OPINION OF MR ADVOCATE GENERAL GULMANN
delivered on 12 February 1992 *

Mr President,
Members of the Court,

The Court is well acquainted from several cases with the problems which arose on the Greek cereals market following Greece's accession to the Community on 1 January 1981. In its judgments in such cases the Court has decided as to the legality under Community law of a series of the measures adopted by the Greek authorities to solve these problems. [1]

This case concerns the legality of certain cases of intervention on the market for cereals in the years 1982 to 1986.

The Commission claims that the Court should declare that:

— by promoting, through KYDEP (Central Office for the Management of National Products), exports of cereals and processed cereals-based products and making good the deficits which KYDEP thereby incurred by means of direct and indirect aid measures, including fixing the prices of cereals for the milling and processing industries partly below the intervention prices fixed by the Community (programme contracts);

— by inducing KYDEP to deliver 340 000 tonnes of wheat into Community intervention in 1982 and covering KYDEP's losses incurred thereby;

— by failing to notify the Commission of those aids and other measures it took between 1982 and 1986; and

— by failing to cooperate with the Commission,

the Hellenic Republic has failed to fulfil its obligations under Community law, in particular Regulation (EEC) No 2727/75 on the common organization of the market in cereals, [2] the relevant implementing regulations and Articles 93 and 5 of the EEC Treaty.

* Original language: Danish.

1 — See in particular the judgments:
— in Case C-281/87 Commission v Greece [1989] ECR 4015 concerning instructions from Greece to KYDEP to purchase inferior-quality durum wheat from the 1982 harvest;
— in Case C-35/88 Commission v Greece [1990] ECR I-3125 concerning the Greek Government's influence on KYDEP's activities on the market in feed grain;
— in Case C-32/89 Greece v Commission [1991] ECR I-1321 concerning the Greek Government's conclusion of programme contracts with KYDEP relating to the export of common and durum wheat and Kydep's placing durum wheat into intervention on instructions from the Greek Government; and
— in Case C-110/89 Commission v Greece [1991] ECR I-2659 concerning measures preventing the export of maize except by KYDEP.

2 — OJ 1975 L 281, p. 1.

The Hellenic Republic contends that the Court should dismiss the application.

Admissibility

The Greek Government claims that the application should be dismissed inasmuch as the Commission's claims imply a decision as to whether the Hellenic Republic has granted an illegal State aid. It contends that such questions cannot be decided in an action brought under Article 169 of the Treaty but should be decided in an application under Article 93(2) of the Treaty. The Greek Government put forward the same argument in Case C-35/88 [3] which dealt with the authorities' intervention on the Greek market in feed grain, and which on that point is analogous to this case.

The Court, in its judgment in that case, rejected the Greek objection of inadmissibility on the following grounds:

'... the Court has consistently held that the appropriate procedure for obtaining a declaration that the rules of the common organization of the markets have been infringed is the procedure for a declaration against Member States under Article 169 of the Treaty. Although, according to that case-law, Article 93(2) of the Treaty set up a procedure specifically adapted to the special problems created by State aid with regard to competition in the common market, the existence of that procedure in no way prevents the compatibility of an aid scheme in relation to Community rules other than those contained in Article 92 from being assessed under the procedure provided for in Article 169 ...

In those circumstances the point relied on by the Hellenic Republic, namely that the contested State intervention would — if substantiated — include an aid scheme, does not prevent the Commission from challenging the compatibility of such intervention with the rules governing the common organization of the market in cereals by using the procedure under Article 169 of the Treaty.' (paragraphs 11 and 12).

The Greek Government's contention that the case should be dismissed must therefore be rejected.

However, there is another problem with regard to the admissibility of the case, on which the Court must decide. The background to it is that two of the heads of claim which the Commission has put forward in its application do not appear in its reasoned opinion. On the other hand both these grounds of complaint were mentioned in the Commission's formal initial letter. The Greek Government has not referred to this fact during the proceedings and has not therefore used it as a ground for claiming that the case should be dismissed.

The Court has several times had occasion to express its views on the importance and

3 — See note 1.

requirements of the prior administrative proceedings in cases brought in pursuance of Article 169 of the Treaty.

Most recently the Court declared in its judgment in Case C-198/90:[4]

'It should be observed that that complaint appears neither in the formal letter before action nor in the reasoned opinion, which merely plead an infringement of Articles 73 and 75 of Regulation No 1408/71, without referring, directly or indirectly, to an infringement of the principle of equal treatment.

As the Court has consistently held, ... the scope of an action brought under Article 169 of the Treaty is delimited both by the preliminary administrative procedure provided for by that article and by the form of order sought in the application and by the Commission's reasoned opinion and the application must be founded on the same grounds and submissions' (paragraphs 14 and 15).

The case-law of the Court shows that the Court attaches importance to the observance of the Treaty's requirements with regard to the prior administrative procedure and that failure to observe them entails dismissal of the application.

It may be concluded from the case-law that it is not sufficient for a fact to have been mentioned in the initial letter since it is expressly required that the reasoned opinion and the application must be founded on the same grounds and submissions.

