

JUDGMENT OF THE COURT
10 June 1993 *

In Case C-183/91,

Commission of the European Communities, represented by Xenophon A. Yataganas and Michel Nolin, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Anecchino, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic, represented by Fokionas P. Georgakopoulos, representative of the State Legal Service, acting as Agent, with an address for service in Luxembourg at the Greek Embassy, 177 Val Sainte-Croix,

defendant,

APPLICATION for a declaration that, by failing to comply with Commission Decision 89/659/EEC of 3 May 1989 relating to the aid granted to exporting undertakings in the form of an exemption from the special single tax — introduced by Ministerial Decision E.3789/128 of 15 March 1988 — for the proportion of profits corresponding to export earnings (OJ 1989 L 394, p. 1), the Hellenic Republic has failed to fulfil its obligations under the EEC Treaty,

THE COURT,

composed of: C. N. Kakouris, President of Chamber, acting for the President, G. C. Rodríguez Iglesias 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,

* Language of the case: Greek.

Advocate General: W. Van Gerven,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 2 February 1993,

after hearing the Opinion of the Advocate General at the sitting on 17 February 1993,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 15 July 1991, the Commission of the European Communities brought an action under the second subparagraph of Article 93(2) of the EEC Treaty for a declaration that, by failing to comply with Commission Decision 89/659/EEC of 3 May 1989 relating to the aid granted to exporting undertakings in the form of an exemption from the special single tax — introduced by Ministerial Decision E.3789/128 of 15 March 1988 — for the proportion of profits corresponding to export earnings (OJ 1989 L 394, p. 1), the Hellenic Republic had failed to fulfil its obligations under the EEC Treaty.
- 2 Decision E.3789/128, taken by the Minister of Financial Affairs of the Hellenic Republic on 15 March 1988, introduced a special single tax on the total income of certain undertakings in the 1987 financial year. The proportion of earnings deriving from export operations was, however, exempted under Article 1(2) of the decision.
- 3 The said Decision 89/659 found that the aid was unlawful as having been granted in breach of Article 93(2) of the Treaty, and also incompatible with the common market within the meaning of Article 92(1) of the Treaty, and ordered the special

single tax scheme to be modified without delay (Article 1). The Commission similarly required recovery of the aid from the recipient undertakings, in the form of payment of the part of the tax which had not been levied (Article 2), and required the provision of information on the measures taken to comply with the decision and a report on the amount of the aid and the undertakings concerned by repayments (Article 3).

4 The Greek Government did not challenge that decision. Nor did it recover the aid in question. In response to a series of enquiries by the Commission as to the implementation of the decision, the Greek authorities, by letters of 25 March 1989 and 19 March 1990, communicated to the Commission certain observations on the exceptional nature of the scheme and the absolute impossibility of implementing the decision. After a number of meetings between the Commission and the Greek Government, the Commission brought the present action.

5 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.

6 The Commission submits that there have been no implementing measures whatsoever and that the failure to fulfil obligations is consequently undeniable.

7 The Greek Government contends that the Commission's decision is unlawful and that it is absolutely impossible to implement it.

8 It is not disputed that no measure has been taken by Greece with a view to recovery of the aid, as required by Decision 89/659.

9 It is also not disputed that neither the Greek Government nor the undertakings which enjoyed the exemption have brought an action for annulment of the decision in question under Article 173 of the Treaty, and that it has consequently become definitive.

10 In those circumstances, in accordance with the Court's settled case-law, the Hellenic Republic may no longer call in question the validity of a decision addressed to it on the basis of Article 93(2) of the Treaty once the time-limit laid down in the third paragraph of Article 173 of the Treaty has expired (Case 156/77 *Commission v Belgium* [1978] ECR 1881 and Case 52/84 *Commission v Belgium* [1986] ECR 89). It follows from the latter judgment in particular that in those circumstances the only defence which can be raised to the action for failure to fulfil Treaty obligations is that it is absolutely impossible to implement the decision properly.

11 On that point, the Greek Government submits that recovery would necessarily take the form of a retrospective financial levy, which would be incompatible with Article 78(2) of the Greek Constitution. In the Greek Government's view, that provision gives expression to general principles which govern both the national and the Community legal orders, in particular the principles of legal certainty and the protection of legitimate expectations.

