OPINION OF ADVOCATE GENERAL TESAURO
delivered on 2 December 1992 *

Mr President,
Members of the Court,

1. During 1987, the Commission received several complaints from a French company, alleging that the Greek authorities had imposed unjustified restrictions on the importation of frozen chickens from France.

More precisely the complaints stated that: (a) in June 1987, the Greek authorities had confiscated 90 tonnes of frozen chickens because the presence of salmonella had been discovered on the carcasses of the birds; (b) in October 1987, the same authorities had held up two consignments of chickens on the pretext that the water content of the chickens exceeded Community limits; (c) lastly, during the same year, the release to the market of certain consignments of frozen chickens had been delayed on several occasions.

2. The Commission considered the facts thus brought to its attention and concluded that the measures adopted by the Greek authorities constituted an infringement of Community law; it therefore first requested the Greek Government to authorize the importation and marketing of the goods and then — when its request was refused — decided to initiate the procedure laid down in Article 169 of the EEC Treaty.

During the pre-litigation procedure, the Greek authorities resolutely denied having infringed the relevant Community rules and stated that they had merely scrupulously applied the Community provisions on health and, in the absence of such provisions, had applied the national ones, without any discrimination as to the country of origin of the products.

3. The Commission regarded such a reply as unsatisfactory and decided to bring the matter before the Court and to seek a declaration that by: (a) prohibiting the importation of a consignment of 90 tonnes of frozen chickens from France because of the presence of salmonella on the surface of certain carcasses; (b) prohibiting the importation of more than 40 tonnes of chickens on the pretext that they contained excessive amounts of extraneous water; (c) systematically and repeatedly delaying the importation of several consignments of frozen chickens, the Hellenic Republic had failed to fulfil its

* Original language: Italian.

obligations under Directive 71/118/EEC, [1] Directive 83/643/EEC, [2] as amended by Directive 87/53/EEC, [3] Regulations (EEC) Nos 2967/76 [4] and 2777/75 [5] and Articles 30 to 36 of the EEC Treaty.

4. I propose to consider the three complaints against the Greek Government separately, in the order listed.

With respect to the first complaint, regarding the prohibition of the importation of chickens because of the alleged presence of salmonella, I feel I should begin by recalling in greater detail the facts which gave rise to the present proceedings.

It appears from the documents in the case that the Greek authorities did in fact confiscate 90 tonnes of chickens in June 1987 after detecting the presence of 'infantis' and 'Virchow' serotypes on the goods.

However a counter-analysis carried out in December 1987 by a veterinary expert designated by the exporting company on the basis of Article 10 of Directive 71/118/EEC [6] resulted in the conclusion that the presence of the salmonella found by the Greek authorities was in all probability due to *post mortem* contamination of the meat. According to the expert, the disparity between the results of the microbiological tests carried out in France (entirely negative) and those carried out in Greece (partly positive) was attributable to the difference between the method of analysis used by the Greek veterinary experts, which was to take a 25-gramme sample of skin, subcutaneous tissue and pectoral muscle, and that employed by the French veterinary experts, which involved removing the skin and cauterizing the muscle surfaces.

A further expert report, using other samples, substantially confirmed the earlier results: traces of salmonella were found on two samples analysed according to the Greek method but the samples analysed according to the French method again yielded negative results.

5. The Commission first points out that under Directive 71/118/EEC the import prohibition extends only to consignments of chickens which are found to include birds suffering from an infectious disease. However, it considers that the presence of a limited number of salmonella bacteria on the surface of the carcasses, probably resulting from *post mortem* contamination, does not

1 — Council Directive of 15 February 1971 on health problems affecting trade in fresh poultry meat (OJ, English Special Edition 1971 (I), p. 106).

2 — Council Directive of 1 December 1983 on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States (OJ 1983 L 359, p. 8).

3 — OJ 1987 L 24, p. 33.

4 — Council Regulation of 23 November 1976 laying down common standards for the water content of frozen and deep-frozen chickens, hens and cocks (OJ 1976 L 339, p. 1).

5 — Regulation of the Council of 29 October 1975 on the common organization of the market in poultry meat (OJ 1975 L 282, p. 77).

6 — It should be remembered that, as appears from the judgment in Case C-332/88 *Alimenta* [1990] ECR I-2077, paragraph 21, the opinion delivered by a veterinary expert provided for under Article 10 of Directive 71/118/EEC is not decisive or binding but does represent an important factor to be taken into account by the national authorities and any national courts before which proceedings are brought.

imply that the chickens have contracted an infectious disease such as salmonellosis.

