JUDGMENT OF THE COURT (Fifth Chamber)

29 April 2004 *

In Case C-278/00,

Hellenic Republic, represented by I. Chalkias and C. Tsiavou, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by J. Flett and D. Triantafyllou, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of Commission Decision 2002/458/EC of 1 March 2000 relating to the aid schemes implemented by Greece in favour of the settlement of debts by the agricultural cooperatives in 1992 and 1994, including the aids for reorganisation of the dairy cooperative AGNO (OJ 2002 L 159, p. 1), or, in the alternative, of Article 2 of that decision,

* Language of the case: Greek.

THE COURT (Fifth Chamber),

composed of: P. Jann, acting for the President of the Fifth Chamber, C.W.A. Timmermans and S. von Bahr (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,
Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 17 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 25 September 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 13 July 2000, the Hellenic Republic brought an action under the first paragraph of Article 230 EC for the annulment of Commission Decision 2002/458/EC of 1 March 2000 relating to the

aid schemes implemented by Greece in favour of the settlement of debts by the agricultural cooperatives in 1992 and 1994, including the aids for reorganisation of the dairy cooperative AGNO (OJ 2002 L 159, p. 1, hereinafter 'the contested decision') or, in the alternative, of Article 2 of that decision.

Relevant national provisions

2 Article 32 of Law No 2008/92 of 11 February 1992 (FEK A'16) provides:

'1. The Greek State undertakes, in connection with the reorganisation of the cooperatives, to assume the debts outstanding at 31 December 1990.

2. Similarly, it may assume and settle debts to the Agricultural Bank of Greece incurred by primary, secondary and tertiary cooperative associations, cooperatives and undertakings covered by Law No 1541/85 between 1982 and 1989, provided that they stem from the implementation of social or some other intervention policy on the instructions or on behalf of the State. The amount of those debts shall be fixed for each cooperative by joint order of the Ministers of Finance and Agriculture on the recommendation of the committees set up by the Minister of Agriculture.

3. The debts will be assumed and settled by the State if and only if the cooperative, association or company is deemed viable.'

3 The aim of Article 5 of Law No 2237/94 of 14 September 1994 (FEK A' 149) is to define the general framework of Decision No 1620 of the Governor of the Bank of Greece of 5 October 1989 (FEK A' 236/18.10.1989, hereinafter 'Decision No 1620/89'), which authorises credit institutions in Greece to regularise debts of all kinds.

4 Decision No 1620/89 provides:

'1. Credit institutions are authorised to settle their debts, whether outstanding or not, pursuant to any type of loan in drachmae or foreign currencies, and those arising out of calls on guarantee.

2. Credit institutions are authorised to convert into equity the debts referred to in the previous paragraph.

3. Settlements of debts are subject to the condition that credit institutions shall set out the conditions necessary to limit the credit risks they assume and to ensure proper service of the debts which have been settled.

...'

5 Article 5 of Law No 2237/94 provides:

'The Agricultural Bank of Greece may, by decision of the appropriate staff, settle debts to it outstanding at 31 December 1993 incurred by primary cooperative associations which convert and market agricultural products, provided that they result from the financing of those activities, and by secondary and tertiary cooperative associations, if those debts are not covered by realisable goods and assets ..., provided that, in the opinion of the Agricultural Bank of Greece, they are not the result of mismanagement but of objective factors (crisis on the market for certain agricultural products or loss of markets owing to external events, etc.) ...

The final amount will be repaid in up to 10 annual instalments and the Agricultural Bank of Greece may, in exceptional cases of particularly heavy debts, extend the repayment period to a total of 15 years, with a period of grace of a maximum of three years. During the first half of the repayment period, the associations will not be required to pay interest on the amounts settled; during the second half, interest shall be chargeable at a rate of 50% of the current market rate. In exceptional cases, that percentage may be reduced at the discretion of the Agricultural Bank of Greece ... . Settlement is subject to the submission of a study on the feasibility, modernisation and development of the beneficiary cooperative, demonstrating that it is able to fulfil the conditions of the settlement ... .'

The facts

First opening of the procedure

6 On 7 June 1993, the Commission was informed by letter from the Greek Minister of Agriculture of the intention of the Greek Government to apply the provisions of

Article 32(2) of Greek Law No 2008/92 to write off the debts of several types of cooperatives to the Agricultural Bank of Greece (hereinafter 'the ABG'), concerning the period 1982 to 1989.

