OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 30 September 1999 *

1. In an action under Article 169 of the EC Treaty (now Article 226 EC) the Commission is asking the Court to declare that the French Republic has failed to fulfil its obligations under the EC Treaty and Council Directive 93/15/EEC of 5 April 1993 on the harmonisation of the provisions relating to the placing on the market and supervision of explosives for civil uses (hereinafter 'the Directive'). [1]

Legal framework

2. Article 9 of the Directive establishes an approval system for the transfer of those explosives within the Community, its purpose being to define this system. In particular, paragraph 3 of that article provides that the purchaser, consignee of the explosives, must obtain approval *ad hoc* from the recipient competent authority to carry out the transfer. That authority is to verify that the consignee is legally authorised to acquire explosives and that he is in possession of the necessary licences or authorisations. Where the competent authority approves the transfer, 'it shall issue to the consignee a document which includes all the information referred to in paragraph 7' (Article 9(5)).

In the absence of particular requirements of public security a Member State may approve the transfer of explosives on its territory or part thereof without prior provision of information. In this case the recipient competent authority 'shall then grant an approval for a fixed period' (Article 9(6)).

3. An approval system is also established for the transfer of ammunition from one Member State to another (Article 10 et seq.). The authorisation in this instance is to be issued by the Member State where the ammunition in question is located.

Paragraph 3 of that article provides that each Member State 'may grant dealers the right to effect transfers of ammunition from its territory to a dealer established in another Member State without the prior authorisation referred to'. For this purpose the State 'shall issue an authorisation valid for three years which may at any time be suspended or cancelled by reasoned decision.' Paragraph 4 of the article also

* Original language: Italian.

1 — OJ 1993 L 121, p. 20.

provides that each Member State 'shall supply the other Member States with a list of the ammunition the transfer of which to its territory may be authorised without its prior consent.'

4. Article 11 of the Directive provides that by way of derogation from Articles 9 and 10 each Member State 'in case of grave threats to, or attacks upon, public security through the illicit possession or use of explosives or ammunition ... may take all necessary measures concerning transfers of explosives or ammunition in order to prevent such illicit possession or use.'

In accordance with Article 12 of the Directive the Member States are to set up 'information exchange networks for the implementation' of the Directive. [2]

Article 13 of the Directive then provides that matters concerning its application are to be examined by a consultative committee, which assists the Commission, composed of the representatives of the Member States and chaired by the representative of the Commission.

2 — Article 14 of the Directive also provides that Member States are to keep 'at the disposal of the other Member States and the Commission updated information concerning undertakings in the explosives sector possessing licences or authorisations .... '

Facts of the case and procedure

5. The provisions contained in Articles 9, 10, 11, 12, 13 and 14 of the Directive were to be adopted by the Member States and notified to the Commission before 30 September 1993 (Article 19 of the Directive).

As that date had passed without any communication from the French Government, the Commission sent a letter of formal notice to that government on 13 April 1994, charging it with failure to fulfil the obligation to adopt the provisions for the implementation of the Directive and requesting information in this respect.

The French Government replied by a letter dated 4 July 1994, stating that a decree for transposition concerning explosives for civil uses would be published in the autumn of 1995.

On 26 November 1996, the French Government sent the text of Decree 96-1046 of 26 November 1996 to the Commission, [3] transposing the provisions of the Directive relating to the placing on the market, supervision of compliance, and EC marking of explosives and the penalties applicable in the event of a failure to observe the rules on marking.

3 — JORF (Official Journal of the French Republic), 5 December 1996, p. 17695.

However, the Commission considered that by this decree other provisions of the directive were not transposed, mainly those relating to the transfer of explosives and ammunition in the Community (Articles 9, 10 and 11), and those concerning the obligations of information (Articles 12 and 14).

On 30 April 1997, the Commission therefore adopted a reasoned opinion under Article 169 of the EC Treaty and notified the French authorities of this opinion, as it had not been informed by those authorities of the transposition of the other provisions.

6. As there was no reply, the Commission brought before the Court the present action for a declaration that, by failing to introduce within the prescribed period the measures necessary to comply with Articles 9, 10, 11, 12 and 14 of the Directive, the French Republic has failed to fulfil its obligations under the EC Treaty.

Arguments of the parties

7. The French Government disputes the claims of the Commission, asserting, on one hand, with regard to ammunition, that the pertinent provisions of the Directive have been transposed, and, on the other hand, with regard to explosives, the existence of objective difficulties which hindered the implementation of the provisions contained in Article 9 of the Directive.

