

JUDGMENT OF THE COURT  
27 April 1993 \*

In Case C-375/90,

**Commission of the European Communities**, represented by Dimitrios Gouloussis, Legal Adviser, and Rafael Pellicer, of its Legal Service, with an address for service in Luxembourg at the office of Nicola Anecchino, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

supported by

**French Republic**, represented by Philippe Pouzoulet, Deputy Director of Legal Affairs at the Ministry of Foreign Affairs, and Géraud de Bergues, Principal Assistant Secretary for Foreign Affairs at the said Ministry, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

intervener,

v

**Hellenic Republic**, represented initially by K. Samoni-Rantou, Advocate, Senior Legal Assistant in the Community Legal Department at the Ministry of Foreign Affairs, and subsequently by Fokion P. Georgakopoulos, delegate of the State Legal Council, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

Application for a declaration that, by

- (a) prohibiting the importation of a consignment of 90 tonnes of frozen chicken from France because of the presence of salmonella on the surface of certain carcasses,

\* Language of the case: Greek.

- (b) prohibiting the importation of more than 40 tonnes of chickens on the pretext that they contained excessive amounts of extraneous water,
- (c) systematically and repeatedly delaying the importation of several consignments of frozen chickens,

the Hellenic Republic has failed to fulfil its obligations under Council Directive 71/118/EEC of 15 February 1971 on health problems affecting trade in fresh poultry meat (OJ, English Special Edition 1971 (I), p. 106), Council Directive 83/643/EEC of 1 December 1983 on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States, as amended by Council Directive 87/53/EEC of 15 December 1986 (OJ 1987 L 24, p. 33), Council Regulation (EEC) No 2967/76 of 23 November 1976 laying down common standards for the water content of frozen and deep-frozen chickens, hens and cocks (OJ 1976 L 339, p. 1), Regulation (EEC) No 2777/75 of the Council of 29 October 1975 on the common organization of the market in poultry meat (OJ 1975 L 282, p. 77) and Articles 30 and 36 of the EEC Treaty,

#### THE COURT,

composed of: O. Due, President, C. N. Kakouris and M. Zuleeg (Presidents of Chambers), R. Joliet, J. C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco, P. J. G. Kapteyn and D. A. O. Edward, Judges,

Advocate General: G. Tesauro,  
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 27 October 1992,

after hearing the Opinion of the Advocate General at the sitting on 2 December 1992,

gives the following

## Judgment

- 1 By application lodged at the Court Registry on 18 December 1990, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by prohibiting the importation of a consignment of 90 tonnes of frozen chickens from France because of the presence of salmonella on the surface of certain carcasses, prohibiting the importation of more than 40 tonnes of chickens on the pretext that they contained excessive amounts of extraneous water, and systematically and repeatedly delaying the importation of several consignments of frozen chickens, the Hellenic Republic has failed to fulfil its obligations under Council Directive 71/118/EEC of 15 February 1971 on health problems affecting trade in fresh poultry meat (OJ, English Special Edition 1971 (I), p. 106), Council Directive 83/643/EEC of 1 December 1983 on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States, as amended by Council Directive 87/53/EEC of 15 December 1986 (OJ 1987 L 24, p. 33), Council Regulation (EEC) No 2967/76 of 23 November 1976 laying down common standards for the water content of frozen and deep-frozen chickens, hens and cocks (OJ 1976 L 339, p. 1), Regulation (EEC) No 2777/75 of the Council of 29 October 1975 on the common organization of the market in poultry meat (OJ 1975 L 282, p. 77) and Articles 30 and 36 of the EEC Treaty.
  
- 2 During 1987, the Commission received a number of complaints to the effect that the Greek authorities had imposed restrictions on the importation of frozen chickens from France.
  
- 3 The first complaint alleged that the Greek authorities had without justification seized 90 tonnes of frozen chickens on the ground that a veterinary inspection carried out by those authorities had revealed the presence of salmonella on the skin of the samples taken. It was also alleged that the Greek authorities had failed to follow the procedures laid down in Directive 71/118/EEC.
  