7 Initially, the Commission considered this letter as a notification within the meaning of Article 93(3) of the EC Treaty (now Article 88(3) EC). Subsequently, the Commission was informed of the fact that aid provided for in Article 32(2) of Greek Law No 2008/92 had already been granted, at least to the dairy cooperative AGNO, without prior Commission approval. The Commission therefore decided to include these legal provisions in the register of non-notified aids.

8 By letter dated 19 December 1997, the Commission finally informed Greece of its decision to initiate the procedure laid down in Article 93(2) of the Treaty in respect of the aid measures to reimburse debts of cooperatives pursuant to Article 32(2) of Greek Law No 2008/92.

Second opening of the procedure

9 By letter of 20 November 1995, the Commission received a complaint regarding aid to the dairy cooperative AGNO in northern Greece. According to the complainant, the Greek authorities had decided, through the ABG, to assist AGNO in paying some or all of its debts, possibly amounting to GRD 13 billion. AGNO had supposedly also benefited from fiscal concessions available to cooperative companies in the agricultural sector in Greece.

10 Following requests for additional information, two bilateral meetings were held, at the request of the Greek authorities, on 16 May 1997 and 23 July 1997 between the Greek authorities and the Commission. As a result of these meetings, the Greek authorities supplied additional information by letters dated 9 June 1997 and 29 August 1997.

11 From this exchange of information with the Greek authorities, it emerged that the dairy cooperative AGNO benefited from the following aid measures, through the ABG:

— GRD 851 million under Article 32(2) of Law No 2008/92 and GRD 529.89 million under Article 19(1) of Law No 2198/94 (non-notified) as compensation for losses due to the Chernobyl nuclear disaster,

— GRD 10 145 billion under Article 5 of Law No 2237/94 (non- notified) in the form of a consolidation loan linked to a debt due to the considerable delays in the implementation of an investment project,

— GRD 1 899 billion under Decision No 1620/89 authorising banks to consolidate loans to clients (non-notified).

12 By letter dated 19 December 1997, the Commission informed the Hellenic Republic of its decision to initiate the procedure laid down in Article 93(2) of the Treaty in respect of the general provisions for debt consolidation of agricultural cooperatives, as well as in respect of the aids for reorganisation of the cooperative AGNO.

Third opening of the procedure

13 The Commission also opened the procedure provided for in Article 93(2) of the Treaty in relation to Law No 2538/97 of 1 December 1997 (FEK A' 242) authorising the Greek State to write off debts of over 200 cooperatives (or associations of producers, companies and farmers) via the ABG.

14 Subsequently, the Hellenic Republic made a request to the Council to agree to such measures pursuant to the provisions of the third subparagraph of Article 93 (2). By Decision No 14015, of 15 December 1998, the Council agreed to this request.

The contested decision

15 In the contested decision, the Commission ruled inter alia that Article 32(2) of Law No 2008/1992 constituted State aid which did not satisfy the requirements laid down in the rules governing aid to make good the damage caused by natural disasters or exceptional occurrences (Article 87(2)(b) EC). It also ruled that Article 5 of Law No 2237/1994 constituted State aid which did not satisfy the requirements laid down in the rules governing restructuring aid for undertakings. Both aid schemes were declared incompatible with the common market. In passing, and to respond to the arguments advanced by the Greek authorities, the Commission investigated the individual case of the settlement of the debts of the AGNO cooperative. This investigation confirmed the Commission's assessment of the two aforementioned aid schemes. Aids granted to AGNO under Article 19 of Law No 2198/94 and Decision No 1620/89 were also declared incompatible with the common market (Article 1 of the contested decision).

16 The contested decision also invited the Greek authorities to take all the measures necessary to recover from the recipients the unlawful aids referred to in Article 1 of the decision within two months of the notification of the decision, in accordance with the procedures laid down by national law. The sums to be recovered were to bear interest from the date on which they were made available to the recipients until their actual recovery (Article 2 of the contested decision).

17 Finally, the Hellenic Republic was asked to inform the Commission, within two months following notification of the decision, of the measures taken to comply with it and to submit a full list of beneficiaries of all the aid schemes, the amounts to be recovered and the interest payable. The Commission also requested further information on the control exercised over the AGNO cooperative by the ABG, on the relations between the ABG and the Greek State and on the settlement of the debts of the cooperatives by the ABG pursuant to Decision No 1620/89 (Article 3 of the contested decision).

