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

My Lords,

The Hellenic Republic seeks the annulment of Commission Decision 86/187/EEC (Official Journal 1986, L 136, p. 61: the 'Decision') which held that an interest rebate system for exports of all goods except petroleum products adopted in Greece (which had not been notified to the Commission under Article 93 (3) of the EEC Treaty) constituted State aid incompatible with the common market.

Its interim request for suspension of the Decision was rejected by Order of the President of the Court of 30 April 1986.

Under the scheme as described in the Decision and in the President's order, with effect from April 1983 commercial interest rates (which in Greece are fixed by the Bank of Greece) were revised to the following levels: 21.5% for loans to industry, 18.5% for loans to processors of agricultural products and 14% for so-called craft undertakings. It appeared at the hearing, contrary to what was thought to be the position at the time of the President's order, that the 18.5% rate applied to all undertakings processing agricultural goods whether or not they exported the processed products.

A rate of 10.5% for loans for pre-financing and financing of exports, applicable before April 1983 under a system which was in force at the time of Greece's accession to the Communities, was abolished. To offset the resulting disadvantage for exporters, interest rebates of 6% (3% in the case of loans granted at 14%) were granted to exporters of all products other than petroleum products provided that sale proceeds were rapidly repatriated and converted into drachmas.

The operative part of the Decision is confined to declaring the scheme's incompatibility with the common market under Article 92 (1), though the Commission stated in the last recital of the Decision that the Decision did not prejudice 'any conclusions which the Commission may draw as regards the recovery of the said aids from beneficiaries and as regards the financing of the common agricultural policy by the European Agricultural Guidance and Guarantee Fund'. Article 1 provides that 'the aid in the form of an interest rebate of 6 or 3% which, subject to certain conditions, the Greek authorities grant to exporters of agricultural products listed in Annex II to the Treaty, with respect to which Articles 92 to 94 of the Treaty have been made fully applicable by virtue of Articles 42 and 43 of the Treaty, and to exporters of all other products not listed in

Annex II with the exception of petroleum products, is incompatible with the common market under the terms of Article 92 of the Treaty and must be abolished'.

Article 2 provides that 'Greece shall inform the Commission, within one month of receiving notification of this Decision, of the measures which it has taken in order to comply therewith'. The measures taken by the Greek authorities subsequent to the Decision are the subject of the proceedings in Case 63/87 *Commission* v *Greece*.

Greece raises three principal arguments which do not differentiate between the categories of exports involved. They are respectively that the rebate scheme does not constitute 'State aid' within the meaning of Article 92 (1) (and therefore did not have to be notified under Article 93), that the rebate was not financed 'through State resources', and lastly that the Commission has not proved that the scheme affected trade between Member States.

Two points are made to support the first argument, namely that the rebate scheme was intended to operate neutrally *vis-à-vis* the system in force before April 1983 (that is, it merely cancelled out the adverse effects of the increased rate on exporters and did not confer an additional advantage on them) and was in any case a measure of monetary policy, not a subsidy scheme.

The applicant argues that, since the Commission did not investigate the previous scheme under Article 93 (1) and never declared it incompatible with the common market, it cannot now declare the revised scheme incompatible since it has the same effect and indeed, in the case of loans for periods over six months, is less advantageous for exporters.

Although the Commission gives different reasons for the fact that it did not examine the previous system, it validly observes that the revised scheme can be assessed independently of the old scheme. If the new scheme favours certain undertakings or the production of certain goods, and satisfies the other conditions of Article 92 (1), it is an aid scheme and should have been notified under Article 93 (3), either as a new aid or as an alteration of an existing aid. It is irrelevant whether it is more or less favourable than the system which it supersedes and whether or not that system was an aid scheme and, if so, compatible with the common market.

It is clear that under the scheme the interest rates applying generally to commercial operations within Greece are lowered only in the case of loans for the financing of certain exports. Export undertakings thus receive an evident advantage over domestic sellers and over certain other exporters by what the Commission treated as an export subsidy applying to intra-Community trade. The Commission's conclusion to this effect is supported by the judgment in Joined Cases 6 and 11/69 *Commission* v *France* [1969] ECR 523 in which the Court held that a preferential rediscount rate for exports constituted aid within Article 92 (1).

That case is also relevant for the second limb of Greece's first argument, that the scheme is a measure of monetary policy. The applicant contends that the scheme was devised to improve the country's balance of payments by encouraging exporters to repatriate the proceeds of their sales and convert them into drachmas rather than holding foreign currencies in order particularly to benefit from falls in the exchange rate of the drachma. It was not, it is said, devised to benefit exporters as such.

The Commission doubts whether the previous system encouraged such practices and whether the new system is effective to provide a remedy. It also observes that measures such as penalties which do not have a protective effect could be used to achieve the same end.

Be that as it may, it is clear law that, despite Member States' relative freedom in the monetary sphere, measures taken therein may fall within the scope of Article 92. As the Court said, dismissing the French argument to the contrary in the preferential rediscount case, Articles 108 (3) and 109 (3) 'confer power of authorization or intervention on the Community institutions which would be otiose if the Member States were free, on the pretext that their action related only to monetary policy, unilaterally to derogate from their Treaty obligations without control by the Community institutions'; the principle of solidarity contained in Article 5 finds expression in Article 108 and 'the exercise of reserved powers cannot therefore permit the unilateral adoption of measures prohibited by the Treaty'. The Court therefore found the preferential rate to be an aid within Article 92.

