OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 14 June 1988 *

Mr President,
Members of the Court,

1. In proceedings concerning the compatibility with Community law of national provisions requiring systematic inspection on the importation of fresh poultrymeat from another Member State, the Bundesverwaltungsgericht has referred to the Court six questions for a preliminary ruling on the interpretation of various instruments of secondary law.[1] However, the Court is also requested to state which provisions of the EEC Treaty form the basis for an individual citizen's right to rely on a directive where the State to which it is addressed has failed to fulfil its obligations under that directive.

2. Approaching the questions in the order in which they are set out in the decision submitting them to the Court, I turn first to question one, which seeks to establish whether systematic inspection involving the measures described by the national court is prohibited under Article 30 of the EEC Treaty as a 'measure having equivalent effect'. The principle laid down in the Court's judgment in *Dassonville*[2] is sufficient to answer this question in the affirmative. There can be doubt that the requirements in question are 'capable of hindering directly or indirectly, actually or potentially, intra-Community trade'.

3. However, the question then arises whether the measures in question can be justified under Article 36 of the Treaty. In this respect it should be pointed out that the Court has consistently held that recourse may not be had to this provision once the sphere in question has been harmonized.[3]

4. As regards Community trade in fresh poultrymeat, which is the subject of Directive 71/118, the Court considered in its judgment in *Delhaize*[4] that a harmonized system of health inspections had been introduced. More specifically, that decision extended to the matter in question the solution adopted in the *Simmenthal* case;[5] indeed, it repeated the following remarks from that case:

'... as far as fresh meat is concerned, the Court has already stated in its judgment of 15 December 1976 ... that the harmonized system of public health inspections, introduced in particular by Directive 64/433, has as its aim the abolition of barriers to intra-Community trade in fresh meat by the harmonization of public health measures. That system, which is based on the principle that the public health guarantees required by all the Member States are equivalent, accordingly has as its purpose 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, whilst at the same time giving

* Translated from the French.

1 — Council Directive 71/118/EEC of 15 February 1971 on health problems affecting trade in fresh poultrymeat (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 (OJ 1983, L 359, p. 8); Regulation (EEC) No 2777/75 of the Council of 29 October 1975 (OJ 1975, L 282, p. 77)

2 — Judgment of 11 July 1974 in Case 8/74 [1974] ECR 837.

3 — Judgment of 15 December 1976 in Case 35/76 Simmenthal [1976] ECR 1871; judgment of 5 October 1977 in Case 5/77 *Tedeschi* v *Denkavit* [1977] ECR 1555, at p. 1576; and, more recently, judgment of 3 October 1985 in Case 28/84 *Commission* v *Federal Republic of Germany* [1985] ECR 3097, at paragraph 25.

4 — Judgment of 6 October 1983 in Joined Cases 2 to 4/82 [1983] ECR 2973.

5 — Case 35/76, cited above.

the Member State of destination the opportunity of ensuring that the guarantees provided by the system of inspections thus standardized are in fact given.[6]

The Court also added that, in those circumstances, systematic public health inspections at the frontier carried out on the products referred to in Directive 64/433 were no longer necessary or, consequently, justified under Article 36 of the Treaty and that only occasional inspections were permissible, provided that they were not increased to such an extent as to constitute a disguised restriction on trade between Member States.[7]

Those considerations must be extended, for the same reasons, to the products covered by Directive 71/118 on problems affecting trade in fresh poultrymeat'.[8]

5. For the sake of completeness it should be added that in the judgment in *Simmenthal* the Court stated that:

'... in principle a mere examination of the documents (health certificates) which are required to accompany the products should disclose whether the conditions with regard to health have been fulfilled ...';[9]

it cannot be inferred from that choice of words that such measures are unlawful if carried out systematically.

6. It is therefore clear from the decisions of the Court that health inspections in the poultrymeat trade have been harmonized. It follows that veterinary inspections may be carried out only occasionally. Inspections of documents, even where they are systematic, are not prohibited. In so far as the detailed rules for their completion have not been the subject of harmonizing legislation, I think they may derive their justification from Article 36.