The applicant also maintains that the presence of salmonella on the carcasses of birds is unfortunately a very widespread phenomenon in the Community and that it appears from the scientific literature on the subject that the presence of certain micro-organisms, including salmonella, on the carcasses of poultry does not constitute a danger to human health because such products always undergo high-temperature treatment before they are consumed.

Unless and until methods of microbiological analysis and limit values are laid down at Community level, it would therefore in the Commission's view be unrealistic to require the surface of poultry carcasses to be completely free from germs.

It follows, according to the applicant, that if the Greek method for detecting salmonella were to apply, it would be impossible to market a large proportion of the poultry produced in the Community.

6. In these circumstances it should first be recalled that to facilitate intra-Community trade in fresh poultry meat the Council adopted Directive 71/118/EEC in the early 1970's with the intention of harmonizing the health requirements of the various Member States.

However, as the Court itself has pointed out, 'Directive 71/118 expressly reserves to the Member States, until such time as greater harmonization is achieved, the power to prohibit the importation into their territory of poultry meat which is deemed to be unfit for human consumption' [7]; and Article 9(1) of the directive provides that a Member State may prohibit the marketing in its territory of fresh poultry meat coming from another Member State if at the time of the health inspection carried out in the country of destination it is found that such meat is unfit for human consumption.

Clearly, in prohibiting the importation of the goods into its territory, the Member State may not exceed the limits laid down in Article 36 of the EEC Treaty, which authorizes Member States to impose prohibitions justified *inter alia* on grounds of the protection of health and life of humans provided that such prohibitions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

7. In this connection, it should be made clear at once that the Commission — as it expressly stated itself at the hearing — is not claiming that the Hellenic Republic employed methods of analysis or discriminatory criteria with regard to imported products but merely that it refused to authorize the importation of poultry which, in the Commission's opinion, did not constitute a danger to human health.

7 — Judgment in *Alimenta*, paragraph 17.

It should also be recalled that the Court has consistently held that whenever there are uncertainties at the present stage of scientific research it is for the Member States, in the absence of harmonization, to decide what degree of protection of the health and life of humans they intend to ensure, having regard however to the requirements of the free movement of goods within the Community. [8]

8. In those circumstances I would point out that a consideration of the scientific literature produced by the Commission and the Greek Government does indeed show that the presence of salmonella on the carcasses of chickens is a fairly widespread phenomenon in the Community. However, contrary to what the Commission maintains, that literature stresses that there is a real risk to human health not only in cases where salmonella are found in the muscular tissue of poultry but also, and to a significant extent, where such micro-organisms are present only on the carcass of the bird.

The danger of infection for humans may arise from inappropriate heat treatment, unhygienic handling of infected carcasses, keeping contaminated cooked meat in poor conditions or simply from contamination of premises, surfaces, utensils and the hands of persons who have come into contact with the infected carcasses.

The danger of contamination is greater in climatic conditions which are conducive to the multiplication of salmonella bacteria and may be particularly serious in cases where poultry is used in considerable quantities, as is normally the case in schools, hospitals, prisons and the like.

Also, as one might expect, the risk of infection is particularly high in certain sections of the population such as children, old people or people with a weakened immune system — categories which may be infected by even relatively small quantities of salmonella.

9. These considerations regarding the risk involved in the presence of salmonella on poultry carcasses are further confirmed by the fact that the Commission first appeared to admit that certain limit values must in any case be respected even as concerns the presence of salmonella on the surface of carcasses (point 7 of the application) but then abandoned its earlier view that limit values should be laid down for the quantity of salmonella to be accepted in intra-Community trade in favour of a policy of prevention, that is, reducing the presence of salmonella in holdings and conducting a consumer information campaign (Commission reply to the third question put by the Court).

10. In the light of the foregoing, it seems to me that the Greek authorities might

8 — Case 97/83 *Melkunie* [1984] ECR 2367, paragraph 18, Case 174/82 *Sandoz* [1983] ECR 2445, paragraph 16, and Case 272/80 *Biologische Produkten* [1981] ECR 3277, paragraph 12.

justifiably fear that the importation of the chickens in question might constitute a danger to human health and I do not think it is reasonable to require them to expose the population to a risk — albeit a limited one — which might arise if the poultry were handled incorrectly.

