Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 19 September 2018[1]

Case C-127/17

European Commission
v

Republic of Poland

(Failure of a Member State to fulfil obligations – Directive 96/53/EC – Articles 3 and 7 – Transport – International road traffic – Vehicles – Maximum authorised axle weights – Restrictions on certain roads or engineering structures – Special permit regime)

1. By its application, the European Commission asks the Court to declare that, by requiring transport companies to be in possession of special permits in order to use certain public roads, the Republic of Poland has failed to fulfil its obligations under the combined provisions of Article 3 and Article 7 of Council Directive 96/53/EC of 25 July 1996 laying down for certain road vehicles circulating within the Community the maximum authorised dimensions in national and international traffic and the maximum authorised weights in international traffic,[2] as amended by Directive (EU) 2015/719 of the European Parliament and of the Council of 29 April 2015,[3] read in conjunction with points 3.1 and 3.4 of Annex I to Directive 96/53.

2. This application is particularly important on account of, first, it being unprecedented, even though Directive 96/53 has been in force for more than twenty years and, secondly, the economic importance of the obligation to comply with rules that have been harmonised in the European Union since 1985, intended to facilitate traffic flow between Member States, in a context of rapid growth in European road haulage.[4] Indeed, if international and national trade is to develop, it is crucial that goods can be transported quickly, safely and affordably, especially in the wake of certain economic practices, including offshoring. It is therefore necessary to be particularly vigilant as regards grounds for subjecting hauliers to constraints, in so far as those constraints must not hinder the achievement of European objectives, particularly environmental and competition objectives.

3. In this Opinion, I will set out the reasons why, in my view, this action for failure to fulfil obligations is well founded.

1 Original language: French.

2 OJ 1996 L 235, p. 59.

3 OJ 2015 L 115, p. 1, 'Directive 96/53'.

4 In 2016 this had increased by 5.1% compared with 2015, according to statistics provided by Eurostat.

I. Legal context

A. EU law

1. Directive 96/53

4. Recitals 1, 2, 3, 5, 7 and 12 of Directive 96/53 state that:

‘(1) … Council Directive 85/3/EEC of 19 December 1984 on the weights, dimensions and certain other technical characteristics of certain road vehicles [5] established, in the framework of the common transport policy, common standards permitting improved use of road vehicles in traffic between Member States;

(2) … Directive [85/3] has been significantly amended on many occasions; … on the occasion of its further amendment it should for reasons of clarity and rationality be recast in a single text together with Council Directive 86/364/EEC of 24 July 1986 relating to proof of compliance of vehicles with Directive [85/3] [6];

(3) … differences between standards in force in the Member States with regard to the weights and dimensions of commercial road vehicles could have an adverse effect on the conditions of competition and constitute an obstacle to traffic between Member States;

…

(5) … the abovementioned standards reflect a balance between the rational and economical use of commercial road vehicles and the requirements of infrastructure maintenance, road safety and the protection of the environment and the fabric of [life];

…

(7) … additional technical requirements related to the weights and dimensions of vehicles may apply to commercial vehicles registered or put into circulation in a Member State; … these requirements must not constitute an obstacle to the circulation of commercial vehicles between Member States;

…

(12) … for the other vehicle characteristics, Member States are authorised to apply in their territory different values from those laid down in this Directive only to vehicles used in national traffic’.

5. Under Article 1(1) of that directive:

‘This Directive applies to:

(a) the dimensions of motor vehicles in categories M2 and M3 and their trailers in category 0 and motor vehicles in categories N2 and N3 and their trailers in categories 03 and 04, as defined in Annex II to Directive 2007/46/EC of the European Parliament and of the Council [of

5 OJ 1985 L 2, p. 14.

6 OJ 1986 L 221, p. 48.

5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive)[7]];

(b) the weights and certain other characteristics of the vehicles defined in (a) and specified in Annex I (2) [[8]] to this Directive.'

6. Article 2 of that directive provides that:

'For the purposes of this Directive:

– …

– "vehicle combination" shall mean either:

  – a road train consisting of a motor vehicle coupled to a trailer; or

  – an articulated vehicle consisting of a motor vehicle coupled to a semi-trailer,

– …

– "maximum authorised weight" shall mean the maximum weight for use of a laden vehicle in international traffic,

– "maximum authorised axle weight" shall mean the maximum weight for use in international traffic of a laden axle or group of axles,

– "indivisible load" shall mean a load that cannot, for the purpose of carriage by road, be divided into two or more loads without undue expense or risk of damage and which owing to its dimensions or mass cannot be carried by a motor vehicle, trailer, road train or articulated vehicle complying with this Directive in all respects,

…'

7. Article 3(1) of the same directive provides that:

'A Member State may not reject or prohibit the use in its territory:

– in international traffic, of vehicles registered or put into circulation in any other Member State for reasons relating to their weights and dimensions,

– in national traffic, of vehicles registered or put into circulation in any other Member State for reasons relating to their dimensions,

provided that such vehicles comply with the limit values specified in Annex I.

7 OJ 2007 L 263, p. 1. According to Annex II, Part A, point [1.1], of Directive 2007/46, category M consists of 'motor vehicles with at least four wheels designed and constructed for the carriage of passengers.' According to Annex II, Part A, point 1[.2.2], of that directive, category N2 consists of '… vehicles [designed and constructed primarily for the carriage of goods] having a maximum mass exceeding [3.5] tonnes but not exceeding 12 tonnes.' According to Annex II, Part A, point 1[.2.3], of that directive, category N3 consists of '… vehicles [designed and constructed primarily for the carriage of goods] having a maximum mass exceeding 12 tonnes.'

8 See footnote 9 of this Opinion.

This provision shall apply notwithstanding the fact that:

(a) the said vehicles are not in conformity with the requirements of that Member State with regard to certain weight and dimension characteristics not covered by Annex I;

(b) the competent authority of the Member State in which the vehicles are registered or put into circulation has authorised limits not referred to in Article 4(1) exceeding those laid down in Annex I.'

8. Article 7 of Directive 96/53 is worded as follows:

'This Directive shall not preclude the application of road traffic provisions in force in each Member State which permit the weight and/or dimensions of vehicles on certain roads or civil engineering structures to be limited, irrespective of the State of registration of such vehicles or the State where such vehicles were put into circulation.

