OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 18 January 2001 [1]

A — Introduction

1. By application registered on 24 August 1999 in the Registry of the Court of Justice, the European Commission brought an action under the second paragraph of Article 226 EC for a declaration that, by failing to adopt within the prescribed period the measures necessary to transpose into its own law Council Directive 96/43/EC of 26 June 1996 amending and consolidating Directive 85/73/EC in order to ensure financing of veterinary inspections and controls on live animals and certain animal products and amending Directives 90/675/EEC and 91/496/EEC (OJ 1996 L 162, p. 1; hereinafter 'the Directive'), the Federal Republic of Germany has failed to fulfil its obligations under the EC Treaty and that directive.

2. Article 1 of the Directive replaced the articles of and annexes to Directive 85/73 by new texts set out in the Annex to the Directive, and Article 2 made some amendments to Directives 90/675 and 91/496. Article 4 of the Directive required the Member States to bring into force the laws, regulations and administrative provisions necessary in order to comply with the Directive (paragraph 1) and to communicate to the Commission the text of the main provisions of national law which they adopt in the field governed by the Directive (paragraph 2). Under (i) in the first subparagraph of Article 4(1), the date for adoption of these provisions of national law was set at 1 July 1996 for the provisions of Article 7 and of Chapter I(1)(e) of Annex A to Directive 85/73, and at 1 January 1997 for the provisions of Chapter II, Section II (see Article 4.1, first subparagraph under (iii)) of Chapter III of Annex A and Chapter II of Annex C to Directive 85/73 and at 1 July 1997 for the other amendments (see Article 4.1, first subparagraph under (ii)). However, the second subparagraph of that article gave Member States a further period, which could extend to 1 January 1999, to comply

1 — Original language: Italian.

with the provisions of Section I of Chapter III of Annex A to Directive 85/73.

B — Pre-litigation procedure

3. Having received no communication from the German Government regarding the measures to transpose the Directive, on 5 November 1997 the Commission requested that Government under Article 169 of the EC Treaty (now Article 226 EC) to submit its observations within two months. In its communication of 11 February 1998, sent under cover of a letter of 17 February 1998 from the Permanent Representation, the German Government's response to the Commission was essentially that the part of the transposition falling within the competence of the Federal Government was complete, whereas that part within the competence of the *Länder* was still in progress, although not much was required for completion.

4. Therefore, noting that transposition of the Directive was not yet complete and, indeed, no further communication on the matter had been received from the German Government after that exchange of correspondence, on 7 August 1998 the Commission issued a reasoned opinion in which it complained that the Government was in breach of the obligations set out in the Directive and requested it to adopt the necessary measures within two months. The following November, the Federal Republic of Germany responded to the reasoned opinion and supplied more up-to-date particulars on progress by the *Länder* in transposing the Directive. However, even those particulars showed that transposition could not yet be regarded as complete.

5. No further information was supplied by the German Government after that and, on 24 August 1999, since the period specified in the reasoned opinion had long expired, the Commission brought the present proceedings.

C — The defence of the German Government

6. In its defence, the German Government states that, with respect to the situation described by the Commission in its originating application, further progress has been made in transposing the Directive although transposition is still not yet complete. It therefore does not deny that the Directive had not been fully transposed into its law upon the expiry of the period specified in the Commission's reasoned opinion. It argues, however, that the delay does not constitute an infringement which can be attributed to itself. The reasons for this are summarised below.

7. Firstly, the Federal Republic of Germany argues that a number of aspects of the Directive are unclear or contradictory and at all events such as to make the task of the

federal authorities or *Länder* governments engaged in properly transposing the Directive a difficult one. In this connection, the German Government also refers to a series of meetings which the federal and *Länder* authorities had had with the Commission's departments specifically for the purpose of clarification and consultation on transposing the Directive. Those meetings took place on 2 July and 2 December 1997 and on 24 November 1998, but they did not lead to tangible results or produced contradictory results.

8. Indeed, according to the German Government, the Commission itself helped to aggravate the difficulties since, in the course of those meetings, the various Commission departments taking part in them offered divergent interpretations of some provisions of the Directive. Thus the Commission failed in its duty of sincere cooperation under Article 10 EC and is now, by the present proceedings, acting in a manner injurious to the good faith of the German Government.

9. Lastly, the German Government cites in its defence the judgment of 9 September 1999 in Case C-374/97 *Feyrer* [1999] ECR I-5153 in which the Court interpreted certain provisions of Directive 85/73 (as amended by Council Directive 93/118/EC of 22 December 1993; OJ 1993 L 340, p. 15), that is of the Directive amended and consolidated by the Directive under consideration. It contends that the delays in transposing the Directive, of which the Commission complains, were also justified by the need to await that preliminary ruling. For all three reasons, therefore, the defendant Government asks that the application be dismissed.