- 4 In view of that complaint, an analysis was carried out on 2 December 1987, in accordance with Article 10 of Directive 71/118, by a veterinary expert who was not of French or Greek nationality. Having completed his analysis, the expert

concluded that the presence of salmonella was due to *post mortem* contamination of the skin of the chickens. According to him, the difference between the results of the tests carried out in Greece and France was attributable to the fact that the Greek veterinary experts had taken samples of subcutaneous tissue and pectoral muscle as well as of the skin, whereas the method employed in France was to analyse 25 grammes of muscular tissue after removal of the skin. He concluded that the consignments in question met the requirements of Directive 71/118.

- 5 At the request of the Commission's officers, a further analysis was carried out on a batch of 50 chickens. The method adopted on this occasion was to analyse one half of each chicken using the Greek method and the other half using the French method. No traces of salmonella were found on the samples analysed according to the French method whereas traces of salmonella were found on two chickens analysed according to the Greek method.
- 6 The second complaint alleged that two consignments of chickens had been held up since October 1987 on the pretext that the water content of the chickens exceeded Community limits.
- 7 With respect to this second complaint, a counter-analysis carried out on 25 and 26 January 1988 using the rapid detection method described in Annex II to Regulation No 2967/76 revealed that the extraneous water content was 4.9%, that is, below the maximum level permitted under the regulation. However, a second check carried out on seven carcasses using the method described in Annex III to the regulation showed a water content exceeding the limits laid down in the regulation.
- 8 The third complaint alleged that, on three occasions in 1987, the Greek authorities had delayed the release to the Greek market of consignments of frozen chickens.
- 9 After considering the documents in the case, the Commission initiated the procedure laid down in Article 169 of the Treaty and, on 18 April 1988, sent the Greek Government a letter of formal notice.

- 10 By letter of 22 July 1988, the Greek authorities denied having infringed the Community provisions in question and stated that they had faithfully applied the Community health provisions and, in the absence of such provisions, had applied the national ones then in force, without discrimination as to the country of origin of the products subjected to health checks.
- 11 Considering the Greek authorities' reply to the letter of formal notice to be unsatisfactory, the Commission delivered a reasoned opinion to the Hellenic Republic on 28 September 1989, requesting it to take the necessary measures to comply with it within one month of receiving it.
- 12 By letter of 18 December 1989, the Hellenic Republic stated that it maintained its view that the measures in question were justified on grounds of public health.
- 13 In those circumstances the Commission brought these proceedings before the Court.
- 14 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.

**The first complaint: infringement of Article 30 of the Treaty and Council Directive 71/118**

- 15 Under Article 9 of Directive 71/118, 'a Member State may prohibit the marketing in its territory of fresh poultry meat coming from another Member State if ... it is found that ... such meat is unfit for human consumption'. The Court has held that Directive 71/118 expressly reserves that power to the Member States until such time as greater harmonization is achieved (see Case C-332/88 *Alimenta* [1990] ECR I-2077, paragraph 17).