This includes the possibility to impose local restrictions on maximum authorised dimensions and/or weights of vehicles that may be used in specified areas or on specified roads, where the infrastructure is not suitable for long and heavy vehicles, such as city centres, small villages or places of special natural interest.'

9. Annex I to that directive is entitled 'Maximum weights and dimensions and related characteristics of vehicles'. [9]

10. Point 3 of that annex is entitled 'Maximum authorised axle weight of the vehicles referred to in Article [1(1)(b)] (in tonnes)'. Points 3.1 and 3.4 indicate as follows:

'3.1	Single axles Single non-driving axle	10 tonnes

…

3.4	Driving axle [10]	
3.4.1	Driving axle of the vehicles referred to in 2.2.1 [11] and 2.2.2 [12]	11.5 tonnes
3.4.2	Driving axle of the vehicles referred to in points 2.2.3 [13], 2.2.4 [14], 2.3 [15] and 2.4 [16]	11.5 tonnes

…'.

9 Point 1 is entitled 'Maximum authorised dimensions for the vehicles referred to in Article [1(1)(a)]'. Point 2 concerns the 'Maximum authorised vehicle weight (in tonnes)'.

10 The maximum authorised weight of the vehicles in question ranges from 18 to 44 tonnes.

11 'Road trains with five or six axles …'

12 'Articulated vehicles with five or six axles …'

13 'Road trains with four axles consisting of a two-axle motor vehicle and a two-axle trailer'.

14 'Articulated vehicles with four axles consisting of a two-axle motor vehicle and a two-axle semi-trailer, [with a distinction according to] the distance between the axles of the semi-trailer …'

15 'Motor vehicles …'

16 'Three-axle articulated buses …'

2. Decision No 1692/96/EC

11. Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network,[17] which was replaced by Decision No 661/2010/EU,[18] the latter being replaced in turn by Regulation (EU) No 1315/2013,[19] in Article 2, entitled 'Objectives', provided as follows:

'1. The trans-European transport network shall be established gradually by 2010 [[20]] by integrating land, sea and air transport infrastructure networks throughout the Community in accordance with the outline plans indicated on the maps in Annex I and/or the specifications in Annex II.

2. The network must:

(a) ensure the sustainable mobility of persons and goods within an area without internal frontiers under the best possible social and safety conditions, while helping to achieve the Community's objectives, particularly in regard to the environment and competition, and contribute to strengthening economic and social cohesion;

…'

3. 2003 Act of Accession

12. Article 24 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded[21] provides as follows:

'The measures listed in Annexes V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV to this Act shall apply in respect of the new Member States under the conditions laid down in those Annexes.'

13. Annex XII to the 2003 Act of Accession is entitled 'List referred to in Article 24 of the Act of Accession: Poland'. Point 8 of that annex, headed 'Transport policy', declares, in paragraph 3, that Directive 96/53 is applicable on the following terms:

'31996 L 0053: … Directive 96/53 … as last amended by:

– 32002 L 0007: Directive 2002/7/EC of the European Parliament and of the Council of [18 February 2002[22]].

17 OJ 1996 L 228, p. 1.

18 Decision of the European Parliament and of the Council of 7 July 2010 on Union guidelines for the development of the trans-European transport network (OJ 2010 L 204, p. 1).

19 Regulation of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU (OJ 2013 L 348, p. 1).

20 Article 1(1) of Decision No 884/2004/EC of the European Parliament and of the Council of 29 April 2004 amending Decision No 1692/96/EC on Community guidelines for the development of the trans-European transport network (OJ 2004 L 167, p. 1) replaced that date with '2020'. See also recitals 1, 4 and 5 of that decision.

21 OJ 2003 L 236, p. 33, 'the 2003 Act of Accession'.

22 OJ 2002 L 67, p. 47.

By way of derogation from Article 3(1) of Directive [96/53], vehicles complying with the limit values of category 3.4 of Annex I to that Directive may only use non-upgraded parts of the Polish road network until 31 December 2010 if they comply with Polish axle-weight limits. As from the date of accession, no restrictions may be imposed on the use, by vehicles complying with the requirements of Directive [96/53], of the main transit routes set out in Annex I to Decision [No 1692/96].

Poland shall adhere to the timetable set out in the tables below for the upgrading of its main road network, as contained in Annex I to Decision [No 1692/96]. Any infrastructure investments involving the use of funds from the [EU] budget shall ensure that the arteries are constructed or upgraded to a load bearing capacity of 11.5 tonnes per axle.

In line with the completion of the upgrading, there shall be a progressive opening of the Polish road network, including the network as contained in Annex I of Decision [No 1692/96], for vehicles in international traffic complying with the limit values of the Directive. For the purpose of loading and unloading, where technically possible, the use of non-upgraded parts of the secondary road network shall be allowed during the entire transitional period.

…'

14. The timetable for upgrading the main Polish road network to which the third subparagraph of Annex XII, point 8.3 of the 2003 Act of Accession refers is laid down in eight tables, and spanning the period from 1 January 2004 to 1 January 2011.

B. Polish law

15. Article 41 of the ustawa o drogach publicznych (Law on Public Roads) of 21 March 1985,[23] in the version in force at the material time,[24] states:

'1. Subject to Article 41(2) and (3), the use of vehicles with an authorised single driving axle weight of 11.5 tonnes is permitted on public roads.

2. The Minister właściwy do spraw transportu [(Minister for Transport, Poland)], shall establish, by way of regulation, the list of:

1) the national and regional roads on which vehicles with an authorised single axle weight of 10 tonnes may circulate,

2) the national roads on which vehicles with an authorised single axle weight of 8 tonnes may circulate,

having regard to the need to protect the roads and ensure circulation.

3. Regional roads other than those defined in the first subparagraph of Article 41(2), district roads and municipal roads constitute a road network that may be used by vehicles with an authorised single axle weight of 8 tonnes.'