D — Legal analysis

10. I must observe at once that, at least in part, the Commission's application cannot be granted. The application is intended to secure a declaration that the Federal Republic of Germany has failed to fulfil its obligations by not transposing the Directive, considered in its entirety, [2] within the periods specified therein. However, as we know, the question whether there is a failure to fulfil obligations must, as the Court has consistently held, be considered with reference to the situation existing upon the expiry of the period set in the reasoned opinion. [3] But, at that date (that is, at the beginning of October 1998), the Federal Republic of Germany still had several months in which to transpose the provisions of Section I of Chapter III of Annex A to Directive 85/73 since, as I noted earlier, the *second subparagraph* of Article 4(1) gave the Member States a further period (expiring on 1 July 1999) for transposition. [4] In my opinion, there-

2 — See point 15 of the Commission's application.

3 — See, among many others, the judgment in Case C-327/98 *Commission* v *France* [2000] ECR I-1851, paragraph 28.

4 — I see that the Commission has already made a similar error regarding the directive now under consideration. I refer specifically to Cases C-137/99 *Commission* v *Greece* [1999] ECR I-9009 and C-91/99 *Commission* v *Portugal* [2000] ECR I-4389, where the Court dismissed that part of the application which related to failure by Greece and by Portugal to transpose those very provisions of the second subparagraph of Article 4(1) of the Directive (see paragraphs 10 and 14, respectively, of those judgments). This is because in these instances the two-month period stated in the Commission's reasoned opinion expired at the end of September and the end of October, respectively, of 1998 (see paragraphs 6 and 8 of those judgements).

fore, the application should be declared inadmissible in respect of this part of the complaints made by the Commission. On the other hand, it is admissible in respect of the part that relates to the failure to transpose the provisions of the Directive in the *first subparagraph* of Article 4(1), and it is within these limits that I shall examine it below.

11. However, even within this more restricted context, it seems to me that the reasons put forward by the German Government to oppose the Commission's application cannot be accepted.

12. Firstly, and I believe that this is a decisive point, I must point out that if a directive is not fully and correctly transposed within the period prescribed for the purpose, a declaration of failure to fulfil an obligation is justified. [5] In this instance, the delay in transposition is not denied. Nor has the German Government pleaded *force majeure* or claimed that transposition is absolutely impossible, that is to say, one of the rare justifications which the Court, as a matter of principle, considers acceptable where a Member State delays implementation of a Community act. [6] As has been said, the Federal Republic of Germany relies only on alleged difficulties of interpretation raised by the Directive. Apart from the suspicion that those difficulties could not in fact have been so crucial if — at the end of the period specified in the Commission's reasoned opinion — they persisted only in respect of certain *Länder*, there remains the fact that not even the defendant Government felt that it could describe them as capable of amounting to '*force majeure*' or 'absolute impossibility'.

13. However, for the sake of completeness, I shall also examine the merits of the arguments raised by the German Government. I shall begin by noting that it is not entirely clear from the documents before the Court which are the difficulties of interpretation to which the federal authorities and/or the *Länder* refer. On this point the submissions of the Federal Republic of Germany seem too general to enable one to understand precisely in what sense and to what extent those difficulties could have hindered transposition of the Directive — particularly since it is not shown that other Member States have involved difficulties of a similar kind or at least so serious as to prevent transposition of the Directive. [7] If, therefore, those difficulties related to parti-

5 — See the judgments in Case C-268/93 *Commission* v *Spain* [1994] ECR I-947, paragraph 6, and in Case C-137/99, paragraph 9.

6 — See the judgments in Case 101/84 *Commission* v *Italy* [1985] ECR 2629, paragraph 16, in Case C-217/88 *Commission* v *Germany* [1990] ECR I-2879, paragraph 33, and in Case C-50/94 *Greece* v *Commission* [1996] ECR I-3331, paragraph 39, in which there are further references.

7 — The difficulties referred to in the text were not raised in any of the cases brought before the Court for failure to implement this directive: see the judgments in Joined Cases C-91/99 and C-137/99, cited above, and also the judgment in Case C-190/99 *Commission* v *Ireland* [2000] ECR I-4403, and the Opinion delivered by Advocate General Mischo in Case C-168/99 *Commission* v *Spain*, where the Commission subsequently withdrew its application.

cular matters of German law, I would have to point out that the Court has consistently held that a Member State may not invoke provisions, practices or circumstances in its own legal system in order to justify failure to fulfil obligations prescribed by a directive and to comply with the periods set for its transposition. [8] Nor, however, it must be added, may it invoke difficulties relating to interpretation of the directive to delay transposition beyond the time-limits specified. [9]

14. The German Government also claims that it had striven, with the aid of the Commission, to resolve these difficulties of interpretation and it refers insistently to the meetings with the relevant departments of the Commission to discuss the problems relating to transposition of the Directive. I imagine that the primary purpose of this insistence is to bear witness to the propriety and the good faith of the defendant Government in this case, and this concern seems to me to be perfectly understandable. However, I must observe that, given the objective nature of infringement proceedings, [10] the good will of the government of the Member State concerned, albeit helpful and valuable, is not capable of expunging the fact of the infringement, if an infringement there has been. [11] And I must also observe, in addition, that the meetings to which the German Government refers did not take place until after expiry of the periods specified in the first paragraph of Article 4(1). It need scarcely be pointed out that, in accordance with the duty of cooperation laid down in Article 10 EC, the German Government should have contacted the Commission services *in good time* for the purpose of finding a solution to the problems which it was encountering and, if appropriate, have requested an extension of the periods specified in the Directive. [12]

