OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 24 May 1988 *

Mr President,
Members of the Court,

1. By an application received at the Court Registry on 20 July 1987, the Commission of the European Communities applied to the Court for a declaration that the Hellenic Republic has failed to fulfil its obligations under the Treaty of Rome. It is alleged that it failed to take within the prescribed period the measures necessary to implement Commission Decision 85/276/EEC of 24 April 1985 concerning the insurance in Greece of public property and loans granted by Greek State-owned banks (Official Journal L 152, p. 25).

The facts are as follows. Article 13 of Law No 1256/82 of 28 to 31 May 1982, which amended Articles 31 (1) and 54 (1) of Law No 400/70 of 13 to 17 January 1970, provides that: (a) all public property, including the assets of Greek public undertakings, may be insured only with public sector companies and (b) State-owned banks must recommend in writing to their customers that they take out insurance with companies owned and controlled by the public banking sector.

The Commission considered that provision to be contrary to Article 90 (1) read in conjunction with Article 52, Article 53, the second paragraph of Article 5 and Article 3 (f) of the Treaty; on 30 May 1985 it notified the Greek Government of the adoption of Decision 85/276 and called upon it to inform the Commission within two months of the measures taken to put an end to the incompatibility. By letter of 30 September 1985 the time-limit was extended to 18 October, but it was only on 29 October that Greece replied to the Commission, giving an assurance that the required amendments would be made rapidly. Since that assurance was not followed by any action, the Commission initiated the infringement proceedings on 8 April 1986 by sending the Hellenic Republic the usual formal notice and, several weeks later (26 May), a reminder.

On 11 July 1986, Greece confirmed that the contested provision was to be amended and that a bill for that purpose was about to be submitted to Parliament. That undertaking was repeated both at a meeting at ministerial level which took place in Athens on 28 and 29 July 1986 and in a letter of 4 November 1986 in which Greece replied to a further reminder which the Commission had addressed to it on 13 October. The Commission took note of those assurances (1 December) and indicated that it was prepared to suspend the infringement proceedings if the Greek Government addressed a circular 'to the bodies concerned' requiring 'State-owned banks and insurance companies to comply immediately with the provisions amending Law No 1256/82, pending formal approval by Parliament of the amendments'.

However, no circular was issued. Consequently, on 17 February 1987 the Commission delivered a reasoned opinion

* Translated from the Italian.

calling upon Greece to adopt the necessary measures within two months from the date of its notification. The Greek Government did not reply and the Commission brought the action now before the Court.

2. The defence of the defendant Member State is based on two arguments: (a) Decision 85/276 was not binding in nature, and (b) it was unlawful.

In regard to argument (a), Greece argues, first, that the Commission has used Article 90 (3) of the Treaty for the first time as the legal basis of a decision and, secondly, that the nature of that measure is not clear — there is an influential school of thought which regards such a decision as an opinion, albeit one which carries considerable 'moral weight' (Pappalardo, 'Régime de l'article 90 du traité CEE — Les aspects juridiques', in 'L'entreprise publique et la concurrence, les articles 90 et 37 du traité CEE et leurs relations avec la concurrence', *Semaine de Bruges 1968*, Bruges 1969, p. 81). The fact that it was not contested does not therefore imply an admission that it is valid and does not mean that it cannot be contested before the Court. A different result would deprive the Member States of the greater protection which Article 169 accords them, at the pre-litigation and litigation stages, than the 'summary' procedure under the combined provisions of Articles 90 and 173.

In regard to the second argument, the Greek Government contends that the allegation that Article 13 of Law No 1256/82 is incompatible with Community law is not based on a realistic and objective analysis of the national insurance market. In particular, the Commission has not shown that the provision hinders intra-Community trade, free competition or the establishment in Greece of insurance companies from other Member States and, consequently, infringes Article 3 (f), the second paragraph of Article 5, Article 52 and Article 53 of the Treaty. Finally, the measure adopted also appears to infringe the principle of proportionality.