Forms of order sought

18 The Hellenic Republic claims that the Court should:

— declare its application admissible;

— annul the contested decision in its entirety, or in the alternative annul Article 2 of the decision, which requires recovery of the aid found to be unlawful, together with interest.

19 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the Hellenic Republic to pay the costs of the proceedings.

The application

20 The Hellenic Republic puts forward a large number of arguments relating to Article 32(2) of Law No 2008/92 and Article 5 of Law No 2237/94, and also to AGNO's particular circumstances. Those arguments may be regrouped into seven pleas which will be examined in turn.

The first plea, alleging infringement of Article 88 EC

The first limb of the first plea, alleging that the subject-matter of the proceedings is misconceived

21 The Hellenic Republic maintains that the Commission's review should have related to the aids which were actually paid, not Article 32(2) of Law No 2008/92. It submits that that provision was no longer applicable to individual cases when the Commission stopped considering the matter. The Hellenic Republic maintains

that the Commission knew the number and identity of the agricultural cooperatives which were the recipients of the aid and, furthermore, based the contested decision on information about those cooperatives provided by the Greek Government. In those circumstances, the decisions taken pursuant to Article 32(2) of Law No 2008/92 should have been regarded as individual aid measures.

22 The Hellenic Republic also claims that each case of rescheduling of debts made pursuant to Article 5 of Law No 2237/94 should have been examined separately.

23 In that regard, it must be stated that the Commission was right to conclude that Article 32(2) of Law No 2008/92, which provides for the granting of aid in individual cases to undertakings, defined in a general and abstract manner, is an aid scheme.

24 It must be pointed out that, in the case of an aid scheme, the Commission may confine itself to examining the general characteristics of the scheme in question without being required to examine each particular case in which it applies. That power cannot be altered by the fact that the aid scheme in question has ceased to apply (see inter alia Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 51).

25 In those circumstances, the Commission did not err by not examining each individual aid granted pursuant to Article 32(2) of Law No 2008/92.

26 It follows that the first limb of the first plea must be rejected.

The second limb of the first plea, alleging infringement of the rule in *Lorenz*

27 The Hellenic Republic claims that the Commission failed to carry out the preliminary examination of the aid scheme provided for in Article 32(2) of Law No 2008/92 within two months of notification of the scheme, the period set by the Court in Case 120/73 *Lorenz* [1973] ECR 1471). The Commission therefore wrongly classified that aid scheme as a non-notified new aid scheme.

28 The Hellenic Republic states that it had informed the Commission on 7 June 1993 of its intention to apply the provisions of Article 32(2) of Law No 2008/92. It points out that, according to the settled case-law of the Court of Justice, notification of planned aid measures enables the Commission to carry out a preliminary investigation of those measures within a period of two months.

29 However, according to the Hellenic Republic, the Commission only informed Greece of its decision to initiate the procedure provided for in Article 93(2) of the Treaty, with respect to Article 32(2) of Law No 2008/92, by letter of 19 December 1997, that is, four and a half years after notification.

30 In that regard, it should be pointed out that, under the first sentence of Article 88 (3) EC, plans to introduce or alter aid measures must be notified to the Commission before they are implemented. The Commission then conducts an initial review of the planned aid. If at the end of that review it considers a plan to

be incompatible with the common market, it must without delay initiate the consultative examination procedure under Article 88(2) EC.

31 It follows from the last sentence of Article 88(3) EC that throughout the preliminary period the Member State concerned may not put the planned aid into effect. Where the consultative examination procedure is initiated, that prohibition continues until the Commission reaches a decision on the compatibility of the planned aid with the common market (Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 38). However, if the Commission has not responded within two months of notification, the Member State concerned may implement the plan after informing the Commission (see the judgment in *Lorenz*, cited above, paragraph 4).

32 Without it being necessary to decide whether the planned aid was notified in accordance with the provisions of Article 88(3) EC and whether the two-month period had elapsed, it must be held that the Hellenic Republic subsequently implemented the planned aid without informing the Commission beforehand.

33 In those circumstances, the Commission rightly classified Article 32(2) of Law No 2008/92 as a non-notified new aid scheme.