8 — See, among many others, the judgment in Case C-42/89 *Commission* v *Belgium* [1990] ECR I-2821, paragraph 24, in Case C-217/88 *Commission* v *Germany* [1990] ECR I-2879, paragraph 26, in Case C-71/97 *Commission* v *Spain* [1998] ECR I-5991, paragraph 17, in Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 13, in which there are further references, and in Case C-387/97 *Commission* v *Greece* [2000] I-5047, paragraph 70.

9 — See judgment in Case 301/81 *Commission* v *Belgium* [1983] ECR 467, paragraphs 10 to 12. In the sense that I indicate in the text, see the Opinion of Advocate General Léger in Case C-344/96 *Commission* v *Germany* [1998] ECR I-1165: he considered, in my opinion correctly, that if one were to allow any other approach this would allow '*a Member State ...* [to] *avoid its obligation to transpose a directive within the prescribed time-limit by raising doubts, alleged or real, on the interpretation of that directive*' (paragraph 12). It should also be added that, as the Court has observed, '*the governments of the Member States participate in the preparatory work for directives and must therefore be in a position to prepare within the period prescribed the legislative provisions necessary for their implementation*' (see Case 301/81, paragraph 11).

10 — See judgments in Case 301/81, paragraph 8, in Case C-73/92 *Commission* v *Spain* [1993] ECR I-5997, paragraph 19 (where there are further references), and in Case C-71/97, paragraph 14.

11 — I note that, in Case C-71/97, the Court stated that '*as in the present case [finding objectively that a Member State has failed to observe the obligations imposed on it by Community law], it is irrelevant whether the failure to fulfil obligations is the result of intention or negligence on the part of the Member State responsible, or of technical difficulties encountered by it*' (paragraph 15).

12 — In this connection, see the judgment in Case C-337/89 *Commission* v *United Kingdom* [1992] ECR I-6103, paragraph 27, where the Court stated that when it is seen to be necessary, a request for a longer period for complying with specified provisions of a directive must be made within the period laid down for its transposition and that the Commission may not entertain a late request to the same effect; see the judgments in Case C-42/89, paragraph 23, and in Case C-344/96, paragraph 9.

15. On the other hand, there might be more force in the argument to which the German Government has recourse in complaining of injury to its good faith caused by the conduct — described as uncooperative or contradictory — which the Commission is said to have displayed during the meetings referred to. If this were really the case (and there is no reason not to believe the defendant Government, particularly since in its pleadings the Commission has not replied on the point), the diverse, or even contradictory nature of the information given on those occasions by the Commission's departments would certainly not have assisted the German Government in a task that its internal difficulties had already made arduous. In that sense, the criticisms directed against the Commission by the Government would certainly not be unjustified, because it is incumbent upon the Commission's departments to arrive at a uniform position before taking part in meetings at which they are asked to collaborate in solving problems which Community legislation creates for a Member State. None the less, the fact remains that the Commission's conduct that is the subject of complaint is said to have occurred *after* the expiry of the periods prescribed for transposing the Directive and that, in any case, that conduct, at least as has been described, does not seem so serious as to be able to justify the failure to transpose the Directive.

16. Lastly, as regards the German Government's reference to the *Feyrer* judgment (see point 9 of this Opinion), I would merely observe that, in that case, the order for reference was made on 20 October 1997 and reached the Court Registry on 3 November 1997. At that date, the provisions of the Directive set out in the first subparagraph of Article 4(1) should already have been transposed by the Federal Republic of Germany.

17. I therefore consider that my conclusion must be that the failure on the part of the Federal Republic of Germany to transpose the provisions of the first subparagraph of Article 4(1) of Directive 96/43 constitutes a breach of its obligations under the Directive itself and under the third paragraph of Article 249 EC.

18. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to pay the costs, if applied for by the successful party. Since the Commission has applied for costs and the Federal Republic of Germany has, in my opinion, been unsuccessful as regards the main part of its application, I propose that the defendant be ordered to pay costs.

Conclusion

19. In the light of the foregoing considerations, I therefore propose that the Court should declare that:

(1) By failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with the provisions specified in the first subparagraph of Article 4(1) of Council Directive 96/43/EC of 26 June 1996 amending and consolidating Directive 85/73/EC in order to ensure financing of veterinary inspections and controls on live animals and certain animal products and amending Directives 90/675/EEC and 91/496/EEC, the Federal Republic of Germany has failed to fulfil its obligations under the third paragraph of Article 249 EC and under the first subparagraph of Article 4(1) of Directive 96/43;

(2) The remainder of the application is inadmissible;

(3) The Federal Republic of Germany shall pay costs.