11. Nor am I convinced by the Commission's statements that the Greek veterinary authorities in fact found only six salmonella bacteria on six chickens and that the quantity of salmonella found in the consignments in question was consequently below the danger threshold.

There does not seem to me to be any objective evidence for those assertions, whereas the Greek Government on the other hand has stated that the method of analysis used in this case involves enrichment, which makes it impossible to determine the precise quantity of salmonella present on the various carcasses. In the defendant's opinion, the best way to ensure that the product is harmless is, instead, to check that there are no salmonella in a given weight or surface area.

12. Moreover, it is clear from the Commission's reply to the first question put by the Court that Greece is not the only Community country to carry out checks on the skin of poultry and even the French Government, intervening in support of the applicant, recognizes that the Greek health authorities are entitled, in the absence of specific Community provisions on the subject, to carry out tests on samples consisting of a mixture of skin and muscle (statement in intervention, p. 4).

13. In its second complaint, the Commission claims that the Greek authorities raised unjustified obstacles to the importation of two consignments of chickens on the pretext that they contained excessive amounts of extraneous water.

To understand fully the scope of the alleged infringement, it is necessary at this point to recall the provisions of Regulation No 2967/76 which the applicant claims have been infringed.

Under Article 4 of that regulation:

'1. The water content may be checked initially in accordance with the rapid detection method described in Annex II.

Where there are grounds for assuming that, during processing, substances having the effect of increasing water retention in the poultry have been used, the water content shall be determined directly in accordance with one of the methods of analysis described in Annexes III and IV, the choice being made by the Member State.

If the result of the rapid detection method does not exceed the level fixed in Annex II (7), the poultry concerned shall be deemed to comply with this regulation.

2. If the result of the checks using the rapid detection method is in excess of the level fixed in Annex II (7), or if this checking method is not used, a chemical analysis shall be carried out using one of the methods described in Annexes III and IV, the choice being made by the Member State.

If the result of the checks using one of the methods of analysis described in Annexes III and IV is in excess of the admissible limits, the poultry concerned shall be deemed not to comply with this regulation. In that event, however, the holder of the poultry concerned may request that a counter-analysis be carried out using the same method.'

14. Both during the pre-litigation procedure and in the application, the Commission claimed that the Greek authorities employed two different types of analysis in succession, first the rapid detection method described in Annex II and then the method described in Annex III of the regulation in question.

According to the Commission, as the results of the analysis carried out in accordance with the drip-loss technique (described in Annex II) did not exceed the limits laid down, the goods in question should have been deemed to comply with Community rules and there was no need to carry out a further analysis using the method described in Annex III.

The applicant adds that in any event, even if they were entitled to undertake an additional analysis, the Greek authorities should have followed the procedures and methods of calculation laid down in Annex III but did not do so.

15. As regards the first point, I must observe that it is clear from the documents in the case that, from the pre-litigation procedure onwards, the Greek Government resolutely denied having carried out two successive analyses using different methods and stressed that, on the contrary, it had used the method described in Annex III for both the first and the second analyses. The consignment of poultry at issue was, it stated, examined in accordance with the method described in Annex II on the occasion of a further analysis of the consignment in question and then only at the request of the expert, to whom it had been explained that in any case the result of such an analysis was not considered relevant because the different method described in Annex III had been employed for the purposes of the first analysis.

16. That statement was not duly challenged by the Commission, which — it should be remembered — bears the onus of proving that the alleged infringement took place [9] and this complaint too must therefore be rejected.

Nor do I think the Court can take account of the other argument advanced by the Commission at the hearing, namely that the Greek authorities should not in any case have used in their first analysis without due justification the technique described in Annex III. The Commission is thus in effect completely changing the subject of its own

9 — See, most recently, Case C-157/91 *Commission* v *Netherlands* [1992] ECR I-5899, paragraph 12.

complaint and this — as we know — is not allowed under the provisions governing the procedure before the Court.

17. Similarly, the Commission's statement that, by employing the method described in Annex III, the Greek authorities failed to comply with the prescribed technical standards does not appear to be adequately substantiated in the light of the relevant details provided by the Greek Government, which complains in particular that the Commission mentioned the data established on the basis of a single specimen only in connection with the calculation to determine the average protein content, whilst none of the values established on the basis of the other six carcasses analysed exceeds the limits laid down in the ISO 937 method. The defendant adds that if the result is based on those six birds, the consignment examined clearly exceeds the limits laid down in Annex III to Regulation No 2967/76.

