

OPINION OF MR. ADVOCATE GENERAL TESAURO  
delivered on 30 June 1989 \*

*Mr President,  
Members of the Court,*

(iii) by failing to carry out post-clearance recovery of the abovementioned amount pursuant to Articles 1 and 2 of Regulation (EEC) No 1697/79, <sup>4</sup>

1. For the second time the Court of Justice is called upon to give judgment by default. <sup>1</sup> The Hellenic Republic did not lodge a defence within the prescribed period. Accordingly, by a document lodged on 9 June 1988 the Commission applied for judgment by default pursuant to Article 94(1) of the Rules of Procedure. Its conclusions were as follows:

(iv) by failing to institute appropriate criminal and/or disciplinary proceedings, pursuant to Article 5 of the EEC Treaty, against the persons who committed or contributed to the fraud,

(i) by failing to establish, pursuant to Articles 1, 9 and 10 of Regulation (EEC, Euratom, ECSC) No 2891/77 <sup>2</sup> and Regulation (EEC) No 2727/75, <sup>3</sup> certain own resources, in particular the agricultural levies due on certain consignments of maize imported from a non-member country in the amount of DR 447 053 406, and to make that sum available to the Commission on 20 July 1986 at the latest,

(v) by failing to carry out the necessary verifications and inquiries and the additional inspection measures requested by the Commission pursuant to Articles 1 and 18 of Regulation (EEC, Euratom, ECSC) No 2891/77;

(ii) by failing to pay interest on the abovementioned sum as from 20 July 1986 until the day of payment, in accordance with Article 11 of Regulation (EEC, Euratom, ECSC) No 2891/77,

the Hellenic Republic has failed to fulfil its obligations under the EEC Treaty.<sup>7</sup>

2. *The legislative background* is as follows. Article 13(1) of Regulation (EEC) No 2727/75 on the common organization of the market in cereals provides that a levy equal for each product to the threshold price less the cif price is to be charged on imports.

\* Original language: Italian.

1 — The other case in which judgment was given in default was that of 23 March 1988 in Case 105/87 *Morabito* [1988] ECR 1707.

2 — OJ 1977, L 336, p. 1.

3 — OJ 1975, L 281, p. 1.

4 — OJ 1979, L 197, p. 1.

Pursuant to Articles 1, 9 and 10 of Regulation (EEC, Euratom, ECSC) No 2891/77, the Member States are required to establish and make available to the Commission the Community's own resources, including agricultural levies, at the latest by the 20th day of the second month following the month during which the entitlement is established.

Article 11 of the same regulation fixes the rate of interest payable in the event of delay in transferring the payment.

Under Article 18, the Member States are to carry out verifications and inquiries concerning the establishment and making available of own resources; they are to carry out additional inspection measures at the request of the Commission, to associate the Commission with such inspection measures, at its request, and to take all measures necessary to facilitate such inspection measures.

Finally, pursuant to Article 2 of Regulation (EEC) No 1697/79 the competent authorities must recover duties not collected where they find that all or part of the import duties or export duties legally due have not been required from the person liable for payment.

The system thus established is intended to ensure that the correct amounts of Community own resources are properly established and collected when due.

3. The facts of the present case and the course of the procedure are described in the

Report for the Hearing, to which I refer the Court. I shall give details thereof only in so far as is necessary for my reasoning.

4. No problems arise in my opinion concerning the admissibility of the application and the due fulfilment of the procedural formalities, which the Court is required to verify by virtue of Article 94(2) of the Rules of Procedure. It is therefore necessary to consider whether the applicant's submissions appear well founded.

5. In its first submission, the Commission complains, on the basis of information obtained during an on-the-spot investigation carried out in 1986 and subsequent inquiries, that the Hellenic Republic failed to establish and make available to the Commission the agricultural levies payable on two consignments of maize of Yugoslav origin imported into Greece and subsequently exported to Belgium as goods of Greek origin.

The official documents relating to the first of the two consignments at issue, carried by the vessel *Alfonsina*, indicate that that vessel, after taking on board some 9 000 tonnes of maize at the Greek port of Kavala between 30 April and 7 May, proceeded to Salonica in order to complete the necessary customs formalities, on 8 and 9 May, before sailing to Belgium.

However, the Commission came to the conclusion that the *Alfonsina* took the maize on board at Koper in Yugoslavia between

25 April and 3 May and put in at Salonica from 8 to 9 May — it did not put in at Kavala at all — simply in order to ‘transform’ the ‘Yugoslav’ documents into ‘Greek’ documents by a kind of magical operation which although perhaps not spectacular was certainly not lacking in financial benefits.

