OPINION OF ADVOCATE GENERAL MISCHO

delivered on 6 June 2000 *

1. By application lodged at the Court Registry on 10 June 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by not implementing or correctly transposing some provisions of Council Directive 93/118/EC of 22 December 1993 amending Directive 85/73/EEC on the financing of health inspections and controls of fresh meat and poultrymeat, [1] the Hellenic Republic has failed to fulfil its obligations under the EC Treaty and, in particular, points 1, 2 and 5 of Chapter 1 of the annex to that Directive.

Legal background

2. Council Directive 85/73 of 29 January 1985 on the financing of health inspections and controls of fresh meat and poultrymeat, as amended by Directive 93/118 (hereinafter the 'Directive'), [2] aims to harmonise rules on the financing of health inspections and monitoring in slaughterhouses, with a view to ensuring that the control arrangements operate effectively and distortions of competition are avoided.

3. Article 1(1) of the Directive requires Member States to collect a fee for the costs occasioned by health inspections and controls for the meat referred to in the various Community directives.

4. The standard rates to be collected for this fee are fixed in Chapter I of the annex to the Directive and vary, in particular, according to the species, age and weight of the animal.

5. The standard rates intended to cover the inspection costs linked to slaughter operations are set in point 1 of Chapter I and the amounts to be collected for controls and inspections linked to cutting operations are set in point 2.

* Original language: French.

1 — OJ 1993 L 340, p.15

2 — OJ 1985 L 32, p 14.

6. Point 5 of the chapter provides for situations in which a State can set fees which are lower than the standard fees.

7. In Greece, the Directive has been transposed by Presidential Decree No 34/94.

Procedure

8. The Commission submits that Presidential Decree No 34/94 is not compatible with the requirements of the annex to the Directive since, contrary to the provisions in points 1, 2 and 5 of Chapter I of the said annex:

— it fails to refer, for the collection of fees on the occasion of slaughter operations, to the category of solipeds/equidae which is expressly mentioned in point 1(b) of Chapter I of the annex to the Directive;

— it sets the amounts of the fees at 50% of the standard Community rates, without this reduction being justified in accordance with the provisions of the annex to the Directive;

— finally, it does not refer to poultrymeat for the purposes of the application of the fee for cutting operations, although this category of meat falls within the scope of the Directive.

9. Since the Hellenic Republic neither responded to the letter of formal notice nor reacted to the reasoned opinion from the Commission, the latter, under Article 169 of the Treaty, brought an action for failure to fulfil obligations on the ground of failure to implement or correctly transpose the provisions of points 1, 2 and 5 of Chapter I of the annex to the Directive.

10. The Hellenic Republic contends that the Court should dismiss the action brought by the Commission as unfounded.

11. I will now examine in turn the complaints put forward by the Commission.

Failure to refer to the category of solipeds/equidae in the list of meat to which the fees laid down by the Directive apply

12. The Commission submits that, with regard to the fees to be collected for health inspections and checks on the slaughter of animals, Presidential Decree No 34/94 has not correctly transposed the Directive, because it fails to refer to the category corresponding to solipeds/equidae.

13. The Hellenic Republic recognises that Presidential Decree No 34/94 does not refer to this category. However, under the applicable national and Community provisions, the slaughter of animals can only be carried out in approved slaughterhouses. In Greece, there are no approved slaughterhouses for the slaughter of solipeds/equidae and, therefore, there will be no slaughter of these animals in this Member State.

14. The Commission contends that, in accordance with the case-law of the Court, directives must be transposed clearly and transparently, so as to allow individuals to be aware of their rights and obligations. [3] In particular, Member States are bound to provide a specific legal framework in the field referred to by the directive in question and *the fact that a certain activity does not exist in a Member State cannot justify the absence of provisions for implementation.* The fact that no slaughterhouses have been approved in Greece for solipeds/equidae does not prevent these animals from being slaughtered there in the future. The full application of the Directive cannot depend on whether or not the competent national bodies are willing to approve such slaughterhouses, so that an internal binding provision referring to solipeds/equidae is indispensable.

15. The Hellenic Government replies that the obligation to use approved slaughterhouses is sufficient and leads to the same result as that sought by the Directive, so that the Commission's argument, based on the possibility of this type of slaughter occurring in the future, is without relevance. The failure to refer to this category in Presidential Decree No 34/94 therefore has no legal consequence.

16. In any case, in view of the imminent implementation of Council Directive 96/43/EC of 26 June 1996 amending and consolidating Directive 85/73 in order to ensure financing of veterinary inspections and controls on live animals and certain animal products and amending Directives

3 — Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851, and Case C-59/89 *Commission* v *Germany* [1991] ECR I-2607.

90/675/EEC and 91/496/EEC, [4] the Presidential Decree in course of adoption expressly mentions the category of solipeds/equidae.