12 The Greek Government further maintains that the trifling financial importance of the exemption, the administrative difficulties in distinguishing between profits deriving from intra-Community trade and those deriving from exports to non-member countries, and the disproportionate cost of the measures for recovery of the aid would make it uneconomic and unreasonable to collect the tax.

13 In so far as it argues that recovery of the aid, as ordered by the Commission's decision, conflicts with general principles of law which are recognized in the Community legal order, the Greek Government necessarily raises the question of the lawfulness of that decision. However, as stated in paragraph 10 above, the Greek Government is no longer entitled to challenge the validity of the decision.

14 Furthermore, the arguments it puts forward in that respect are in any event unfounded.

15 In arguing that recovery of the aid would have to take the form of a retroactive tax, contrary to the general principles of Community law, the Greek Government misunderstands the consequences of the classification in law of the tax exemption at issue as an unlawful aid.

16 It follows from the Court's case-law that recovery of unlawful aid is the logical consequence of the finding that it is unlawful (see in particular Case C-142/87 *Belgium v Commission* [1990] ECR I-959, paragraph 66). That consequence cannot depend on the form in which the aid was granted.

17 Where an aid has been granted, as in the present case, in the form of a tax exemption and has duly been found to be unlawful, it is not correct to argue, as the Greek Government does, that recovery of the aid in question must necessarily take the form of a retroactive tax, which would as such be absolutely impossible to enforce, having regard in particular to the general principles of Community law. On the basis of Decision 89/659, the Greek authorities merely have to take measures ordering the undertakings which have received the aid to pay sums corresponding to the amount of the tax exemption unlawfully granted to them.

18 Moreover, while a recipient of unlawfully granted aid is not precluded from relying on exceptional circumstances which may legitimately have caused it to assume the aid to be lawful, a Member State, on the other hand, whose authorities have granted the aid contrary to the procedural rules laid down in Article 93 may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission

decision ordering it to recover the aid. If it could do so, Articles 92 and 93 of the Treaty would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive decisions taken by the Commission under those provisions of the Treaty of their effectiveness (Case C-5/89 *Commission v Germany* [1990] ECR I-3437, paragraphs 16 and 17).

- 19 Finally, as regards the Greek Government's other arguments, it must be emphasized that the fact that the only defence which a State to which a decision has been addressed can raise to an action such as that in the present case is that implementation of the decision is absolutely impossible does not prevent that State — if, in giving effect to the decision, it encounters unforeseen and unforeseeable difficulties or perceives consequences overlooked by the Commission — from submitting those problems for consideration by the Commission, together with proposals for suitable amendments to the decision in question. In such cases the Commission and the Member State must, by virtue of the rule imposing on the Member States and the Community institutions a duty of genuine cooperation, a rule which underlies in particular Article 5 of the Treaty, work together in good faith with a view to overcoming the difficulties while fully observing the Treaty provisions, in particular the provisions on aid (see Case 52/84 *Commission v Belgium*, cited above, and Case 94/87 *Commission v Germany* [1989] ECR 175).
- 20 In the present case the defendant Government merely informed the Commission of the legal and practical difficulties involved in implementing the decision, without taking any step whatsoever to recover the aid from the undertakings in question, and without proposing to the Commission any alternative arrangements for implementing the decision which would have enabled the alleged difficulties to be overcome.
- 21 In those circumstances, it must be held that the Greek Government cannot claim that it was absolutely impossible to implement the Commission's decision.

22 Accordingly, a declaration of failure to fulfil Treaty obligations must be granted in the form sought by the Commission.

Costs

23 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by failing to comply with Commission Decision 89/659/EEC of 3 May 1989 relating to the aid granted to exporting undertakings in the form of an exemption from the special single tax — introduced by Ministerial Decision E.3789/128 of 15 March 1988 — for the proportion of profits corresponding to export earnings, the Hellenic Republic has failed to fulfil its obligations under the EEC Treaty;
2. Orders the Hellenic Republic to pay the costs.

Kakouris

Rodríguez Iglesias

Zuleeg

Joliet

Moitinho de Almeida

Grévisse

Diez de Velasco

Kapteyn

Edward

Delivered in open court in Luxembourg on 10 June 1993.

J.-G. Giraud

C. N. Kakouris

Registrar

For the President