OPINION OF MR ADVOCATE GENERAL DARMON

delivered on 20 March 1990 *

Mr President,
Members of the Court,

1. In these Article 169 proceedings against the Kingdom of Belgium, the Commission seeks a declaration that a system requiring prior authorization for the importation of live animals is incompatible with Community law. It had initially also sought a declaration concerning that system as it applied to imports of meat, but withdrew that head of claim at the hearing following the adoption of an amendment of the Belgian legislation during the course of the procedure.

2. A distinction must be drawn between the requirement of a prior import authorization for bovine animals and swine and the requirement of a prior import authorization for other animals, in particular sheep, goats, poultry and solipeds. In the first case, the Commission claims that Belgian law is incompatible with Directive 64/432/EEC, [1] while in the second it alleges an infringement only of Article 30 of the Treaty. I shall consider the two cases in turn.

3. In the Commission's submission, Directive 64/432 has brought about complete harmonization of the measures which importing Member States may adopt with regard to the species to which it applies. Member States may therefore no longer rely on Article 36; they may merely examine the certificate issued by the official veterinarian of the exporting State and, possibly, carry out spot checks, without prejudice to the application, where appropriate, of the safeguard provisions in Article 9 of the directive. The completeness of that system precludes any requirement of import authorizations, even if they are issued automatically.

4. The Belgian Government maintains, first of all, that the authorization in issue does not introduce any health inspection or restriction of intra-Community trade over and above the health inspection provided for in Directive 64/432. The authorization system is, moreover, intended to make up for the absence of any harmonized information system within the framework of Directive 64/432. Until such a system is set up, the Belgian arrangements will remain necessary in order to achieve two objectives:

(i) to inform the importer that importation is not prohibited on health grounds;

(ii) to provide a document containing administrative information for both the inspection authority and the importer.

5. Since Belgium appears to be contesting the restrictive effects of the system in question, it should be pointed out first of all

* Original language: French.

1 — Council Directive 64/432/EEC of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine (OJ, English Special Edition 1963-64, p. 164).

that the Court has considered import authorizations to constitute an infringement of Article 30 of the Treaty. It has held that

'Article 30 precludes the application to intra-Community trade of national provisions which require, *even as a pure formality*, import licences or any other similar procedure' [2]

and categorically stated that

'freedom of movement is a right whose enjoyment may not be dependent upon a discretionary power or on a concession granted by national authorities'. [3]

The fact that an import authorization may be issued automatically does not, therefore, exempt it from the prohibition in Article 30 of the Treaty.

6. If, as the Commission contends, the harmonization achieved in this field is complete, the Kingdom of Belgium may no longer rely on Article 36 and must confine itself to the procedures laid down in Directive 64/432.

7. Let us first consider the Court's analysis in *Simmenthal* [4] with regard to Directive 64/432. After pointing out that the approximation of national legislation consisted

'mainly in imposing upon exporting Member States the obligation to ensure compliance with certain veterinary and public health measures intended *inter alia* to guarantee that the exported animals are not a source of contagious disease' [5]

the Court observed that,

'with a view to providing the competent authorities of the Member States of destination with a guarantee that the livestock or imported meat satisfy the prescribed veterinary and public health requirements the directives lay down that the imported goods must be accompanied by a health certificate certifying that the rules relating to veterinary and public-health inspections have been complied with and the inspections carried out'. [6]

8. It then explained that

'Article 6 of Directive 64/432 (animals) allows the country of destination to prohibit the introduction of bovine animals into its territory if an examination made at the frontier post by an official veterinarian reveals that the animals are affected by, or suspected of being affected by, or of being contaminated by a compulsorily notifiable disease or that the provisions of Articles 3 and 4 have not been observed;

. . . ;

Furthermore the same provision with a view to facilitating these inspections permits each

2 — Judgment in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, paragraph 9, emphasis added.

3 — *Ibidem*, paragraph 10.

4 — Judgment in Case 35/76 *Simmenthal SpA* v *Italian Minister for Finance* [1976] ECR 1871.

5 — *Ibidem*, paragraph 27.

6 — *Ibidem*, paragraph 29.

Member State to designate the frontier posts to be used for the introduction of the animals into its territory, *and to require advance notification of the entry of such animals*'.[7]

9. The Court concluded that

'the aim of the [harmonized system of health inspections] is to transfer supervision to the exporting Member State and to replace in this way the systematic measures of protection at the frontier with a uniform system so as to make multiple frontier inspections unnecessary and at the same time to give the Member State of destination the opportunity of ensuring that the guarantees provided by the system of inspections thus standardized are in fact given;

it follows that systematic veterinary and public-health inspections at the frontier of the products referred to in the directives mentioned above are no longer necessary or, consequently, justified under Article 36 as from the latest dates specified in the directives for the entry into force of the national provisions which are necessary in order to comply with the said directives'.[8]

10. Those extracts show unambiguously that Directive 64/432 has brought about complete harmonization of intra-Community trade in bovine animals and swine. Any system of import authorizations established unilaterally by Member States appears, therefore, to be contrary to the very system of that directive.