The Court has also stated that it must, of its own motion, ensure that the requirements of the Treaty with regard to the administrative procedure are observed by the Commission.

Thus, in the case just referred to, the Court refused to decide a claim that the rule at issue was a sign of indirect discrimination on grounds of nationality, as it had not been put forward in the reasoned opinion. That was despite the fact that the Netherlands Government had not claimed that the action should be dismissed, and even though Mr Advocate General Van Gerven had proposed that the Court should consider the substance of the matter in view of the fact *inter alia* that the Netherlands Government had not made such a claim.[5]

However, there may, in my view, be grounds for considering whether it is correct that the Court must, of its own motion, ensure the observance of the requirements with regard to the administrative procedure as they may be deduced from Article 169 of the Treaty. As the Member State in question appears before the Court to defend itself, it is, in my view both unnecessary and inappropriate for the

4 — Commission v Netherlands [1991] ECR I-5816.

5 — Mr Advocate General Van Gerven said: ... The assertion that the residence requirement is a disguised form of discrimination is to my mind a development of that argument which, moreover, may be regarded as having been raised by implication in the reasoned opinion, all the more so since the Netherlands Government did not claim an infringement of the rights of the defence on this point. I therefore consider that the argument as to a disguised discrimination is admissible ....

Court to take upon itself the duty of ensuring of its own motion that the Commission has correctly drafted its initial letter and its reasoned opinion as compared with the content of the application.

It is clear from the Court's case-law on this subject that the requirements with regard to the prior administrative procedure are based on consideration for the Member State. Thus the Court has stated on several occasions that:

— the purpose of the administrative procedure is to define the subject-matter of the dispute and to indicate to the Member State the factors enabling it to prepare its defence; and

— the opportunity for the Member State concerned to submit its observations on the points of view expressed in the initial letter during the administrative procedure constitutes an essential guarantee required by the Treaty, observance of which is a condition for the legality of the action for a State's failure to comply with its obligations under the Treaty. [6]

However, these considerations are, in my view, sufficiently safeguarded by the State's opportunity to claim that the application should be dismissed as a result of defects in the administrative procedure.

The Member State itself is in a better position to assess whether a defect in the Commission's preparation of the case has been so important that it would wish the Court to refuse to go into the substance of the matter, in particular because it has not had sufficient opportunity to prepare its defence. There may well also be cases in which the Commission and the Member State have a common positive interest in having a disputed question decided by the Court by an action for failure to fulfil Treaty obligations, even though the Commission may not have complied with the requirements of the prior administrative procedure. It is hard for me to see that there may be an independent procedural ground requiring the Court to take upon itself of its own motion the sometimes quite difficult task of examining the initial letter, the reasoned opinion and the application with a view to investigating whether the application represents an extension on one or more points of the subject of the dispute as defined during the administrative procedure. The factual and legal basis on which the Court must decide the case is in all circumstances the one put forward during the proceedings before the Court. [7]

6 — Judgment in Case 31/69 Commission v Italy [1970] ECR 25. Cf. also the judgments in Case 51/83 Commission v Italy [1984] ECR 2793 at paragraphs 4 and 5 and in Case 274/83 Commission v Italy [1985] ECR 1077 at paragraphs 19 and 20.

7 — One might also ask, with some justification, why the Court's duty of review should be greater when it is dealing with actions for failure to fulfil obligations under the Treaty than in applications for a declaration that a Commission decision in a competition case is void. In Article 19 of Regulation No 17 of the Council (OJ, English Special Edition 1959-1962, p. 87) as supplemented by Article 4 of Regulation No 99/63/EEC of the Commission on the hearings provided for in Article 9(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47) it is stated that the Commission shall in its decisions against undertakings deal only with those objections in respect of which the undertakings concerned have been afforded the opportunity of making known their views in the prior administrative proceedings. In accordance with these provisions the Court has stressed, in its case-law, that the Commission decision must be based solely on objections contained in the Commission's prior statement of objections. As far as I am aware, however, this question has never been examined by the Court of its own motion. A declaration that a Commission decision is void on the ground that the Commission's statement of objections does not correspond to the subsequent decision seems thus to have been made solely after a claim to that effect by the undertaking concerned. My view is that the two situations have so much in common that it may seem difficult to explain why they should not be dealt with in the same way.

As the Greek Government has not claimed that one or more of the Commission's grounds of complaint should be excluded from a consideration of the substance of the matter because they were not included in the reasoned opinion, I shall propose that the Court should proceed to consider the substance of the case as defined in the application.

If the Court decides, despite these observations, to examine of its own motion whether in this case there are grounds for dismissal, I shall propose that the Court should base its decision on the following considerations.

The Commission's heads of claim include the following two allegations:

— the Greek Government induced KYDEP to place 340 000 tonnes of wheat into Community intervention and covered the losses which KYDEP incurred thereby; and

— in contravention of Article 5 of the Treaty, the Greek Government failed to cooperate with the Commission.

