OPINION OF ADVOCATE GENERAL TESAURO

delivered on 12 April 1993 *

Mr President,
Members of the Court,

1. In the present case the Commission asks the Court to declare that, by having adopted and maintained in force a system of temporary and permanent importation of means of transport which is incompatible with certain provisions of Council Directives of 28 March 1983 83/182/EEC [1] and 83/183/EEC [2] and also with Council Directive 73/148/EEC of 21 May 1973, [3] the Hellenic Republic has failed to fulfil its obligations under the EC Treaty.

The complaints brought by the Commission against the Greek Government relate to several aspects of the national rules in question: (a) the definition and determination of normal residence within the meaning of Directives 83/182/EEC (Article 7(1)) and 83/183/EEC (Article 6(1)); (b) the checks carried out in order to ascertain the place of normal residence for the purposes of tax exemption; (c) the practice of stamping passports when foreign vehicles enter and leave Greek territory; (d) the setting of a time-limit of 10 days for the re-export of vehicles belonging to car-hire firms having their head office within the Community; (e) the limitation in certain cases of the temporary importation exemption to a period of three months; (f) the prohibition on transfers of vehicles in adjacent countries.

In its reply the Commission abandoned the last two complaints, acknowledging in the one case (complaint (e)) that it was unfounded and in the other (f) that the Greek Government had in the meantime complied with Community legislation. Those complaints will therefore not be considered in this Opinion.

2. Reference is made to the Report for the Hearing for a detailed description of the pre-litigation procedure, and also the national legislation at issue and the relevant Community provisions, to which I shall refer only in so far as is necessary for the purposes of analysing the individual complaints made by the Commission.

A — Determining normal residence

(a) *For the purposes of temporary importation*

3. The Commission alleges that the Greek Government uses a concept of normal

* Original language: Italian.

1 — Directive on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another (OJ 1983 L 105, p. 59).

2 — Directive on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals (OJ 1983 L 105, p. 64).

3 — Directive on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14).

residence which differs from that contained in the first subparagraph of Article 7(1) of Directive 83/182/EEC. Whereas that provision defines normal residence as 'the place where a person usually lives, that is for at least 185 days in each calendar year, because of personal and occupational ties', the relevant national provision (Article 3 of Ministerial Order No 247/13 of 1 March 1988) refers to the place where a person stays for at least 185 days in a 12-month period. The Commission is of the opinion that reference to a period of 12 months rather than to the calendar year is contrary to both the letter and the spirit of the directive and reverses its logic, in that the place of normal residence comes to depend on the temporary importation, rather than the temporary importation on the place of residence. In any event, the non-application of the criterion defined in the directive leads to a disparity in the treatment of Community citizens in the same circumstances.

The Greek Government, however, relies on Article 9(1) of that directive, which permits Member States to maintain and/or introduce *more liberal arrangements* than those provided for in the directive, and argues that reference to a period of 12 months is more favourable to the persons concerned, since it enables the exemption to be granted to persons who have resided in Member State A for 185 days during the 12 month-period preceding the temporary importation of the vehicle into Member State B, but not for 185 days in the calendar year preceding the importation concerned.

4. The Greek Government's argument cannot be accepted. First of all, as the example given in the Commission's pleadings demonstrates, it is not always the case that reference to the 12 months preceding importation is more advantageous to the persons concerned. On the contrary, it is clear that, depending on the period in which the residence in question occurred (with reference to the time of temporary importation) and on whether or not it was continuous, the fact that the 12-month period preceding importation is taken into account rather than the previous calendar year may prove disadvantageous or favourable for them. That finding is sufficient in itself to lead to the conclusion that in the present case Article 9(1) of the directive cannot be relied on to justify adoption of a criterion other than that laid down in Article 7(1) of the same directive.

Moreover, for the purposes of Directive 83/182/EEC, as the Court has stated, once the place of normal residence is established 'it is possible to determine into which Member State the vehicle concerned has been temporarily imported, and which Member State is entitled to apply its tax legislation to the vehicle'. [4] If that is its aim, the concept of normal residence plainly cannot be other than a (harmonized) Community concept and the place of normal residence must be determined in the same way in all the Member States, for obvious reasons of certainty and uniformity and, in particular, because if the Member States were allowed to define normal residence in different ways, confusion would arise as to which State was

4 — Case C-297/89 *Ryborg* [1991] ECR I-1943, paragraph 16.

entitled to tax the vehicle in question. There would be a risk that two Member States would both consider the same person to be resident for tax purpose or even (attractive prospect) that a vehicle would escape tax in any State.

