JUDGMENT OF THE COURT
16 December 1992 *

In Case C-210/91,

Commission of the European Communities, represented by Maria Patakia and Maria Blanca Rodriguez Galindo, of its Legal Service, with an address for service in Luxembourg at the office of R. Hayder, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic, represented by Fokion Georgakopoulos, Assistant Legal Adviser to the Council of State, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

APPLICATION for a declaration that, by imposing on a tourist entitled to benefit from the Community temporary importation arrangements in respect of the personal effects which he was carrying in his car a fine calculated on the basis of the taxes and duties applicable to an item which he had failed to declare, even though the false declaration of which he was guilty could not have deprived the State of

* Language of the case: Greek.

any taxes and duties in view of the fact that the video camera in question was part of his personal effects, the Hellenic Republic has failed to fulfil its obligations under the EEC Treaty,

THE COURT,

composed of: O. Due, President, C. N. Kakouris, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco and P. J. G. Kapteyn, Judges,

Advocate General: C. Gulmann,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 24 June 1992, at which the Commission was represented by D. Gouloussis, of its Legal Service, acting as Agent, and the Hellenic Republic by F. Georgakopoulos, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 15 September 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 7 August 1991, the Commission of the European Communities brought an action pursuant to Article 169 of the EEC Treaty for a declaration that, by imposing on a tourist entitled to benefit from the Community temporary importation arrangements in respect of the personal effects which he was carrying in his car a fine calculated on the basis of the duties and taxes applicable to an article which he had failed to declare, even though the false

declaration of which he was guilty could not have deprived the State of any taxes and duties in view of the fact that the video camera in question was part of his personal effects, the Hellenic Republic had failed to fulfil its obligations under the Treaty.

2 Under Article 19 of Council Regulation (EEC) No 3599/82 of 21 December 1982 on temporary importation arrangements (OJ 1982 L 376, p. 1), the benefit of temporary importation arrangements with total relief from import duties is to be granted in respect of the personal effects which travellers are carrying on their person for the duration of their stay in the customs territory of the Community. Article 2(2) of that regulation states that the competent authorities 'shall take all measures which they consider necessary to ensure that the goods can be identified and that the use to which they are put can be verified'. In addition, under Article 12 of Commission Regulation (EEC) No 1751/84 of 13 June 1984 laying down certain provisions for the application of Council Regulation (EEC) No 3599/82 on temporary importation arrangements (OJ 1984 L 171, p. 1), personal effects are to be allowed the benefit of temporary importation, without a written declaration, under the conditions laid down by the competent authorities.

3 That provision thus does not exclude the possibility of the said authorities requiring an oral declaration.

4 It is apparent from the documents before the Court that on 22 March 1989 a German citizen crossed the frontier between Yugoslavia and Greece in his car, at the Evzoni border post. As he entered Greece, a customs official asked him in English and German whether he had anything to declare, in particular electronic or video equipment or cameras. The traveller answered in the negative. The official nevertheless proceeded to examine the vehicle and the objects in it. In so doing he found a video camera whose customs status could not be established. The German tourist claimed that the camera was placed visibly in the back of the car, whereas the customs official considered that it had been 'carefully concealed'.

5 The Greek customs authorities considered that the tourist's behaviour constituted a customs offence (false declaration) and fined him DR 404 800, that being twice the amount of the customs duties and taxes chargeable on lawful importation of the goods in question. Doubling the applicable duties and taxes is the minimum penalty laid down by Greek law for making a false declaration.

6 The Commission considered that the penalty imposed was disproportionate to the offence committed and consequently was liable to jeopardize the application of the Community temporary importation arrangements on a total relief basis for travellers' personal effects, and brought the present action for failure to fulfil obligations.

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 In its application, the Commission argues firstly that it initiated the procedure for failure to fulfil obligations on the grounds that the penalty imposed by the Greek customs authorities in this case was part of an administrative practice and the case of the German tourist was therefore not an isolated one.

9 The Hellenic Republic contends that that complaint does not appear in the letter of formal notice or the reasoned opinion, and that it must consequently be declared inadmissible.