The first complaint is not contained in the conclusions of the Commission's reasoned opinion, nor is it expressly referred to in that opinion. On the other hand, the opinion contains in point 4 a reference to point 1.8 of the initial letter, which does refer to that fact.

The second of the complaints mentioned is not expressly referred to in the reasoned opinion and there are no specific references to it.

However, it should be mentioned that the reasoned opinion contains the following passage:

'The Greek reply is not however such as to modify the opinion expressed by the Commission in its letter of 2.9.1987 (the initial letter) on the facts and background, the effects of the Greek measures and the Community law applicable, *which it fully maintains*' (emphasis added).

In my view the Commission, by such more or less general references to the initial letter, is not satisfying the requirements of the administrative procedure as laid down by Article 169 of the Treaty. The purpose underlying the reasoned opinion must be to require the Commission to amplify and specify the complaints on which it wishes to rely. To accept that references to the initial letter would be sufficient involves the risk of reducing the reasoned opinion to a document without independent significance.

In so far, then, as the Court chooses to come to a decision of its own motion on this question, my view is that both complaints should be rejected.

Substance

The Greek authorities' intervention on the market in cereals

The Commission claims in this case that the Hellenic Republic intervened through KYDEP on the market in cereals contrary to the common organization of the market in cereals.

KYDEP, that is, the Central Office for the Management of National Products, is a national association of regional cooperatives for cereals, vegetables and animal feedingstuffs. Its main functions are to buy up, store and sell its members' products and to operate as a Community intervention agency for certain agricultural sectors.

The background to the case is, as described by the Commission and confirmed by various documents before the Court, some of which come from KYDEP, that from 1982 KYDEP was faced with very serious difficulties in disposing of wheat which it had purchased and stored.

It appears that in this case KYDEP had during the material period a pressing need to increase its sales of cereals, *inter alia* to reduce storage and other costs and to make room for storing the next harvest.

According to the Commission the Greek Government sought to solve these problems, on the one hand by instructing KYDEP directly or indirectly to adopt various measures and on the other hand by wholly or partially covering KYDEP's losses in this respect.

The various measures, aimed at disposing of cereals on the export market, were adopted, according to the Commission, in so-called 'programme contracts' containing overriding guidelines as to how various consignments of wheat were to be disposed of.

According to the information given by the Commission there were two types of programme contracts.

The first main type consisted of contracts entered into between the Greek authorities, KYDEP and private traders.

The essential content of some of these was that:

— KYDEP was to sell its stocks of wheat to flour mills and other processing undertakings on advantageous conditions (prices below the market price and interest-free credit for eight months);

— the private traders were to undertake to process and export the wheat subject to given time-limits; and

— the Greek authorities undertook to cover KYDEP's loss and to secure financing of the system with the Greek agricultural banks through the National Bank of Greece.

Whilst it was a characteristic of the programme contracts I have just described that the traders obtained credit from KYDEP, which was re-financed by the Greek agricultural banks, other contracts provided that financing was to be effected by the commercial banks granting loans to the traders subject to approval by the National Bank of Greece, which in turn had received the approval of the Ministry of Economic Affairs. [8]

The second main type of programme contracts aimed at laying down the framework for processing and export carried out by KYDEP itself, with the State granting KYDEP a given subsidy per kg of flour exported.

The Commission also claims that the Greek Government, contrary to Community law, instructed KYDEP to deliver 340 000 tonnes of wheat into Community intervention in 1982, whilst the government covered KYDEP's losses incurred thereby.

8 — It appears further from the documents before the Court that a committee had been appointed, consisting of representatives of the organization for the promotion of exports, the Ministry of Economic Affairs, the Ministry of Agriculture and KYDEP, its purpose being to negotiate with the traders regarding the conclusion of contracts with KYDEP for the purchase of wheat on the usual conditions against a subsidy direct from the Ministry of Economic Affairs. However, it is not clear how far contracts of that type were ever concluded. Reference may be made to the order of the Ministry of Economic Affairs of 26 November 1982, produced by the Greek Government, and to the analytical report concerning KYDEP's accounts for 1988, p. 71, produced as Annex XII to the application.

As I have already mentioned, the Court has delivered a series of judgments in similar cases. They are of essential importance in this case since:

— to a considerable extent they contain a decision on the legal questions arising in this case;

— they constitute a solid basis for assessing the relationship between the Greek authorities and KYDEP; and

— they contain a probative assessment of certain of the factual circumstances which are the subject of this case.

The *legal assessment* of the case is simple, since it follows from the Court's case-law that, if the Member States intervene as described in the Commission's application, these are serious infringements of Community law.

The Court declared most recently, in its judgment in Case C-110/89 *Commission* v *Greece*, [9] which concerned obstacles to the export of maize, that:

'... the common organizations of the markets are based on the concept of an open market to which every producer has free access under genuinely competitive conditions and the functioning of which is

9 — See note 1.

regulated solely by the instruments provided for in those organizations. In particular, in sectors covered by a common organization of the market, and *a fortiori* when that organization is based, as in the present case, on a common price system, Member States can no longer take action through unilateral measures affecting the machinery of price-formation as established under the common organization . . . ' (paragraph 21).