The allegation of fraud, involving the participation of Greek civil servants, is based in particular on the Greek authorities’ refusal to authorize certain inquiries which would have made it easy to establish the truth of the matters certified by them; on an examination of documents and information supplied *in tempore non suspecto*; on an analysis of information from independent international organizations such as Lloyd’s and the International Maritime Bureau; on the finding that certain documents bearing the stamp of the *Alfonsina* and the signature of its master had been falsified; and, finally, on the statements made by the master of the vessel on arrival at Salonica.

6. The place and date of loading of the second consignment — 11 000 tonnes of maize aboard the *Flamingo* — are not, on the other hand, contested. Nevertheless, the Commission considers that in that case, contrary to the particulars certified by the Greek authorities, the maize had been brought from Yugoslavia by rail to the port of Salonica and was then loaded as Greek maize without any agricultural levy being collected.

With respect to the operations relating to that consignment, too, the Commission complains that the Greek authorities refused

to allow a number of checks to be carried out, including an inspection of the records for the maize silo at Salonica and of the documents recording train movements during the week in which the vessel was loaded.

The refusal to carry out the requested measures, together with other factors such as the entry made in the *Flamingo*’s log to the effect that the presence of insects in the rail cars caused loading operations to be suspended on two occasions, prompted the Commission to conclude that the maize taken on board in fact came from Yugoslavia.

7. A review of the information produced to the Court, the essential features of which I have just mentioned and which is to be found in various parts of the investigators’ report annexed to the application, and an appraisal of the conduct of the Greek authorities in the course of the investigation, in particular the refusal to allow an examination of documents which might have clarified even better the pattern of the events at issue, prompt me to conclude that the Commission has in this case discharged the obligation incumbent upon it under the procedure provided for in Article 169 of the Treaty to provide proof of the alleged failure to fulfil obligations.<sup>5</sup>

The information gathered, which is voluminous and consistent and was obtained by thorough inquiry, provides support for the view that in both cases the maize exported

<sup>5</sup> — See most recently the judgment of 25 April 1989 in Case 141/87 *Commission v Italy* [1989] ECR 943, paragraph 15.

from Greece to Belgium as a product of Greek origin in fact came from Yugoslavia.

In those circumstances, without my thereby postulating a reversal of the onus of proof, it was, in line with previous dicta of the Court,<sup>6</sup> incumbent upon the Hellenic Republic to refute in substance and in detail the information produced and the conclusions drawn from it.

8. However, the Greek authorities did no more than plead in somewhat general terms at the pre-litigation stage that the matter was the subject of a judicial investigation and that it was necessary to await the outcome of those proceedings before carrying out the measures proposed by the Commission.

That response cannot be considered satisfactory. It is true that the Community regulations do not mention any relationship between the powers of inspection in relation to establishing the Community's own resources, on the one hand, and the guarantees provided by municipal law for the proper conduct of criminal proceedings, on the other.<sup>7</sup>

And it is also true that the Member States continue to be empowered to take proceedings and measures for the recovery of own resources from private persons.<sup>8</sup>

However, the mere fact that court proceedings are pending — and in the present case they do not seem to have been

instigated by the Greek authorities but rather by a competitor of the defendant company and they appear to relate to only one of the two consignments — does not of itself release the authorities of a Member State in which a fraud has been committed in relation to goods subject to agricultural levies from the duty to establish and make available to the Commission the full amount of own resources, including any sums which may not have been collected.

The two courses of action may in fact pursue aims and have effects which differ to some extent, one being to guarantee that the Community receives its own resources in due time and the other being to prosecute those responsible for the fraud.

Moreover, it does not appear that the Greek authorities have taken any appropriate measures to establish the amount of the fraudulently evaded levies or that the judicial authorities raised any objection that the matter was *sub judice*, as occurred in Case 267/78, cited earlier, nor is it apparent to what extent the proceedings pending in Greece relate to investigation of the operations in question and prevent the establishment of the own resources apparently due.

9. However, I should point out that, particularly in an area as delicate as that of establishing own resources and combating fraud detrimental to the Community budget, the obligation to cooperate laid down in Article 5 of the EEC Treaty — an

<sup>6</sup> — See judgment of 22 September 1988 in Case 272/86 *Commission v Greece* [1988] ECR 4875, paragraph 21.

<sup>7</sup> — See the judgment of 10 January 1980 in Case 267/78 *Commission v Italy* [1980] ECR 31, paragraph 20.

<sup>8</sup> — See the judgment of 5 May 1977 in Case 110/76 *Pretore di Cento v Ignoto* [1977] ECR 851, paragraph 6.

article which, as the Commission correctly remarked in its application, in a way provides the background to and the basis for the proceedings with which we are concerned — is one which must be strictly complied with by the Member States in order to ensure that the Community may dispose of its own resources in the best possible conditions.