11. But Belgium justifies the authorization system in issue by pointing out *inter alia* that there is no 'harmonized information system' in the directive.

12. In that regard, I cannot but point out that Article 6(2) of the directive authorizes the Member States to require importers to give up to 48 hours' advance notice of importation. That procedure enables the States of destination to ensure, if necessary, the supervision of the animals' health after importation, a point to which the Belgian Government has attached great importance.

13. Furthermore, the arguments put forward by the Belgian Government do not, in my opinion, in any way bear out the view that harmonization is not complete.

14. In that connection, it refers to the explanatory memorandum prefacing the proposals for regulations[9] concerning veterinary checks in which the Commission proposes *inter alia* that veterinary checks at internal frontiers should be eliminated. With that in view, the Commission states that this general approach 'implies recourse to and the development of a mutual information system', from which the Kingdom of Belgium concludes that the information system is not harmonized as the law now stands.

15. I cannot find that argument convincing. Perusal of the document in question reveals that it envisages a modification of all the

7 — *Ibidem*, paragraphs 30 and 32, emphasis added

8 — *Ibidem*, paragraphs 35 and 36

9 — COM(88) 383 final.

provisions governing veterinary checks in intra-Community trade.

16. The proposal does indeed contain ad hoc provisions concerning information to be provided by the State of dispatch to the State of destination, but it must be noted that such arrangements are to be seen as a quid pro quo both for the elimination of all frontier veterinary checks, which are still possible under Directive 64/432 in the form of spot checks, and for the repeal of Article 6(2) of that directive, under which advance notification of importation may be required. [10]

17. It is not, therefore, a question of harmonizing an information system which is inadequate as Community law now stands but of envisaging measures appropriate to a new context in which frontier checks, at present possible in trade in bovine animals and swine to the extent specified above, are eliminated.

18. The Belgian Government's arguments clearly ignore the overall balance of the draft regulation in question. They in no way prove that Directive 64/432 is incomplete as regards the information to be provided to the State of destination.

19. Finally, the justification of the import authorization by the check required under Directive 81/389/EEC [11] is entirely irrelevant. The sole aim of that directive is to provide for frontier checks on the conditions in which live animals are transported; in no way does it provide that importation may be made conditional on prior authorization.

20. I therefore propose that the Court should declare that the system set up by the Kingdom of Belgium is incompatible with Directive 64/432 in so far as it concerns bovine animals and swine.

21. Let us now consider whether, in the light of Article 36, the import authorization is compatible with the Treaty as regards other live animals. I shall be brief.

22. The Court has held that

'the issue of an administrative authorization necessarily involves the exercise of a certain degree of discretion and creates legal uncertainty for traders'. [12]

Such a system therefore constitutes a serious infringement of the principle of free movement of goods, and the principle of proportionality is, in my view, totally ignored if, as the Belgian Government claims, the aim of the system is to inform importers *inter alia* that the importation is not prohibited and to record information of an administrative nature.

23. The disproportion between those aims and a system of authorizations is obvious. Doubt may even be cast on the relevance of

10 — See, in that connection, Article 14(2) of the proposal for a regulation.

11 — Council Directive 81/389/EEC of 12 May 1981 establishing measures necessary for the implementation of Directive 77/489/EEC on the protection of animals during international transport (OJ L 150, 6.6.1981, p. 1).

12 — Case 124/81 *Commission* v *United Kingdom*, cited above, paragraph 18.

the system: does it not purport, in the final analysis, to inform the importer of a right which he enjoys under Article 30 of the Treaty? Moreover, as the Court has already held,[13] measures less restrictive of trade, such as the completion of a declaration by the importer or the production of the certificates issued in the exporting Member State, would undoubtedly suffice to enable the importing Member State to obtain the information which is of use to it. It is thus clear that, under this head too, Belgium has failed to fulfil its obligations.

24. I therefore propose that the court should declare that by subjecting imports of live animals coming from other Member States to the requirement of a prior import authorization, whether issued automatically or otherwise, the Kingdom of Belgium has failed to fulfil its obligations under Article 30 of the EEC Treaty and under Directive 64/432.

25. I also propose that the Kingdom of Belgium should be ordered to pay all the costs, including those relating to the head of claim withdrawn by the Commission, in so far as the necessary measures were adopted during the course of the proceedings.

13 — Case 124/81 *Commission* v *United Kingdom*, cited above