On the basis of that understanding of the meaning of the common organizations of the markets, the Court, in its judgment in Case C-32/89 (paragraphs 17 and 18 and 20 to 22) [10] gave judgment as to whether the Commission had been justified in refusing to recognize certain expenditure as chargeable to the EAGGF. The Commission had contended that that was justified inasmuch as programme contracts had been concluded on the Greek market in cereals, by which the Greek authorities controlled KYDEP's activities and made good its deficit and because the Greek authorities had instructed KYDEP to deliver a consignment of wheat into Community intervention.

The case dealt with the same, or similar, instances of intervention as those covered by this case and the Court agreed with the Commission that they were contrary to the common organization of the market in cereals.

The legal assessment must naturally be identical, whether in relation to a case concerning expenditure chargeable to the EAGGF or to a case of failure to fulfil obligations under the Treaty.

The instances of intervention described are contrary to the common organization of the market in cereals from the very fact that they take place in circumstances exhaustively regulated by the common organization of the market. In practice such intervention involves serious and illegal disturbances, as regards organization of the market, of price formation mechanisms, of the special intervention system and of the regulation of trade.

The Court's case-law shows that there is no necessity in a case such as this to show that the instances of national intervention in question constitute infringements of specific rules of the relevant organization of the market. It is sufficient to show that the intervention is a contravention of the basic principles of the organization of the market.

As far as the *relationship between the Hellenic Republic and KYDEP* are concerned, the previous judgments give a picture of KYDEP as a body through which, in the material period and in several ways, the State has intervened on the market in cereals and cereal products and which was controlled and partially financed by the State. In the judgment in Case C-32/89 the Court stated:

'In view of the foregoing, the Greek authorities must be held to have controlled KYDEP's operations and made good its deficits during the period with which the present proceedings are concerned' (paragraph 17).

The period dealt with in that judgment corresponds to the relevant period in this

10 — See note 1.

case. The Hellenic Republic has not put forward in this case any considerations which might lead the Court to change its view of the relationship between the State and KYDEP. The Greek Government merely maintains that KYDEP is a legal person in private law over which the State cannot exert any authority — an argument which the Court has rejected on a number of occasions.

Finally, as regards the *probative assessment of the facts*, it appears that four of the programme contracts referred to in this case were also the subject of the judgment given by the Court in Case 32/89, namely:

(1) a programme contract concluded in 1982 between the Greek authorities, KYDEP and the flour-millers' federation relating to the milling and export of 500 000 tonnes of common wheat, effected between January and May 1983;

(2) a programme contract concluded in February 1984 between the Greek authorities and KYDEP, whereby KYDEP undertook to mill and export 400 000 tonnes of common wheat against receipt of a certain subsidy per kg of flour exported;

(3) a programme contract entered into in 1984/85 between the Greek authorities, KYDEP and pasta manufacturers concerning the export of 8 900 tonnes of pasta corresponding to 15 000 tonnes of durum wheat;

(4) a programme contract entered into in 1985 between the Greek authorities and KYDEP concerning the export of 40 000 tonnes of meal corresponding to 78 000 tonnes of durum wheat.

In both Case 32/89 and during the oral procedure in this case, the Hellenic Republic has acknowledged the existence of the first three of these programme contracts.

In addition the Court found in its judgment in Case 32/89 that the existence of the fourth programme contract had been sufficiently proved.

The Court declared:

'In the light of that note, the authenticity of which is not disputed by the Greek Government, and since the Greek Government merely denies the existence of a programme contract for durum wheat meal without putting forward any argument or evidence in support of its denial, the Commission must be held not to have acted in error in concluding that there was a fourth programme contract involving durum wheat meal' (paragraph 12). [11]

11 — In that extract the Court is referring to an internal memorandum of 6 June 1985 from the board of KYDEP which is also produced as an annex in this case, cf. Annex IV to the application.

The existence of a fourth programme contract is still denied by the Hellenic Republic, although it seems that no new evidence has been produced in that respect. It may therefore be accepted in this case too that a fourth programme contract was concluded.

In Case 32/89 the Court also found it proved that the Hellenic Republic had made good KYDEP's deficit resulting from the conclusion of these four programme contracts (paragraphs 14 to 17). There is no information available in this case providing any basis for altering that conclusion.

However, the Commission has claimed in its pleadings that the Greek authorities concluded other programme contracts and intervened on other occasions on the market in cereals in the period 1982 to 1986.

It is therefore necessary to consider whether the Commission has adduced sufficient evidence of such further instances of intervention.

Conclusion of programme contracts in the period 1982 to 1986

It will be recalled that the concept of programme contracts is used by the Commission in relation both to the agreements which must have been concluded between the Greek authorities, KYDEP and private traders with a view to the latter's export of the processed wheat and to the agreements by which KYDEP was itself to undertake to process and export the wheat.