3. In my opinion, the arguments summarized above must be rejected. I should observe first of all that the lawfulness of Decision 85/276 cannot be contested in these proceedings. In order to show that, it is unnecessary to rule on the admissibility of an objection of the kind provided for in Article 184 in the context of an action for failure to fulfil obligations (for a complete picture of the academic writing and case-law on this subject, see Kovar, 'Contentieux de la légalité — L'exception d'illégalité', in *Jurisclasseur de droit international*, 1981, section 161-C, part three, paragraphs 19 to 25). It is sufficient to point out that the Court has held that such an objection may not be raised in regard to individual decisions except in the extreme case where a decision infringes a principle of a constitutional nature (judgment of 10 December 1969 in Joined Cases 6 and 11/69 *Commission* v *France* [1969] ECR 523; judgment of 12 July 1973 in Case 70/72 *Commission* v *Federal Republic of Germany* [1973] ECR 813; judgment of 12 October 1978 in Case 156/77 *Commission* v *Belgium* [1978] ECR 1881 and the Opinions of Mr Advocate General Roemer in the first of those cases and of Mr Advocate General Mayras in the second).

Having said that, I would point out, to adopt the terms of the judgment in Joined Cases 6 and 11/69, that Decision 85/276 does not 'lack all legal basis in the Community legal system' (paragraph 13).

According to Article 90 (3), 'the Commission shall ensure the application of the provisions [concerning public undertakings] and shall . . . address appropriate directives or *decisions* to Member States' (my emphasis). Naturally the measure could have been contested within the time-limit laid down in Article 173. However, Greece allowed that period to expire without acting and it cannot conceivably remedy its inertia of 1985 two years later. The reason why that is so is clear. The time-limit laid down is intended to avoid Community measures being called in question *ad infinitum*. It is thus an application of the first and most important principle, that of legal certainty, underlying the system of remedies established by the Treaty (see, in regard to decisions under the first subparagraph of Article 93 (2), the judgment of 12 October 1978, cited above, at paragraph 24).

4. Having arrived at that conclusion, I shall consider the Greek Government's arguments to the effect that the decision is unlawful only for the sake of completeness.

The fact that there is no precedent for the decision in the application of Article 90 (and, I should add, only one similar decision: the Decision of 22 June 1987 concerning reductions in air and sea transport fares available only to Spanish nationals resident in the Canary Islands and the Balearic Islands, Official Journal 1987, L 194, p. 28) is correct but is also entirely irrelevant in legal terms. On the other hand, it is certainly wrong to deny that it fits into the pattern of Article 189 and, therefore, may be regarded as a measure fully binding on the addressee. In particular, Greece's reference to the views of Professor Pappalardo is irrelevant. In the work cited, Professor Pappalardo states that the power conferred on the Commission must not be exaggerated because 'if the State involved does not comply with . . . the decision, the only solution is to have recourse to Article 169'. The parallel (not, indeed, a particularly apt one) which he draws between the kind of measure provided for in Article 90 (3) and opinions must be understood in that context.

The defendant Member State's criticisms of the reasons on which the decision is based, in order to show that that decision is unlawful, are also without substance. The Commission gave detailed consideration to all the obstacles created by the contested provision both to competition from private insurers, in particular agencies, branches and subsidiaries of companies from other Member States, and to the right of establishment. Article 13 of Law No 1256/82 in practice prevents those undertakings from insuring public property, in respect of which premiums equal to one quarter of the national insurance market are paid.

Finally, I should say that the decision at issue does not by any means infringe the principle of proportionality. It is one of the instruments which the Treaty provides to the Commission for the exercise of its power and duty of monitoring national provisions concerning public undertakings.

5. In the light of the foregoing considerations, I propose that the Court should declare that by failing to take within the prescribed period the measures necessary to implement Commission Decision 85/276 of 24 April 1985 concerning the insurance in Greece of public property and loans granted by Greek State-owned banks the Hellenic Republic has failed to fulfil its obligations under the EEC Treaty.

I also propose that the Court should order the unsuccessful party to pay the costs.