- 16 In the same case the Court stated that, although the opinion delivered by a veterinary expert provided for under Article 10 of Directive 71/118 represents an important factor to be taken into account by the national authorities, it is not decisive or binding.
- 17 The Commission claims, first, that under the terms of the directive chickens are unfit for human consumption only if they are suffering from an infectious disease. Consequently the Hellenic Republic would have been entitled to prohibit the importation of the consignments in question only if that had been the case on this occasion. However, the Commission considers that the presence of salmonella on the skin of chickens by no means shows that the birds are suffering from an infectious disease, in this case salmonellosis, a septicaemic infection of the gastrointestinal tract.
- 18 The Hellenic Republic cites Article 36 of the Treaty in justification of the contested measures. It contends that the mere presence of salmonella on the skin of a chicken, whether or not it is suffering from salmonellosis, constitutes a risk to human health because those microbes can cause infectious diseases in man.
- 19 With respect to these various arguments, it should be recalled that the Court has consistently ruled that where the data available at the present stage of scientific research do not make it possible to determine with certainty the number of pathogenic micro-organisms above which a food product represents a danger to health, in the absence of harmonization in this field, it is for the Member States to determine, with due regard to the requirements of the free movement of goods, the level at which they wish to ensure that human life and health are protected (see, in particular, Case 97/83 *Melkunie* [1984] ECR 2367, paragraph 18).
- 20 The Commission admits that that decision is applicable in this case but nevertheless considers that the checks carried out by the Greek authorities were not in keeping with the principle of proportionality. In this connection it claims, first, that in examining not only the muscular tissue but also the skin and the subcutaneous tissues, the Hellenic Republic used a method which is rejected by all the

Member States, including the Hellenic Republic itself, to examine similar products of national origin prior to marketing. Secondly, the risk to public health represented by salmonella on the skin of poultry can be eliminated by hygiene measures and, in particular, by high-temperature treatment. Thirdly, the traces of salmonella found on the samples taken were well below the minimum quantity capable of causing food poisoning.

- 21 The Commission's arguments cannot be accepted.
- 22 With respect to the first argument, it should be noted that the Commission stated at the hearing, in reply to a question put by the Court, that it had no evidence enabling it to determine the methods actually employed by the Hellenic Republic to detect the presence of salmonella on Greek chickens and that in any case it was not alleging that the Hellenic Republic had taken discriminatory measures against imported products. It is also clear from the data provided by the Commission itself that a number of other Member States carry out the tests in question in the same way as the Hellenic Republic, on the skin and muscular tissue of the poultry. Lastly, it should be noted that the French Republic, intervening in support of the form of order sought by the Commission, recognized that in the absence of Community provisions the Greek authorities were entitled to carry out tests on samples consisting of a mixture of skin and muscle.
- 23 As to the second argument, it is clear from the scientific literature produced by the parties at the Court's request that the presence of salmonella, even if only on the skin of poultry, may constitute a danger to human health, notably because of the risk of contamination before the meat is cooked from premises, utensils and other food products used in this connection.
- 24 As to the third argument, the Hellenic Republic stated at the hearing without challenge from the Commission that the method used to detect salmonella in this case, which is an enrichment method, makes it possible only to ascertain the presence or absence of salmonella, not to determine the precise number of salmonella microbes present. Moreover, even if the quantity was relatively small, it is clear from the

documents produced that certain sections of the population are particularly vulnerable, notably children, old people and people who are already ill, so that even quite a small quantity is sufficient to infect them.

- 25 It follows that the Commission has failed to prove its allegation that the contested examinations were disproportionate in relation to the aim to be achieved and its first complaint must therefore be rejected in its entirety.

### **The second complaint: infringement of Council Regulation No 2967/76**

- 26 Article 4 of Regulation No 2967/76 provides:

‘1. The water content may be checked initially in accordance with the rapid detection method described in Annex II.

Where there are grounds for assuming that, during processing, substances having the effect of increasing water retention in the poultry have been used, the water content shall be determined directly in accordance with one of the methods of analysis described in Annexes III and IV, the choice being made by the Member State.

If the result of the rapid detection method does not exceed the level fixed in Annex II (7), the poultry concerned shall be deemed to comply with this Regulation.

2. If the result of the checks using the rapid detection method is in excess of the level fixed in Annex II (7), or if this checking method is not used, a chemical analysis shall be carried out using one of the methods described in Annexes III and IV, the choice being made by the Member State.

If the result of the checks using one of the methods of analysis described in Annexes III and IV is in excess of the admissible limits, the poultry concerned shall be deemed not to comply with this Regulation. In that event, however, the holder of the poultry concerned may request that a counter-analysis be carried out using the same method.’