In its application the Commission claims that a number of programme contracts of the first type were concluded in the period 1982 to 1986. These agreements concerned partly common wheat processed into flour by the millers, partly durum wheat processed into pasta or meal. The contracts for processing and export of wheat by KYDEP itself were, according to the Commission, carried out in respect of the 1984, 1985 and 1986 harvests.

The Commission has not been able to produce the programme contracts which it claims were concluded. It has, however, been able to produce a series of documents from which it thinks it possible to deduce that they did in fact exist. In addition the Greek Government produced during the oral procedure, at the Court's request, documents which are also of importance for evaluating the evidence.

On the basis of the annexes in the case it is not possible to obtain a particularly clear or detailed picture of the Greek authorities' intervention on the market in cereals during the material period. The Commission's evidence is too restricted in this respect and, as will be shown, the Greek Government has not made a fair contribution to satisfactorily elucidating the facts of the case.

In a number of cases the Commission has sought to discharge the burden of proof which rests upon it by substantiating that KYDEP has claims against the Hellenic Republic concerning the period in question, as appears from KYDEP's accounts. However, my view is that the existence of claims by KYDEP against the Hellenic Republic is not in itself a sufficient ground for assuming that programme contracts have been concluded. Such claims may also originate in other legal relationships between the Greek State and KYDEP. The existence of claims by KYDEP against the Greek State can be used as evidence only if there are other established facts leading to the conclusion that the claims originate in a programme contract.

But that having been said, it must be added that in other respects the evidence in the case shows clearly enough that the Commission is right in thinking that the Greek authorities, at any rate in the period from 1982 to 1985, intervened extensively, contrary to Community law, on the market in cereals.

I shall now consider, by examining the most important evidence, to what extent it may be regarded as established that programme contracts were concluded. The examination will first relate to the programme contracts concluded between the Greek authorities, KYDEP and the private traders, and then to the programme contracts by which KYDEP itself undertook to export.

As has been mentioned, the Hellenic Republic has acknowledged that a programme contract was concluded with the millers' federation in 1982. That programme contract concerned the milling and export of 500 000 tonnes of common wheat and was carried out in 1983.[12] From the analytical report on KYDEP's accounts for 1988, prepared by KYDEP itself,[13] it may be deduced that further programme contracts were concluded in 1982/83. On page 40 of the report reference is made to two claims against the State in respect of programme contracts concluded with the Ministry of Economic Affairs concerning wheat from 1982 and 1983 for DR 4 208 976 152 and DR 139 575 642 respectively. These claims are considerably in excess of the amount which the acknowledged programme contract,

12 — Contracts were concluded for the performance of this programme contract between KYDEP and private traders. As Annex II to its application the Commission has produced two such contracts concluded in January and February 1983. It appears from them that the traders were required to mill and export the flour at the latest by 30 September 1983, that the traders incurred fines from the Greek State if the foreign currency was not repatriated and that KYDEP allowed the traders eight months' interest-free credit. The Commission states in addition that the prices entered in the contracts were below the intervention price at the material time. That is not challenged by the Greek Government. From a letter of 23 December 1982 from the Ministry of Economic Affairs to the National Bank of Greece, produced by the Greek Government, and a letter of 24 December 1982 from the Director of the National Bank of Greece to all banks, produced as Annex XVI to the application, it appears that the credit granted by KYDEP was approved by the Ministry of Economic Affairs and financed by the Greek Agricultural Bank, which again was re-financed by the National Bank of Greece.

13 — The report is produced in summary form as Annex XII to the application.

according to a report of KYDEP's 36th general meeting, cost the State.[14]

From two documents it may be deduced that in 1984, too, programme contracts concluded with the millers' federation concerning common wheat were executed. Thus in a letter of 6 September 1984 from the millers' federation to the Ministry of Economic Affairs[15] reference is made to the programme contract 'concluded most recently' which according to the letter concerned common wheat which was to be exported at latest by 30 September 1984. It appears from other documents that the programme contract concerning common wheat, which the Greek Government has acknowledged concluding (cf. above), required export to be effected at latest by 30 September 1983.[16] Furthermore it is stated in an internal memorandum drafted by KYDEP and dated 16 April 1984[17] that in the period from 10 April to 30 June 1984 55 000 tonnes of common wheat were to be withdrawn from KYDEP's stores in connection with contracts concluded with millers in execution of a programme contract. It appears from the same memorandum that it was for the Ministry of Economic Affairs to find the means to make good the deficit incurred by KYDEP on the sale of common wheat in the framework of the programme contract concerning aid for the export of flour.[18]

