

OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 19 September 1991 *

*Mr President,
Members of the Court,*

1. By application received at the Court Registry on 16 March 1990, the Commission brought an action for a declaration that, by failing to communicate within the prescribed period the laws, regulations and administrative provisions by which it claims to have fulfilled its obligations under Council Directive 87/53/EEC of 15 December 1986 amending Directive 83/643/EEC on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States¹ or by failing to adopt in time the measures needed to comply therewith, the Italian Republic has failed to fulfil its obligations under that directive and the EEC Treaty.

2. To my knowledge this action is the fourth in a series in which the Commission takes issue with the Italian legislation on customs formalities and the manner in which it is applied. Two earlier actions by the Commission have given rise to judgments of the Court, namely Cases 340/87² and C-209/89.³ In a third case, C-187/89, the Commission discontinued the

proceedings on the ground that Italy had in the meantime taken the necessary measures to bring the contested infringement to an end.⁴ Each of those cases were with individual infringements of Community provisions relating to customs formalities.

3. In this case the Commission does not complain that the Italian legislature or the Italian customs authorities have committed an individual infringement of Community law. Its action is directed against Italy's failure to transpose Directive 87/53 into national law.

Directive 87/53 aims at 'further progress... in the short term so that inspections and formalities in trade between Member States can be facilitated further'. To that end, Article 1 of the Directive makes a number of amendments and additions to Directive 83/643.⁵ Article 2(1) of the new directive requires the Member States, after consulting the Commission, to bring into force the laws, regulations and administrative provisions necessary for them to comply with the Directive by 1 July 1987 at the latest. In addition, Article 2(2) requires the Member States to communicate the texts of the relevant provisions to the Commission.

* Original language: Dutch

1 — OJ 1987 L 24, p. 33.

2 — Commission v Italy [1989] ECR 1483.

3 — Commission v Italy [1991] ECR I-1575

4 — See the Order of 4 June 1991

5 — Council Directive 83/643 on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States (OJ 1983 L 359, p. 8)

4. Before considering the parties' arguments in more detail, I would point out that the Italian Government does not deny its continued failure to implement Article 7a of Directive 83/643, added by Directive 87/53. That article is worded as follows:

'Member States shall see to it that any sums payable in respect of the inspections and formalities applied to trade between Member States can also be paid by means of guaranteed or certified international cheques, expressed in the currency of the Member State in which the debt is due.'

5. As far as the other provisions of Directive 87/53 are concerned, however, the Italian Government denies that there has been any failure to act. It contends that although those provisions impose a number of obligations on the Member States, compliance with those obligations does not necessitate the adoption of national laws or regulations. It adds that, with the exception of Article 7a (quoted above), Directive 87/53 merely imposes on the Member States a number of guidelines relating to compliance with a certain line of conduct, compliance with which could be verified by the Commission only in specific situations, there being no need for such guidelines to be laid down in specific laws or regulations of general application.

6. I cannot accept this view. Directive 87/53 aims to facilitate transfrontier trade

in goods by imposing a number of simplifications and relaxations of customs inspections and formalities. Although the rules laid down for that purpose may therefore be addressed in the first instance to the customs authorities of the Member States they are also of some relevance, as will be shown by examination of the specific provisions of the directive, to the legal position of persons or undertakings who transport or import goods to or into other Member States or send goods in transit through a Member State. Such persons and undertakings may have an interest in invoking the obligations imposed on customs authorities by the directive when they are confronted by a situation or by conduct which they consider to be contrary to the directive or to the national legislation adopted in order to implement it. In this connection, regard should be had to the Court's case-law which, in relation to provisions of directives which are intended to create rights for individuals, stresses the importance of clear, precise and published implementing rules. The domestic implementing rules must give persons concerned a sufficiently clear perception of their rights under Community law and of the means open to them for relying on Community law (or a rule of domestic law adopted in order to implement Community law) before the national courts.⁶

However, even with regard to the provisions of the directive in question which are not intended to confer upon individuals rights capable of being relied upon (so that published, detailed implementing provisions are not required), the Italian Government's

6 — See, for example, the judgment in Case 363/85 *Commission v Italy* [1987] ECR 1733 (at paragraph 7), recently confirmed by the judgment in Case C-131/88 *Commission v Germany* ECR [1991] I-826 (at paragraph 6).

defence is not necessarily well founded. To my mind, the 'provisions', within the meaning of Article 2(2) of the Directive, which must be adopted for transposing the directive (and communicated to the Commission) refer also to the adoption of internal administrative instructions or — as will be shown later — the conclusion of agreements or conventions between Member States; in other words, they refer to legislative activity of any kind which is necessary for implementing the directive.

before the Court is unfounded, except in relation to the provisions of the directive which *manifestly* do not require implementation measures.