Likewise here, whatever the reasons which led the Greek authorities to adopt the interest rebate scheme, it clearly favours exporters and therefore falls within Article 92, if the other conditions of that Article are satisfied, the subject of the second and third grounds of attack. I would therefore reject the first argument.

The second argument is that the rebate is not granted out of State resources. Two apparently contradictory assertions are made, the first that the commercial banks pay the rebate out of their own resources (return on term deposits of their own funds), the second that in effect they are only returning to the exporters what is already theirs. In paragraph 11 of his order on the interim application, the President noted that 'it became clear at the hearing that the interest rebates accorded to their exporting customers by the commercial banks which granted the loans did not come from those banks' own resources, ... the banks were reimbursed by the Bank of Greece'. For that reason he held that 'it appears difficult to conclude, at this stage, that those funds do not come from State resources'.

Nothing has emerged following the President's order, either in the written proceedings or at the hearing of the main application, to lead the Court to take a different view. In particular, Greece has not sought to deny that the lending banks are reimbursed by the central bank.

Moreover, as the Commission observes, the Bank of Greece is authorized by statute to implement the Government's monetary policy and the governor of the Bank is appointed by the Government and over half of the commercial banks are in effect managed by or for the account of the State, none of which contentions was challenged by the Greek Government.

Finally, 'as is clear from the actual wording of Article 92 (1), aid need not necessarily be financed from State resources to be classified as State aid' as the Court held in Case 290/83 *Commission* v *France* [1985] ECR 439, at p. 449. In that judgment, the Court also referred to Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595, in which it was held that there was no distinction between 'aid . . . granted directly by the State or by public or private bodies established or appointed by it to administer the aid' (at p. 614). These cases were confirmed in Joined Cases 67, 68 and 70/85 *Kwekerij Gebroeders Van Der Kooy BV and Others* v *Commission*, judgment of 2 February 1988, ECR 219.

It is enough to satisfy Article 92, as I see it, that aid is paid at the State's behest or by order of a body empowered to that effect by the State, as is the Bank of Greece, even if it is not financed directly through State resources, as this scheme almost certainly was. The second ground therefore fails.

The third argument is that, in the Decision, the Commission has not proved the existence of an effect on inter-State trade and competition.

The applicant argues that the Commission must rely on actual figures to show that Greek exports increased as a result of the aid whereas the Decision is confined to assertion. In fact, particularly in the cereal sector, Greek exports have lost ground.

The Commission, however, starts from the position that, as the Court held in Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671, at pp. 2688 and 2689, 'when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid'. The presumption of effect on intra-Community trade is also to be found in Joined Cases 296 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek BV* v *Commission* [1985] ECR 809, in which the Court recognized that 'in certain cases the very circumstances in which the aid is granted are sufficient to show that the aid is *capable* of affecting trade between Member States and of distorting or threatening to distort competition' (at p. 824). The word 'capable' serves as a reminder that Article 92 deals with potential as well as actual effects.

In Part V of the Decision it is said:

'The interest rebates (6 or 3%) introduced after 1983 by Greece for exports of products other than petroleum products artificially serve to facilitate their sale on Community and non-Community markets since they result in an appreciable reduction in the costs incurred in selling them on foreign markets.

It is to be borne in mind firstly that Greek products constitute an enormous trade flow (in 1982, 46.3% of the total value of Greek exports of ECU 4 381 million was accounted for by sales to other Member States; in 1984 the value of exports reached 13.6% of the gross domestic product) and secondly that exports are the subject of stiff competition between Greek undertakings and those of the other Member States.

Furthermore, by facilitating the creation of new commercial outlets, or at least the maintenance of existing ones, this measure (the impact of which is directly linked to the volume of exports) serves to encourage Greek producers to increase the quantities produced which, thanks partly to economies of scale, will firstly reduce their production costs and secondly, as a consequence of that reduction, increase their competitiveness on all markets.'

There was plainly material — namely the substantial rebate paid to exporters — from which the Commission could deduce that intra-Community trade was or might be affected, which deduction is expressed in such a way in the Decision as to comply with Article 190 of the Treaty. The third argument is accordingly not made out to my satisfaction.

Finally, at the hearing, the applicant contended that the Commission was estopped from arguing that the rebate scheme affected intra-Community trade because, in the context of the clearance of EAGGF accounts, the Commission had declared the aid arising from the scheme to be *de minimis* and had not charged it to Greece. As the Commission observes, this is a new argument and therefore inadmissible. I should dispose of it on that basis.

However, even if the facts are correct, it does not detract from the finding in the Decision that the rebate scheme constitutes aid within the meaning of Article 92. It merely shows that the Commission chose not to enforce the Decision, for reasons which do not arise for consideration in these proceedings.

This application should therefore, in my view, be dismissed and Greece should be ordered to pay the Commission's costs, including those of the interim measures proceedings.