7. It therefore falls to the national court to determine whether the measures in question are 'justified, that is to say necessary for the attainment of [the] objective [pursued]',[10] it being understood that they 'may not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.[11] More specifically, since the matter in question has not been harmonized, the indications given in the Court's judgment in *United Foods*[12] concerning certain health inspections may, where appropriate, provide guidelines for the consideration of the manner in which documents are checked. However, I would add three comments, having regard to the existence of various provisions of secondary law.

8. In the first place, the prohibition laid down in Community law on systematic health inspections requires that they be distinguished from the verification of documents. To this end, the national court must ensure that the latter, irrespective of their classification under domestic law, are in fact limited to establishing that the

6 — Joined Cases 2 to 4/82, cited above, at paragraph 11.

7 — Ibid., paragraph 12.

8 — Ibid., paragraph 13.

9 — Case 35/76, cited above, at paragraph 38.

10 — Case 25/78, *Denkavit Futtermittel* [1979] ECR 3369, paragraph 21.

11 — Ibid., at paragraph 21.

12 — Case 132/80 [1981] ECR 995, in particular paragraph 28 at p. 1024: 'the requirement that notice must be given in writing setting forth all the details prescribed under the legislation at issue at least 24 hours before importation appears to be incompatible with the speed of transactions and of transportation in this field, given the perishable nature of the goods in question. If, with regard to the determination by the customs authority of the premises where control is to be carried out as well as of days and times of their opening, it appears that the effect of these measures is to hinder imports they would be justified only on condition that they could be shown to satisfy objective requirements appertaining to the organization of the public health service'.

references in the health certificate correspond to the goods, without possessing features which would bring them, in substantive terms, within the category of health inspections. In particular, the fact that a veterinarian has to carry out the inspection may be such as to reflect a surreptitious shift towards an unlawful 'grey zone'.

9. Furthermore, although there has been no harmonization of the manner in which documents relating to trade in fresh poultrymeat are to be checked, it must be borne in mind nevertheless that the documents themselves are Community documents and uniform in nature. Directive 71/118 states in this respect:

'as regards intra-Community trade, the issue of a health certificate drafted by an official veterinarian of the exporting country is considered to be the best way of *assuring* the competent authorities of the country of destination that a consignment of poultrymeat complies with the provisions of this directive; ... this certificate must accompany the consignment of poultrymeat to the place of destination'.[13]

The model health certificate set out in Annex IV of that directive provides as follows:

'I, the undersigned, official veterinarian, certify that:

(a) the poultrymeat described above and

(b) the packaging of the meat described above

bears a mark proving that the meat comes from animals slaughtered in approved slaughter houses ...' (my emphasis).

It would considerably diminish the value of the certificate if the statements which it contained were to be the subject of systematic verification.

10. Finally, there is the question of the possible effects of Directive 83/643 in this matter, but as I wish to observe the order adopted by the national court I shall consider this question at a later stage.

11. The second question seeks to establish whether the expression 'measure having equivalent effect' in Article 11 (2) of Regulation (EEC) No 2777/75 of the Council of 29 October 1975 must be interpreted in the same way as the corresponding expression in Article 30 of the EEC Treaty.

12. I need only be very brief on this point. As the Commission has correctly pointed out, the provision in question does not concern intra-Community trade. In my view it is clear from the regulation that it concerns trade with non-member countries. The first paragraph of the same Article 11 concerns the interpretation and application of the Common Customs Tariff, while the ninth recital in the preamble to the regulation, which logically relates to this article, states:

'the levy system makes it possible to dispense with all other protective measures at the external frontiers of the Community'.

13 — Eighth recital in the preamble to Directive 71/118, my emphasis.

13. Finally, and above all, in the judgments in the *Wigei*[14] and *Leonelli*[15] cases various aspects of Article 11 (2) of Regulation No 123/67 on the common organization of the market in poultrymeat (repealed and replaced by Regulation No 2777/75), identical in substance to the provision in question, were interpreted without its even being envisaged that it could apply to situations other than trade with non-member countries. I therefore propose that in reply to the question put by the national court it should be stated that the provision in question does not concern intra-Community trade.

