# OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 1 October 1987 *

*Mr President,*
*Members of the Court,*

1. In this case, the Court is called upon to decide whether the Italian Republic has correctly implemented Council Directive 79/109/EEC [1] of 24 January 1979 amending as regards brucellosis Directive 64/432/EEC. [2]

2. As the Court has already held, the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts. [3]

3. On the other hand, mere administrative practices, which by their nature may be changed as the authorities see fit and which lack appropriate publicity cannot be regarded as constituting a valid implementation of the duty imposed on Member States by the third paragraph of Article 189 of the EEC Treaty. [4]

4. It is in the light of those principles that I now wish to consider whether the Italian Republic has correctly transposed Directive 79/109/EEC into national law.

5. Let me point out first that during the oral procedure the defendant's Agent admitted that the killed 45/20 adjuvant vaccine referred to in the second indent of Annex A (II) (A) (2) (b), inserted in Directive 64/432 by Article 6, has not yet been registered in Italy and that that provision has therefore not been transposed into national law.

6. The other problems raised by this case may be grouped under two headings, namely the provisions contained in the administrative circulars and the rules applied to animals imported from other Member States.

## A — The provisions contained in the administrative circulars

7. It can be seen from the information provided by the Italian authorities and in particular, from the table drawn up by them at the Court's request that the amendments to Directive 64/432 contained in the following articles of Directive 79/109 have been the subject of Administrative Circulars No 65, of 16 April 1973, No 25, of 23 June 1981 and No 32, of 30 April 1986:

* Translated from the French.

1 — Official Journal L 29 of 3 February 1979, p. 20.

2 — Council Directive 64/432/EEC of 26 June 1984 on animal health problems affecting intra-Community trade in bovine animals and swine, Official Journal, English Special Edition 1963-64. p. 164.

3 — Judgment of 23 May 1985 in Case 29/84 *Commission* v *Federal Republic of Germany* [1985] ECR 1661; judgment of 9 April 1987 in Case 363/85 *Commission* v *Italian Republic* [1987] ECR 1733, paragraph 7.

4 — See, in particular, the judgment of 15 December 1982 in Case 160/82 *Commission* v *Kingdom of the Netherlands* [1982] ECR 4637, paragraph 4; the judgment of 15 March 1983 in Case 145/82 *Commission* v *Italian Republic* [1983] ECR 711, paragraph 10; and more recently, the judgment of 15 October 1986 in Case 168/85 *Commission* v *Italian Republic* [1986] ECR 2945, paragraph 13.

Article 5: subparagraph (ii), second indent;

Article 7: paragraph (c), first indent;

Article 8;

Article 9: Section D.

8. It was said at the hearing that the circulars involved are *secundum legem* and not *contra legem*. However, besides the fact that the Court has never to my knowledge accepted such a distinction, it can be seen from a close reading of the provisions at issue that they either amend the basic directive (64/432/EEC) directly or permit alternative tests to be carried out which were not provided for in that directive, which amounts to amending it.

9. The 1964 directive was transposed into the Italian legal order by a law, namely Law No 397 of 30 April 1976 (published in the GURI of 11 June 1976, No 153). The provisions of Directive 79/109/EEC must therefore be transposed in domestic provisions of the same legal rank as those which they are intended to amend (judgment of 6 May 1980 in Case 102/79 *Commission* v *Belgium* [1980] ECR 1473, at p. 1486, paragraph 10).

10. I must however admit that Section D, inserted by Article 9, is a borderline case. That article supplements Annex C to Directive 64/432/EEC by adding thereto a description of three methods of analysis or tests only one of which has been adopted in Italy under the option which Member States have in that regard. The test in question is the buffered brucella antigen test (to be found in Section D, inserted by Article 9), made applicable in Italy by the Ministerial Decree of 15 April 1981.

11. However, the description of the method does not appear in the ministerial decree but in Circular No 25 of 23 June 1981. The Commission takes note of that fact but it has not told the Court whether it considers that to be sufficient. However, that appears to be its view because it made no further mention of Article 9 at the hearing.

12. I admit that it could be asked if it is really necessary for the technical definition of a method of analysis to be transposed by a law or regulation or whether a circular would not be sufficient for the purpose. Those methods are used only by approved laboratories or official veterinarians and not by traders.

13. On the other hand, however, as the Court had said in previous decisions, circulars may be changed as the authorities see fit and therefore do not provide all the guarantees of legal certainty. It should also be noted that the descriptions of methods of analysis to be found in the annex to the basic 1964 directive were published in Italy as an annex to the Law of 30 April 1976.

14. It therefore seems to me that the new method of analysis, which has the same status as that published in 1976, should also be transposed into domestic law by a legislative provision.