16. On 13 May 2015, on the basis of Article 41(2) of the Law on Public Roads, the Minister Infrastruktury i Rozwoju (Minister for Infrastructure and Development, Poland) adopted the rozporządzenie w sprawie wykazu dróg krajowych oraz dróg wojewódzkich, po których mogą poruszać się pojazdy o dopuszczalnym nacisku pojedynczej osi do 10 t, oraz wykazu dróg krajowych, po których

23 Dz. U. No 14, position 60.

24 Namely 26 April 2016, as confirmed at the hearing.

mogą poruszać się pojazdy o dopuszczalnym nacisku pojedynczej osi do 8 t (Regulation on the list of national and regional roads on which use is permitted by vehicles with an authorised single axle weight of 10 tonnes and the list of national roads on which use is permitted by vehicles with an authorised single axle weight of 8 tonnes).[25]

17. Article 2(35a) of the prawo o ruchu drogowym (Law on Road Traffic) of 20 June 1997[26], in the version in force at the material time,[27] defines a non-standard vehicle as a vehicle or vehicle combination whose laden or unladen axle weight is greater than the authorised weights laid down for a particular road by the provisions relating to public roads, or that has dimensions or a total actual laden or unladen weight greater than the authorised dimensions or weights laid down by the provisions of that law.

18. Article 2(35b) of the Law on Road Traffic defines an indivisible load as a load that cannot be divided into two or more loads without undue expense or risk of damage.

19. Article 64(1) to (3) of that law establishes that:

'1. Non-standard vehicles are authorised to circulate subject to compliance with the following requirements:

(1) obtention of a road traffic permit for non-standard vehicles in the corresponding category, issued by the competent authority by means of an administrative decision …;

(2) compliance with the road use conditions laid down in the permit referred to in Article 64(1);

(3) where the non-standard vehicle exceeds at least one of the following dimensions, it is driven by an authorised driver [28]:

   (a) length: 23 m;

   (b) width: 3.2 m;

   (c) height: 4.5 m;

   (d) total actual weight: 60 tonnes;

(4) particular care is taken by the driver of the non-standard vehicle.

2. The transport, by a non-standard vehicle, of loads other than indivisible loads is prohibited, with the exception of non-standard vehicles authorised to circulate under a category I or category II permit.

3. The dimensions, weight and axle weights of the non-standard vehicles authorised to circulate under permits in categories I to VII and the roads on which those vehicles may circulate are set out in the table [29] in Annex 1 to the present law.'

25 Dz. U. of 2015, position 802.

26 Dz. U., No 98, position 602.

27 Namely 26 April 2016, as confirmed at the hearing.

28 Article 2(35c) of the Law on Road Traffic, cited by the Republic of Poland, defines 'authorised driver' as the person responsible for ensuring safe road use and minimising hindrances to road traffic when the vehicle concerned is being driven.

29 That table indicates the dimensions (length, width and height) and the axle weights for each of those categories.

20. Article 64a to 64d of that law lays down the procedure for filing a permit application and for the issuing of permits, for each of the seven categories of non-standard vehicle. For vehicles with an authorised single driving axle weight of 11.5 tonnes, the permit is a category I or category IV permit depending on the category of public roads that those vehicles are to use.

21. Article 64a(3) of the Law on Road Traffic specifies that the category I permit [30] is issued by the competent road operator for the road on which the journey is to take place. The permit will be issued within seven working days from the date on which the application was filed.

22. Point 2 of Article 64c(3) of that law states that the category IV [31] permit in particular will be issued by the Generalny Dyrektor Dróg Krajowych i Autostrad (Director-General for National Roads and Motorways, Poland). Under the Article 64c(4), on entry into the territory of the Republic of Poland, that permit is also issued by the naczelnik urzędu celno-skarbowego (Director of the Customs and Tax Office, Poland). Under Article 64c(7), the category IV permit is issued within three working days from the date on which the application was filed.

23. Under point 3 of Article 64d(2) of the Law on Road Traffic, cited by the Republic of Poland, the permit is issued, inter alia, where it is possible to identify a route ensuring safe and efficient road use and, in particular where:

'(a) the traffic intensity is such that the non-standard vehicle can be driven safely;

(b) the technical condition of the built structures along the envisaged itinerary (that condition being determined on the basis of the rules of construction law) is such as to allow that road use;

(c) that road use does not jeopardise the technical condition of the built structures close to the aforementioned route.'

24. Article 64f of that law establishes, for each category, the upper limit of the fee payable for issuance of a permit, which ranges from 240 Polish zlotys (PLN) (approximately EUR 55 [32]), for category I, to PLN 5 800 (approximately EUR 1 326), for category VI. For category IV, the maximum amount is PLN 3 600 (approximately EUR 823).

25. In Section 4 of the same law, Article 140aa et seq. provide for fines to be levied on non-standard vehicles circulating without a permit or in breach of the requirements set out in the permit.

26. The Republic of Poland clarified that the exact fee payable for the permit is set by the rozporządzenie Ministra Transportu, Budownictwa i Gospodarki Morskiej w sprawie wysokości opłat za wydanie zezwolenia na przejazd pojazdu nienormatywnego (Regulation of the Minister for Transport, Construction and the Maritime Economy on fee payable for the road use permit for non-standard vehicles) [33] of 28 March 2012, and is:

'(1) for category I:

– PLN 50 [approximately EUR 11.50] for a permit valid for 1 month;

– PLN 100 [approximately EUR 23] for a permit valid for 6 months;

– PLN 200 [approximately EUR 46] for a permit valid for 12 months;

30 That is to say, the permit to use municipal, district and regional roads.

31 That is to say, the permit to use national roads.

32 At the exchange rate on 26 April 2016. That rate is used as a benchmark for the amounts referred to subsequently.

33 Dz. U. of 2012, position 366.

…

(4) for category IV:

– PLN 500 [approximately EUR 115] for a permit valid for 1 month;

– PLN 1 000 [approximately EUR 230] for a permit valid for 6 months;

– PLN 2 000 [approximately EUR 460] for a permit valid for 12 months;

– PLN 3 000 [approximately EUR 686] for a permit valid for 24 months.'

II. Pre-litigation procedure

27. Following complaints filed by transport companies carrying on their activity in Polish territory and the gathering of information from the Republic of Poland as part of an EU Pilot [34] procedure, the Commission sent that Member State a letter of formal notice on 30 April 2015.

