OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 17 November 1988 *

Mr President,
Members of the Court,

1. Regulation No 136/66 of the Council on the establishment of a common organization of the market in oils and fats set up a system of aid for the production of olive oil. Article 5(2) of that regulation, as amended by Council Regulation No 1413/82 of 18 May 1982 (Official Journal 1982, L 162, p. 6) provides as follows:

'The aid shall be granted:

to growers who are members of a producer group recognized pursuant to this Regulation, on the basis of the quantity of oil actually produced by them,

to other growers, on the basis of the number and production potential of the olive trees which they grow . . . '.

2. Article 20c(1) lays down a total of seven criteria which producer groups must meet in order to be recognized. The first criterion is that producer groups must

'consist of individual growers and/or organizations engaged in producing, processing or marketing olives and olive oil and consisting solely of olive growers'.

3. Whilst producer groups may therefore consist of 'organizations engaged in producing', they may in addition form 'associations' which may also be granted official recognition (see in particular Article 5(3) and Article 20c(2)).

4. Council Regulation No 2261/84 of 17 July 1984, adopted under Regulation No 136/66, laid down general rules on the granting of aid for the production of olive oil (Official Journal 1984, L 208, p. 3). It lays down additional conditions in regard to the recognition of producer organizations and associations of such organizations and the second paragraph of Article 20 of the regulation contains the following transitional provision:

'With a view to ensuring the respect of the objectives of this Regulation whilst taking into consideration specific problems which may arise in certain Member States in the application of these provisions, the Member States concerned may, after consulting the Commission, whilst taking into consideration any additional criteria, grant for a transitional period of three marketing years, from the marketing year 1984/85, provisional recognition to such producers' organizations and their associations which make a request.'

5. Neither that regulation, nor Commission Regulation No 2711/84 of 26 September 1984 laying down certain detailed rules for the application of Regulation (EEC) No

* Original language: French

2261/84 for the 1984/85 marketing year as regards olive oil producer organizations and associations thereof (Official Journal 1984, L 258, p. 12) provides that only cooperatives may be recognized as producer organizations.

6. Pursuant to the second paragraph of Article 20 of Regulation No 2261/84, the Hellenic Republic informed the Commission of the 'additional criteria' by telex message of 19 September 1984. On 25 October 1984 the Greek Minister for Agriculture signed Order No 330358, which makes recognition of producer organizations subject to those criteria. Consequently, the time which elapsed between the notification of the criteria and the adoption of the Ministerial Order was probably not sufficient to permit the Commission to study the criteria in detail and to make the Greek authorities aware of its views. In any event, the Commission made its position known only at the end of January 1985.

7. The Hellenic Republic is right in arguing that by so doing, the Commission did not act with proper diligence (see, in regard to that concept, in particular the judgment of 11 December 1973 in Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471).

8. On the other hand, I do not agree with the Hellenic Republic's argument to the effect that the application is without purpose because the additional criteria will cease to be in force before the date on which the Court will deliver its judgment. According to the case-law of the Court, even where a default has been remedied subsequently to the time-limit prescribed by the second paragraph of Article 169 (the time-limit fixed by the Commission in the reasoned opinion), pursuit of the action still has an object. That object may consist in particular in establishing the basis of any responsibility which a Member State may incur to third parties who obtain rights as result of the said default (see, in particular, the judgment of 7 February 1973 in Case 39/72 *Commission* v *Italy* [1973] ECR 111).

9. *A fortiori*, that must be the situation when the action was brought, as in this case, at a time when the contested provision was still in force (15 April 1987).

10. Let me now turn my attention to the substance of the case, which arises from Article 3 of the abovementioned Ministerial Order of 25 October 1984, which is drafted in the following terms:

'The producer organizations referred to in paragraphs 1 and 2 must be entitled to pursue, on behalf of their members and on their responsibility, all commercial activities relating to the collection, distribution and sale of olive products. Their members — natural persons — shall participate in the organization or shall be represented by local organizations established at the level of communities or adjoining communities, having legal personality and pursuing economic and social objectives. The members shall undertake to provide the organization with information about all their agricultural activities. This paragraph shall apply for three (3) marketing years, with effect from the 1984/85 marketing year.'