Various documents deal with the conclusion of programme contracts with pasta manufacturers. The Hellenic Republic has acknowledged that it concluded a programme contract concerning 8 900 tonnes of pasta representing 15 000 tonnes of durum wheat. From an internal memorandum dated 6 June 1985 drafted by KYDEP's board and concerning the 1984/1985 harvest,[19] it may be supposed that that programme contract must have been concluded in the period 1 June 1984 to 31 May 1985. From a letter of 30 December 1983 from the Ministry of Economic Affairs to the National Bank of Greece, produced by the Greek Government, and a document issued on 31 January 1984 by the director of the National Bank of Greece,[20] it appears that the National Bank of Greece, after approval from the Ministry of Economic Affairs, authorized the commercial banks to grant loans to the pasta industry in connection with the purchase of 30 000 tonnes of durum wheat with an option on a further 10 000 tonnes. This wheat was to be withdrawn from KYDEP's stores at latest by 31 March 1984, and to be exported at latest by 31 December 1984. From the internal memorandum of 16 April 1984, previously mentioned, it appears that 25 000 tonnes of durum wheat were to be

14 — The report is produced as Annex X to the application. From p. 12 it appears that the acknowledged programme contract cost the State DR 1 500 000 000. In its pleadings the Hellenic Republic has claimed that the version of the report produced by the Commission does not agree with the official version. It is correct that the version of the report produced by the Greek Government does not contain the passages concerning the Greek Government's interference in KYDEP's operations. The version produced by the Commission may be regarded as an earlier edition of the report. That version was, according to the Commission, sent to a large number of the cooperative societies which are members of KYDEP, as the Greek Government does not deny. In my view there is no ground for doubting the accuracy of the information contained in the version produced by the Commission.

15 — Annex XVII to the application.

16 — See in this respect the letter of 10 August 1983 from the millers' federation, produced as Annex XVIIa to the application, together with the two contracts concluded between KYDEP and private traders in January and February 1983 concerning sale of common wheat from the 1982 harvest, cf. note 12.

17 — Annex XI to the application.

18 — Finally it may be mentioned that in addition the analytical report concerning KYDEP's accounts for 1988 refer to the second contract ... signed with the millers in August 1984. However, it is not quite clear whether this is an actual programme contract or whether it refers to a contract concluded by KYDEP with the millers in connection with the contract under which KYDEP itself undertook to arrange for 400 000 tonnes of common wheat to be processed and exported; in that connection see below.

19 — Annex IV to the application.

20 — Annex XIII to the application.

withdrawn from KYDEP's stores before 30 June 1984 in connection with programme contracts concluded with pasta manufacturers. From the same memorandum it appears that it was for the Ministry of Economic Affairs to find a means to cover KYDEP's deficit arising from the delivery of durum wheat to the pasta manufacturers. In addition it may be presumed from pages 3 and 4 of the aforesaid memorandum of 6 June 1985 that KYDEP's total loss as a result of the operations on the market in durum wheat in 1984/1985 were covered by the Ministry of Economic Affairs. It must therefore be possible to conclude, as a result of the documents just referred to, *that* in 1984 more programme contracts were concluded with pasta manufacturers than the Greek Government has acknowledged having concluded, *that* the pasta manufacturers, through the intermediary of the Greek Government, obtained finance from the commercial banks in connection therewith, and *that* the loss suffered by KYDEP in connection with these contracts were to all appearances covered by the Hellenic Republic.

With regard to 1985, it may be seen from a decision of 2 December 1987 by the Committee on prices and incomes[21] that KYDEP entered into contracts with the millers in relation to the 1985 harvest of common wheat (which were presumably carried out in 1986) and that it was subsequently decided that KYDEP's deficit thereby incurred should be made good by the State. The expression 'programme contract' does not appear expressly in that connection but it is stated that KYDEP 'in this case was executing political decisions'. Further, it appears from the internal memorandum of 6 June 1985 that the contract concerning 40 000 tonnes of meal corresponding to 78 000 tonnes of durum wheat, the existence of which has been recognized by the Greek Government, must have been concluded before 6 June 1985, but only carried out after that date.

Finally as regards 1986 it does not seem possible to deduce from the documents produced that programme contracts were concluded in that year. However, from the analytical report on KYDEP's accounts for the financial year 1988 (cf. pages 66 and 90), it appears that KYDEP's total deficit incurred in connection with the management of the 1986 wheat harvest was made good by the State.

Then as regards the second type of programme contracts in which KYDEP itself undertook to have the wheat processed and exported, the Greek Government acknowledges having concluded one such contract in 1984 with regard to the export of 400 000 tonnes of common wheat.[22] In the report of KYDEP's 36th general meeting the aid relating to this programme contract is stated to be DR 2.45 per kg. In the analytical report concerning KYDEP's accounts for the financial year 1988, cf. page 71, it is stated that KYDEP itself undertook to mill and export flour in return for aid amounting to DR 3.5 per kg. Further, the report states, on page 79, that KYDEP managed to mill and export in one

21 — The decision was produced by the Greek Government. It concerns mainly cereals from the 1987 harvest, but contains on p. 3 a section with the heading: Covering KYDEP's deficit resulting from the sale of common wheat from the 1985 harvest.

22 — In the internal memorandum of 16 April 1984, Annex XI to the application, it is stated that for the period from 10 April to 30 June 1984, 132 000 tonnes of common wheat were to be withdrawn from KYDEP's stores in connection with KYDEP's milling of flour under the programme contract.

year 435 000 tonnes of wheat. It seems that it is possible to deduce directly from that information that further programme contracts were concluded in addition to those acknowledged by the Greek Government. However, the context in which this information occurs seems to suggest that actually the same contract is concerned, even though some of the numerical data may be incorrect.