In that area the Member States have a real duty to take the initiative, a duty which the Greek authorities do not appear to have discharged in the present case. Indeed, they merely took refuge behind a general reference to the existence of criminal proceedings without ever going into the substance of the issues raised.

The first allegation is therefore well founded and the Commission's calculation of the sum of which payment was evaded also seems to be correct.

10. In its second submission, the Commission asks the Court to declare that interest should have been paid on the sum due from 20 July 1986 until that sum was paid.

Article 11 of Regulation (EEC, Euratom, ECSC) No 2891/77 provides that:

'Any delay in making the entry in the account . . . shall give rise to the payment of interest by the Member State concerned . . .'

Moreover, the Court has held that:

'the default interest provided for by Article 11 of the regulation is payable in respect of "any delay", regardless of the reason for the delay in making the entry in the Commission's account'.<sup>9</sup>

In any case there can be no justification for allowing the Government of the Hellenic Republic to profit by its failure to establish own resources in order to evade the obligation to pay interest in case of delay.

11. The complaint concerning failure to effect post-clearance recovery of the uncollected levies, pursuant to Article 2 of Regulation No 1697/79, also appears well founded.

The option of not effecting post-clearance recovery of such duties, offered by Article 5(2) of that regulation, presupposes that there has been an error on the part of the competent authorities and good faith on the part of the person liable for payment, together with observance by the latter of all the requirements concerning his customs declaration; those conditions do not appear to have been satisfied in this case.

12. The fourth submission is based on Article 5 of the Treaty. The Commission

<sup>9</sup> — See judgments of 22 February 1989 in Case 54/87 *Commission v Italy* [1989] ECR 385, paragraph 12; of 18 December 1986 in Case 93/85 *Commission v United Kingdom* [1986] ECR 4011, paragraph 37; and of 20 March 1986 in Case 303/84 *Commission v Germany* [1986] ECR 1171, paragraph 17.

criticizes the Greek authorities for not having commenced appropriate criminal and disciplinary proceedings against the perpetrators of the fraud and their accomplices.

That submission also appears to be well founded. The obligation imposed by Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community entails a duty to prosecute and impose appropriate penalties on those who infringe Community law in such a way as to prejudice its effectiveness.

The general indications given by the Greek authorities in the pre-litigation phase in response to precise requests from the Commission do not provide adequate support for the conclusion that the Greek Government fulfilled that duty satisfactorily.

On the contrary, it is quite apparent that, approximately three years after the material events, there is no news of the initiatives taken by the competent authorities and the

measures adopted; in that regard, the laconic reply given by the Greek authorities to the Commission's reasoned opinion cannot be regarded as sufficient — besides being given belatedly, it merely indicated that the relevant documentation and the report sent by the Commission had been forwarded to the judicial authorities.

13. Similarly vague and inchoate were the replies given by the Greek authorities concerning the inquiries and verifications carried out and the additional inspection measures requested by the Commission at the end of January 1987. In that case, too, despite the repeated requests from the Commission, it does not appear that any precise information has been provided as to the progress and results of any inquiries.

It must therefore be concluded that the Government of the Hellenic Republic failed to carry out adequate inquiries and verifications and did not take the additional inspection measures requested by the Commission pursuant to Article 18 of Regulation (EEC, Euratom, ECSC) No 2891/77.

14. In the light of the foregoing considerations, I propose that the Court:

(1) declare that:

- (i) by failing to establish, pursuant to Articles 1, 9 and 10 of Regulation (EEC, Euratom, ECSC) No 2891/77 and Regulation (EEC) No 2727/75, certain own resources, in particular the agricultural levies due on certain

consignments of maize imported from a non-member country in the amount of DR 447 053 406, and to make that sum available to the Commission on 20 July 1986 at the latest,

- (ii) by failing to pay interest on the abovementioned sum as from 20 July 1986 until the day of payment, in accordance with Article 11 of Regulation (EEC, Euratom, ECSC) No 2891/77,
- (iii) by failing to carry out post-clearance recovery of the abovementioned amount pursuant to Articles 1 and 2 of Regulation (EEC) No 1697/79,
- (iv) by failing to institute appropriate criminal and disciplinary proceedings, pursuant to Article 5 of the EEC Treaty, against the persons who committed or contributed to the fraud,
- (v) by failing to carry out the necessary verifications and inquiries and the additional inspection measures requested by the Commission pursuant to Articles 1 and 18 of Regulation (EEC, Euratom, ECSC) No 2891/77,

the Hellenic Republic has failed to fulfil its obligations under the EEC Treaty;

- (2) order the Hellenic Republic to pay the costs.