14. By the third question, the national court, according to its own reasons for judgment, seeks

'to clarify on the basis of which provision of Community law there is a requirement not to apply a provision of national law on the ground that it is incompatible with a Community directive'.[16]

Two preliminary remarks are called for in this respect.

15. In the first place, the national court did not question the Court of Justice on the precise issue whether Directive 83/643/EEC was capable of being relied on by individuals. It may be thought, as the Commission has suggested, that this question, arising in a court from whose decisions there is no appeal, was one which must give rise to a reference for a preliminary ruling pursuant to the third paragraph of Article 177, particularly since the fourth, fifth and sixth questions submitted by the national court show that 'recourse to Community law is necessary to enable [the national court] to decide [the] case'.[17] Does this mean, however, that it is necessary to give an interpretation which has not been requested? The legal precision of the mechanism set up under Article 177 and the need to ensure that the respective jurisdictions of the Court of Justice and the national courts do not encroach on each other suggests that in this case it would be preferable not to do so.

16. I am led to make a further observation by the passage in the reasons for judgment of the Bundesverwaltungsgericht in which that Court states that it based its reasoning on the principle of good faith (Treu und Glauben) contained in Paragraph 242 of the BGB in order to enable an individual citizen to rely before the courts on a directive where the State has failed to fulfil its obligations thereunder. Without referring in detail here to the cardinal principles of the Community legal system, let me simply note that the status and the scope of its rules cannot be derived from rules of national law. Such an approach would weaken simultaneously the autonomy and the unity of Community law, which is 'independent of the legislation of the Member States'.[18]

17. This specific identity,[19] which Professor L. J. Constantinesco[20] analyses under three aspects as being uniform in its binding force (gleichbindend), uniform in meaning (gleichbedeutend) and invariable in substance (gleichbleibend), would be dissipated if its effects were derived from the rules of the Member States. The validity

14 — Judgment of 22 January 1980 in Case 30/79 [1980] ECR 151.

15 — Judgment of 22 March 1983 in Case 88/82 [1983] ECR 1061.

16 — P. 17 *in fine* of the original text.

17 — Judgment of 6 October 1982 in Case 83/81 *Cilfit* [1982] ECR 3415, at paragraph 11.

18 — Judgment of 5 February 1963 in Case 26/62 *Van Gend en Loos* [1963] ECR 1, at p. 24.

19 — 'The law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question' — judgment of 15 July 1964 in Case 6/64 *Costa* v *ENEL* [1964] ECR 585.

20 — 'La spécificité du droit communautaire', RTDE, 1966, p. 1.

of Community measures can under no circumstances depend on their conformity with national rules, including constitutional rules,[21] and their effects cannot be based on such rules, whatever their status in the domestic system. It is necessary always to maintain the *unity* of the law derived from the Treaties.

18. Subject to these observations, I shall now try to identify the factors on the basis of which a reply to the question put may be given. The decision of the national court, which examined the established case-law,[22] obliges us to review that case-law from a point of view which significantly restricts the possibilities, in so far as the Court has developed the law in this respect without resigning itself to a literal or formalistic interpretation.

19. We must therefore bear in mind, first of all, the Court's desire to give full effect to the provisions of Community law and to afford individuals complete and effective judicial protection. Even though the national court clearly wishes the Court of Justice to state which textual provision or which Community legal rule provides the basis for the solution in question, the Court's reply must remain within the approach adopted in previous cases.

20. The starting point of the analysis is of course provided by the Bundesverwaltungsgericht, which expressly refers to the fourth sentence (in other words the third paragraph) of Article 189 and Article 5 of the Treaty.

21. Let me say at once that these two provisions constitute the corner-stone on which the solution to this question rests.

22. Article 189 provides that directives are binding on the Member States. Article 5 imposes on them a positive and negative obligation whose scope and complexity have been analysed as a combination of the principles of good faith and Community loyalty and the duty not to adopt conflicting provisions, linked together in a principle of cooperation.[23]

23. Consideration of the case-law reveals two interrelated themes:

(i) the binding effect of directives;

(ii) the rule that States cannot rely as against individuals on their own failure to comply with their obligations.