17. The legal problem to be resolved in the present case is that of the effect, from the point of view of the principle of the obligation to transpose directives, of the non-existence in a particular Member State of an activity referred to by a Community directive.

18. This legal problem is not without precedent, since the Court has already dealt with a similar problem in Case C-339/87 *Commission* v *Netherlands*, cited above, which concerned Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds. [5]

19. In that case, the directive in question *inter alia* obliged Member States to prohibit the hunting of wild birds from aircraft. To justify the failure to implement the provision of the directive prohibiting this practice, the defendant Member State claimed that aircraft were not used on its territory for hunting game and that consequently, since the forbidden practices did not exist in its territory, there was no need to carry out a formal transposition.

20. As Advocate General Van Gerven rightly stated in his Opinion, this line of defence could only be taken into consideration if the Netherlands Government had been able to demonstrate that the practice prohibited by the directive could not, under any circumstances, exist in the territory of the Netherlands, which it could not do by referring to the factual situation at any given time because that could always change. As a result, the existence of a precise legal framework, guaranteeing the full application of the directive in all circumstances, is always necessary to offer protection against such changes.

21. The Court followed Advocate General Van Gerven, by ruling as follows:

'The fact that a number of activities incompatible with the prohibitions contained in the directive are unknown in a particular Member State cannot justify the absence of appropriate legal provisions. In order to secure the full implementation of directives in law and not only in fact, Member States must establish a specific legal framework in the area in question.'

22. Can this case-law be transposed to the present case?

4 — OJ 1996 L 162, p 1.
5 — OJ 1979 L 103, p 1.

23. In my opinion, yes, although the Directive referred to in the case which we are examining does not prescribe a prohibition, but rather a positive obligation. The Greek Government relies on a purely factual situation. Even if, at the present time, there are no approved slaughterhouses and, as a result, no slaughter is carried out for the category of solipeds/equidae, it is not disputed that the present situation could change. Thus there is no legal obstacle to an approval being issued, as Presidential Decree No 410/94, produced in annex to the defence, allows for such a possibility. The Greek Government itself recognises, moreover, that this situation is temporary. Thus it considered it worthwhile to submit, in its defence, that 'in any case, having regard to the imminent implementation and transposition of Directive 96/43 by the Presidential Decree in the course of adoption, express reference will be made to the category of solipeds/equidae, so that this category will also be provided for in future.'

24. With regard to the value of this argument, one need only recall that the Court has consistently held that 'the subject-matter of an action brought under Article 169 of the Treaty is determined by the Commission's reasoned opinion and that, even where the default has been remedied after the time-limit prescribed by the second paragraph of that article has expired, 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 towards other Member States, the Community or private parties'. [6] This applies *a fortiori* where it is alleged that the default is about to be remedied.

25. The first complaint raised by the Commission therefore appears to me to be justified.

Fixing the rate of fees at 50% of the standard Community rates

26. Presidential Decree No 34/94 laid down the amounts of the fees to be collected for health checks on the slaughter of animals and those connected with cutting operations at 50% of the standard Community rates.

27. The Commission does not claim that the reduction carried out by the Greek authorities exceeds the limit tolerated by Community regulations, but submits that the reduction has not been shown to be well-founded, in accordance with point 5 of Chapter I of the annex to the Directive, which allows Member States to reduce the standard amounts only to the extent that 'salary costs, the structure of establishments and the relationship between veterinarians and inspectors diverge from the

6 — *Commission* v *Germany*, cited above, paragraph 35.

Community average taken as a basis for calculation of the standard amounts fixed in points 1 and 2(a)'. As a result, the Greek authorities should have sent the Commission the information on the basis of which the reduced fees provided for by the national legislation were calculated.

28. The Greek Republic maintains that, where the cost of living and salary costs in a Member State differ significantly from the Community average on the basis of which the standard fees have been fixed, the Directive allows a derogation from the Community amounts fixed, as long as the Member State does not provide for a reduction of greater than 55% of the amounts specified in the Directive.

29. Consequently, as long as this requirement is respected, the fixing of the fees is within the discretion of the Member State concerned, which takes into account a multitude of material and social facts.

30. The Commission maintains that any derogation must be justified on the basis of specific data, having regard to the aim of the Directive, which is to ensure the correct operation of the control system and to avoid distortions of competition.

31. It adds that this requirement is corroborated by Article 5 of the EC Treaty (now Article 10 EC) and by Article 2(5) of the Directive, according to which '[t]he Member States shall forward information — initially two years after the introduction of the new system and subsequently at the Commission's request — to the Commission concerning the distribution and use of the fees and must be able to justify their method of calculation'.

32. The Greek Government states that neither the Directive nor any other Community provision obliges the Member States to send the Commission the information which justifies such a reduction in the fees.