34 Accordingly, the second limb of the first plea must be rejected.

The third limb of the first plea, alleging infringement of Council Decision No 14015

35 The Hellenic Republic claims that by Decision No 14015 the Council authorised, pursuant to the third subparagraph of Article 88(2) EC, State aid referred to in Law No 2538/97, which repeatedly refers to the provisions of Law No 2237/94. It maintains that it follows that the Council implicitly validated all previous aid measures granted under the latter law. It claims that, in those circumstances, farmers and agricultural cooperatives could not foresee that they would have to repay, in 2000, aid granted prior to Decision No 14015.

36 In that regard, it should be pointed out that, under the third subparagraph of Article 88(2) EC, the Council may, acting unanimously, decide that a State aid measure shall be considered to be compatible with the common market, in derogation from Article 87 EC, if such a decision is justified by exceptional circumstances.

37 Decision No 14015 states that some provisions of Law No 2538/97 are compatible, in derogation from Article 87 EC, with the common market up to a maximum of GRD 158 672 billion.

38 It must be observed that that decision does not relate to the aid schemes covered by the contested decision.

39 In those circumstances, it must be held that Decision No 14015 does not affect the validity of the contested decision.

40 It is therefore appropriate to reject the third limb of the first plea and, consequently, the plea in its entirety.

The second plea, alleging infringement of Article 87(1) EC

The first limb of the second plea, alleging misapplication of the private investor or creditor principle

41 First, the Hellenic Republic complains that the Commission wrongly concluded that the settlement of debts by the ABG under Article 5 of Law No 2237/94 does not comply with the private investor or creditor principle.

42 It states that in 1994 certain circumstances, including the collapse of the Soviet Union, to which most Greek agricultural produce was sent, meant that many agricultural cooperatives were unable to pay their debts.

43 The Hellenic Republic explains that the ABG sought to enable the cooperatives to survive, in order to recover the sums lent and to continue to provide the

cooperatives with banking services by receiving the commissions and remuneration relating to them.

44 It maintains that the ABG's important role in the agricultural sector in Greece requires that bank to take account of major sectorial parameters in its decisions and to protect its reputation as principal lender in the sector. According to the Hellenic Republic, it is very doubtful that a private bank could have rescheduled the debts of the agricultural cooperatives to the same extent as the ABG.

45 With regard to the AGNO cooperative, the Hellenic Republic considers that, contrary to the view held by the Commission, the ABG could accept the personal assets of AGNO's members as security against the risk of the cooperative's insolvency.

46 In that regard, it may be observed that Article 5 of Law No 2237/94 establishes debt rescheduling terms which are very favourable to the borrower. As the Advocate General observes in point 126 of his Opinion, it is very difficult to imagine that a private bank operating under normal market conditions would agree to a three-year period of grace and an interest rate of 50% of the market rate as provided for in that article.

47 It is also apparent from the arguments put forward by the Hellenic Republic that the ABG cannot act solely in its own commercial interest, as a private bank would do, but must take account of the broader interests in its decisions.

48 In those circumstances, the Hellenic Republic has not established that the Commission misapplied the private investor criterion with regard to the rescheduling of debts by the ABG under Article 5 of Law No 2237/94.

49 So far as concerns the specific case of the AGNO cooperative, it need only be observed that, in the light of the circumstances of the case, namely that the AGNO cooperative was in financial difficulties, that it had already benefited from the measures under Laws Nos 2008/92, 2198/94 and 2237/94 and that it was unable to offer adequate security for the settlement of its debts, the Commission was entitled to find that the ABG did not act as a private investor when it rescheduled the debts of that cooperative under Article 5 of Law 2237/94.

50 In those circumstances, the first limb of the second plea must be rejected.

The second limb of the second plea, concerning the existence of aid granted by the State or through State resources

51 The Hellenic Republic claims that the settlement of debts by the ABG, in accordance with Article 5 of Law No 2237/94, cannot be regarded as aid using State resources since the Greek State did not pay compensation to the ABG.

52 In that regard, it should be pointed out that Article 87(1) EC includes all the financial resources which the State may indeed use to support undertakings. The

fact that those resources constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources and for the measure to fall within the scope of Article 87(1) EC (Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 50).

53 It is not disputed that the Greek State is the ABG's sole shareholder and that it appoints the members of its board of directors. The Greek State can thus have a dominant influence, directly or indirectly, on the use of the ABG's financial resources.

54 Therefore, the Commission was right to conclude, in point 105 of the statement of reasons for the contested decision, that the rescheduling of debts under Article 5 of Law No 2237/94 involved the use of State resources.