5. That being said, it must be acknowledged that the test of residence of at least 185 days in a given place is not of course decisive for the purpose of determining what normal residence is, since it must be assessed in conjunction with the personal and occupational ties of the person concerned, and those ties have greater weight than the quantitative criterion of 185 days. [5] Essentially, besides the question whether the 185 days are calculated by reference to the calendar year or to a period of 12 months, normal residence has, on the basis of an overall assessment of the criteria mentioned, come to be considered as 'the place where a person has established his permanent centre of interests'. [6]

It is precisely on the basis of those considerations that the Greek Government has asserted, but unconvincingly, that the reference to 12 months rather than the calendar year does not of itself contravene the directive on the point at issue and that, in short, the disparity between the Community definition and that adopted by the Greek Government is merely one of form.

While it is undoubtedly true that the reference to 12 months may not be decisive, it is nevertheless an important factor in ascertaining whether one of the criteria (a stay of 185 days) which together determine normal residence has been met. The fact that it is not consistent with the wording of Article 7(1) of Directive 83/18 may therefore lead in some cases to an outcome contrary to the directive as well as engendering confusion and doubt for the persons concerned, as I have already said. The objection under consideration must accordingly be held to be well founded.

(b) *For the purposes of permanent importation*

6. The problem of determining the place of normal residence is the same where the granting of exemption concerns the permanent importation of vehicles is concerned. The Greek provision transposing Article 6(1) of Directive 83/183/EEC, which has exactly the same wording as Article 7(1) of Directive 83/182/EEC, into national law also refers to a period of 12 months rather than to the calendar year. [7] My observations concerning temporary importation are therefore equally valid in this case.

I shall now move on to examine the other objections raised against the Hellenic Republic by the Commission on the point at issue, the first of which is that the competent Greek authorities use the concept of 12 months in order to prevent persons who have resided in Greece for more than

5 — To that effect see both Case C 297/89 *Ryborg* and Case 284/87 *Schaflem* v *Commission* [1988] ECR 4475.

6 — See *inter alia* the judgments in *Schaflem*, paragraph 9, and *Ryborg*, paragraph 19

7 — Article 2(1) of Ministerial Order No 245/11 of 1 March 1988.

185 days during the 12 months prior to moving from qualifying for the exemption. When called on to supply further details, the Commission merely replied, however, that the result of using the concept of 12 months *may* be that persons are prevented from qualifying for exemption and/or that a series of detailed checks is imposed as regards the existence of the other conditions required in order to determine normal residence.

Leaving aside for the moment the matter of checks, which forms a specific ground of objection and will accordingly be examined in due course, I merely observe that the Commission has manifestly not proved that the method of calculation used by Greece does prevent persons who have spent more than 185 days on Greek territory from qualifying for exemption. In addition, as the Greek Government has stated, under Article 4(2) of Ministerial Order No 245/11, if the other conditions are satisfied, the exemption is also granted to those who decide to transfer their normal residence to Greece after living there for a period of up to two years. In that case, the legislation in question expressly provides that normal residence at the time of arrival in Greece is to be taken into consideration.

7. As regards the grant of the exemption, however, Article 4(1) of that Order requires the persons concerned to have had their normal residence in another Member State for at least two years before moving to Greece. The Commission considers such a condition to be contrary to Article 6(1) of the directive concerned, in so far as the latter does not lay down any minimum length of residence for the purposes of acquiring normal residence.

Having made it clear that for the purposes of the directive in question, it is essential however to have lived in a given place at least long enough to be able to rely on the rules on normal residence, I cannot accept the Greek Government's argument that it is lawful to lay down a minimum period of 'normal residence', since that assumes that there exists a close and *permanent* link with a given place.

8. The only condition laid down by the directive in order to qualify for the exemption is that the imported vehicle should have been used by the person concerned in the Member State from which it has been exported for at least six months before the change of residence (first indent of Article 2(b)). It follows that, to qualify for the exemption where a vehicle is permanently imported, it is sufficient if the person concerned has resided for six months in one place. Article 4(1) of Ministerial Order No 245/11 is therefore plainly incompatible with the directive.

The objection concerned must accordingly be held to be well founded in that the Greek legislation adopts a period of 12 months instead of the calendar year as the reference period in calculating 185 days, and also

because it subjects the grant of the exemption to the condition that the person concerned should have had his normal residence in another Member State for at least two years.

B — Checks for ascertaining normal residence

(a) *On temporary importation*

9. The Commission first charges the Greek Government with failing to transpose into national law Article 7(2) and (3) of Directive 83/182/EEC, that is to say the provisions which require individuals to give proof of their place of normal residence by any appropriate means, in particular their identity card or any other valid document (Article 7(2)) and authorize the Member State of importation, where it has doubts as to the validity of a statement as to normal residence, to request any additional information or evidence (Article 7(3)).