24. In fact, the express statement of this basis came somewhat after the solution itself. It was in *Ratti*[24] that the Court, undoubtedly for the first time,[25] expressed this idea in stating that:

21 — Judgment of 17 December 1970 in Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

22 — The Court's judgments in Case 9/70 *Grad* [1970] ECR 825, and Case 33/70 *SACE* [1970] ECR 1213 'opened the way' (J. V. Louis: *L'effect direct des directives*, Mélanges Baugniet, p. 1) for a series of decisions, from which may be selected: Case 41/74 *Van Duyn* [1974] ECR 1337; judgment of 29 November 1978 in Case 21/78 *Delkvist* [1978] ECR 2327; Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113; Case 38/77 *ENKA* [1977] ECR 2203; Case 148/78 *Ratti* [1979] ECR 1629; Case 8/81 *Becker* [1982] ECR 53; Case 255/81 *Grendel* [1982] ECR 2301; Case 271/82 *Auer II* [1983] ECR 2727; Case 70/83 *Kloppenburg* (1984) ECR 1075, and the judgments and opinions cited here under paragraph 25.

23 — See Vlad Constaninesco: 'L'article 5 CEE, de la bonne foi à la loyauté communautaire', *Liber Amicorum Pierre Pescatore*, Nomos Verlagsgesellschaft, Baden-Baden, 1987, p. 97.

24 — Case 148/78, cited above.

25 — However, Mr Advocate General Warner had already expressed this view in his Opinion in the abovementioned *ENKA* case.

'It would be incompatible with the *binding effect* which Article 189 ascribes to directives to exclude on principle the possibility of the obligations imposed by them being relied on by persons concerned;[26]

Particularly in cases in which the Community authorities have, by means of a directive, placed Member States under a duty *to adopt a certain course of action*, the effectiveness of such an act would be weakened if persons were prevented from relying on it in legal proceedings and national courts prevented from taking it into consideration as an element of Community law.[27]

Consequently a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails'.[28]

25. Similar statements may be found in subsequent judgments of the Court, in particular *Becker*,[29] *Federatie Nederlandse Vakbeweging*,[30] *McDermott and Cotter*[31] and *Kolpinghuis*,[32] and the opinions of the Advocates General[33] set out the key themes leading to that conclusion, based on

'the principle that directives are *binding* on the Member States and on the principle that a Member State which has not taken measures to implement the directive within the prescribed period *may not*, as against individuals, *plead* its own failure to fulfil such obligations'.[34]

26. It should be stressed right away that the possibility for an individual to rely in the courts on a directive is the exception rather than the rule. It presupposes a 'pathological' context,[35] where the Member State which is bound in any event by the obligation to achieve the result laid down in the directive, fails to implement it or to implement it correctly.[36] 'Only in (these) specific circumstances'[37] may an individual rely on the directive. Where a directive is correctly implemented by the Member States[38] there is no need to have recourse to what the Court has called a 'minimum guarantee'.[39] This possibility has been accurately described as the 'reflection',[40] the 'corollary'[41] of the obligation to achieve the result set out in the directive, which arises for the Member State[42] upon notification of the directive as provided for in Article 191 of the Treaty, so that it cannot rely on its

26 — Paragraph 20, my emphasis.

27 — Paragraph 21, my emphasis.

28 — Paragraph 22, my emphasis.

29 — Case 8/81, cited above.

30 — Judgment of 4 December 1986 in Case 71/85 [1986] ECR 3855.

31 — Judgment of 24 March 1987 in Case 286/85 [1987] ECR 1453, at paragraph 12.

32 — Judgment of 8 October 1987 in Case 80/86 [1987] ECR 3969.

33 — See the Opinion of Mr Advocate General Reischl in *Ratti*, cited above, and the Opinion of Advocate General Sir Gordon Slynn in *Becker*, cited above.

34 — Case 286/85, cited above, paragraph 12, my emphasis.