From the documents produced it does not seem possible to show that programme contracts of this type were also concluded in 1985 and 1986. However, as regards 1986 I would refer also in this context to the information in the analytical report on KYDEP's accounts for the financial year 1988 on the coverage of the deficit by the State.

It may therefore be concluded that the Commission has furnished proof that the Greek authorities, at any rate in the years 1982 to 1985, concluded programme contracts with KYDEP and the private traders with regard to the latters' processing and export of wheat and that the Greek Government, at any rate in 1984, concluded a programme contract with KYDEP with regard to its processing and export of wheat. In addition the Commission has shown that in the period 1982 to 1986 the Hellenic Republic made good KYDEP's deficit arising from operations on the market in durum and common wheat.

The Hellenic Republic has not denied the genuineness of the documents produced by the Commission and has not put forward more detailed explanations with regard to the information I have mentioned. The Hellenic Republic has only put forward the following arguments in its defence.

First, it is alleged that the Commission has not discharged the burden of proof of the existence of programme contracts and *ipso facto* has not been able to produce copies of any.

In that respect it need only be said that the question whether programme contracts concluded in writing may be produced cannot be decisive as long as sufficient evidence of their existence may be considered to have been adduced in some other way.

Secondly, the Commission, it is stated, has not given the exact amount of KYDEP's deficit allegedly made good by the Greek State.

In view of the fact that KYDEP's internal documents show a fair number of discrepancies and that the Greek Government has been reluctant to assist the Commission in clarifying the facts in this case, the Commission cannot be reproached for the fact that it has been impossible to establish the exact amount by which the Greek State has subsidized KYDEP. That circumstance cannot be regarded as preventing a finding that aid has been granted in contravention of the rules of Community law.

Thirdly, the Hellenic Republic claims that the fact that it appears from KYDEP's accounts that KYDEP has a claim against the State ought to prove that the programme contracts concluded were never

actually executed and that public resources were not spent in extending them. It is hard to understand that argument. It must be possible to repudiate it, if only because KYDEP would naturally not enter in its accounts claims against the State not based on transactions actually effected, which in KYDEP's view gave it a claim against the State under existing Greek law.

It follows from the Court's case-law that in a situation such as this, when the Commission has put forward circumstances sufficient to substantiate a series of facts, the State cannot rely upon a mere denial of their existence. [23] As the Greek Government has not contested substantively and in detail the information produced by the Commission, it must be regarded as substantiated.

Delivery of cereals into Community intervention

As proof that KYDEP delivered 340 000 tonnes of common wheat into Community intervention, the Commission has relied on the report of KYDEP's 36th general meeting, page 12 of which states as follows in describing operations in 1982:

'By order of the government, KYDEP delivered 346 000 tonnes (of common wheat) into Community intervention, the difference between the cost price and the EEC price being covered by the Greek Treasury'. [24]

The Hellenic Republic has not put forward any evidence in refutation of this information. [25]

It may therefore be regarded as established that in 1982 KYDEP delivered 340 000 tonnes of common wheat into Community intervention on the instructions of the Greek State and that KYDEP's deficit arising therefrom was covered by the Hellenic Republic.

The Hellenic Republic's failure to notify the Commission of the aids granted on the market in cereals

As I have already stated, it must be regarded as established *that*:

— KYDEP continually had its deficit arising from the aforesaid operations on the market in cereals covered *partly* by direct aid from the State, *partly* by favourable financing arrangements obtained from the Greek agricultural bank, which was re-financed by the National Bank of Greece, which in turn was acting with the approval of the Greek Ministry of Economic Affairs;

23 — See the Court's judgment in Case 272/86 Commission v Greece [1988] ECR 4875 at paragraph 21.

24 — As may be seen from the quotation, the report (see Annex X to the application) states that 346 000 tonnes of wheat were delivered into intervention and not only 340 000 tonnes, as stated in the Commission's claim. In its application the Commission quotes the report correctly and it seems that the restriction of the claim to 340 000 tonnes must have been due to a clerical error. Nevertheless, the Court should in my view restrict its decision to the quantity stated in the claim.

25 — See note 14 in this connection.

— the Greek millers, as a result of State interference in KYDEP's operations, were able to purchase cereals at prices below intervention prices and with eight months' interest-free credit from KYDEP; and

— the Greek pasta manufacturers, on the orders of the National Bank of Greece, and so of the Greek State, were able to obtain favourable financing for the purchase of cereals from KYDEP.

These grants of aid are covered by the rules of the EEC Treaty on State aids and the Commission ought therefore to have been informed of them under Article 93(3) of the Treaty. However, no such notification was made and on this point too, therefore, the Commission's claim that the Hellenic Republic did not comply with its obligations under Community law must be upheld.