28. In that letter, the Commission drew the Republic of Poland's attention to the fact that a number of provisions of its national legislation failed to comply with its obligations under, first, Article 3 of Directive 96/53, in so far as almost 97% of the Polish road network was closed to use by vehicles complying with the weight limits established in point 3.1 and/or point 3.4 of Annex I to that directive, and, secondly, Article 7 of that directive, in so far as that Member States relied on the derogations in that article without justifying why 97% of the Polish road network was entitled to benefit from them.

29. By its letter of formal notice, the Commission also questioned the special permit regime under which vehicles complying with the weight restrictions laid down in point 3.1 and/or point 3.4 of Annex I to Directive 96/53 may use infrastructure normally closed to such vehicles.

30. Considering the Republic of Poland's reply of 29 June 2015 to be unsatisfactory, the Commission issued a reasoned opinion by letter of 26 February 2016. The Commission asserted that the Republic of Poland was failing to fulfil its obligations under the combined provisions of Article 3 and Article 7 of Directive 96/53 by restricting the circulation of motor vehicles with a maximum single driving axle weight of 11.5 tonnes to roads forming part of the trans-European transport network and certain other national roads, and by subjecting the use of other public roads by those vehicles to a special permit regime, the necessity of which it also disputed.

31. On 26 April 2016, the Republic of Poland submitted to the Commission a request to extend the limit for replying to the reasoned opinion, which the Commission rejected on the grounds that it did not contain specific information on the legislative changes envisaged in order to end the infringement.

32. In its reply to the reasoned opinion, of 30 August 2016, the Republic of Poland informed the Commission of its endeavours, primarily to expand the network of public roads that may be used by vehicles with a maximum axle weight of 11.5 tonnes, and to amend the applicable laws and regulations with a view to reducing the number of sections of national and regional road subject to vehicle weight limits. The Republic of Poland stated that those amendments were to come into force in May 2017 and February 2018.

34 EU pilot file No 5913/13/MOVE. In its rejoinder, the Republic of Poland stated that the Ogólnopolski Związek Pracodawców Transportu Drogowego (National Employers' Association for the road transport sector, Poland) had filed a complaint with the Commission.

33. Since it was not persuaded that the contemplated legislative amendments complied with EU law and did not accept the timescale within which the provisions were to be amended, the Commission decided to bring the present action before the Court of Justice under the second paragraph of Article 258 TFEU.

34. By a single plea in law, the Commission alleges that the Republic of Poland has failed to fulfil its obligations under the combined provisions of Article 3 and Article 7 of Directive 96/53, read in conjunction with points 3.1 and 3.4 of Annex I to that directive, in particular by imposing a special permit regime as a condition for use of an exorbitant number of public roads by vehicles with a maximum driving axle weight of 11.5 tonnes.

III. Arguments of the parties

A. The Commission

35. In support of its action, the Commission claims that the restriction on access to public roads by the vehicles and their trailers referred to in Directive 96/53[35] that comply with the authorised maximum axle weight, that is to say 10 tonnes for the non-driving axle and 11.5 tonnes for the driving axle, results from a combination of two factors, namely, first, the fact that only roads that form part of the trans-European transport network and certain other national roads are open to vehicles with a maximum driving axle weight of 11.5 tonnes, under Article 41(2) of the Law on Public Roads, and, secondly, the requirement to possess a special permit allowing use of other roads, in accordance with Article 64 et seq. of the Law on Road Traffic.

36. To illustrate the economic impact of that requirement on the activity of factories of European and international significance, the Commission cited, inter alia, the example of the roads affording access to the town of Kętrzyn (Poland) where the Plastivaloire and Philips plants are located; according to the Commission, the traffic regime obliges hauliers to make long detours in order to transport products manufactured in those plants to the markets of Western Europe.

1. Restriction of international traffic to only the roads in the trans-European transport network and certain national roads

37. The Commission argues, in the first place, that the restriction under the Polish legislation conflicts with Article 3(1) of Directive 96/53, which lays down a regime for the free movement of vehicles with a maximum driving axle weight of 11.5 tonnes.

38. In that respect it submits, first, that, although Article 41(1) of the Law on Public Roads establishes the principle that vehicles with a maximum driving axle weight of 11.5 tonnes may use all public roads, Article 41(2) and (3) includes derogations that render Article 41(1) meaningless inasmuch as they have the effect of excluding those vehicles from nearly 97% of the road network.

39. It states, secondly, that it is apparent from the information supplied by the Republic of Poland on 29 June 2015 that less than 40% of the network of motorways and national roads is open, without restriction, to use by vehicles with a maximum driving axle weight of 11.5 tonnes, which represents less than 4% of the road network comprising motorways, national roads and the most important regional roads in Polish territory.

35 See points 5 and 10 of this Opinion.

40. Thirdly, the Commission disputes the Republic of Poland's argument that only the roads with the most international traffic, that is to say cross-border traffic on the trans-European road network, are subject to the requirements of Directive 96/53. The Commission asserts, giving several examples, that sections of roads affording access to large towns and cities involved in international transport and particularly in loading and unloading [36] cannot be used freely.

41. Furthermore, it emphasises that, contrary to the assertions of the Republic of Poland, Directive 96/53 does not include any restrictions, in accordance with the objectives of the directive since it came into force, and that the scope of application of the directive remained unaltered after the creation of the trans-European transport network by Decision No 1692/96, which has the same objective of facilitating the movement of goods. The Commission states that, although Article 2 of Directive 96/53 does not contain a definition of international traffic, recitals 3 and 7 of that directive, which refer to the circulation of traffic between Member States, read in the light of recital 12, indicate that that concept should be interpreted as relating to all cross-border traffic irrespective of road type. Any other interpretation would render Article 7 of Directive 96/53 ineffective.

42. Fourthly, addressing the Republic of Poland's arguments based on the condition of the road infrastructure, the Commission notes that, although there is no obligation under Directive 96/53 to build all public roads in order to ensure that the criteria in points 3.1 and 3.4 of Annex I can be met, the Member States must nevertheless comply with those criteria. Furthermore, roads which can bear a weight of 10 tonnes can, according to the Commission, bear limited traffic consisting of vehicles with a driving axle weight of 11.5 tonnes.

43. It adds that the Republic of Poland may not justify its failure to comply with the rules laid down in Directive 96/53 concerning the maximum authorised axle weight by claiming that it is seeking the balance referred to in recital 5, when those rules arise from the need for such balance.

