for travellers' personal effects, the Member States are competent to adopt such penalties as appear to them to be appropriate. When making use of that competence they are, however, required to comply with Community law and its general principles, and consequently, the principle of proportionality. In that respect, 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.

3. Where, in proceedings based on Article 169 of the Treaty, the Commission requests the Court to declare that a Member State has failed to fulfil its obligations under the Treaty, it is for the Commission itself to adduce evidence of the alleged infringement.

# REPORT FOR THE HEARING
## in Case C-210/91 *

## I — Facts and procedure

### A — *Legal background*

1. In accordance with 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. The same provision is laid down in Article 19 of Council Directive 85/362/EEC of 16 July 1985 on the harmonization of the laws of the Member States relating to turnover taxes — exemption from value added tax on the temporary importation of goods other than means of transport (OJ 1985 L 192, p. 20) as regards exemption from VAT.

2. Article 2(2) of each of the foregoing Community measures 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'. Furthermore, in accordance with 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

* Language of the case: Greek.

importation arrangements (OJ 1984 L 171, p. 1), travellers' personal effects are to be allowed the benefit of temporary importation, without a written declaration, under the conditions laid down by the competent authorities.

That provision does not preclude the possibility of the competent national authorities requiring a verbal declaration.

B — *Background to the proceedings*

1. On 22 March 1988 a German citizen crossed the border between Yugoslavia and Greece by 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, mentioning in particular electronic and video equipment and cameras. The traveller answered in the negative. The official nevertheless proceeded to check the vehicle and the articles in it. In so doing he discovered a video camera whose customs status (Community product or product of a non-member country) could not be established. The German tourist maintains that the camera was placed in view in the rear of his car, while the customs official considers that it was 'carefully concealed'.

The Greek customs authorities considered that the tourist's behaviour amounted to a customs offence (a false declaration). On the basis of the value of the camera, they estimated the applicable customs duties and taxes at DRA 197 070. Consequently, they imposed a fine of double that amount on the tourist. Doubling the applicable duties and taxes is the minimum penalty laid down by Greek law for a false declaration. With stamp duty on the amount of the fine, the German tourist had to pay DRA 404 800 in total.

2. On 29 November 1989 the Commission sent the Hellenic Republic a letter of formal notice under Article 169 of the EEC Treaty. In the letter the Commission stated that the fine inflicted was disproportionate to the seriousness of the offence committed and could thus jeopardize the application of the Community temporary importation arrangements for travellers' personal effects.

3. By letter of 7 February 1990 the Permanent Representation of Greece to the European Communities replied to the Commission's objections and argued that Greece was correctly applying the Community rules on temporary importation, in particular the provisions concerned with the personal effects of travellers. In that connection it argued that the abovementioned legislation allowed the customs authorities to require a verbal declaration from a traveller on the question whether he was carrying articles whose value exceeded the exemption applicable to goods imported definitively. The Greek Government considered that penalties could be imposed for false declarations and that the penalties laid down by Greek law were not disproportionate in relation to the objectives being pursued.

4. The Commission considered that the observations furnished by the Hellenic Republic were not satisfactory, and on

5 November 1990 it issued a reasoned opinion under Article 169 of the EEC Treaty rejecting the Greek Government's assertions and stating that the Greek authorities had imposed a disproportionate fine on the tourist.

5. In its reply of 29 January 1991, the Hellenic Republic contended, first, that goods imported under the temporary importation arrangements are subject to duties and taxes whose collection is merely suspended since the goods are destined to be re-exported. In the case in question the duties and taxes not only applied theoretically, but were also due and payable. Consequently the fine imposed was not considered to be disproportionate, but was lawful and imposed in accordance with the national provisions in force. Secondly, the Hellenic Republic pointed out that administrative penalties and fines are governed by national legislation in so far as there is no Community harmonization with respect to customs offences.

6. The Commission found that the Hellenic Republic had not adopted the necessary measures to comply with its reasoned opinion in the time allowed, and it therefore brought before the Court the present action for failure to fulfil obligations.

C — *Written procedure*

1. The Commission's application was lodged at the Court Registry on 7 August 1991.

2. The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

**II — Forms of order sought by the parties**

The *Commission* claims that the Court should:

declare that by imposing on a tourist entitled to benefit from the Community temporary importation arrangements in respect of 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 among his personal effects, the Hellenic Republic has failed to fulfil its obligations under the EE Treaty;

order the Hellenic Republic to pay the costs.

The *Hellenic Republic* contends that the Court should:

dismiss the action;

order the Commission to pay the costs.