11. The Commission considers that those additional criteria exceed the limits of the powers granted to the Member States by the second paragraph of Article 20 of Regulation No 2261/84. Moreover, the Commission considers that the concurrent

application of the criteria introduced arbitrary discrimination between producers contrary to Article 40(3) of the EEC Treaty. The criteria at issue do not genuinely deal with specific problems but limit recognition to associations of agricultural cooperatives (known as 'second degree cooperatives'). They exclude, from the outset and generally, all other forms of producer organization capable of providing the necessary guarantees.

12. For its part, the Hellenic Republic argues that 'the only purpose of laying down additional criteria was to ensure transparency and objectivity of the activities of the oil mills and producer organizations' (rejoinder, section 3, third paragraph). It follows that it does not argue that there were 'specific problems' (within the meaning of the second paragraph of Article 20 of Regulation No 2261/84) in Greece making it necessary to take into consideration 'any additional criteria' the purpose or effect of which was to exclude certain forms of producer organization. Moreover, it denies that it had any intention of recognizing only cooperatives or of excluding commercial companies. Consequently, it accepts the Commission's argument to the effect that when the Council adopted the measures in question, it was not concerned with the legal form of producer organizations but merely with their efficiency from the point of view of the proper functioning of the system of production aid.

13. The dispute can therefore be reduced to the question as to whether the *effect* of the measures referred to by the Commission, despite the stance adopted by the Greek Government, is to prevent recognition of olive oil producer organizations having a legal form other than that of a cooperative.

14. I should point out first that the Hellenic Republic cannot be accused of limiting recognition to 'second degree' producer organizations, that is to say organizations composed of other organizations, since the second sentence of paragraph 3 of the Ministerial Order reads as follows: 'Their members — natural persons — shall participate in the organization or shall be represented by local organizations . . . '. The juxtaposition of the concepts of participation and representation leaves the possibility open of recognizing organizations of which natural persons may be direct members.

15. The only problem is therefore to determine whether the only producer organizations eligible for recognition in Greece are cooperatives or associations of cooperatives.

16. The definition laid down by the Greek Minister is as follows:

'The producer organizations . . . must be entitled to pursue, on behalf of their members and on their responsibility, all commercial activities relating to the collection, distribution and sale of olive products'.

17. Certainly, the phrase 'all commercial activities relating to the collection, distribution and sale of olive products' is very similar to the terms of Article 18(3) of Greek Law No 1541 on agricultural cooperatives, in which the following provision is to be found:

'The cooperative shall take responsibility for the production of its members which is delivered to it in accordance with Article

11(3); it shall distribute and market it in accordance with the decisions of the association of agricultural cooperatives to which it belongs and with the general rules laid down for the marketing of the product in question by the Central Cooperative Association for the sector involved.'

18. Furthermore, Article 49(2)(b) of the law provides that associations of cooperatives are to

'see to the distribution, advertising and marketing of their members' products. Consequently, the provisions of Article 18(3) shall apply'.

19. However, that resemblance between the wording of the Ministerial Order and that of the law is not sufficient in itself to decide the matter because it is difficult to see what purpose a producer organization — irrespective of its legal form — might serve if not to collect, distribute and sell the agricultural products cultivated or harvested by its members.

20. On the other hand, what strikes me in the passage from the Ministerial Order quoted above is that the organization may act only on the responsibility of its members. Although the wording of the measure is not unambiguous, I consider that the expression 'on their responsibility' refers to 'members' and not to 'producer organizations' as the Commission seems to think (see page 7 of the French version of the application). That form of words therefore precludes recognition of any organization cast in the form of a company in which the shareholders bear the losses only up to the amount of their contribution to the company (public limited company under Greek law; Article 33 of the Law on Commerce of 19 April 1835) or in which only the assets of the company may be used to meet its debts (limited liability company; Article 1(1) of Law No 3190/1955).

21. For its part, Article 17 of Law No 1541/85 on agricultural cooperatives provides as follows:

'1. The members shall be liable for the cooperative's commitments *vis-à-vis* third parties up to the amount of three times the value of their share of the cooperative and to the extent corresponding to each member's share of the debt. The statutes may also provide for the liability of members to be increased by a resolution of the general meeting adopted in accordance with the special quorum requirement and by the majority provided for in Article 25(2). [1]

2. Personal liability of members to the cooperative's creditors shall arise only in so far as the creditors do not obtain satisfaction from the cooperative's assets or from guarantors; members shall also be personally liable for debts incurred by the cooperative before they became members of the cooperative.

3. Members shall remain liable even after ceasing to be members of the cooperative for debts incurred during their period of membership. The limitation period for claims by third parties against members shall be one year following the member's departure from the cooperative.