33. In any case, it is generally recognised that the cost of living and salary costs in Greece are significantly different from those of other Member States and additional justification, detail or evidence is not required, since the basic details of the economy of each Member State are well-known and accessible in particular to the Commission.

34. According to the Commission, the argument based on the standard of living and salary costs in Greece does not constitute satisfactory justification for the reduction in question, since the Greek authorities should, for this purpose, have produced the data relating to salary costs and administrative expenses in the field in

question, the structure and operating cost of establishments, the cost of examination of residues which are included in the amount of the fees and the relationship between veterinarians and inspectors, on the basis of which the decision was taken to reduce the fees by 50%.

35. It seems to me that the Commission's argument may be supported by the text of point 5 of Chapter I of the annex to the Directive, since, according to its wording, the Member States may reduce the amounts fixed by points 1(a) and 2(a) 'to meet the real costs of inspection', which cannot mean that, as long as the conditions to which the collection of fees at a lower rate than the standard Community rates are subject have been met, the extent of the reduction is fully at the discretion of the national authorities.

36. However, as the Commission's objection is not to the amount of the fees collected in Greece but to the lack of justification by the Greek Government for these amounts, the Court must examine whether the Hellenic Republic is at fault with regard to the obligations imposed on Member States by Article 2(5) of the Directive.

37. In my opinion, Article 2(5) of the Directive must be interpreted as meaning that the Member States have an obligation spontaneously to notify the Commission of the distribution and use of the fees, two years after the establishment of the new system and later at its request. On the other hand, regarding the method of calculating the fees, the aforementioned provision simply states that the member States must *be able* to communicate their method of calculation. This implies that the national authorities are only bound to do this if the Commission requests this. It could only be otherwise if this provision had specified that the data relating to the distribution and use of fees must *be accompanied* by information to justify the method of calculation of these fees.

38. This interpretation is corroborated by Article 8(1) of the Directive, which expressly authorises the Hellenic Republic to 'derogate from the principles laid down in this Directive where, because of geographical characteristics, the costs of collecting a fee in geographically remote regions are greater than the yield from the fee.' In this specific case, the aforementioned provision specifies that: 'The Greek authorities shall inform the Commission of the territorial extent of the derogations granted. The information shall be accompanied by any necessary explanations.'

39. Outside this specific derogation, the obligation to inform the Commission of the method of calculation of the fees is subject to the existence of a prior request to do so. As a result, a substantive infringement can only be found if the Greek authorities

refrain from responding or refuse to respond to a request from the Commission.

40. During the proceedings before the Court, the Commission maintained that, on several occasions, it requested that the Hellenic Republic send it this information, but that it obtained no response, not even after sending the letter of formal notice and the reasoned opinion in this procedure.

41. The letter of formal notice indicated that the reduction of 50% made by the Greek authorities could be considered as conforming to Community regulations, but that it would 'nonetheless be necessary to justify the correctness of this reduction by sending the information on which the calculation of the fees was based.' However, no reference is made to any request to communicate data prior to the letter of formal notice. It is up to the Commission to establish the existence of the alleged failure to fulfil obligations and it has not proved the existence of a prior request for justification of the method of calculation, which the Greek Government omitted or refused to send. The assertion, in the reply, that such a request had been made on several occasions prior to sending the letter of formal notice cannot remedy the absence of this proof.

42. In accordance with the Court's case-law on the subject, 'at the pre-litigation stage of proceedings for failure of a State to fulfil its obligations, the purpose of the letter of formal notice is to delimit the subject-matter of the dispute and to indicate to the Member State, which is invited to submit its observations, the factors enabling it to prepare its defence.' [7]

43. The letter of formal notice must, therefore, briefly identify a supposed violation of Community law by a Member State and invite it to submit its observations. The violation complained of must, therefore, necessarily exist prior to the letter of formal notice. In the present case, the substantive infringement attributed to the Greek Government consists in a failure to communicate the information on which the calculation of the reduced fees was based. But the Directive merely provides that Member States must justify their method of calculation at the request of the Commission, not that they are obliged to do so spontaneously. Consequently, the Commission cannot criticise the Greek Government for its lack of action, since it has not proved that it requested that details of the calculation be communicated prior to the opening of the official phase of the pre-litigation procedure.

44. Moreover, the Commission cannot criticise the Greek authorities for not having responded to the formal notice and the reasoned opinion, since these acts form part of 'a preliminary procedure, which does not

7 — In particular, see Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405.

have any binding legal effect for the addressee.' [8]

45. The second complaint raised by the Commission must therefore be rejected.

The application to poultrymeat of the fee for cutting

46. The Commission maintains that no fee is demanded in Greece for health inspections and controls for cutting operations of poultrymeat. Article 3(2) of Presidential Decree No 34/94 omits to indicate, contrary to the provisions of point 2(a) of Chapter I of the annex to the Directive, that the standard amount of the fee for cutting operations is added to the amounts referred to in point 1 of the said annex, which also cover the category of poultry.