55 The second limb of the second plea must therefore be rejected.

The third limb of the second plea, concerning the absence of an obligation to reschedule debts

56 The Hellenic Republic claims that Article 5 of Law 2237/94 should not be regarded as State aid since Article 5 does not impose any obligation on the ABG to reschedule the debts of the agricultural cooperatives.

57 In that regard, it need only be stated that the fact that the ABG is not required to reschedule the debts of agricultural cooperatives which apply for rescheduling does not prevent the measures taken under Article 5 of Law No 2237/94 from being State aid.

58 Since the Commission was entitled to find that the ABG was subject to State control and that it had rescheduled debts of the agricultural cooperatives on terms which did not comply with the private investor principle, it could regard Article 5 of Law No 2237/94 as a State aid scheme.

59 The third limb of the second plea must therefore also be rejected.

The fourth limb of the second plea, alleging misapplication of the reference rate

60 The Hellenic Republic maintains that the Commission wrongly concluded, in points 128 to 132 of the grounds of the contested decision, that the difference between the interest rate of 21.5% applied by the ABG when rescheduling the debt of the AGNO cooperative, under Decision No 1620/89, and the reference rate of 26.47% applicable on that date in Greece constituted State aid within the meaning of Article 87(1) EC. The Hellenic Republic considers that the Commission's belief that the interest rate applied to the rescheduling of AGNO's debt should be compared with the reference rate is unfounded. It claims that the Commission applies the reference rate to determine the amount of regional aid. On the other hand, according to the Hellenic Republic, the banks do not use that rate when granting loans to their clients.

61 In that regard, it should be pointed out that the reference rate is used to calculate the element of aid present in subsidised loan schemes. The reference rate is deemed to reflect the average level of interest rate applicable in a Member State to medium- and long-term loans for which the usual securities have been provided.

62 For reasons of legal certainty and equality of treatment, the Commission may consider, as a general rule, that it is legitimate to apply the reference rate in force during a certain period to all loans granted during that period (Case C-457/00 *Belgium* v *Commission* [2003] ECR I-6931, paragraph 72).

63 In those circumstances, the Commission rightly held, in points 128 to 132 in the statement of reasons for the contested decision, that the difference between the interest rate applied and the higher reference rate applicable on that date in Greece constituted State aid within the meaning of Article 87(1) EC.

64 The fourth limb of the second plea must therefore be rejected.

The fifth limb of the second plea, alleging that neither competition nor trade between the Member States has been affected

65 The Hellenic Republic considers that, even if all the settlements of debts under Laws Nos 2237/94 and 2198/4 and under Decision No 1620/89 are regarded as

State aid within the meaning of Article 87 EC, they have neither distorted competition nor altered the conditions of trade between the Member States.

66 According to the Hellenic Republic, the selective granting of a relative competitive advantage through State aid or State resources to certain undertakings or for certain products can distort competition only if the negative effects of that advantage are evident and conclusive. In the present case, it considers that the lack of a significant effect on intra-Community trade prevents classification of aid as contrary to Community law.

67 It also points out that a large number of debt write-offs under Article 32(2) of Law No 2008/92 and of settlements of debts under Article 5 of Law No 2237/94 were too small in amount to have a significant effect on intra-Community trade, according to Commission Notice 94/C 368/05 on Community Guidelines on State aid for rescuing and restructuring firms in difficulty, published in the *Official Journal of the European Communities* of 23 December 1994 (OJ 1994 C 368, p. 12, hereinafter 'the Guidelines').

68 According to the Hellenic Republic, the Commission did not explain on what grounds it had reached the conclusion that the settlements in question actually affected trade between the Member States.

69 As regards the argument that the overall amount of aid in question is small and that it is divided between a large number of farmers, each of whom receives a

negligible sum in national or Community terms, it is settled case-law of the Court that the relatively small amount of aid or the relatively small size of the undertaking which receives it does not prima facie exclude the possibility that intra-Community trade may be affected or competition distorted (see inter alia Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraphs 11 and 12; Case C-142/87 *Belgium* v *Commission* ('*Tubemeuse*') [1990] ECR I-959, paragraph 43; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 42; Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 86, and Case C-113/00 *Spain* v *Commission* [2002] ECR I-7601, paragraph 30).

70 Other factors may be decisive when assessing the effect of aid on trade, such as whether the aid is cumulative and whether the undertakings that receive it are operating in a sector that is particularly exposed to competition (see *Spain* v *Commission*, cited above, paragraph 30).