44. As regards the category and the location of the public roads, many of them unmetalled, to which the Republic of Poland refers, the Commission does not consider this argument to be relevant since the debate is not about the roads on which there are no important loading and unloading points the condition of which could justify their falling within Article 7 of Directive 96/53, but about the majority of the metalled roads which may be used.

45. Fifthly, the Commission disputes the Republic of Poland's argument based on point 8.3 of Annex XII of the 2003 Act of Accession, on the ground that the first subparagraph of point 8.3 clearly required roads other than those in the trans-European road transport network to be adapted for international traffic after 31 December 2010, without waiting further for the progressive upgrading of the national road network as was permitted during the transitional period.

46. In addition, it states that, from 2004, several thousand kilometres of roads other than national roads or those in the trans-European transport network were upgraded as part of the national programme for the reconstruction of local roads, financed by European funds. However, according to the Polish regulations, those municipal or district roads are, in principle, subject to the 8-tonne single axle weight limitation, with no distinction between upgraded roads and other roads. The situation has remained the same since entry into force of the rozporządzenie Ministra Infrastruktury i Budownictwa w sprawie wykazu dróg krajowych oraz dróg wojewódzkich, po których mogą poruszać się pojazdy o dopuszczalnym nacisku pojedynczej osi do 10 t, oraz wykazu dróg krajowych, po których mogą poruszać się pojazdy o dopuszczalnym nacisku pojedynczej osi do 8 t (Regulation of the Minister for Infrastructure and Construction on the list of national and regional roads that can be used by vehicles with an authorised single axle weight of 10 tonnes and the list of national roads that can be used by

36 The Commission states that these places are also called the 'first-last mile'.

vehicles with an authorised single axle weight of 8 tonnes)[37] of 21 April 2017, to which the Republic of Poland refers, which came into force after the action for failure to fulfil obligations was brought, and has meant that vehicles with a maximum axle weight compliant with the requirements of Directive 96/53 still cannot use nearly 45% of the national roads without a permit. The Commission is also of the view that inasmuch as vehicles may use the roads after obtaining a permit, the Republic of Poland's plea in defence, invoking the ongoing upgrading of the road network, is unfounded.

47. The Commission argues, in the second place, that the restrictions under Article 41(2) and (3) of the Law on Public Roads are based on a misinterpretation of Article 7 of Directive 96/53 according to which there can be an exception to the principle of free movement for vehicles with a maximum driving axle weight of 11.5 tonnes. The Commission recalls, first, that the Republic of Poland cannot claim that the restriction relates to roads that do not carry international traffic, principally on the ground that no EU act makes such a distinction.

48. The Commission states, secondly, that the sole possible derogation from the principle of free movement on all roads may be based only on the roads being unsuitable for use by vehicles with a maximum driving axle weight of 11.5 tonnes. It argues that the criteria to be taken into consideration are the safety of that traffic, the load-bearing capacity of the engineering structures and the volume of road traffic. It notes, in that respect, that Article 7 of Directive 96/53, which establishes a right to derogate from the principle of free movement 'on certain roads or civil engineering structures', must be interpreted restrictively. That being so, the Commission claims that there is no basis for derogations to be applied to 97% of the Polish road network or, more specifically, to all local roads.

49. Lastly, the Commission observes that the restrictions on access to certain Polish public roads are not founded on considerations relating to the condition of those roads or sections of them, as is apparent from the system for issuing unlimited road use permits.

2. The requirement to be in possession of a special permit to use other roads

50. The Commission claims that the regime prohibiting road use unless a permit is obtained is contrary to Directive 96/53 in so far as it limits and hinders the free movement of vehicles.

51. It observes that, under the restrictive regime covering regional, district and municipal roads, permits must be applied for, for each of those roads, from various authorities for a single journey. It considers that, in the absence of a one-stop shop, and given the time it takes to obtain the permit, and the fees, the system in place is costly, time-consuming and such as to discriminate indirectly against non-resident hauliers and hauliers from the Member States. It states that, under Article 64(2) of the Law on Road Traffic, category IV permits, which allow vehicles with a driving axle weight of 11.5 tonnes to circulate on national roads, may not be used when transporting divisible loads, whereas such loads comprise the majority of loads carried by road. The work of transport companies is therefore complicated by the need to use a larger number of lorries. The Commission emphasises that all those disadvantages motivated the filing of complaints that gave rise to its action for failure to fulfil obligations. It also claims that there is a serious restriction on the freedom to provide road services.

52. According to the Commission, the Republic of Poland's argument that the permit regime at issue does not contravene Directive 96/53, given that it is applied benevolently and without restriction or discrimination, is not only irrelevant in view of the principle of free movement laid down in that directive, but also reveals that protecting the road infrastructure and controlling the number of vehicles using it cannot serve to justify the system put in place by the Polish legislature.

37 Dz. U. of 2017, position 878.

53. The Commission adds that the Republic of Poland cannot maintain that the obligation to obtain a permit is intended to encourage hauliers to use parallel roads more suitable for lorry traffic, since that explanation is contrary to Article 3 of that directive.

54. Moreover, the Commission observes, by way of example, that, in respect of national road DK 92 between Berlin (Germany) and Warsaw (Poland), that objective has been achieved by other means, namely by levying a fee on lorries, which, unlike the permit regime, is a reasonable traffic management method. It also notes that on some roads, in order to access areas for the loading and unloading of goods, there is no option but to obtain a permit.

B. The Republic of Poland

55. The Republic of Poland believes that the Commission's action is based on a misinterpretation of Articles 3 and 7 of Directive 96/53 and asks the Court to dismiss it.

1. Infringement of Article 3 of Directive 96/53

(a) The roads covered by the obligation to allow use by heavy vehicles used 'in international traffic'

56. Here, the Republic of Poland's main argument is that the Commission is wrong to consider that the concept of 'international traffic' relates to the entire road network of the Member States, whereas it actually refers only to cross-border traffic and roads on which that traffic is concentrated. It submits that the Commission's broad interpretation of international traffic, which implies that any Member State road whatsoever, including a local road, is to be open to vehicles with a maximum driving axle weight of 11.5 tonnes, is not apparent from any provision or any recital of Directive 96/53, or from any debate held with a view to amending the directive. According to that Member State, the Commission's interpretation would undermine the second indent of Article 3(1) of that directive, which limits national traffic on grounds of vehicle dimensions.