47. The Hellenic Republic rejects the Commission's complaint, on the ground that poultrymeat is not exempt from the fee for the cutting of fresh meat. Article 3 of the said decree clearly provides for such a fee since it refers directly to Presidential Decrees No 599/85 and No 959/81, now replaced by Decrees No 410/94 and No 291/96, which mention the fee for cutting operations for poultrymeat and are therefore in conformity with the provisions of the Directive.

48. The Commission points out that the transposition of a directive requires, however, the existence of a legal framework to guarantee its full application in a sufficiently transparent and clear manner. Consequently, the said decree is not sufficiently specific and clear with regard to the obligation to pay the fee for the cutting of poultrymeat.

49. The Hellenic Republic relies, furthermore, on an administrative practice which is carried out regularly and fully conforms to the provisions of the Directive, in that the fees for the cutting of poultrymeat are paid throughout Greek territory. Moreover, the documents showing the payment of those fees, produced during the procedure before the Court, fully confirm the statements of the Hellenic Republic.

50. We may say straight away that this last argument by the Greek Government cannot, in any way, succeed since, in accordance with settled case-law, neither mere administrative practices nor even the existence of factual situations corresponding to the directive's requirements can remedy the failure to introduce into national legislation and regulations rules contained in the directive which is to be transposed. Cer-

8 — Case C-272/97 *Commission* v *Germany* [1999] ECR I-2175.

tainly, the obligation to transpose a directive does not 'necessarily require legislative action in each Member State', [9] and does not even 'necessarily require the provisions of that legislation to be enacted in precisely the same words in an express and specific enactment; a general legal context may be sufficient if it is sufficiently clear and precise in order to ensure effectively the full application of the directive'. [10]

51. But let us precisely address the main argument of the Greek Government, namely that the legislation in force in Greece ensures, in the case of poultrymeat, the collection of both a fee for controls linked to slaughter operations and a fee for controls linked to cutting operations.

52. In this connection, it must be said that the structuring of the Greek legislation does not allow the conclusion that it satisfies this requirement for clarity. It is indisputable that, as the Commission observes, Article 3(2) of Presidential Decree No 34/94 (which provides that the amount referred to in paragraph 1 is added to the sums referred to in Article 2(1)(a), (b) and (c)) does not refer to poultrymeat, whereas it states very clearly that, for beef and veal, sheepmeat, pigmeat and goatmeat, the amount of the fee linked to cutting is to be added to the fee which must be paid for slaughter operations.

53. This omission itself creates an ambiguity with regard to the amounts which must be paid by economic operators, who may well interpret the absence of a reference, in Article 3(2) of Presidential Decree No 34/94, to poultrymeat as indicating that cutting operations for poultrymeat do not give rise to the collection of a fee in the same way as for other meat.

54. In my opinion, such an ambiguity means that the Directive has not been correctly transposed on this point.

55. Thus, it is in vain that the Greek Government states that, in reality, if two other Presidential Decrees (namely Presidential Decrees No 599/85 and No 959/81, now replaced by Presidential Decrees No 410/94 and No 291/96) are taken into account, the conclusion is that a fee is actually due specifically for cutting operations for poultrymeat. Moreover, it has not been explained to us why the Greek authorities should have chosen, for poultrymeat, to transpose the Directive with a combination of texts which is, by defini-

9 — Case 29/84 *Commission* v *Germany* [1985] ECR 1661.

10 — Case 236/85 *Commission* v *Netherlands* [1987] ECR 3989.

tion, less transparent for economic operators than a single text, while, for other meat, all the provisions which transpose the Directive have been gathered into a single text, Presidential Decree No 34/94.

56. The third complaint raised by the Commission therefore appears to me to be well founded.

Costs

57. Given that two of the three complaints raised by the Commission appear to be well founded, but that the Commission has not made a claim for costs, it seems to me that pursuant to Article 69(2) and (3) of the Rules of Procedure it should be concluded that the Commission shall bear, in addition to its own costs, one-third of the costs of the Hellenic Republic, which shall bear its own costs.

Conclusion

58. In view of the above considerations, I propose that the Court rule as follows:

— By failing to mention the category of solipeds/equidae with regard to the fee charged on the occasion of cutting operations, and by failing expressly to refer to poultrymeat for the purposes of the application of the fee for cutting, the Hellenic Republic has failed to fulfil its obligations under points 1(b) and 2(a) of Chapter I of the annex to Council Directive 93/118/EC of 22 December 1993 amending Directive 85/73/EEC on the financing of health inspections and controls of fresh meat and poultrymeat, and under the EC Treaty.

— The remainder of the application is dismissed.