71 It appears that the sector in question is exposed to fierce competition between the producers of the Member States whose products are traded within the Community. It is also apparent from point 106 of the contested decision that the Greek producers export substantial quantities of agricultural products to other Member States.

72 In those circumstances, the grant of aid will distort competition and affect trade between Member States, as is apparent from points 107 and 108 of the statement of reasons for the contested decision.

73 It is true, according to the Guidelines and to the Commission's Notice 96/C 68/06 on the *de minimis* rule for State aid, published in the *Official Journal of the European Communities* of 6 March 1996 (OJ 1996 C 68, p. 9, hereinafter 'the Notice on the *de minimis* rule for State aid'), that where the amount of aid is very small it may not have an appreciable effect on trade and competition between Member States, and is therefore exempt from the requirement of prior notification to the Commission.

74 However, it is apparent both from point 2.3 of the Guidelines and from the fourth paragraph of the Notice on the *de minimis* rule for State aid that the *de minimis* rule does not apply to the agriculture and fisheries sectors (*Spain* v *Commission*, cited above, paragraph 35).

75 The Hellenic Republic is therefore not justified in relying on it in this case.

76 In the light of all these considerations, the fifth limb of the second plea must be rejected as unfounded, and, accordingly, the plea must be rejected in its entirety.

The third plea, alleging infringement of Article 87(2)(b) EC

77 The Hellenic Republic maintains that the Commission should have regarded the aid granted under Article 32(2) of Law No 2008/92 and Article 5 of Law No

2237/94 as aid compatible with the common market, since it is designed to make good damage caused by natural disasters or exceptional occurrences.

78 In any event, it states that the aid granted to AGNO and certain other cooperatives following the Chernobyl nuclear disaster should have been regarded as such aid. AGNO bought milk produced by its members at the market price prevailing before Chernobyl after the milk market collapsed as a consequence of that disaster. The purpose of the aid granted to the cooperative, under Article 32 (2) of Law No 2008/92 and Article 19 of Law No 2198/94, was to reimburse the sums paid out by the cooperative on account of the Chernobyl disaster.

79 The Commission disputes the claims made by the Hellenic Republic. In so far as concerns the losses allegedly suffered by AGNO and certain other agricultural cooperatives, it argues that the Member State has not established a causal link between those losses and the damage caused to farmers by the Chernobyl disaster. According to the Commission, in the application of Article 32(2) of Law No 2008/92 no reference whatever is to be found to the damage actually suffered by producers. The absence of the essential link between the Chernobyl nuclear accident and the aid is also confirmed by the lapse of time between the circumstances which caused the 'damage' and the introduction of the 1992 scheme.

80 In that regard, it should be pointed out that the provisions of Article 87(2)(b) EC state that 'aid to make good the damage caused by natural disasters or exceptional occurrences' are to be compatible with the common market.

81 Since it constitutes a derogation from the general principle laid down in Article 87(1) EC that State aid is incompatible with the common market Article 87(2)(b) EC must be construed narrowly (Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 49, and Case C-301/96 *Germany* v *Commission* [2003] ECR I-9919, paragraph 66).

82 Consequently, only economic disadvantages directly caused by natural disasters or by exceptional occurrences qualify for compensation as provided for in that provision(see to this effect Case C-156/98 *Germany* v *Commission*, cited above, paragraph 54, and Case C-301/96 *Germany* v *Commission*, cited above, paragraph 72).

83 Under Article 32(2) of Law No 2008/92, the Greek State could assume and settle debts owed to the ABG by agricultural cooperatives provided that they were incurred owing to the implementation of a social or some other intervention policy on the instructions or on behalf of the State.

84 It is apparent from the wording of that provision that it sanctions the intervention of the Greek State to settle all kinds of debts incurred by agricultural cooperatives with the ABG, provided that they relate to social purposes. It also appears that Article 32(2) of Law No 2008/92 was applied, in accordance with its wording, to very diverse situations.

85 A provision with so broad a scope cannot be regarded as aid to make good the damage caused by natural disasters or exceptional occurrences.

86 It must be said that the same considerations are valid and the same conclusions must be reached with regard to the aid scheme provided for in Article 5 of Law No 2237/94.

87 In those circumstances, it must be held that the Commission did not err in considering that Article 32(2) of Law No 2008/92 and Article 5 of Law No 2237/94 did not qualify for the derogation referred to in Article 87(2)(b) EC.