III — Pleas in law and arguments of the parties

A — *Admissibility*

1. With respect to the subject matter of the proceedings, the *Greek Government* contends that in its application the Commission mentions for the first time that the inspection carried out by the Greek customs authorities was an instance of an administrative practice and not an isolated incident. According to the Greek Government, the only question which arose at the pre-litigation stage was the specific case of the German tourist and, in the Commission's opinion, the disproportionate nature of the fine imposed on him. There was no allusion to any particular practice on the part of the Hellenic Republic, by reference directly or indirectly to other similar situations, and the provisions of national law governing the legal relations in question were not the subject of observations expressed in general terms either. The Greek Government accordingly considers that the plea in law is inadmissible.

2. The *Commission*, on the other hand, claims that there is no procedural irregularity, since the Commission's complaints against the Hellenic Republic have been the same both at the pre-litigation stage and in the application. In that connection it maintains, as regards the issue of an administrative practice, that the Commission in fact incorporated in its application information taken from the Greek authorities' reply to its reasoned opinion. According to the Commission, it follows from that reply that the case in question was dealt with in accordance with an administrative practice on the basis of the provisions of national law, as regards both the detection of the offence and the imposition of the fine.

B — *Substance*

1. The *Commission* first points out that the video camera which was discovered in the German tourist's luggage was part of his personal effects. The traveller should therefore have benefited from the temporary importation arrangements under the conditions set out in Regulation (EEC) No 3599/82 and Directive 85/362/EEC. In that connection the Commission considers that even assuming that the Greek authorities could make a verbal declaration at the time of crossing the border compulsory, with the possibility of a fine in the event of a false declaration, without thereby breaching Community law, the amount of the fine imposed is disproportionate and thus constitutes a breach of the general principle of proportionality, a principle that has been established by the Court of Justice in its case-law.

The Commission goes on to analyse the facts of the case. It states that, contrary to the Hellenic Republic's assertions, the Commission is bound under Article 155 of the EEC Treaty to make an assessment of the facts of a case which falls within the scope of Community law in order to establish whether a Member State is in breach of its obligations.

With respect to the German tourist's intentions, the Commission first observes that even if the question asked by the customs official could be understood from the linguistic point of view, it nevertheless contained an ambiguity: it is difficult for an

ordinary tourist to distinguish between the system of exemptions applicable upon definitive importation and the temporary importation arrangements applying to articles which are to be re-exported in the same condition. In the Commission's view, the tourist's negative reply can very probably be explained by the fact that he considered that the camera did not have to be declared since it was part of his personal effects. According to the Commission, the fact that he had placed the camera out of sight is fully justified by the risk of theft during the journey. Moreover, from the facts it does not appear that the tourist refused to have his car searched.

Secondly, the Commission emphasizes that the tourist had in his possession only one video camera and not several. It may logically be concluded that if a tourist has in his possession a single video camera and intends to spend his holidays in Greece, he is intending to use the video camera for tourist purposes and it therefore forms part of his personal effects.

Finally the Commission refers to the disproportionate nature of the fine inflicted in this case. In its opinion the fine is disproportionate because although it is true that the German tourist is guilty of making an objectively false declaration, it is nevertheless to be presumed that his case falls within the scope of the temporary importation arrangements for personal effects and that consequently he did not intend to avoid paying duties and taxes. Such duties and taxes cannot be levied under the temporary importation arrangements. The Commission therefore considers that the fine, which was intended to apply to the hiding of articles on which duties or taxes are levied on importation, is disproportionate when it is applied in cases such as the one described above.

The Commission observes, moreover, that although the Member States have the power, in the absence of harmonization at the Community level, to adopt legislative, administrative or other measures in a given domain, they are nevertheless obliged to exercise that power in accordance with Community law and its general principles.

In that connection the Commission states that it is especially necessary to respect the principle of proportionality in this case because it involves measures which, although they fall within the competence of Member States, are nevertheless concerned with the correct implementation of Community measures. That principle, it says, must govern both the choice and the application of national supervisory measures. The Commission refers in that regard to the case law of the Court of Justice, according to which in areas which continue to come within the Member States' jurisdiction Community law places limits on the supervisory measures which it allows Member States to retain in relation to the free movement of goods and persons. Administrative and penal measures must not go beyond what is strictly necessary, supervisory methods must not be devised in such a way as to restrict the freedom intended in the Treaty, and a penalty must not be applied which is so disproportionate to the seriousness of the offence that it becomes an obstacle to that freedom.

According to the Commission, it is clear in this case that the imposition of an excessive fine in order to punish an offence against national legislation may jeopardize the positive effects expected of the Community measures laying down the temporary importation arrangements, in particular the

possibility for a traveller to import personal effects free of all duties and taxes for the duration of his stay in a Member State.