The Commission then claims that Article 7(2) of Directive 83/182/EEC has not been properly transposed by Article 15 of Ministerial Order No 247/13, since the latter merely provides that: 'The burden of proof of compliance with the conditions laid down in this Order with regard to the customs authorities shall fall on the person concerned', but does not indicate either the means or the evidence judged to be sufficient by the Greek authorities as proof of normal residence.

Article 15 is therefore insufficiently clear and precise, whereas the Court has consistently held that, in implementing Community directives, the national legislature is obliged to adopt provisions which are sufficiently clear and precise to enable individuals to ascertain the full extent of their rights and to rely on them before the national courts. [8] The Commission takes the view that it is precisely because the national measure in question is lacking in clarity that the practice of systematic checks has grown up.

10. According to the Commission, confirmation of the existence of such checks is supplied by the fact that Title II of Circular No Δ 366/26 Πολ 10 lists the various items of documentary evidence [9] that the customs authorities *may take into consideration* for the purposes of proving normal residence. In any event, the circular in question did not properly transpose Article 7(3) of the directive, given that that provision must be given a restrictive interpretation, since it derogates from the principle of facilitating freedom of movement for persons, whereas the circular authorizes the competent Greek authorities to carry out further checks whenever it is not possible to ascertain from the passport or identity card how long a period has been spent abroad during the 12 months prior to the importation.

8 — Case 363/85 *Commission* v *Italy* [1987] ECR 1733, paragraph 7.

9 — In addition to a passport or identity card, I shall mention a certificate of registration with municipal or commune authorities, a certificate of registration with consular authorities, residence permit, work permit, tax returns, insurance company certificates and documents proving the place of residence of other members of the family.

For the Commission, it follows that such legislation is unclear and in any case a source of uncertainty; furthermore, it points out that the Court has consistently held [10] that a circular does not constitute proper fulfilment of the obligation to transpose imposed on the Member States and does not provide the requisite guarantees of clarity, precision and transparency to enable individuals to ascertain the full extent of their rights and obligations.

11. It is beyond doubt that the burden of proof of normal residence falls on the person concerned and it is equally beyond doubt, to my mind, that Article 15 of Ministerial Order No 247/13, like Article 7(3) of the directive, gives persons concerned the possibility of proving normal residence by any means, including therefore by identity card or passport alone, provided that those documents are conclusive. In that sense, therefore, I consider that the provision in question is sufficiently clear and not liable to create uncertainty or confusion for the persons concerned.

The list contained in Title II of the circular in question, while not being exhaustive, does provide guidance to the customs authorities as to what documents they may accept as valid, but it does not require any one in particular to be requested or even that all the documents must be presented in order to qualify for the exemption. However, the very fact that the circular in question expressly provides that the competent authorities may demand to see the documents listed in Title II where they consider that the passport (or identity card) is not conclusive goes to show that as a rule those documents are not requested and that the checks are not systematic.

In short, there is no evidence to prove that there is a practice of carrying out systematic checks and the Commission can only infer from the wording of the applicable national legislation that the competent Greek authorities necessarily undertake checks in order to determine normal residence.

In the light of the foregoing considerations, the objection in question must be rejected.

(b) *On permanent importation*

12. As regards Article 6(2) and (3) of Directive 83/183/EEC also, which have exactly the same wording as Article 7(2) and (3) of Directive 83/182/EEC, the Commission charges the Greek Government with having failed to transpose them properly into the national legal order. In particular, the Commission claims that Article 29(3) of Order No 245/11, which is framed in terms almost identical to those of Article 15 of Order No 247/13, grants the administrative authorities extensive discretion with regard to the production of documentary evidence and requires systematic checking of proof of normal residence. Those are essentially the same arguments as those considered with respect to temporary importation.

10 — See, for example, the judgment in Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851, paragraph 6.

I shall refer, where appropriate, to the points developed above, but otherwise confine myself to an examination of those objections which specifically concern checks carried out in order to determine normal residence in cases of permanent importation.

The Commission claims that, contrary to Article 6(2) of the directive in question, the Greek authorities require other Community nationals to produce a permit for five years' residence, and Greek nationals to produce a certificate of change of residence issued by the Greek consulate in the State in which they previously lived, in order to prove normal residence. In every case, therefore, those authorities require their own nationals to supply evidence of the exact period of residence.