15. To sum up, therefore, I propose that the Court should follow its previous decisions and hold that the articles mentioned above have not been transposed adequately and definitively into national law and that the Italian Republic has failed to fulfil its obligations under the EEC Treaty in that regard.

**B — The application of the provisions of the directive to animals imported from other Member States**

16. The Commission considers that in regard to certain rules which have been put into effect in Italy concerning the checks to be carried out on animals bred in Italy, or which did not need to be put into effect in the national territory because the Member States had an option in that regard, Italy none the less ought to have adopted an express provision to the effect that the importation of animals tested in accordance with the rules of the country from which they come must be allowed.

17. The first problem is the failure to introduce the concept of 'region'. *Article 1* of Directive 79/109/EEC amended Article 2 of Directive 64/432/EEC by introducing that new concept into it.

18. *Article 2*, read together with *Article 4* of Directive 79/109/EEC, makes it possible, under certain conditions, to simplify the brucellosis tests to be carried out in 'a part of a Member State comprising several adjacent regions'. For that to be possible, the Commission must adopt a decision in accordance with the opinion of the standing veterinary committee (procedure laid down in Article 12 of Directive 64/432/EEC, inserted by Directive 71/285/EEC, Official Journal, English Special Edition 1971 (II), p. 649).

19. The Commission considers that, as it now stands, the Italian legislation does not permit the importation of animals from a part of the territory of another Member State in which the tests have been thus simplified.

20. The Commission also mentions *Article 3* of Directive 79/109/EEC. That article amends Annex A (II) (A) (1) of Directive 64/432/EEC which defines the circumstances in which 'bovine animals and herds are to be considered brucellosis-free'.

21. Whereas under the former version of paragraph (c) (i) of that section, the sero-agglutination method could be replaced only by three ring-tests, it can now also be replaced by a bufferred brucella antigen test.

22. As I have already pointed out, that new method was made applicable in Italy by the Ministerial Decree of 15 April 1981. However, the Commission claims that that Ministerial Decree carries the title '*National* prophylactic plan to combat bovine brucellosis' and that the provision in question applies only to imports.

23. Finally, Article 5 of Directive 79/109/EEC introduced in Annex A (II) (A) (1) (c) (ii) and (iii) four serological tests which may be used according to choice. Italy, in the Ministerial Decree of 15 April 1981, adopted, for the purposes of checks carried out on its national territory, the sero-agglutination test or the brucella antigen test. It did not provide for the use of the plasmo-agglutination test or the plasma ring-test.

24. If I correctly understand the Commission's point of view, it argues that Italy should have expressly provided in a law or regulation that the importation of bovine animals tested by one of the two methods not provided for in regard to tests carried out within the country should none the less be permitted.

25. However, I am not convinced by the Commission's argument on that point and I would like to refer in that regard to Italian Law No 397 of 30 April 1976, to which I have already referred, which implemented Directive 64/432/EEC. According to Article 11 of that law, 'bovine animals and swine sent to Italy from other Member States of the European Economic Community must provide the same guarantees in regard to health as those prescribed in the case of shipment from Italy to other Member States. However, the said animals must be presented for the veterinary check carried out at the frontier and be accompanied by certificates conforming to models I to IV set out in Annex F, drafted in the Italian language'.

26. According to Article 15 of the abovementioned law, 'veterinarians assigned to the frontiers shall prohibit the introduction into Italian territory of bovine animals and swine coming from other Member States of the European Economic Community:

(a) if the animals are affected by, or suspected of being affected by, or of being contaminated by a contagious disease;

(b) if the examination carried out at the frontier reveals that the guarantees which the certificate is intended to provide have not been provided in respect of those animals.'

27. What conclusions may be drawn from those measures?

28. The general statement of principle that 'animals sent to Italy (. . . ) must provide the same guarantees in regard to health as those prescribed in the case of shipment from Italy to other Member States' could give rise to the belief that Italy allows on to its territory only animals from herds which have been tested in accordance with rules identical in every respect to those adopted for testing in Italy, even in areas in which the directive leaves the Member State an option.

29. That impression could be reinforced by penultimate paragraph of Administrative Circular No 32 of 30 April 1986, which states that 'the provisions laid down in respect of brucellosis for bovine animals shipped from Italy to the European Economic Community also apply to bovine animals for breeding or production imported from other Member States'.

30. In my opinion, however, such a conclusion is not necessarily correct because:

(i) by the Commission's own admission, there has hitherto been no obstacle to trade (with regard to the consequences of the absence of practical difficulties see the judgment of 10 July 1986 in Case 235/84 *Commission* v *Italy* [1986] ECR 2291, paragraph 14);

(ii) the provisions of the law must take precedence over the terms of the circular;

(iii) the law, by using the expression 'the same guarantees' must be interpreted as meaning that any test carried out in the country of origin which is in accordance with the directive fulfils that condition;

(iv) the 'operational' part of the law of 1976 is constituted by Article 15 thereof which sets out restrictively the grounds on which access to Italian territory may be prohibited.