On the first point, it argues that the provisions of Article 10 of the Directive concerning the transfer of ammunition were transposed into national law by Title V of Decree 95-589 of 6 May 1995 (mainly by Articles 92, 93 and 94 of Section 2 of Title V),[4] relating to the application of the decree of 18 April 1939, which establishes the system for war equipment, arms and ammunition. Article 95 of Decree 95-589 refers the definition of the conditions for the issue of prior authorisations and the related derogations to an implementing regulation.

In conformity with Article 12 of the Directive, Article 101 of Decree 95-589 provides that, once the implementing regulation referred to above has been adopted, the Minister responsible for Customs is to send the information relating to the application of Articles 9 and 10 of the Directive to each Member State concerned.

The French Government lodged the text of the draft of that implementing regulation with its defence and then stated, during the hearing, that this draft, adopted by the Government on 25 May 1999, was published in the Journal Officiel on 4 June and is applicable as from 15 June 1999.

4 — JORF, 7 May 1995, p. 7458.

The transposition of Article 11 of the Directive, however, was ensured, according to the French Government, by Article 80 of Decree 95-589, which confers upon the Minister responsible for Customs the power to take all necessary steps in the case of grave threats or attacks upon public order through the unlawful possession or use of explosives or ammunition.

8. With regard to the implementing measures relating to the transfer of explosives, the French Government does not dispute the fact that it has not transposed the provisions of Articles 9 and 11 of the Directive. Instead, it states that it had encountered objective difficulties in transposing the provisions in Article 9. In particular, it emphasises that the transposition of Article 9 is pointless and provisional in nature if it is not accompanied by the adoption of a valid harmonised document such as a transfer authorisation. At present, if explosives are transferred to France, the authorisation issued by that country may not be recognised as suitable by the authorities of another Member State, also because the legal form of the document at the moment differs considerably from State to State. The French Government notes that, in the case of a transfer from France to another Member State, and in the absence of transposition by all the States obliged to so do (according to the French Government, caused by the aforementioned objective difficulties), the system laid down by the Directive is not at present in a position to function; to achieve the aims of the Directive, the Commission should adopt a decision which makes a harmonised authorisation document compulsory.

The French Government claims that it has not been inactive in the face of the difficulties indicated above. In two meetings of the consultative committee set up on the basis of Article 13 of the Directive, on 6 December 1996 and 23 April 1998 respectively, the French delegation proposed that a harmonised document for the transfer of explosives should be adopted. According to the minutes of the meeting held in April 1998, a draft harmonised document was to be submitted to a vote in the committee and then be the subject of a decision by the Commission. The French Government emphasises that, as yet, neither the vote of the committee nor the decision by the Commission has taken place.

According to the French Government, therefore, the failure to transpose the Directive with regard to the transfer of explosives is due to the lack of clarity and precision of its provisions. These deficiencies are largely due to the Commission, which has not to date adopted the implementing measures referred to in Article 13, a circumstance which is also clear from the minutes of the committee, mentioned above.

9. The Commission, however, denies that such an obligation is contained in the Directive. Article 9 does not in any way require the adoption of a harmonised document comprising the transfer licence, nor does it subject the obligation to implement the provision in point to such a condition.

In addition, contrary to what is asserted by the French Government, the Commission maintains that the provisions of the Directive are sufficiently precise, and that in any case, even if they were not, this could not justify the failure by a Member State to comply with its obligations under the Treaty. The Commission adds that any delays by other Member States in the transposition of the Directive may not be raised by a Member State in order to justify its own failure to comply.

10. As regards the provisions of the Directive relating to ammunition, the Commission stresses first of all that Decree 95-589 of 6 May 1995 was never notified to it, that it only became aware of it during the proceedings before the Court, and that this constitutes a breach of the obligation of information under Article 19 of the Directive. At the hearing, the Commission also stated that it had not been formally notified of the regulation implementing the aforementioned decree.

In short, according to the Commission, it is to say the least undeniable that, on the expiry of the period set by the reasoned opinion, France had not yet completed the transposition of the provisions concerning ammunition, and in particular, those stated in Articles 10 and 12 of the Directive.

Existence of failure to fulfil obligations

11. It may first be observed that the complaint relating to the failure to transpose Article 14 of the Directive relating to information concerning undertakings in the explosives sector possessing licences or authorisations remains outside this dispute: this is because, following the notification by the French Government of the decree of transposition of 10 February 1998 (JORF 14 March 1998, p. 3837), the Commission discontinued, in its rejoinder, this part of its application. [5]

12. The failure with which the French Republic is charged, which remains the subject of the proceedings and on which the Court will have to rule, consists essentially of two aspects: failure to transpose, on one hand, the provisions of the Directive relating to the transfer of explosives (Articles 9, 11 and 12), and on the other hand, the provisions relating to the transfer of ammunition (Articles 10, 11 and 12).