13. Relying on the fact that the first time the Commission mentioned Circular No Δ 357 of 22 March 1988, by virtue of which a five years' residence permit may be demanded, was in response to a written question asked by the Court, the Greek Government maintained at the hearing that such a plea was not admissible, taking into account the defendant State's rights of defence in proceedings under Article 169.

Contrary to the Greek Government's assertions, I do not consider that the Commission has thus widened the scope of the action, for the simple reason that the Commission had already challenged the practice in its reasoned opinion. It must therefore be acknowledged that, by referring to the circular which expressly provides for such a demand, the Commission merely substantiated its previous assertions; the Greek Government had, moreover, commented on those in its reply to the reasoned opinion, claiming in particular that the requirement that persons arriving in Greece with the purpose of establishing residence there should possess a five years' residence permit is not at all contrary to Community law, especially since under the provisions applicable to the exemption those persons may transfer their normal residence to Greece up to 24 months after the date of their arrival.

14. That having been said, I would observe that the very nature of the document being discussed here (residence permit) demonstrates that it is not a document intended to prove that, before arriving in Greece, the person concerned had his or her normal residence in another Member State but one which proves that there has been a change of residence, which implies that the requirement of a residence permit does not and cannot constitute proof of normal residence within the meaning and for the purposes of Article 6 of Directive 83/183/EEC. [11]

In essence, while Article 6 governs the way in which normal residence is to be established and proved with respect to the Member State of residence before the move, the requirement of a residence permit makes it possible instead to check the pre-condition

11 — It is hardly necessary in this regard to point out that normal residence, as established on the basis of the criteria set out in Article 6, may not and must not, at the time of permanent importation, be ascertained with respect to the Member State to which residence is being transferred. If that were the case, then no one would ever be entitled to the exemption, given that it is impossible for a person to demonstrate that he has his 'normal residence' in the place to which he is moving.

for permanent importation, that is to say the actual move, which can definitely not be proved by means of a passport or identity card. From that point of view, therefore, the Commission's objection on the point under discussion is quite unfounded.

Nor is it possible to maintain that to require a residence permit is arbitrary or unnecessarily restrictive. It must be recognized that in reality the only document which is, as a rule, capable of proving transfer of residence, and thus establishment in a Member State other than the national state, is the residence permit, which in accordance with the relevant Community legislation [12] is issued within six months at the latest and for a *minimum* period of five years.

15. Finally, with respect to the requirement to which Greek nationals are subject, that they should before returning to Greece obtain a certificate from the Greek consular authorities in the State in which they used to live, I would first of all point out that it was the Greek Government which brought that practice to the attention of the Commission during the pre-litigation procedure, explaining that such a certificate is intended to allow the persons concerned freedom to import with the benefit of the exemption where their identity cards or other documents do not provide sufficient proof of residence.

On that point I shall merely note, first, that the condition at issue is not especially burdensome or hard to satisfy and, secondly, that the Commission has not in any case proved that the Greek authorities do demand the certificate in question even in cases in which no doubts arise.

16. That clarification having been made, it none the less remains the case that, just as it did with regard to the supposed practice of making checks on temporary importation, the Commission has inferred the existence of a constant, arbitrary and unnecessarily restrictive practice of carrying out checks for determining normal residence simply from the wording of the relevant national provisions, which in its opinion are unclear and furthermore allow the Greek authorities a broad discretion in relation to the documentary evidence to be produced for proving normal residence.

It does not seem to me to be possible to follow the Commission in its reasoning, since it has not shown that the Greek authorities *actually* carry out such checks systematically and arbitrarily. This objection must therefore be rejected as well.

C — Stamping of passports

17. The Commission objects, thirdly, that the Greek Government follows a practice of stamping passports with vehicle registration numbers when vehicles enter and leave Greek territory which leads to discriminatory treatment between persons going to

12 — See Article 5 of Council Directive 64/221/EEC of 25 February 1964 (OJ, English Special Edition 1963-1964, p. 117).

Greece: those who produce their passport undergo checks and the resulting delays, while others who simply produce their identity card may enter freely and without difficulty.

The Greek Government has pointed out that since Community citizens normally use identity cards, such a practice applies solely to Greek nationals resident abroad, or rather it applied to them until 10 June 1991. [13] From that date onward, Greek nationals, too, have been able to move from one Member State to another on production of their identity cards, and so the Greek authorities have completely given up the practice in question.

The Commission has none the less maintained this objection, considering that in the absence of legislation formally abolishing the practice in question, it has not been proved that it has been abolished with regard to those who continue to show their passports. For the purposes of these proceedings, the question of whether or not the competent Greek authorities have stopped stamping the passports of their own nationals who cross the frontier with a vehicle is in any event irrelevant, inasmuch as the Greek Government does not deny that at the end of the period set in the reasoned opinion for complying with that opinion, that practice was still in application.