- 27 The Commission claims that, when they examined the two consignments of chicken in question, the Greek authorities first employed the rapid detection method described in Annex II to Regulation No 2967/76, which showed the water content of the chickens to be below the authorized limit. Under the terms of Article 4(1) of the regulation, according to the Commission, the poultry concerned should therefore have been deemed to comply with the regulation and should not have been subject to the further analysis carried out by the Greek authorities using the method described in Annex III to the regulation.
- 28 In its replies to the letter of formal notice and the reasoned opinion, in its defence and also at the hearing, the Hellenic Republic stated that in this case it had not used the rapid detection method described in Annex II but only the detection method described in Annex III to Regulation No 2967/76. The rapid detection method had been used only on the occasion of the further analysis carried out at the expert's request.
- 29 It should be noted that the Commission did not challenge that statement either during the written procedure or at the hearing. It must therefore be concluded that the Commission has not substantiated its allegation that the Hellenic Republic was bound to abide by the results of the examinations carried out in accordance with the method described in Annex II and was consequently not entitled to carry out a further analysis using the detection method described in Annex III to Regulation No 2967/76.
- 30 The Commission claimed at the hearing that under the terms of Article 4 of Regulation No 2967/76, the Hellenic Republic should in any case have employed first the rapid detection method described in Annex II as the national authorities are entitled to use the method described in Annex III only if there are grounds for assuming that, when the poultry was being prepared, substances having the effect of increasing water retention in the tissues were used.
- 31 It must be observed that this argument, advanced at the hearing, had not been put forward during the pre-litigation procedure or the written procedure before the Court. The Court cannot therefore take it into account.

- 32 In the alternative, the Commission claims that the Hellenic Republic, when analysing the chickens in question, failed to comply with the technical requirements laid down in Annex III to Regulation No 2967/76 and that this casts doubt on the reliability of the analyses.
- 33 The Court has consistently held that under the procedure laid down in Article 169 of the EEC Treaty it is incumbent upon the Commission to prove that an obligation has not been fulfilled (see *inter alia* Case C-157/91 *Commission v Netherlands* [1992] ECR I-5899, paragraph 12, and Case 141/87 *Commission v Italy* [1989] ECR 943, paragraphs 15 and 16).
- 34 It is true that in this case the Commission produced some data to support its plea but the Hellenic Republic provided detailed information in its written pleadings and at the hearing to show that it had in fact complied with the requirements of Annex III and the Commission did not dispute the accuracy of that information.
- 35 It must consequently be concluded that the Commission has failed to substantiate its allegation that the provisions of Regulation No 2967/76 were infringed. The second complaint must therefore be rejected.

**The third complaint: infringement of Article 30 of the Treaty and Article 6 of Council Directive 83/643**

- 36 The Commission's third complaint is that the Hellenic Republic systematically and repeatedly delayed the importation of several consignments of frozen chickens. These comprised a consignment of 112 tonnes whose release to the market was delayed for one month in April 1987, a consignment of 216 tonnes delayed for two weeks in July 1987 and two consignments of 22 tonnes each, one delayed for two weeks and the other for four weeks in October 1987.
- 37 This complaint is based on Article 30 of the Treaty and on Article 6 of Directive 83/643, as amended by Directive 87/53, which provides:

‘Member States shall take the measures necessary to ensure that waiting time caused by the various inspections and formalities does not exceed the time required for their proper completion. To that end, they shall organize the business hours of the departments which are to carry out inspections and formalities, the staff available and the practical arrangements for processing goods and documents associated with the carrying out of the inspections and formalities in such a way as to reduce waiting time in the flow of traffic to a minimum.’