57. The Republic of Poland also argues that Directive 96/53 must be interpreted in a manner consistent with Decision No 1692/96 on the trans-European transport network, which shares the same objectives, since both those instruments became binding simultaneously when the Republic of Poland acceded to the European Union.

58. According to the Republic of Poland, it follows from that obligation that it is not infringing Article 3 of Directive 96/53 by derogating from the general principle of the free movement of vehicles with a maximum driving axle weight of 11.5 tonnes as regards the use of certain national and local roads, such as regional, district and municipal roads. The choices it has made are intended to achieve the objectives set out in recital 5 of that directive. According to the Republic of Poland, it was thereby seeking a balance between the rational and economical use of commercial road vehicles and the requirements of infrastructure maintenance, road safety and the protection of the environment and the fabric of life.

59. In the alternative, the Republic of Poland relies on the transitional provisions laid down in Annex XII to the 2003 Act of Accession, which, in point 8.3, govern matters relating to the implementation of Directive 96/53 and of Decision No 1692/96, in particular the second and third subparagraphs of that point, from which it is apparent that the Republic of Poland was not set a time limit for adapting any roads other than those in the trans-European transport network to the maximum level of load-bearing capacity.

60. It emphasises, first, that, in accordance with the third subparagraph of point 8.3 of that annex, the road network was to be opened to vehicles in international traffic progressively and in parallel with completion of the process of upgrading those roads. The Republic of Poland does not share the Commission's view that such an interpretation conflicts with the second sentence of the third subparagraph, under which use of the non-upgraded parts of the secondary road network was to be allowed for the purpose of loading and unloading during the entire transitional period, on the grounds that this is an exception to the principle.

61. Secondly, the Republic of Poland contests the Commission's argument that its interpretation of the transitional provisions would mean accepting that the opening up of the Polish road network, in accordance with Directive 96/53, would not take place for several decades. It claims that the upgrading work must relate to metalled roads and that, as result of the work already done, 54.2% of all national roads are open to the vehicles in question.

62. In that respect, it notes, first, that approximately 91% of public roads in Poland were built before it acceded to the European Union with a limit, on national roads, of 10 tonnes for the maximum single axle weight and 8 tonnes on other roads, and that Polish legislation was amended in order to comply with the obligations under EU law.

63. The Republic of Poland then states that the national roads, which represent 5% of public roads, carry up to 60% of traffic. The remaining 95% of public roads are local roads of which 88% are district and municipal roads. Those roads are used for local requirements and a third of public roads are unmetalled, as can be seen from the Eurostat official statistics cited by the Commission. The Republic of Poland therefore considers that the Commission cannot claim that 97% of the Polish road network is closed to vehicles with a maximum driving axle weight of 11.5 tonnes, without having regard to the characteristics of that network.

64. Lastly, it refers to its constant efforts, since its accession to the European Union, to open new national roads, having regard to the requirements of international traffic and the environment, and draws attention to the fact that adapting its entire road network for use by vehicles with a maximum driving axle weight of 11.5 tonnes, something no other Member State has done, would represent a considerable long-term financial burden.

(b) The requirement to be in possession of a permit to use other roads

65. The Republic of Poland contends that restricting use of the road network is not contrary to Article 3 of Directive 96/53 and adds that it is the financial contribution towards the maintenance of roads damaged by the circulation of heavy vehicles, as provided for under Article 64 et seq. of the Law on road traffic, that ensures, in the long term, the free circulation of vehicles with axle loads that do not comply with the technical capabilities of the roads.

66. The Republic of Poland states, in that respect, that the Commission's description of the permit system was partly inaccurate and clarifies that the permits are issued by the road operator, as regards category I permits,[38] and by the Director-General for National Roads and Motorways, as regards category IV permits for the national roads concerned. The category I permits are issued to the haulier, for a duration of 1, 6, or 12 months as requested, and do not indicate the vehicles to which they relate. The permit is issued within a maximum of seven working days from the date on which the application was filed. The same rules apply to category IV permits, which may, however, also be issued for a 24-month period, within a maximum period of three working days from the date on which the application was filed.

38 That is to say, for the sections of roads within its competence, namely municipal, district and regional roads.

67. According to the Republic of Poland, in order to ensure legal certainty for applicants, the maximum fee for category I permits was set at PLN 240 (approximately EUR 55), whilst it is PLN 3 600 (approximately EUR 850) for category IV permits. However, the actual amount of the fee, which is set by the Regulation of the Minister for Transport, Construction and the Maritime Economy on the fee payable for the road for non-standard vehicles, varies depending on the validity period of each permit. Therefore, according to that fee scale, which has not changed since 2012, the most expensive category I permit, valid for 12 months, costs PLN 200 (approximately EUR 50), whilst the category IV permit valid for 12 months costs PLN 2 000 (approximately EUR 470), and the permit valid for 24 months, PLN 3 000 (approximately EUR 710). [39]

68. In its defence, the Republic of Poland concludes in that regard that it does not share the Commission's view that this system is costly and time-consuming; rather, it is transparent and facilitates travel for hauliers across the whole network. It also disputes the Commission's contention that there is a prohibition on circulating without a permit, in so far as it is possible to choose the route on which the international transport will take place.

69. In its rejoinder, the Republic of Poland claims that the pleas in law alleging indirect discrimination against hauliers from other Member States and a restriction on the freedom to provide road services, which the Commission advances in its observations in reply, are inadmissible because they were not raised previously. [40] It adds that, in any event, those pleas are unfounded since permit applications can be obtained easily via a website, permits are issued for a set period irrespective of the number of transport operations, and the permits are relatively low-cost in the light of the needs of hauliers. It argues that this transparent, practical system meets their expectations and had not been criticised before the complaint made to the Commission.

2. Infringement of Article 7 of Directive 96/53

70. The Republic of Poland sets out its arguments, also in the alternative, on the ground that it considers that its rules comply with Article 3 of Directive 96/53.

