JUDGMENT OF THE COURT (Fifth Chamber)

23 March 2000 *

In Case C-327/98,

Commission of the European Communities, represented by R. Wainwright, Principal Legal Adviser, and O. Couvert-Castéra, a national civil servant on secondment to its Legal Service, acting as Agents, with an address for service at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and D. Wibaux, Foreign Affairs Secretary at that ministry, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

* Language of the case: French.

APPLICATION for a declaration that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Articles 9 to 12 and 14 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 (OJ 1993 L 121, p. 20), the French Republic has failed to fulfil its obligations under the EC Treaty,

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevón (Rapporteur), C. Gulmann, J.-P. Puissochet and P. Jann, Judges,

Advocate General: A. Saggio,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 24 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 30 September 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 4 September 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 failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Articles 9 to 12 and 14 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 (OJ 1993 L 121, p. 20, hereinafter 'the directive'), the French Republic has failed to fulfil its obligations under the EC Treaty.

2 Article 9 of the directive, which regulates the transfer of explosives, provides, *inter alia*, that the consignee is to obtain approval from the recipient competent authority to transfer explosives. The document giving concrete expression to that approval must accompany the explosives until they arrive at their stated destination and must be produced whenever so required by the competent authorities.

3 Article 10 of the directive, which governs the transfer of ammunition, makes such transfer conditional upon a licence issued by the Member State in which the ammunition is located; however, special provisions apply where ammunition is transferred between dealers.

4 Article 11 of the directive provides, in particular, that, by way of derogation from Articles 9 and 10, a Member State, in case of grave threats to, or attacks upon,

public security through the illicit possession or use of explosives or ammunition covered by the directive, may take all necessary measures concerning transfers of explosives or ammunition in order to prevent such illicit possession or use.

5 Article 12(1) of the directive provides:

'Member States shall set up information exchange networks for the implementation of Articles 9 and 10. They shall notify the other Member States and the Commission of the national authorities responsible for forwarding or receiving information and for applying the procedures referred to in the said Articles 9 and 10.'

6 Article 13 of the directive provides that matters concerning its application are to be examined by an advisory committee which assists the Commission; this committee is to be composed of representatives of the Member States and chaired by the representative of the Commission.

7 Finally, Article 14 of the directive contains provisions relating to the exchange of information concerning undertakings in the explosives sector and the implementation of a system for keeping track of explosives.

8 Pursuant to Article 19(1) and (5) of the directive, Member States were to bring into force the provisions necessary to comply, *inter alia*, with the articles cited above before 30 September 1993 and to communicate to the Commission the provisions adopted for that purpose.

9 By letter of 13 April 1994, the Commission, having received no notification from the French Government as to the transposition of Articles 9 to 12 and 14 of the directive and having no access to any other information in that connection, gave the French Republic formal notice to submit its observations within two months.

10 By letter of 4 July 1994 the French Government stated in reply that the measures designed to transpose the provisions into national law were in preparation. In that regard, the French authorities, on 10 December 1996, communicated, by way of transposition of those provisions, Decree No 96-1046 of 28 November 1996 amending Decree No 90-153 of 16 February 1990 laying down various provisions concerning the rules applicable to explosive products and Decree No 71-153 of 10 September 1971 implementing Article 1 of the Law of 3 July 1970 revising the rules applicable to explosive powders and substances (JORF, 5 December 1996, p. 17695).

11 The Commission took the view that that decree only transposed the provisions of the directive concerning the placing on the market, monitoring of conformity and CE marking of explosives and the sanctions applicable in the event of a breach of the rules on CE marking and, by letter of 30 April 1997, communicated to the French Republic a reasoned opinion concerning Articles 9 to 12 and 14 of the directive and invited it to comply therewith within two months of being notified thereof.

12 Since no response to the reasoned opinion was received, the Commission brought the present action. In its reply it withdrew the complaint in respect of the failure to transpose Article 14 of the directive.

13 As regards, first, explosives, the French Government does not deny that the relevant provisions were not transposed into national law; however, it refers to difficulties which it, like other Member States, encountered in implementing Articles 9 and 11 of the directive, owing in particular to the absence of a common transfer document. It contends that it did not fail to fulfil its obligations because the provisions were not sufficiently precise to be transposed.

14 It points out in that regard that it did not remain idle but, within the committee referred to in Article 13 of the directive, proposed a number of solutions with a view to the harmonisation of the transfer licence. However, those proposals were not followed up. It therefore maintains that any failure to transpose the relevant provisions can be explained, in particular, by the omission on the part of the Commission, which did not adopt appropriate measures for the implementation of the directive.

15 The Commission does not agree that Article 8 of the directive presupposes the adoption of a common model for the document issued when approval to transfer explosives is granted. In response to the French Government's argument that the provisions of the directive lacked precision, it contends that they were sufficiently precise and that, in any event, imprecision in the provisions of a directive cannot justify a Member State's failure to fulfil its obligation to transpose that directive into domestic law.

