remaining issue, therefore, is whether discussions between the Commission and Greece subsequent to the Decision complained of, concerning Greece's balance of payments, led to the waiving of the obligation to comply or to an extension of the period for compliance. Because this matter was not dealt with in the Commission's pleadings, the Court put a written question to the Commission, from the answer to which it emerged that, whilst the Commission was broadly sympathetic to the difficulties experienced in the Greek economy, it took no specific position on the interest rebate scheme in issue in these proceedings and Case 57/86, which were already pending before the Court when the discussions took place. The Greek undertaking to phase out the scheme in the manner embodied in the two decisions of the Governor of the Bank of Greece was without prejudice to the outcome of these cases.

The Decision was adopted on 30 November 1985. Under Article 108 (3), the Commission has adopted two decisions in Greece's favour, respectively dated 22 November 1985 (Official Journal 1985, L 373, p. 9) and 16 December 1986 (Official Journal 1986, L 357, p. 28), both of which authorize the gradual phasing-out of a Greek export aid system which, however, is different from the interest rebate scheme with which the Court is concerned. It appears, therefore, that no formal steps have been taken by the Commission to waive compliance with the Decision. In particular, it has not abrogated the Decision or withdrawn these proceedings.

Can the same result arise merely because general discussions concerning difficulties have taken place? In paragraph 16 of the judgment in Case 52/84 (*supra*) the Court said: '... the fact that the only defence which a Member State to which a Decision has been addressed can raise in legal proceedings such as these is that implemen-

tation of the Decision is absolutely impossible does not prevent that State — if, in giving effect to the Decision, it encounters unforeseen or unforeseeable difficulties or perceives consequences overlooked by the Commission — from submitting those problems for consideration by the Commission, together with proposals for suitable amendments. In such a case the Commission and the Member State concerned must respect the principle underlying Article 5 of the Treaty, which imposes a duty of genuine cooperation on the Member States and Community institutions; accordingly, they must work together in good faith with a view to overcoming difficulties whilst fully observing the Treaty provisions, and in particular the provisions on aid. However, in the present instance, none of the difficulties referred to by the Belgian Government is of that nature, and that Government made no proposals whatever to the Commission for the adoption of other suitable measures . . .' (loc. cit. p. 105).

As in Case 5/86 *Commission* v *Belgium* (judgment of 9 April 1987, [1987] ECR 1773) the Commission is in my view not acting contrary to what was said in Case 52/84, or acting unreasonably in not accepting the difficulties put forward as a reason for not insisting on the Decision being carried out.

My conclusion therefore is that Greece has failed to comply with the Decision within the prescribed period. The Commission is entitled to a declaration in those terms and to its costs.