I shall therefore go on to consider the substance of the objection in question.

18. The Commission claims that the stamping practice in question is unnecessarily restrictive and creates an unjustified obstacle to freedom of movement for persons, contrary to Directive 73/148/EEC (and by extension to 83/182/EEC) and to the settled case-law of the Court according to which Member States are to grant the right to enter their territory merely on production of a valid identity card or passport and no entry visa or equivalent requirement may be demanded. [14] The Commission also refers to the Court's finding that the carrying out of controls upon entry into the territory of a Member State may constitute a barrier to the free movement of persons 'if (...) the controls in question were carried out in a systematic, arbitrary or unnecessarily restrictive manner'. [15]

The Greek Government objects first of all that the practice in question has been applied only to Greek nationals residing abroad who wished to make a temporary import and that it is therefore incorrect to speak of systematic checks contrary to Directive 83/182/EEC, and in particular Article 7(3) thereof. According to the Greek Government, passports have been stamped in order to enable the Greek authorities to check, where doubts arise, that the exempt vehicle does not remain on Greek territory any longer than the exemption itself lasts, and from that point of view thus represents an

13 — This was because until 10 June 1991 the identity card issued by the Greek authorities was not valid for expatriation, so that it was possible for nationals to cross the Greek frontier only if they possessed passports.

14 — See Article 3 of Directive 73/148/EEC, and the judgment in Case 157/79 *Pieck* [1980] ECR 2171, paragraph 10.

15 — Case 321/87 *Commission* v *Belgium* [1989] ECR 997, paragraph 15.

advantage for the persons concerned. Second, the Greek Government denies that the practice in question can be regarded as contrary to Directive 73/148/EEC for the simple reason that the directive concerns abolition of restrictions on movement and residence for people whereas the issue in the present case concerns a formality for vehicles allowed into Greek territory free of tax.

19. I do not consider that Article 7(3), on the basis of which specific controls may be carried out only in case of doubt, is applicable in these circumstances, since the purpose of stamping passports is not to determine normal residence in another Member State but rather to enable the authorities to verify that a particular vehicle does not remain on Greek territory beyond the exemption period, that situation not being regulated by the directive concerned.

As to the alleged incompatibility with Directive 73/148/EEC, the stamping of passports of persons crossing the frontier with a vehicle does not create an obstacle to the freedom of movement of the persons concerned or to the length of their stay and cannot be treated as equivalent to a visa incompatible with the directive in question. Moreover, it is a formal requirement which affects only those who seek to make use of the import exemption and does not in any event impose conditions on entry into the territory.

Accordingly, I consider that this objection must also be rejected.

D — Time-limit for the re-export of hired vehicles

20. The Commission's final objection relates to the condition imposed by the second subparagraph of Article 8(2) of Order No 247/13 which, in providing that private vehicles belonging to a car-hire firm having its head office outside Greece may be re-hired to persons who are not resident in Greece, in order to be re-exported, provided that they are in Greece as a result of a hire contract which comes to an end in Greece, sets a maximum period of ten days, according to the distance or situation of the vehicles, within which they must be re-exported. In the Commission's opinion, the setting of such a time-limit is contrary to Article 3(b) of Directive 83/182/EEC.

The abovementioned provision does not lay down any specific time-limit for the re-exportation of hire cars. It clearly follows that the only period of which account may be taken is the duration of the exemption.

That conclusion is not invalidated by the Greek Government's argument that since the purpose of Article 3(b) of the directive is to derogate from the general prohibition on disposing of and hiring out means of transport in the State of importation, that aim would be undermined if the means of transport in question were allowed to remain in Greek territory throughout the duration of the exemption.

On that point, it is sufficient to point out, first, that the imposition of such a (maximum) time-limit is liable to restrict significantly the opportunities of re-hiring a vehicle which qualifies for the exemption and, second, that if that had been the objective pursued by the article in question, the directive itself would have expressly provided for a time-limit for re-export. This objection must therefore be upheld.

21. In the light of the foregoing considerations, I therefore conclude by proposing that the Court should:

(1) declare that the objections relating to the definition and determination of normal residence within the meaning of Article 7(1) of Directive 83/182/EEC and Article 6(1) of Directive 83/183/EEC and the setting of a maximum time-limit of 10 days for the re-export of vehicles belonging to car-hire firms which have their head office within the Community are well founded;

(2) dismiss the remaining objections in the application;

(3) order the costs to be shared between the parties, since each has partially failed in its submissions.