16 As regards, second, ammunition, the French Government claims that Article 10 of the directive was transposed by Section 2 of Title V of Decree No 95-589 of 6 May 1995 on the application of the Decree of 18 April 1939 laying down the rules applicable to war materials, weapons and ammunition (JORF, 7 May 1995, p. 7458, hereinafter 'the decree of 6 May 1995'). Thus Article 92 of that decree, which provides that a licence must be obtained to transfer weapons, ammunition and their component parts to another Member State, constitutes the transposition of Article 10(2) of the directive. Article 93 of the decree, which lays down a procedure for the approval of arms dealers, who may transfer those materials without prior authorisation, is intended to transpose Article 10(3) of the

directive. Under Article 94 of the decree of 6 May 1995 transfers of those materials to France are subject to prior consent, which must be issued by the Minister responsible for customs.

17 According to Article 95 of the decree of 6 May 1995, however, the conditions in which the applications referred to in Articles 92 to 94 of that decree are to be drawn up are to be determined by an implementing order. The French Government stated at the hearing that that order had been adopted on 25 May 1999 and had become applicable on 15 June 1999.

18 The French Government claims that Article 11 of the directive was transposed, in the case of ammunition, by Article 80 of the decree of 6 May 1995, which empowers the Minister responsible for customs, in case of grave threats to, or attacks upon, public order through the illicit possession or use of ammunition or its components, to take all measures necessary to prevent such illicit possession or use as regards transfers of ammunition or its components from or to a Member State.

19 Finally, the French Government states that Article 101 of the decree of 6 May 1995 provides for an exchange between Member States of information received in application of Articles 92, 93 and 95 of the decree and forwarded by other Member States in respect of transfers to France, and places an obligation on the Minister of Defence to notify the Member States and the Commission of the authorities or departments responsible for forwarding or receiving information relating to the acquisition, possession and transfer of weapons, ammunition and their components. Since the adoption of the implementing order provided for in Article 95 of the decree of 6 May 1995 the French Republic has therefore been able to communicate information concerning the implementation of the information exchange network referred to in Article 12 of the directive.

20 In that regard, the Commission replies that in the absence of an implementing order the decree of 6 May 1995 has no effect and that a provision, such as Article 95 of the decree, which merely empowers an authority to adopt the actual provisions necessary at a later stage cannot effect a complete and accurate transposition of the directive.

Findings of the Court

21 As regards, first, the French Government's arguments relating to the difficulties encountered in implementing the provisions of the directive on explosives owing, first, to their lack of precision, it has consistently been held that practical difficulties which emerge when it comes to implementing a Community measure cannot constitute a ground for a Member State to exonerate itself from fulfilling its obligations (see, in particular, Case 128/78 *Commission* v *United Kingdom* [1979] ECR 419, paragraph 10, and Case C-374/89 *Commission* v *Belgium* [1991] ECR I-367, paragraph 10).

22 As regards, next, the obligation to adopt a common model for the document giving concrete expression to approval to transfer, it should be pointed out, as the Commission has correctly observed, that such an obligation does not arise under the directive.

23 Even assuming, moreover, that the most favourable procedure for transfers within the Community presupposes the introduction of such a harmonised document, the failure to adopt Community measures for that purpose cannot prevent a Member State from adopting the laws and regulations necessary to transpose the directive.

24 Furthermore, as regards the proposals which the French Republic allegedly made in the framework of the committee provided for in Article 13 of the directive with a view to the adoption of a common transfer document, such initiatives have no effect on the existence of the failure to transpose the measure concerned.

25 As regards, second, Article 10 of the directive, on the transfer of ammunition, it should be pointed out that Article 95 of the decree of 6 May 1995 provides that an order of the Minister responsible for customs is to define the conditions in which applications to transfer, the temporary approval for transfer and the approval prior to the transfer, and also the declarations of transfer in accordance with Articles 92 to 94 of the decree, are to be drawn up. It is common ground that those provisions cannot be applied in the absence of the implementing order.

26 Since it thus refers to a measure which is subsequently to implement the provisions intended to transpose Article 10 of the directive, the decree of 6 May 1995 cannot be regarded as effecting a complete and accurate transposition of that directive (see, to that effect, Case C-263/96 *Commission* v *Belgium* [1997] ECR I-7453, paragraph 26).

27 As regards Articles 11 and 12 of the directive, while it is true that their implementation by Articles 80 and 101 of the decree does not depend on other measures being adopted, the fact none the less remains that so long as, in the

absence of the implementing order, Article 10, which lays down the general rule, is not transposed, the articles of that decree have no legal effect. The measures transposing those provisions, which merely derogate from, or supplement, Article 10 of the directive, which has not yet been transposed, are therefore irrelevant.

28 As regards, last, the implementing order adopted on 25 May 1999 to which the French Government refers, it should be pointed out that, in an action under Article 169 of the Treaty, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, in particular, Case C-315/98 *Commission* v *Italy* [1999] ECR I-8001, paragraph 11).

29 In light of the foregoing, it must be held that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Articles 9 to 12 of the directive, the French Republic has failed to fulfil its obligations under that directive.

Costs

30 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. **Declares that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with Articles 9 to 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 that directive;**

2. **Orders the French Republic to pay the costs.**

Edward Sevón Gulmann

Puissochet Jann

Delivered in open court in Luxembourg on 23 March 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber