OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 17 February 1993 *

Mr President,
Members of the Court,

1. The present case concerns an action brought by the Commission against the Hellenic Republic under the second subparagraph of Article 93(2) of the EEC Treaty. The Commission asks the Court to declare that, by failing to comply with Commission Decision 89/659/EEC of 3 May 1989 relating to Ministerial Decision No E 3789/128 of the Greek Government establishing a special single tax on undertakings, [1] the Hellenic Republic has failed to fulfil its obligations under the EEC Treaty. The Hellenic Republic contends that the application should be dismissed.

Background

2. By Ministerial Decision No E 3789/128 of 15 March 1988 the Greek authorities introduced a 'special single tax on undertakings'. Article 1(2) of that decision, however, exempted from that tax the undertakings' earnings from export operations.

The Commission considered that that exemption was incompatible with the Treaty and initiated the procedure provided for in Article 93(2) of the EEC Treaty. [2] That procedure led to the adoption of Decision 89/659/EEC. That decision, notified to Greece by letter of 8 June 1989, required the provision in question to be modified without delay (Article 1), the aid which had been granted in the form of the exemption from the single tax to be recovered (Article 2), and information to be provided on the measures taken (Article 3).

3. Greece did not bring an action against Decision 89/659/EEC, but neither did it demand repayment of the aid condemned by the Commission. Following repeated pressure by the Commission, the Greek authorities replied in two letters that it would be impossible to implement the decision. Since the discussions carried on on several occasions between the Commission and Greece led to no result, the Commission brought the present action before the Court.

For further details of the facts I refer to the Report for the Hearing.

Lawfulness of Decision 89/659/EEC

4. Greece considers that Decision 89/659/EEC has no legal basis, since the tax exemption which was the subject of the decision had no adverse effect on trade

* Original language: Dutch.

1 — OJ 1989 L 394, p. 1.

2 — See Notice 88/C 336/04, entitled 'State Aid (Greece)', OJ 1988 C 336, p. 3.

between Member States. The tax imposed — and hence also the exemption from the tax — was unique and extraordinary and its context was an unusually weak economic situation. Furthermore, the exemption was not repeated in later fiscal laws of the same type.

None of those arguments convinces me. [3] I find it remarkable, for instance, that Greece asserts on the one hand that the exemption granted was 'not such as to affect trade between Member States', [4] but argues on the other hand that the non-application or recovery of the tax 'would distort competition with the corresponding undertakings in the other Member States, to the detriment of Greek undertakings'. [5]

5. Be that as it may, the question whether or not the Greek provision adversely affected trade between the Member States is not at issue in the present case. In accordance with the Court's settled case-law, Greece can no longer challenge the validity of a decision addressed to it under Article 93(2) of the Treaty after the expiry of the period laid down in the third paragraph of Article 173 of the Treaty. That 'would be impossible to reconcile with the principles governing the legal remedies established by the Treaty and would jeopardize the stability of that system and the principle of legal certainty upon which it is based'. [6] The only defence which Greece can still raise at this stage of the procedure is the absolute impossibility of implementing the decision properly. [7]

Greece's argument that the possibility that a national court may make a reference for a preliminary ruling renders the immunity of the decision to challenge purely formal has already been rejected by the Court:

'Although it is true that the validity of a Community measure may be called in question by means of the procedure for obtaining a preliminary ruling referred to in Article 177 of the Treaty, in spite of the expiry of the period laid down in the third paragraph of Article 173, such a procedure ... is nevertheless subject to [different] objectives and rules ... and cannot justify a derogation from the principle of the time-barring of applications ... without thereby depriving Article 173 of its legal significance.' [8]

Absolute impossibility of recovering the aid

6. It thus only remains to examine whether recovery of the unlawfully granted aid is

3 — Greece also asserts that the tax was retroactive in nature. I fail to see how that assertion can support its view.

4 — Defence, point III. D.

5 — Ibid., point IV. F; see also point III. D.

6 — Case 156/77 *Commission* v *Belgium* [1978] ECR 1881, paragraph 24; see also the judgments in Case 52/83 *Commission* v *France* [1983] ECR 3707, paragraph 10; Case 130/83 *Commission* v *Italy* [1984] ECR 2849, paragraph 8; Case 52/84 *Commission* v *Belgium* (Boch) [1986] ECR 89, paragraph 13; and Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 8.

7 — See, for instance, *Commission* v *Belgium* (Boch), paragraph 14; Case 94/87 *Commission* v *Germany*, paragraph 8.