Such an infringement of the Treaty may be the subject of a finding in an action brought in pursuance of Article 169 of the Treaty (see, most recently, the Court's judgment in Case 35/88).[26]

The Hellenic Republic's failure to cooperate with the Commission

The Commission claims that the Greek Government has failed to fulfil its obligation under Article 5 of the Treaty by:

— persisting in its refusal to provide the Commission with the information required and to answer the Commission's objections;

— obstructing the holding of an investigation on the spot concerning KYDEP; and

— failing to provide the Commission with orders and decisions concerning KYDEP's intervention on the market in cereals.

In my view there are good grounds for criticizing the Hellenic Republic's conduct in this case.

By a letter of 23 December 1985, the Commission requested the Greek Government to provide information on a number of matters relating to a programme contract concerning 40 000 tonnes of meal and one concerning 15 000 tonnes of pasta.

In its letter of 14 March 1986 in reply, the Greek Government asserted that no programme contracts had been concluded or executed and that no decisions had been taken to make good KYDEP's deficit.

The existence of the two programme contracts in question was subsequently acknowledged by the Greek Government.

26 — See note 1.

In its reply to the Commission's formal initial letter dated 13 January 1988 the Greek Government described KYDEP's legal status and asserted in that connection that no legal text authorized the State to give instructions to KYDEP. Furthermore the Greek Government maintained that the programme contracts described by the Commission in its initial letter were informal contracts concluded between KYDEP and the millers — without any kind of interference from the public sector and without the transfer of any funds from the State to KYDEP or the grant of any kind of aid in respect of the products concerned.

The fact that KYDEP is a body, which, at any rate during the period at issue, was controlled and partially financed by the State, was, as I have mentioned, established by the Court in an earlier case and is in any event also substantiated in this case. The fact that the Greek authorities were party to the programme contracts is similarly clear and is moreover partially acknowledged by the Greek Government.

In other words the fact is that the Greek Government failed to give the Commission the information required and in many cases answered the Commission's inquiries with thoroughly incorrect information.

By letters of 14 March, 1985 and 7 and 28 April 1986 to the Greek Ministry of Agriculture as well as a letter of 1 July 1985 to KYDEP, the Commission attempted to arrange for an investigation on the spot into KYDEP's operations and its relationship to the Greek State and at the same time raised a number of specific questions in that regard.

The investigation was never carried out and the questions seem to have remained unanswered. There is every reason to believe that the Greek Government must be regarded as responsible for that since to all appearances it either failed to answer the Commission's inquiries or did so inadequately. In a letter of 8 April 1985 the Greek Minister for Agriculture stated that he had no opportunity to intervene as it was exclusively for KYDEP to authorize access to information concerning its activities and the like.

The suggestion that the Greek Government had no opportunity in the relevant period to give instructions to KYDEP is contrary to what has already been established regarding the relationship between the Greek Government and KYDEP and the letter may therefore be taken as an expression of the government's lack of intention to cooperate.

That lack of intention to cooperate is no less serious when it is considered that to a certain point it was also apparent during the proceedings before the Court, when the government neglected to answer the Court's written questions and produced the documents required with a delay for which it is difficult to find an excuse.

On those grounds I shall propose to the Court that it should accept the Commission's claim that the Hellenic Republic has failed to comply with its obligation to cooperate in pursuance of Article 5 of the Treaty.

The Commission has alleged that the Hellenic Republic has also infringed Article 24 of Regulation (EEC) No 2727/75 of the Council which requires Member States to communicate all information concerning the operation of the market in cereals. The facts mentioned by the Commission in this respect are however identical with those which constitute a failure to comply with the duty to cooperate and seem to have been sufficiently elucidated in that connection. [27]

Costs

Since in my view the Commission's arguments must in essence be upheld I think the Hellenic Republic must, as claimed by the Commission, be ordered to pay the costs.

Conclusions

I shall accordingly propose that the Court should declare that:

— the Hellenic Republic has failed to fulfil its obligations under the provisions of the common organization of the market in the cereals sector by intervening from 1982 to 1985 on the cereals market by way of programme contracts concluded with KYDEP and private traders and by inducing KYDEP to deliver 340 000 tonnes of common wheat into Community intervention;

— the Hellenic Republic has acted in breach of Article 93(3) of the Treaty by omitting to notify the Commission of aid granted partly to KYDEP and partly to private traders;

— the Hellenic Republic has failed to fulfil its obligation to co-operate under Article 5 of the Treaty by failing to inform the Commission or to assist it in obtaining the information required; and

— the Hellenic Republic should be ordered to pay the costs.

27 — See in this respect the Court's judgment in Case C-35/88, in which the Court declared: In its answers to the questions put by the Court, the Commission also referred to non-compliance with Article 24 of Regulation No 2727/75 ... These complaints against the Hellenic Republic relate, as the Commission itself stated during the pre-litigation stage and in its pleadings, to the alleged failure to comply with the duty of cooperation under the first paragraph of Article 5 of the Treaty. Accordingly, they will be considered under this separate head of complaint (paragraph 32).