88 As regards the aid granted to AGNO under Article 32(2) of Law No 2008/92 and Article 19 of Law No 2198/94, it must be held that the Hellenic Republic has not been able to establish a direct link between that aid and the Chernobyl nuclear disaster.

89 Nor has it established that the amounts of aid granted to AGNO, under those provisions, actually correspond to losses incurred by members of the cooperative as a result of the Chernobyl nuclear disaster.

90 Therefore, the third plea must also be rejected.

The fourth plea, alleging infringement of Article 87(3)(a) EC

91 The Hellenic Republic claims that the Commission wrongly found that Article 32 (2) of Law No 2008/92 did not constitute State aid to promote economic

development in certain areas of Greece and, accordingly, aid compatible with the common market within the meaning of Article 87(3)(a) EC.

92 In that regard, it need only be pointed out that an aid scheme such as that provided for in Article 32(2) of Law No 2008/92, to grant aid to agricultural cooperatives irrespective of the area in which they are established, does not satisfy the criterion of regional specificity to qualify for the derogation provided in Article 87(3)(a) EC.

93 In those circumstances, the Commission was justified in concluding that Article 32 (2) of Law No 2008/92 did not qualify for the derogation provided by Article 87 (3)(a) EC.

94 The fourth plea must therefore be rejected.

The fifth plea, alleging infringement of Article 87(3)(c) EC

95 The Hellenic Republic claims that, even if the Court considers that Article 5 of Law No 2237/94 should be regarded as State aid, the provision is compatible with the common market under Article 87(3)(c) EC, which concerns aid to facilitate the development of certain economic activities or certain economic areas.

96 According to the Hellenic Republic, the Commission was wrong to conclude that the rescheduling of the debts by the ABG under Article 5 of Law No 2237/94 did not satisfy the five conditions laid down in the Guidelines, namely, the restoration of the viability of the beneficiaries of the aid, the avoidance of undue distortions of competition, the proportionality of the aid, the full implementation of a restructuring plan and annual reports to monitor that implementation. The Hellenic Republic considers that Article 5 of Law No 2237/94 does indeed permit the restoration of the firms' viability, prevents undue distortions of competition, provides for aid in proportion to the restructuring benefits, requires full implementation of the restructuring plan and provides for appropriate monitoring and for annual reports.

97 In that regard it must be pointed out that, when applying Article 87(3) EC, the Commission has a wide discretion the exercise of which involves economic and social assessments which must be made in a Community context, and that the Court of Justice, when reviewing the legality of the exercise of that freedom, cannot substitute its own assessment for that of the competent authority but must confine itself to examining whether the latter assessment is vitiated by a manifest error or by a misuse of powers (Case C-456/00 *France* v *Commission* [2002] ECR I-11949, paragraph 41).

98 It should be made clear, however, that the Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and do not depart from the rules of the Treaty (see, in particular, Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 62, and *Italy* v *Commission*, cited above, paragraph 52).

99 In the present case, it should be pointed out that the Commission found inter alia in point 176 of the statement of reasons for the contested decision, in respect of

compliance with the second condition, relating to the prevention of distortions of competition, that the measures should avoid, as far as possible, adverse effects on competitors, and that when there is an excess of production capacity, the restructuring plan must make a contribution, proportionate to the amount of aid received, to the restructuring of the relevant market in the Community by irreversibly reducing or closing the capacity in question. The Commission observed, in point 181 of the statement of reasons for the contested decision, that Article 5 of Law No 2237/94 does not contain any provision concerning measures taken by the Greek State to offset as far as possible adverse effects on competition. Furthermore, the aid scheme applies to cooperatives covering all the agricultural sector, including sub-sectors for which there is an excess of production capacity. As regards the specific case of AGNO, the Commission stated, in point 198 of the statement of reasons for the contested decision, that that undertaking is active in such a sector and that, in spite of its size, the restructuring measures imposed on AGNO did not include any type of capacity reduction.

00 Although it states that Article 5 of Law No 2237/94 satisfies the second condition mentioned in the Guidelines, the Hellenic Republic does not challenge the substance of the Commission's findings in the contested decision.

01 Without it being necessary to examine whether Article 5 of Law No 2237/94 satisfies the other conditions mentioned in the Guidelines, the fifth plea must therefore be rejected.