18. Finally, we come to the Commission's third complaint against the Greek Government, namely that there were systematic and repeated delays in the importation of several consignments of frozen chickens.

In particular, the applicant claims that in October 1987 the Greek authorities delayed the importation of two consignments of goods of about 22 tonnes each, one for two weeks and the other for four weeks; that in July 1987 they delayed a consignment of 216 tonnes for two weeks; and lastly that in April 1987 they held up a consignment of 112 tonnes for roughly a month.

19. The Commission's complaint is based principally on Article 30 of the EEC Treaty and Article 6 of Directive 83/643/EEC, as amended by Directive 87/53/EEC, which requires Member States to take the measures necessary to ensure that waiting time caused by the various inspections and formalities does not exceed the time required for their proper completion. To that end, they must organize the business hours of the departments which are to carry out inspections and formalities, the staff available and the practical arrangements for processing goods and documents associated with the carrying out of the inspections and formalities in such a way as to reduce waiting time in the flow of traffic to a minimum.

20. I must say at once that, with respect to this last complaint too, the evidence for the applicant's allegations does not seem to me to be based on sufficiently firm evidence; on the contrary, I have the impression that having first decided to bring an action for infringement designed essentially to challenge the methods employed by the Greek authorities to check for salmonella and the extraneous water content, the Commission then merely added a number of other complaints from the exporter in question to the main charges.

Indeed, with respect to the delays affecting the consignment of 216 tonnes and the two consignments of some 22 tonnes each, it does not seem to me that the Commission has produced any evidence to contradict the Greek Government's assertions that the delays were caused by the fact that the water content of the chickens in question was excessive and that it was consequently necessary to affix the appropriate labels, an operation which is to be carried out by the

consignor's representatives (Article 2 of Regulation No 2785/80). [10]

The Commission recognizes that the Greek authorities' arguments might be accepted, provided that the analysis of the water content was conducted correctly and that the result exceeded the limit laid down in the Community rules, but maintains — though without offering any evidence — that that was not the position in this case.

21. It is true that with respect to one of the consignments of 22 tonnes, the Greek authorities justified the delay on the ground that the equipment used to conduct the examination pursuant to Annex III of Regulation No 2967/76 had broken down and had had to be replaced.

However, even though it is clear that it is the responsibility of the Member State concerned to organize inspection operations in such a way as to avoid unjustified obstacles and to reduce waiting time to a minimum, it does not seem to me that, in the absence of any other evidence of negligence on the part of the national authorities, a Member State may be held to have infringed Directive 83/643/EEC or Article 30 of the Treaty merely because the importation of goods was delayed as a result of the accidental breakdown of a piece of machinery.

It seems to me appropriate to recall in this connection that it is clear from the documents in the case that the consignment in question had already been examined once using the method described in Annex III and, as a counter-analysis was required, the same method of analysis had to be used under the terms of Article 4(2) of Regulation No 2967/76.

22. Lastly, there remains the consignment of 112 tonnes, held up for roughly a month in April 1987. In that case, it does not seem to me that there is any valid reason for the delay and the Greek Government's replies in this connection, explaining that the goods in question were not correctly labelled and that the Easter holidays may have added to the delay, were vague and altogether unsatisfactory.

Although in my view there was clearly an unjustified delay in the importation of the goods on that particular occasion, I do not think that on the basis of that single episode it is possible to state that the Greek Government systematically and repeatedly delayed the importation of various consignments of chickens and consequently infringed Directive 83/643/EEC or Article 30 of the Treaty.

With regard to the latter provision in particular, it should be remembered that, as may be seen from the case-law of the Court, for an administrative practice to constitute a measure prohibited under Article 30 it must form part of a general trend or practice. [11]

10 — Commission Regulation of 30 October 1980 introducing detailed rules for implementing Regulation (EEC) No 2967/76 (OJ 1980 L 288, p. 13).

11 — Case 21/84 *Commission* v *France* [1985] ECR 1355, paragraph 13, and Case 35/84 *Commission* v *Italy* [1986] ECR 545, paragraph 11.

Conclusion

23. In the light of the foregoing, I therefore propose that the Court should:

(1) dismiss the action;

(2) order the Commission to pay the costs;

(3) order the French Government, the intervener, to bear its own costs.