8 — Case 156/77 *Commission* v *Belgium*, paragraph 24.

indeed absolutely impossible, as Greece claims. According to Greece, recovery would necessarily take the shape of a retroactive tax, which would be incompatible both with Article 78(2) of the Greek Constitution and with general principles of the Greek and the Community legal orders. Moreover, it would be impossible to determine what part of the aid granted related to exports to Member States and what part to exports to non-member countries. Finally, recovery of the tax in question would be uneconomic and unreasonable in view of the average return per undertaking to be expected from imposing the tax, the administrative measures needed for identification, calculation, determination and collection, and the cost of those measures. [9]

7. The *Commission* v *Germany* judgment of 2 February 1989, [10] like the present case, concerned an unconditional and unambiguous obligation to recover aid, imposed on a Member State by the Commission in a decision with definitive character. The Court held in that judgment that if, in giving effect to such a decision, a Member State encounters unforeseen and unforeseeable difficulties, the Commission and the Member State must work together in good faith with a view to overcoming difficulties while fully observing the provisions of the Treaty. [11] The Court, basing its judgment in particular on Article 5 of the Treaty, then said, however:

'In the present case, the German Government merely informed the Commission of the political and legal difficulties involved in implementing the decision, without taking any step whatsoever to recover the aid from the undertaking in question and without proposing to the Commission any arrangements for implementing the decision which would have enabled those difficulties to be overcome.

In those circumstances, *without its being necessary to consider the German Government's arguments* concerning the applicability of national procedural rules to the recovery of the aids, it must be declared that the German Government has no basis for claiming that it was absolutely impossible to implement the Commission's decision' (my emphasis). [12]

8. In the present case too, Greece did no more than inform the Commission that the recovery of aid required by Directive 89/659/EEC was impossible. More precisely, it made not the slightest attempt at effective recovery, nor did it propose any alternative solution to overcome the difficulties described. In accordance with the case-law cited above, Greece too cannot therefore rely on the absolute impossibility of implementing Decision 89/659/EEC.

9 — Defence, point IV. G(b).

10 — Cited above, note 6.

11 — *Commission* v *Germany*, paragraph 9; see also, for example, *Commission* v *Belgium* (Boch), paragraph 16.

12 — *Commission* v *Germany*, paragraphs 11 and 12; see also, for example, *Commission* v *Belgium* (Boch), paragraph 16.

The fact that the difficulties invoked by a Member State are of a constitutional nature makes no difference. Member States are obliged to ensure the full application of Community law, because of the primacy of that law:

'In the first place the application of national law must not affect the scope and effectiveness of Community law. That would be the case in particular if the application of national law made it impossible in practice to recover sums irregularly granted.' [13]

That applies fully in the case of the obligation to recover aid wrongfully granted, [14] an obligation which the Court moreover regards as a 'logical consequence' of the finding that the aid is unlawful. [15]

9. It is obviously not for the Court to examine how Greek law can in the present case be made compatible with that Community law obligation. It appears to me that such compatibility need not necessarily be achieved by amending the Constitution or by not applying it, but that it can just as well be achieved by interpreting the Constitution in a manner in accordance with Community law. That could be relevant here, since the Greek Constitution apparently does not absolutely preclude retroactive effect. The Greek tax at issue was itself of retroactive character. [16] It must also be borne in mind that the present case does *not* concern the retroactive imposition of a tax but the cancellation of a tax *exemption* which was granted unlawfully, that is, in breach of higher-ranking rules of law. Recovery of the tax thus amounts to doing away with a situation which was unlawful from the outset.

10. Finally, Greece's argument that the application of Decision 89/659/EEC would infringe the principle of protection of legitimate expectations can be dealt with briefly. Such an argument concerns the incompatibility of the decision with higher-ranking rules of Community law. It thus relates to the validity of the decision, and can therefore no longer be relied on after the expiry of the period referred to in the third paragraph of Article 173 of the Treaty. [17] Moreover, the Court has recently stated unambiguously:

'It is true that a *recipient* of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it

13 — Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* v *Germany* [1983] ECR 2633, paragraph 22.

14 — See, for instance, the judgments in Case C-74/89 *Commission* v *Belgium* [1990] ECR I-491, paragraph 8 (summary publication); Case C-142/87 *Belgium* v *Commission* (Tubemeuse) [1990] ECR I-959, paragraph 61; Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraphs 12 and 18.

15 — *Belgium* v *Commission* (Tubemeuse), paragraph 66; Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 41.

16 — Greece refers to this expressly at three places in the defence (points I, III. A and V). It adds, however, that that retroactive character remains within the bounds defined in Article 78(2) of the Greek Constitution (rejoinder, point IV).

17 — *Commission* v *France*, paragraph 10; see also Case 94/87 *Commission* v *Germany*, paragraphs 4 to 8.

had legitimately assumed the aid to be lawful and thus declining to refund that aid. If such a case is brought before a national court, it is for that court to assess the material circumstances, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice.

However, a *Member State* whose authorities have granted aid contrary to the procedural rules laid down in Article 93 may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Articles 92 and 93 of the Treaty would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive decisions taken by the Commission under provisions of the Treaty of their effectiveness' (my emphasis). [18]

Conclusion

In conclusion, I propose that the Court rule as follows:

(1) By failing to comply with Commission Decision 89/659/EEC of 3 May 1989 relating to Ministerial Decision No E 3789/128 of the Greek Government establishing a special single tax on undertakings, the Hellenic Republic has failed to fulfil its obligations under the EEC Treaty.

(2) The Hellenic Republic is ordered to pay the costs.

18 — Case C-5/89 *Commission* v *Germany*, paragraphs 16 and 17.