35 — See Y. Galmot and J.-C. Bonichot: 'La Cour de justice des Communautés européennes et la transposition des directives au droit national', *Revue française de droit administratif*, January-February 1988; see also G. Isaac: *Droit communautaire général*, Masson, 1983, p. 168.

36 — '... special problems arise where a Member State has failed to implement a directive correctly and, more particularly, where the provisions of the directive have not been implemented by the end of the period prescribed for that purpose' (Case 8/81, cited above, at paragraph 20).

37 — Case 102/79 *Commission* v *Belgium* [1980] ECR 1473; see also Case 8/81 *Becker*, cited above, paragraph 19; judgment of 15 May 1986 in Case 227/84 *Johnston* [1986] ECR 1651, paragraph 53.

38 — 'Directives are intended to take effect through the adoption of national legislation, although they cannot with impunity be blocked by failure on the part of the State.' R. Kovar: 'Observations sur l'intensité normative des directives', *Liber Amicorum Pierre Pescatore*, p. 359, paragraph 5; judgment of 15 July 1982 in Case 270/81 *Felicitas Rickmers-Linie* [1982] ECR 2771, at p. 2787, paragraph 26: '... in this case the effects of the directive can reach individuals through the intermediary of the implementing measures adopted by the Member State concerned. Therefore it is unnecessary to examine the question whether Article 5 (2) meets the conditions which must be fulfilled for individuals to be able to rely upon it before a national court in the event of the directive not being correctly implemented.'

39 — *Commission* v *Belgium*, cited above.

40 — P. Pescatore: *L'effet des directives communautaires: une tentative de démythification*, Dalloz (1980), p. 171, in particular p. 175; Y. Galmot and J.-C. Bonichot, op. cit.

41 — Ibid.

42 — And arises with regard to the State exclusively: judgment of 26 February 1986 in Case 152/84 *Marshall* [1986] ECR 723; judgment of 12 May 1987 in Joined Cases 372 to 374/84 *Traen and Others* [1987] ECR 2141; judgment of 11 June 1987 in Case 14/86 *Pretore di Salò* [1987] ECR 2545.

own inactivity, its own failure to take action before the expiry of the prescribed period.

27. Whether it is regarded as 'estoppel', the expression of the rule *non contra factum proprium* or even *nemo auditur* . . . ,[43] this principle constitutes in my view a manifestation of the obligations contained in Article 5. Their role consists[44] in extending and strengthening other provisions. Accordingly, a Member State, which is under a duty to adopt the implementing measures prescribed by the directive,[45] cannot, without disregarding the principle of good faith and the duty not to adopt conflicting provisions, be bound in that way and at the same time refuse to take the consequent measures in regard to individuals.[46]

28. The fourth and fifth questions, in substance, seek to establish whether the various measures listed by the national court constitute inspections or administrative formalities within the meaning of Article 1 (1) of Directive 83/643.

29. In the first place, certain clarifications are called for regarding the scope of this directive inasmuch as, according to Article 1, it applies 'without prejudice to individual provisions in force in the framework of general or specific Community rules . . . '. On the basis of this provision, the German Government argues that the directive, in particular Article 2, 'takes precedence' over specific provisions such as those of Directive 71/118.

30. I cannot accept this proposition. We have seen that Directive 71/118 concerns *health inspections,* not detailed rules for inspections of documents. The Federal Government itself maintains, in its observations on the first question, that the measures in issue in this case fall within the latter category and that they are justified under Article 36. However, Member States cannot rely on this provision where the sphere in question has been harmonized. Accordingly, whilst it is true that with regard to veterinary inspections themselves the harmonization which has taken place could in fact 'take precedence' over the application of Directive 83/643, although the practical effect would be slight in the view of the very minor difference between the 'occasional inspections' authorized in the *Delhaize* judgment and the 'spot checks' provided for in Article 2 of the directive, the detailed rules for the frontier inspection of documents necessarily fall within the scope of Directive 83/643.