71. It submits that the plea in law alleging infringement of Article 7 of Directive 96/53 is based on an overly restrictive interpretation of that provision which conflicts with its wording since, first, the scope of application of the first paragraph of Article 7 does not limit the restrictions to situations where roads are unsuitable for the vehicles in question and to 'certain sections of road', and, secondly, the situations to which the second paragraph refers are merely examples.

72. It infers from this that it is entitled to restrict circulation not only on roads unsuitable for use by heavy vehicles, but also on the parts of the road network on which, on account of their structure, it would be dangerous for such vehicles to pass through, or on account of there being a large number of bridges whose low weight-bearing capacity, with load ratings of between 20 and 30 tonnes, the Commission has overlooked.

73. The Republic of Poland is also of the view that, in relation to a small number of local roads, which have already been adapted for use by vehicles with an authorised single driving axle weight of 11.5 tonnes, the right to impose restrictions arises from the first paragraph of Article 7 of Directive 96/53, on the ground that there is no practical benefit in allowing such vehicles to use those roads because they are generally sections that are not connected to the rest of the road system and cannot ensure smooth traffic flow.

39 At the exchange rate on 26 April 2016 (see footnote 32 of this Opinion) those amounts are approximately EUR 55, EUR 823, EUR 46, EUR 460 and EUR 686.

40 See points 51 and 52 of this Opinion.

74. As regards the examples the Commission gives of restrictions on heavy vehicle traffic in Polish territory, the Republic of Poland indicates that heavy vehicles are now authorised to circulate in most of those situations and that, where that was not the case on the date on which it filed its observations,[41] appropriate modifications are planned.

75. Furthermore, it notes that international traffic, within the meaning of Article 3 of Directive 96/53, is not concentrated on those sections and notes that the transitional provisions in the 2003 Act of Accession require only a progressive opening to heavy vehicle traffic of roads that do not form part of the trans-European transport network.

IV. My analysis

76. The Commission's action for failure to fulfil obligations concerns, in essence, the terms on which, until 26 April 2016, the Republic of Poland implemented the principle of free movement for the heavy vehicles covered by Directive 96/53,[42] set out in Article 3(1) of that directive, for international traffic, within the limits specified in Annex I to that directive.

77. The dispute between the parties essentially concerns the scope of that article, in so far as the Polish rules require a special permit in order for heavy vehicles to access all public roads, with the exception of those forming part of the trans-European transport network and certain other national roads.

78. To my mind, it is evident from the wording of Article 3 of Directive 96/53 and the objectives pursued, set out in recitals 3, 7 and 12 of that directive, that the expression 'international traffic' refers to circulation between Member States rather than to travel on certain national roads or roads in the trans-European network. The only restrictions on that traffic concern the weights and dimensions for which the specific values are given in Annex I to that directive, resulting from the need to find the balance referred to in its recital 5.

79. That absence of any distinction between types of road therefore led the EU legislature to envisage exceptions to the principle of free movement in order to take into account the fact that some roads or some engineering structures would be unsuitable. Article 7 of Directive 96/53 pursues that objective. In a time-honoured manner, since this is a derogation, it must be interpreted restrictively.

80. In view of the subject matter of that article, its application, too, must be specifically justified in each case and the resulting measures chosen must be intended to protect the infrastructure where it is unsuitable for use by vehicles with the highest maximum dimensions or weights. Accordingly, whilst it is fair to find, as the Republic of Poland submits, that the second paragraph of Article 7 merely gives an example of the measures that can be taken, that article nevertheless confirms what was stated in the first paragraph of Article 7, that is to say that those measures must consist exclusively of restricting the weights or dimensions of vehicles on the basis that certain places are unsuitable for use by those vehicles.

81. The merits of the Commission's plea in law must therefore be assessed in the light of those factors.

82. In the first place, as regards the argument that international traffic is restricted to certain roads, it should be noted that, whilst Article 41(1) of the Law on Public Roads sets out the principle of free movement on public roads for vehicles with a maximum driving axle weight of 11.5 tonnes, in compliance with the requirements of Directive 96/53, that principle comes with restrictions that considerably reduce its scope.

41 Namely 25 May 2017.

42 For a summary of the categories, see points 5 and 10 of this Opinion.

83. It is, in fact, apparent from Article 41(2) and (3) that:

– any vehicle with a 'single axle' of 10 tonnes or only 8 tonnes will be able to use certain national roads;

– any vehicle with a 'single axle' of 10 tonnes will be able to use certain regional roads;

– any vehicle with a 'single axle' of 8 tonnes will be able to use other regional roads, district roads and municipal roads.

84. Therefore, as the Republic of Poland confirmed at the hearing, since Article 41(2) and (3) of the Law on Public Roads does not distinguish between driving axles and non-driving axles, the prohibition on circulation concerns any axle of more than 8 or 10 tonnes.

85. However, first, Annex I to Directive 96/53, which sets the maximum authorised axle weights for the vehicles in question, does distinguish between 'driving axle' weight and 'single non-driving axle' or 'single axle' weight. Secondly, the authorised maximum weight is set at 11.5 tonnes for the driving axle and at 10 tonnes for the single non-driving axle. The maximum therefore cannot be set at 10 tonnes for driving axles and 8 tonnes for single non-driving axles. In other words, using the terminology in the Polish legislation, vehicles whose maximum driving axle weight is 11.5 tonnes cannot be regarded as non-standard,[43] since that weight complies with that laid down in Annex I to Directive 96/53. The same applies to vehicles whose maximum single non-driving axle weight is 10 tonnes, which on certain roads are subject to the restriction set at 8 tonnes.

86. In addition, as was also confirmed at the hearing, in the case of divisible loads the prohibition on circulation for carriage using 'non-standard' vehicles, within the meaning of the Polish legislation, is absolute for certain national roads,[44] as a result of Article 64(2) of the Law on Road Traffic which governs the permit system for use of the roads subject to access restrictions, on the basis of Article 41(2) of the Law on Public Roads.

87. Furthermore, it has been established that, as a result of the Polish legislation, 97% of public roads are barred to use by vehicles with a maximum driving axle weight of 11.5 tonnes, unless they obtain a special permit.[45] It is not necessary, for the purposes of assessing whether this action is well-founded, to adjudicate on the matter, raised by the Republic of Poland, of whether it is appropriate to use that percentage as a benchmark, having regard to the condition of the road network. It is sufficient merely to shed light on the consequences of the Polish legal provisions on road use for the network of roads likely to be used frequently.