10 In this respect, it should first be noted that, as the Court has consistently held (see, *inter alia*, Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 16), an application brought under Article 169 of the EEC Treaty may be based only on the arguments and pleas in law already set out in the reasoned opinion.

11 It should next be observed that both at the stage of the letter of formal notice and at the stage of the reasoned opinion the Commission's intention was to base its contention that there had been a breach of Community law by the Hellenic Republic on the particular case of the fine imposed on the German tourist in question. There was no allusion to any administrative practice or any direct or indirect reference to other similar situations; nor were the provisions of national law relating to the offence challenged, even implicitly.

12 The complaint concerning an administrative practice must consequently be declared inadmissible. The merits of the present application must therefore be examined solely with respect to the fine imposed in the particular case by the Greek customs authorities.

13 The Commission submits, secondly, that the amount of the fine imposed on the German tourist by the Greek authorities was disproportionate to the seriousness of the offence, and that the fine therefore constitutes a breach of the principle of proportionality as defined in the Court's case-law.

14 The Commission argues in this respect that the facts of the case allow the conclusion that the conduct of the German tourist was merely a technical breach of a customs rule, which could not be punished by a fine exceeding the value of the goods in question.

15 The Hellenic Republic disputes the Commission's analysis, maintaining that it is based essentially on the Commission's subjective interpretation of the German tourist's attitude and in particular on its assessment of the degree of his guilt, the seriousness of his offence and the intent demonstrated by his attitude; the Commission's conclusions in this respect have in no way been established, however.

16 In any event, the Hellenic Republic contends that the assessment of the facts is a matter exclusively for the competent national authorities of each Member State, subject to review by the national courts.

17 In that respect, it states that the competent national authorities regarded the tourist's behaviour not as a mere case of 'non-declaration' as a result of a misunderstanding but rather as a deliberate attempt to import illegally a high-value article on which a high amount of duty was payable. The fine was imposed on that basis; its amount was calculated in accordance with the national legislation in force, in view of the lack of Community harmonization in the field of customs offences.

18 The Hellenic Republic maintains, finally, that the penalty in question was appropriate to the gravity of the offence which had been established, and consequently did not constitute a breach of the principle of proportionality.

19 It should be noted firstly that in the absence of harmonization of Community legislation in the field of customs offences, the Member States are competent to adopt such penalties as appear to them to be appropriate (see, *inter alia*, Case 50/76 *Amsterdam Bulb* v *Produktschap voor Siergewassen* [1977] ECR 137, paragraph 33, and Case 240/81 *Einberger* v *Hauptzollamt Freiburg* [1982] ECR 3699, paragraph 17). When making use of that competence they are, however, required to comply with Community law and its general principles, and consequently, with the principle of proportionality.

20 As the Court has repeatedly held, the administrative measures or penalties must not go beyond what is strictly necessary for the objectives pursued and the control procedures must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty (see, *inter alia*, Case 203/80 *Casati* [1981] ECR 2595, paragraph 27; Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377; and Case 68/88 *Commission* v *Greece* [1989] ECR 2965).

21 It must next be examined whether, as the Commission maintains, the fine imposed on the German tourist by the Greek authorities was so disproportionate to the gravity of the offence that it was such as to jeopardize the system of temporary importation arrangements for travellers' personal effects.

22 It should be recalled in that respect that when the Commission requests the Court to declare that a State has failed to fulfil its obligations under the Treaty, it is for the Commission itself to adduce evidence of the alleged infringement (judgment in Case C-249/88 *Commission* v *Belgium* [1991] ECR I-1275, paragraph 6).

23 The Commission asserts that the tourist in question was guilty only of a technical infringement of a customs rule, that the Greek customs authorities did not make a correct assessment of his intentions and that consequently the fine which they imposed on him was disproportionate. The Court finds, however, that those assertions are not supported by any evidence whatever. Consequently, the Commission's arguments are based entirely on suppositions, which cannot be taken into account in considering the application.

24 The application must consequently be dismissed.

Costs

25 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the Commission to pay the costs.

Due Kakouris Zuleeg Murray

Mancini Moitinho de Almeida Grévisse Diez de Velasco Kapteyn

Delivered in open court in Luxembourg on 16 December 1992.

J.-G. Giraud — Registrar

O. Due — President