31. The distinction between inspections and formalities should in my view be as follows. If there is any physical contact whatsoever with the goods or the means of transport by means of a check which may entail the opening of lorries, handling, taking of samples, scraping of the product and so on, it will amount to an inspection. On the other hand, the simple examination of documents and a request for information concerning the circumstances of the transport will constitute formalities.

32. In the light of this distinction, I propose that the Court should hold that the obligation to declare the goods and the examination of the documents accompanying them constitute formalities. However, verification that the goods indicated in the

43 — Pescatore, op. cit., p. 176.

44 — See Vlad Constantinesco, op. cit., p. 109 *et seq.*

45 — Case 14/83 *Von Colson* [1984] ECR 1891, at p. 1909, in relation to another possibility, in which it was stated, and I consider it worthwhile to cite this passage: '. . . the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts', (paragraph 26); see also judgment of 10 April 1984 in Case 79/83 *Harz* [1984] ECR 1921, at paragraph 26; Case 222/84 *Johnston,* cited above, at paragraph 26.

46 — Pescatore, op. cit.

accompanying documents correspond to the goods actually imported and checking of the prescribed markings constitute inspections, since these measures necessarily require the opening of lorries, handling, etc. Finally, the obligation to present the goods cleared through customs at the customs office must be regarded as a formality in so far as it amounts only to the requirement that the goods be present during customs clearance.

33. The last question seeks to establish whether, first, the meaning of the term 'inspection' in Article 2 of the directive is identical to its meaning in Article 1 and, consequently, whether administrative formalities are subject to the restriction laid down in Article 2, namely that they be carried out only in the form of spot checks.

34. Although Article 2 refers to 'inspections', whereas Article 1 speaks of 'physical inspections', no great significance can be attached to this difference. Indeed, it does not exist in the German version of the text, and furthermore it is expressly stated in Article 1 that physical inspections are referred to in the subsequent provisions of the directive as 'inspections'. From the point of view of textual interpretation, the inclusion of the word 'inspections' is intended, by implication but necessarily, in view of the distinction made in Article 1, to distinguish them from administrative formalities.

35. In these circumstances it must be concluded that the directive has not ruled out the possibility of the systematic imposition of such formalities. However, a further comment is called for: although the systematic imposition of administrative formalities is not prohibited under the directive, that does not mean that all the formalities required to be completed are *ipso facto* lawful from the point of view of Community law. In this respect I would refer to my observations concerning the first question.

36. Consequently, I propose that the Court should hold as follows:

'(1) Procedures for systematic import inspections in intra-Community trade in fresh poultrymeat constitute measures having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the EEC Treaty where they involve:

(a) the obligation for the importer to declare promptly all the goods which he is importing to a national customs office responsible for carrying out import inspection;

(b) the obligation to present the goods declared for import inspection at the customs office;

(c) examination of the documents accompanying the goods, in particular the prescribed health certificate;

(d) verification that the goods referred to in the accompanying documents are identical to the goods actually imported;

(e) verification of the prescribed marking of the goods.

It is for the national court to determine whether such measures are justified under Article 36 of the Treaty, in particular whether they are necessary to attain the aim pursued and do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. In making this assessment the national court must also take into account both the prohibition of systematic health inspections which follows from Directive 71/118 and the statements in health documents harmonized by that directive, subject to the consequences of the application of Directive 83/643.

(2) Article 11 (2) of Regulation No 2777/75 does not concern intra-Community trade but trade with non-member countries.

(3) An individual citizen's right to rely on a directive before the Courts as against a Member State which has not fulfilled the obligations laid down in that directive within the prescribed period is based on Article 5, the third paragraph of Article 189 and Article 191 of the EEC Treaty.

(4) The measures described above under (d) and (e) constitute physical inspections within the meaning of Article 1 of Directive 83/643.

(5) The measures described under (a), (b) and (c) constitute administrative formalities within the meaning of that article.

(6) The meaning of the term "inspection" in Article 2 of Directive 83/643 is identical to its meaning in Article 1 of that directive; it follows that the rule that inspections may be carried out only in the form of spot checks does not concern administrative formalities within the meaning of Article 1 of the directive.'