- 38 The Hellenic Republic offered various explanations for these delays, which must now be examined.
- 39 First, with respect to the consignment of 216 tonnes and one of the consignments of 22 tonnes, the Hellenic Republic maintains that the delays were attributable to the fact that the extraneous water content of the chickens in question exceeded the limits laid down in Regulation No 2967/76. Thus, under Article 2 of Commission Regulation (EEC) No 2785/80 of 30 October 1980 introducing detailed rules for implementing Regulation No 2967/76 (OJ 1980 L 288, p. 13), the chickens should have remained under the control of the competent authority until their holder, under that authority’s supervision, had marked them with a tape or label bearing the wording ‘water content exceeds EEC limit’. In those circumstances, the Hellenic Republic contends that it was not responsible for the delay at issue.
- 40 The Commission considers that that argument cannot be accepted inasmuch as the Greek authorities did not conduct the analysis of the water content correctly and they cannot therefore rely on it to justify the delay imposed on the importations.
- 41 It should be recalled that the Commission’s second complaint, to the effect that the provisions of Regulation No 2967/76 relating to the analysis of the extraneous water content were infringed, has been dismissed. Consequently it must be concluded that, in so far as the consignments referred to in the second and third complaints are the same, the Commission has failed to prove that the provisions referred to in the third complaint were infringed and, in so far as they are different, that it has not produced any fresh evidence to prove the alleged infringement.

- 42 The arguments advanced by the Commission in connection with the two consignments mentioned above must therefore be rejected.
- 43 Secondly, with respect to the second consignment of 22 tonnes, the Hellenic Republic accepts the obligations imposed on the Member States by Directive 83/643 but contends that the delay was justified by exceptional circumstances. It claims that the delay was due to the fact that the machine used to test the extraneous water content had broken down, could not be repaired and had to be replaced with a machine imported from abroad and that this caused the delay of one month of which the Commission complains.
- 44 The Commission does not dispute the truth of these statements but counters by saying that internal problems cannot justify an obstacle to trade.
- 45 It should be noted that Article 6 of Directive 83/643 requires Member States to take measures to reduce waiting time in the flow of traffic to a minimum. However, the Commission has not demonstrated that the breakdown in question was due to negligence on the part of the Greek authorities or that they took an excessively long time to replace the faulty machine or that the delay of which it complains could have been reduced by any other means.
- 46 The Commission's complaint with respect to the second consignment of 22 tonnes of chicken must therefore also be rejected.
- 47 Thirdly, with respect to the consignment of 112 tonnes, the Hellenic Republic contends that the delay of one month imposed on the importation of that consignment was due to the fact that the chickens did not carry a label giving the dates of slaughter and freezing and that in addition the Easter holidays had added to the delay.

48 That argument cannot be accepted.

49 With regard to the labelling referred to, it must be stated that such a requirement is not justified by any provision of Community law. With regard to the explanation that the delay was to some extent caused by the Easter holidays, it is sufficient to note that the Greek authorities were under an obligation pursuant to Article 6 of Directive 83/643 to ensure that waiting time caused by the various inspections and formalities did not exceed the time required for their proper completion and, in that context, to reduce waiting time in the flow of traffic to a minimum.

50 The explanation offered does not constitute a reasonable justification for the delay and it must therefore be concluded that the Hellenic Republic failed to fulfil that obligation with respect to that consignment.

51 It must however be recalled that, according to its wording, the Commission's third complaint alleges that the Hellenic Republic systematically and repeatedly delayed the importation of several consignments of frozen chickens. However, in this case all that the Commission has shown is that there was an unjustified delay in releasing one single consignment to the market.

52 It must therefore be concluded that the Commission has failed to prove that the Hellenic Republic systematically and repeatedly delayed the importation of several consignments of frozen chickens. The Commission's last argument must therefore be rejected and the third complaint be rejected in its entirety.

53 It follows from the foregoing that the action must be dismissed.

### Costs

54 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 action;
2. Orders the Commission to pay the costs.

Due	Kakouris	Zuleeg
Joliet	Moitinho de Almeida	Grévisse
Diez de Velasco	Kapteyn	Edward

Delivered in open court in Luxembourg on 27 April 1993.

J.-G-Giraud  
Registrar

O. Due  
President