3. The *Greek Government* contends first that all the Commission's arguments presented in these proceedings are based on assumptions and probabilities, which cannot form the basis for an allegation that there has been an infringement of the law by a Member State.

According to the Greek Government those arguments are concerned with the German tourist's personal attitude, and more specifically the Commission's assessment of the degree of his guilt, the seriousness of his offence and the intention which they reflect. In the Greek Government's opinion, the assessment of those circumstances and their seriousness and significance in each specific case are questions which are not covered by any rule of Community law and as such lie within the exclusive jurisdiction of the competent national authorities in each Member State; the correctness of their assessment, with respect to both fact and law, is subject to review by the national courts.

The Greek Government goes on to maintain that the assertions contained in the Commission's arguments are not substantiated. In that connection it states first that since the personal effects imported by a traveller are completely exempt from import duties, it is obvious that an untrue negative reply to a precise question asked by the customs official concerning certain particularly valuable goods, including the video camera, signified a desire on the part of the traveller to conceal his intentions.

The Greek Government therefore considers that, in the absence of any other sufficient reason or cause, to conceal possession of an article such as a video camera constitutes a preparatory act making it possible to place the concealed article illegally on the internal market. Furthermore, the attempt to conceal the importation into the country even of a single video camera does not eliminate the financial interest associated with the behaviour.

Secondly, the Greek Government observes that when a traveller is asked whether certain specific valuable objects are included among his personal effects, he is being asked not to resolve complicated questions relating to the customs rules but to reply honestly to the question asked. Even if a traveller considers that the article in question does not have to be declared, in view of the specific question put to him by the competent customs office, which must give rise to doubt as to his own impression, it is obvious that that situation cannot lead the traveller to give a negative reply, but will instead prompt him to seek to clarify the problem by asking appropriate questions of the competent official. Furthermore, even if the traveller is convinced that the article about which he is being questioned does not fall under the declaration procedure, the natural reply is not an assertion that the traveller does not possess such an article but an admission that he does.

Finally, the Greek Government observes that personal effects carried by travellers under the temporary importation arrangements, especially those which are particularly valuable, fall, for that reason, under customs and Community rules which are not determined. The Greek Government explains that it is not possible to check whether such goods have been lawfully placed in circulation within the Community, whether they are goods originating in non-Member States, or whether, under Community law, they fall under specific arrangements for exemption from duties and taxes. Consequently, the purchase price of the product may be lower than it would have been if Community duties had been applied to it.

The Greek Government considers that it is possible to avoid those risks if there are procedures making it possible for products to be traced, procedures backed up by appropriate administrative measures and penalties. It explains in that connection that the procedures and the penalties must be in an inverse relationship. More stringent procedures can rely on lighter sanctions. Less stringent procedures can only operate effectively if they are backed up by heavy sanctions. The requirement of a simple declaration of an article in reply to a specific question constitutes, in the Greek Government's opinion, the least restrictive check procedure possible. Accordingly, in order for that type of procedure to be effective the corresponding offence must entail severe penalties.

The Greek Government considers that the importation of such products into countries where customs duties and taxes are particularly high, as in this case, where the value for customs purposes of the video camera was DRA 180 000 and import duties and taxes were calculated on a figure of DRA 197 070, makes the product particularly attractive for placing on the internal market, given the large difference between the purchase price and the price at which it can be placed on the market.

According to the Greek Government, the threat of a heavier penalty is all the more necessary if it is borne in mind that it is neither desirable nor possible systematically to check every traveller. The persons concerned know that. It is for that reason that the risk of evasion of the obligation must be reduced by the threat of a severe penalty in the event of an offence. The Greek Government states that all of those factors mean that the penalty to which offenders are liable must be of such a kind and extent as to make unattractive any such attempt, whose main and necessary manifestation is the concealment of the existence of an article by not declaring it.

In the Greek Government's opinion, if that were to happen it would entail serious consequences — disruption of the normal operation of the market, loss of Community and national resources, the creation of unlawful situations and the acquisition of unlawful profits.

For that reason the Greek Government considers that the relationship between the penalty and the duties and taxes which would be due if the article was definitively imported in

normal circumstances is entirely necessary, and to double it, or where there are aggravating circumstances to apply the multiple penalty provided for, is a reasonable sanction, especially having regard to the threat to public welfare.

The Greek Government therefore contends that to calculate the amount of the monetary penalty according to the duties and taxes due on the normal definitive importation of the article is in accordance with the goal pursued, in particular in circumstances such as those referred to by the Commission in its application.

Diez de Velasco
Judge-Rapporteur