Failure to transpose the provisions relating to the transfer of explosives

13. With regard to the first aspect, I would say at once that the arguments put forward by the French Government to justify the failure to transpose the provisions of the

5 — A copy of this decree was lodged by the French Government with its reply.

Directive cannot be accepted.

The fact that the Directive may not be sufficiently precise as the Commission had not adopted the relevant implementing measures, amounting essentially to the imposition of a harmonised document for issuing authorisations, cannot affect the obligation to transpose the Directive and to do so within the prescribed period.

In that connection, it should above all be noted that the adoption of a harmonised document is nowhere mentioned in the Directive. The fact that within the consultative committee the need to adopt such a document was emphasised several times and that the Commission itself made statements to this effect, cannot entail the suspension of the obligation to implement Article 9 of the Directive. It is sufficient to recall that, according to the case-law of the Court, [6] the statements appearing in the minutes of a meeting of the Council in which a provision of secondary legislation has been adopted cannot be used for the purpose of interpreting the provision adopted where no reference is made to the content of the statement in the wording of the provision in question, and the statement therefore has no legal significance. According to the same logic, and with greater reason, the statements appearing in the minutes of a committee set up on the basis of a directive cannot be used for the purpose of interpreting the provisions of that directive.

It must next be considered that, contrary to what the French Government appears to maintain, there is no reference in the wording of Article 13 to the alleged obligation on the part of the Commission to adopt such a document. That article only provides for the general obligation of the Commission to submit to the committee 'a draft of the measures to be taken' with regard to the application of the Directive, a draft on which the committee should give its own opinion, and the obligation, equally general, of the Commission to adopt measures which 'shall apply immediately'.

14. Nor is it possible to accept the argument of the French Government that the failure to transpose Article 9 of the Directive was justified in view of the failure of

6 — Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18. On the same point see Joined Cases C-197/94 and C-252/94 *Bautiaa and Société Française Maritime* [1996] ECR I-505, paragraph 47, and case C-329/95 *VAG Sverige* [1997] ECR I-2675, paragraph 23.

other Member States to transpose the provision. This is so for several reasons.

Firstly, this assertion is not based on anything definite. From the case-file it is the contrary that appears to be true. According to the statements by the representative of the Commission at the hearing, all the other Member States have transposed the Directive into their law, including the provisions of Article 9.

In any case, according to the settled case-law of the Court, 'a Member State cannot justify its failure to fulfil obligations under the Treaty by pointing to the fact that other Member States have also failed, and continue to fail, to fulfil their own obligations. Under the legal order established by the Treaty, the implementation of Community law by Member States cannot be made subject to a condition of reciprocity.' [7]

15. It now remains to consider whether, generally, there is cause for justification of the failure to comply with which France is charged in the fact that it is said to have had difficulties of a practical nature in transposing the provisions of Article 9.

This argument has no foundation. It is sufficient to recall that the Court has on several occasions stated that 'practical difficulties which appear at the stage when a Community measure is put into effect cannot permit a Member State unilaterally to opt out of fulfilling its obligations.' [8]

16. Those remarks are especially valid when the Community institutional system or the structure created by the regulation in question provides 'the Member State concerned with the necessary means to ensure that its difficulties be given due consideration, subject to compliance with the principles of the common market and the legitimate interests of the other Member States.' [9]

This is the case here, in view of the fact that the consultative committee mentioned in Article 13 of the Directive has the specific function of examining questions relating to the application of the Directive. It was within that committee that it was decided

7 — Case C-146/89 *Commission* v *United Kingdom* [1991] ECR I-3533. See also case 52/75 *Commission* v *Italy* [1976] ECR 277.

8 — Case 128/78 *Commission* v *United Kingdom* [1979] ECR 419, paragraph 10. See also case C-236/88 *Commission* v *France* [1990] ECR I-3163, paragraph 17.

9 — *Commission* v *United Kingdom*, cited above, paragraph 10.

to adopt a harmonised document to facilitate the procedure mentioned in Article 9.

However, it cannot be inferred from this that the provision in that article is not in itself clear and as such able to be implemented in national law even without the aforementioned implementing measures. This is demonstrated by the fact that, with the exception of France, the Member States have transposed the provision in point into their laws.