88. According to statistics from the end of 2015, provided by the Republic of Poland, less than 40% of the network of motorways and national roads was open without restriction to use by the vehicles in question, which represents less than 4%[46] of the road network comprising motorways, national roads and the most important regional roads in Polish territory. As an example of that situation, it can be seen from the Republic of Poland's response that free access to the towns of Łomża, Nowy Sącz, Piła and Koszalin and the city of Poznań (Poland), to which the Commission referred in its application, via national roads that allow the free circulation of vehicles with an authorised driving axle weight of 11.5 tonnes, has only been possible since entry into force of the Regulation of the Minister for Infrastructure and Construction of 21 April 2017, cited in point 46 of this Opinion. Furthermore, it is

43 See points 17 and 19 of this Opinion.

44 In that case, a category IV permit is required. The only exception provided for in the case of divisible loads relates to vehicles authorised to circulate under a category I or II permit.

45 With the exception of divisible loads on vehicles using certain national roads.

46 According to the written reply to the Court's fourth question to the Republic of Poland, the proportion was 6% on the basis of the figures from the end of 2016.

common ground that on the outskirts of Wrocław and Kraków (Poland), the loading and unloading points are not freely accessible, even though they are crucial to international road freight transport. Similarly undisputed is the Commission's statement that, on the journey from Kętrzyn towards Western Europe, it has still been necessary, after 2017, to apply for two or three permits from two different authorities costing PLN 100 to 150 (approximately EUR 23 to 35) to make a journey of some 25 km just once.

89. In addition, it is worth noting that, although roads other than the national roads or those in the trans-European transport network were upgraded as part of the national reconstruction programme for local roads financed by European funds, those roads are, in principle, barred to use by vehicles with a maximum driving axle weight of 11.5 tonnes in the case of municipal and district roads.

90. Moreover, it can be seen that the expansion of the network as a result of its upgrading continues to have only limited effects, in so far as, according to the Republic of Poland's clarifications relating to the reform that took place in 2017, only 54.2% of national roads, which represent 5% of public roads, are open to free movement by vehicles with a maximum driving axle weight of 11.5 tonnes.

91. It is apparent from all these findings that access to the entire Polish road network is restricted on terms that are contrary to the principle set out in Article 3 of Directive 96/53.

92. In the second place, as regards the Republic of Poland's arguments in the alternative that the restrictions it established on opening its road network to international traffic and the provisions governing those restrictions can find a basis in an interpretation of the provisions of the 2003 Act of Accession or of Article 7 of Directive 96/53, it can be said, as a preliminary point, that, in practical terms, given their breadth and general nature, those restrictions give rise to a situation comparable with that of the transitional period provided for by the 2003 Act of Accession. However, it cannot be concluded from the wording of point 8.3 of Annex XII to that act that the derogating provisions it lays down were intended to last. By contrast, that point sought to make arrangements for the period from the date of the Republic of Poland's accession up to 31 December 2010 so that the principle laid down by Directive 96/53 could be complied with after that date.[47] That objective also justified European funds being allocated for the purpose of achieving it.

93. Moreover, it would appear that, on the same grounds of the excessive nature of their consequences, those derogations cannot find a basis in Article 7 of that directive either, even if they were justified by the age of the road infrastructure, as relied on by the Republic of Poland.

94. Indeed, Directive 96/53 does not contemplate any such general ground and Article 7 of that directive considers the unsuitability of the road network only in specific situations.

95. No restriction based on the type of the road can therefore find basis in that provision. All the more unacceptable is a system of general permits intended to organise those restrictions. Moreover, the specific justification for the restrictions on circulation on the roads designated by the Minister for Transport under Article 41(2) of the Law on Public Roads is questionable if those restrictions can be lifted by obtaining, for a fee, a general permit reserved for indivisible loads on the most heavily used roads, limited only in time and, therefore, unrelated to the degree of damage to the roads[48] or the funding requirements on which the Republic of Poland relies in claiming that the system is appropriate. In other words, either a road can bear an uncontrolled amount of traffic for a period that could be between one and twenty-four months, or the road is unsuitable, in which case payment of a small amount for a permit is not such as to remedy the situation.

47 See, to that effect, Kronenberger, V., 'Transport Policy', *Die Verträge zur EU-Osterweiterung. Kommentar mit systematischen Erläunterungen*, Berliner Wissenschafts-Verlag, Berlin, 2008, pp. 297 to 322, in particular paragraphs 33 to 36 and 54 (article in English).

48 In this regard, it is worth noting that a number of upgraded roads are subject to the regime of road use on the condition of obtaining a permit (see point 89 of this Opinion).

96. It is apparent from the foregoing that, by limiting road use by motor vehicles with a driving axle weight of 11.5 tonnes to roads forming part of the trans-European transport network and certain other national roads and by subjecting the use of other public roads by those vehicles to a special permit regime, the Republic of Poland has failed to fulfil its obligations under the combined provisions of Article 3 and Article 7 of Directive 96/53.

97. Accordingly, it should be declared that, by requiring transport companies to be in possession of special permits in order to use certain public roads, the Republic of Poland has failed to fulfil its obligations under the combined provisions of Article 3 and Article 7 of Directive 96/53 read in conjunction with points 3.1 and 3.4 of Annex I to Directive 96/53.

V. Costs

98. Under Article 138(1) of the Rules of Procedure of the Court of Justice, 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 claimed that the Republic of Poland should be ordered to pay the costs and the Republic of Poland has been unsuccessful, it must be ordered to pay the costs.

VI. Conclusion

99. Having regard to the foregoing considerations, I propose that the Court should rule as follows:

(1) By requiring transport companies to be in possession of special permits in order to use certain public roads, the Republic of Poland has failed to fulfil its obligations under the combined provisions of Article 3 and Article 7 of Council Directive 96/53/EC of 25 July 1996 laying down for certain road vehicles circulating within the Community the maximum authorised dimensions in national and international traffic and the maximum authorised weights in international traffic, as amended by Directive (EU) 2015/719 of the European Parliament and of the Council of 29 April 2015, read in conjunction with points 3.1 and 3.4 of Annex I to Directive 96/53.

(2) The Republic of Poland is ordered to pay the costs.