The sixth plea, alleging infringement of the principles of proportionality and the protection of legitimate expectations

02 The Hellenic Republic claims that the contested decision is disproportionate in that it provides for the recovery of the aid. It is inconceivable that aid granted in

compliance with the procedure laid down in Article 88 EC should be recovered after more than seven years. Referring to Case 223/85 *RSV* v *Commission* [1987] ECR 4617, it also considers that such a delay could lead the beneficiary of the aid to have legitimate expectations which would prevent the Commission from instructing the national authorities to order the repayment of the aid.

103 It should be pointed out, in that regard, that removing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful. Consequently, the recovery of State aid unlawfully granted, for the purpose of restoring the status quo ante, cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aid (*Tubemeuse*, cited above, paragraph 66).

104 As regards the principle of the protection of legitimate expectations, it should be stated that, in view of the mandatory nature of the supervision of State aid by the Commission under Article 88 EC, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article (Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 51, and Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25).

105 However, the contested aid was not granted in accordance with the procedure laid down in Article 88 EC.

106 In so far as concerns the judgment in *RSV* v *Commission*, cited above, relied on by the Hellenic Republic, it should be pointed out that the facts in the present case

are not comparable to the facts which justified the annulment of the Commission's decision in that judgment. As is apparent from paragraphs 14 to 16 of the judgment in *RSV* v *Commission*, cited above, that case concerned aid to meet additional costs of an operation which had received aid authorised by the Commission in a sector which, for years, had received aid granted by the Netherlands Government and authorised by the Commission.

7 However, in the present case, the procedure opened under Article 88(2) EC concerned new aid schemes which warranted an in-depth examination by the Commission.

8 In those circumstances, the contested decision cannot be regarded, either in so far as it requires repayment of the contested aid or in so far as it also requires the payment of interest, as disproportionate or as infringing the legitimate expectations of the undertakings which received the aid.

9 The sixth plea should therefore be rejected.

The seventh plea, alleging that it is wholly impossible to recover the aid

0 The Hellenic Republic maintains that it is wholly impossible to implement the contested decision. It states inter alia that the members of the agricultural cooperatives stand surety for the cooperatives when they and their associations

are unable to pay their debts when they fall due. It points out that the social, economic and political problems which would be caused by compulsory sale proceedings against thousands of lone farmers are obvious.

111 It also points out that the rescheduling of the debts of the agricultural cooperatives by the ABG, under Article 5 of Law No 2237/94 and Decision No 1620/89, are based on loan agreements governed by private law. According to the Hellenic Republic, the consequence of that is that the Commission cannot order the recovery of the aid relating to an individual case of debt rescheduling by the ABG.

112 In that regard, it should be pointed out that, although unsurmountable difficulties may prevent a Member State from complying with its obligations under Community law (see to that effect Case 101/84 *Commission* v *Italy* [1985] ECR 2629, paragraph 16), mere apprehension of such difficulties cannot justify the State's failure to apply that law correctly (see Case C-52/95 *Commission* v *France* [1995] ECR I-4443, paragraph 38, and Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 55).

113 The circumstances referred to by the Hellenic Republic, relating to the financial position of the agricultural cooperatives, have not shown that it is impossible to recover the aid which is the subject of the contested decision. The same is true of the Hellenic Republic's argument that aid cannot be recovered when it has been granted under a private-law contract. As the Advocate General rightly points out, in point 196 of his Opinion, the form in which aid is provided cannot be deemed relevant. Member States could otherwise evade the applicable State aid rules by giving them a particular form.

114 It should also be pointed out that a Member State which encounters unforeseen and unforeseeable difficulties in implementing a Commission decision on State aid, or becomes aware of consequences not envisaged by the Commission, must submit those problems for consideration by the Commission and suggest appropriate amendments to the decision in question. In such a case the Commission and the Member State concerned must, in accordance with the duty of genuine cooperation between the Member States and the Community institutions stated in particular in Article 10 EC, work together in good faith with a view to overcoming the difficulties whilst fully observing the Treaty provisions, in particular the provisions on aid (see inter alia Case C-404/00 *Commission* v *Spain* [2003] ECR I-6695, paragraph 46, and Case C-457/00 *Belgium* v *Commission*, cited above, paragraph 99).

115 Accordingly, the seventh plea, alleging that it is wholly impossible to recover the aid, must be rejected.

116 In those circumstances, the application must be dismissed in its entirety.

Costs

117 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Hellenic Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the Hellenic Republic to pay the costs.**

Jann Timmermans von Bahr

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass
Registrar

V. Skouris
President