It must also be noted that the fact that France had proposed an amendment or complement to the aforementioned provision by means of the adoption of a harmonised document and that the Commission had undertaken to submit a draft cannot, as the Court held in its judgment of 12 February 1987 in *Commission* v *Belgium*, expunge the failure of that country to fulfil its obligations. [10]

It should also be remembered that, according to the Court, 'the fact that the Community institutions amend directives is not sufficient to release Member States from their obligation to comply with those directives within the prescribed period.' [11]

17. Therefore, the difficulties put forward by the French Government are not sufficient to justify non-compliance with their obligations under Community law.

Failure to transpose the provisions relating to the transfer of ammunition

18. On this point, it should be noted first of all that it was only during the hearing that the French Government stated that the regulation implementing Decree 95-589 of 6 May 1995 [12] was adopted on 25 May 1999.

19. The fact that this regulation may have completed the course of transposition into national law of the provisions relating to the transfer of ammunition can have no influence on the outcome of the case. It is the period fixed by the reasoned opinion which defines the State's failure to fulfil its obligation, including the temporal aspect of

10 — Case 306/84 *Commission* v *Belgium* [1987] ECR 675, paragraph 7.

11 — Case C-182/94 *Commission* v *Italy* [1995] ECR I-1465, paragraph 6. See also case C-344/96 *Commission* v *Germany* [1998] ECR I-1165, paragraph 9.

12 — It should be recalled that the Commission was only aware of the text of Decree 95-589 in the first response by the French Government in this case.

that failure, so that where a default has been remedied after the period prescribed, whether before the action was brought or during the proceedings, an interest still subsists in pursuing the action, unless the Commission discontinues it, which in this case has not occurred, at least on this point. [13]

20. It therefore only remains to find that on expiry of the aforementioned period the French Republic had not yet adopted the measures for the implementation of the Directive which now appear in the decree mentioned above. That decree, whose provisions relating to Articles 10 and 11 of the Directive were, with regard to their application, subject to the adoption of the aforementioned regulation, can certainly not be regarded as a suitable legislative measure for effecting a complete and accurate transposition of those articles. [14] This finding is in conformity with the Court's statement in *Commission* v *Belgium* cited above, [15] to the effect that a national law which contains no substantive provision transposing the directive, but merely empowers an authority subsequently to adopt the requisite substantive provisions, cannot be regarded as effecting a complete and accurate transposition of the directive.

21. But even if the Commission were minded to discontinue the action in relation to this point, that is to say, with regard to the failure to transpose the provisions relating to the transfer of ammunition, the failure to transpose the provisions relating to the transfer of explosives would still be proved and not justified. There can therefore be no doubt concerning the breach by the French Republic of its obligations under Article 189 of the EC Treaty (now, after amendment, Article 249 EC) and the Directive. As is well known, a directive is binding on the States as to the results to be achieved, and the States so bound by it are not permitted to bring about only some, and not all, of these results. [16]

Costs

22. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if applied for. As the Commission has applied for costs, the French Republic must be ordered to pay them.

13 — See Case 283/86 *Commission* v *Belgium* [1988] ECR 3271, paragraph 6, and case 291/84 *Commission* v *Netherlands* [1987] ECR 3483. The Court also stated that where the default has been remedied after the time-limit, there is still 'an interest in pursuing the action in order to establish the basis of liability which a Member State may incur as a result of its default as regards other Member States, the Community or private parties' (Case C-287/87 *Commission* v *Greece* [1990] ECR I-125.

14 — Also Article 80 of the aforementioned decree, which transposed Article 11 of the Directive, while not appearing formally subject to the adoption of an implementing regulation, will assume practical value only when the provisions of Article 10 become operative.

15 — Case C-263/96 *Commission* v *Belgium* [1997] ECR I-7453, paragraph 26. See also case C-131/88 *Commission* v *Germany* [1991] ECR I-825.

16 — See my Opinion delivered on 1 October 1998 in Case C-409/97 *Commission* v *Luxembourg*, not published in the ECR.

Conclusion

In the light of the foregoing observations I suggest that the Court should:

— declare that, by failing to adopt within the prescribed period the laws, regulations and administrative measures necessary in order to comply with Articles 9, 10, 11 and 12 of Council Directive 93/15/EEC of 5 April 1993 on the harmonisation of the provisions relating to the placing on the market and supervision of explosives for civil uses, the French Republic has failed to fulfil its obligations under the EC Treaty;

— order the French Republic to pay the costs.