1 — A quorum of two-thirds of the membership and a majority of two-thirds of the members present.

4. A member's liability shall be extinguished one year after the cooperative has been put into liquidation unless an action was brought against him during the course of that year.

5. A member may not be imprisoned for the cooperative's debts to third parties or the State.'

22. Admittedly that provision also does not provide for unlimited liability on the part of the members of cooperatives. However, their liability is greater than their share in the cooperative. The formula employed in the Ministerial Order may therefore be used as an argument in support of the Commission's position.

23. Finally, I should note that the Ministerial Order of 10 January 1985 laying down the list of organizations and associations of such organizations recognized for the 1984/85 olive-oil marketing year refers in its preamble only to the law on agricultural cooperatives and not to the legislation dealing with other forms of association. I am not convinced by the Hellenic Republic's objection to the effect that it was not necessary to refer to the latter legislation because, in fact, the list is entirely composed of cooperatives. Such an order, which is designed to be applied repeatedly, should, in my opinion, be in a form which can be applied at any time and refers to all the relevant legislation, even if part of that legislation is not to be applied in a particular year.

24. The Commission also relies on the fact that only cooperatives were in fact recognized and that the applications of all the limited companies were rejected. The Greek Government replies that the limited companies in question did not fulfil the conditions laid down in the Community rules. For my part, I consider that the list of recognized organizations, which contains the names of 77 associations or groups of cooperatives and not one name of a commercial company, also tends to prove that the definition of producer organizations in the first sentence of paragraph 3 of Ministerial Order No 330358 of 25 October 1984 in fact excludes certain types of producer organizations solely on the ground of their legal form,[2] which constitutes an improper restriction of the scope of Council Regulation No 2261/84. Such a restriction is also contrary to the prohibition of discrimination between agricultural producers laid down in Article 40(3) of the EEC Treaty, which is binding on the Member States when they are adopting measures relating to the common organization of the agricultural markets pursuant to a Community regulation.[3]

25. In those circumstances the question arises as to whether it is still necessary to consider the way in which the Ministerial Order defines the local organizations through which individual olive growers may be represented on the producer organizations. I do not think that is essential since the problem of recognition concerns only producer organizations properly so called and not 'organizations engaged in producing, processing or marketing olives and olive oil and consisting solely of olive growers' of which, according to Article 20c

2 — See the judgment of 18 December 1986 in Case 312/85 *Villa Banfi* v *Regione Toscana* [1986] ECR 4039, and the judgment of 24 February 1988 in Case 8/87 *Andrianou Gizinou Cotton Producers Group* v *Greek State* [1988] ECR 1001.

3 — See the judgment of 26 April 1988 in Case 207/86 *Apesco* v *Commission* [1988] ECR 2151.

(1) (a) of Regulation 136/66, the former may be composed.

26. It is only in case the Court takes a different view that I will say a brief word about this second aspect.

27. The Commission stresses that the expression 'local organizations established at the level of communities or adjoining communities, having legal personality and pursuing economic and social objectives' has also been borrowed from various provisions of the Greek law on agricultural cooperatives. Article 1 of the law defines an agricultural cooperative as 'a voluntary cooperative association of farmers whose object is the economic, social and cultural development of its members within the framework of a common undertaking through cooperation on the basis of equality and mutual assistance'. Article 4 provides that cooperatives are to be established at local level (at the level of a community or adjoining communities).

28. I therefore think that it can be accepted, even if doubt remains, that cooperatives are the only local organizations capable of fulfilling the criterion laid down in the Ministerial Order.

29. To conclude, I propose that the Court should grant the Commission's application and declare that by restricting official recognition of olive oil producer organizations to those which are 'entitled to pursue, on behalf of their members and on their responsibility, all commercial activities relating to the collection, distribution and sale of olive products' and 'whose members — natural persons — participate in the organization or are represented by local organizations established at the level of communities or adjoining communities, having legal personality and pursuing economic and social objectives', the Hellenic Republic has excluded certain types of producer organization on the sole ground of their legal form and has therefore failed to fulfil its obligations under Council Regulation (EEC) No 2261/84 of 17 July 1984 laying down general rules on the granting of aid for the production of olive oil and of aid to olive oil producer organizations and under Article 40(3) of the EEC Treaty.

30. Consequently, the Hellenic Republic should be ordered to pay the costs.