31. It is true that the said Article 15 is not worded in exactly the same terms as Article 6 (3) of Directive 64/432/EEC, which reads as follows:

'Each country of destination may prohibit the introduction of bovine animals and swine into its territory if an examination made at the frontier post by an official veterinarian reveals:

(a) that the animals are affected by, or suspected of being affected by, or of being contaminated by a compulsorily notifiable disease;

(b) that the provision of Articles 3 and 4 have not been observed as regards these animals'.

32. According to the directive, the 'examination made at the frontier post' concerns both hypotheses (a) and (b), whereas in the Italian law that examination is concerned only with subparagraph (b). However, it is difficult to imagine that an Italian official veterinarian could conclude that animals were contaminated without having examined them.

33. Furthermore, subparagraph (b) of the Italian law is more restrictive in scope than subparagraph (b) of the directive, which covers all cases in which the examination carried out revealed that the provisions of Articles 3 and 4 of the directive had not been observed. The Italian law, on the other hand, appears to refer only to cases in which the certificate contains omissions or errors.

34. In any event, to my knowledge, the conformity of the abovementioned provisions of the Italian law with those of Directive 64/432/EEC has never been contested by the Commission. It is therefore possible to suppose that that law has not provoked criticism.

35. Furthermore, Directive 64/432/EEC provides that animals being exported must be accompanied by health certificates. The models for those certificates annexed to the Italian law conform to those provided for under the abovementioned directive, as amended by Directive 71/285/EEC of 19 July 1971 (Official Journal, English Special Edition 1971 (II), p. 649).

36. In my opinion, it follows from the abovementioned articles of the Italian law and from the way in which the health certificates are drafted that a veterinarian employed by the Italian administration cannot refuse to permit the entry into the national territory of animals coming from a 'part of a Member State composed of several adjacent regions' (Article 2 of the 1979 directive) in respect of which the tests have been simplified or which have been tested by one of the methods not adopted in Italy.

37. The health certificates do not mention the concept of 'region' but merely that of 'an officially brucellosis-free bovine herd' or 'a brucellosis-free bovine herd'.

38. It is when a herd may be so described that the concept of 'region' or the application of an alternative method of analysis comes into play. However, it is clear than an Italian veterinarian cannot do anything other than accept the assessment made in that regard by the veterinarian in the exporting country.

39. The entire system is clearly based on the principle of mutual confidence between official departments.

40. That follows in particular from the seventh recital in the preamble to the basic directive (64/432/EEC), which reads as follows:

'. . . so that Member States may be *sure* that these requirements are satisfied, provision must be made for the issue by an official veterinarian of a health certificate which will accompany the animals to their destination'.

41. The certificate thus constitutes a sort of presumption of health which may be rebutted only by the result of an examination carried out at the frontier.

42. It should also be noted that in addition to tests which permit a herd to be classified as 'officially brucellosis-free' or 'brucellosis-free', Article 3 of Directive 64/432/EEC provides that animals intended to be exported must undergo additional tests during the 30 days before loading.

43. With regard to bovine animals, the test involved is a sero-agglutination test (Article 3 (3) (c), as amended by Directives 66/600/EEC and 71/285/EEC) and, in regard to swine, a sero-agglutination test and a complement fixation reaction (Article 3 (4), as amended by Directive 71/285/EEC).

44. Those two types of test are the only ones mentioned on the health certificates. Both were brought into effect in Italy by the Law of 30 April 1976.

45. It therefore seems to me that it is not possible for an Italian veterinary official, unless he infringes the law of his own country, to refuse to permit the importation of an animal into the national territory on the ground that the animal has come from a 'part of a Member State composed of several adjacent regions' in which the tests have been simplified or from a herd tested by one of the methods of analysis newly introduced by Directive 79/109/EEC.

46. It may therefore be concluded that even in its present state, the Italian legislation does not prevent the directive from achieving the desired result in regard to importations into Italy. That is confirmed by the fact that no difficulty has arisen in practice.

## Conclusion

47. For all the reasons set out above, I propose that the Court should hold that, by failing to adopt within the prescribed period the provisions needed to comply with the second indent of subparagraph (ii), contained in Article 5, the second indent of paragraph (b), contained in Article 6, the first indent of paragraph (c), contained in Article 7, the provisions contained in Article 8 and Section D, contained in Article 9 of Council Directive 79/109/EEC of 24 January 1979 amending Directive 64/432/EEC as regards brucellosis, the Italian Republic has failed to fulfil its obligations under the Treaty.

For the rest, the application should be dismissed.

Since the Commission has been successful only in part, I would propose that the Court order it to bear one-third of the costs.