In the light of these principles I propose to examine the Member States' transposition obligations with regard to each provision of the directive in question.

This leaves the category of provisions of the directive which — it is claimed — do not have to be transposed by means of 'provisions' of domestic law. In my view, Article 2(1) of the directive — which requires Member States to consult the Commission before bringing into force the provisions 'necessary' for transposition — means that a Member State which considers, although this is not *manifest* from the terms or aims of the directive, that a particular provision of the directive does not require transposition measures, but only certain non-legislative measures, should notify the Commission in good time (that is to say, before expiry of the time-limit for implementation). Only if this is done can the latter exercise its power of supervision under Article 155 of the Treaty properly. Furthermore, Article 2(1) of the directive is a specific application of the first paragraph of Article 5 of the Treaty, which requires the Member States to cooperate loyally with the Commission to ensure the observance of Community law. The Commission, in its application, states that it received no communication whatever from the Italian Government during the period prescribed for transposition or during the pre-litigation procedure, and this has not been denied by the Italian Government. In those circumstances, I consider that Italy's defence

7. First let me take the new Article 2(2), which was added to directive 83/643 by Article 1(1) of Directive 87/53 and is worded as follows:

'Member States shall facilitate, in circumstances which they deem appropriate, the use of simplified procedures, such as those laid down by the regulations for the despatch, distribution and release for consumption of goods, at the place of origin or destination of the goods.'

To my mind, the interest of specific measures for incorporating this obligation into the national law is manifest. So far as economic operators are concerned, there is great interest in knowing the circumstances in which they are entitled to the application of simplified procedures. Admittedly the directive gives Member States a fairly considerable discretion in determining the cases in which such simplified procedures should be applied, but this does not alter the

fact that specific procedures are being applied in fulfilment of an obligation imposed by Community law. Only a specific legislative measure or regulation which is binding and is published can give economic operators a clear perception of the extent of their rights in this connection.

the Commission in good time pursuant to Article 2 of the directive so that the latter could have contested this viewpoint, if necessary. Therefore it cannot be said that there has been proper transposition.

8. Article 1(1) of Directive 87/53 also adds the following new Article 2(3) to Directive 83/643:

‘Member States shall endeavour to deploy customs offices in such a way, including in the interior of their territory, as best to take account of the requirements of commercial operators.’

9. Article 1(2) of Directive 87/53 adds a new Article 4 to Directive 83/643 which is worded as follows:

‘1. In order to seek appropriate solutions to problems arising at common frontiers, Member States shall take the measures necessary to extend bilateral cooperation between the various departments carrying out inspections and formalities on either side of these frontiers.

2. The cooperation referred to in paragraph 1 shall cover in particular:

— the arrangement of frontier posts,

— the conversion of frontier offices into juxtaposed or combined inspection offices, where possible.

I agree with the Italian Government that that provision of the directive does not lend itself to transposition by means of specific, published rules of domestic law which may be relied on before the courts. However, it seems to me that the deployment of customs offices ought to be effected by means of general administrative measures or at least administrative instructions, so that in any case the ‘provisions’ within the meaning of Article 2(2) of Directive 87/53 ought to have been transmitted to the Commission. If the Italian Government considered that the abovementioned provision of the directive merely contained a guideline which did not lend itself to transposition by legislative ‘provisions’, it ought to have notified this to

3. Member States shall cooperate in order to harmonize the business hours of the various departments carrying out inspections and formalities on either side of each frontier post. Should any difficulties arise in attaining such harmonization, Member

States shall bring them to the Commission's attention so that it may suggest to the Member States concerned such solutions as it deems appropriate to resolve them.

rules which should also have been communicated to the Commission. All in all, therefore, I do not think the Italian Government's defence in relation to Article 4 can succeed.

4. Member States shall provide for the possibility of informal consultation at local and, if appropriate, national level between representatives of the various departments involved in inspections and formalities and of carriers, customs agents, persons engaged in services ancillary to transport and transport users.'

10. Article 1(3) of Directive 87/53 added the following new Article 5 to Directive 83/643:

'1. Member States shall see to it that:

The first three paragraphs of this new article impose on Member States an obligation to organize closer cooperation between customs authorities at their frontiers. I do not think that fulfilment of this obligation presupposes the adoption of specific measures of domestic law which can be invoked by private individuals before the courts. Nevertheless, in my view these provisions entail an obligation to give concrete form to bilateral cooperation, for example, by concluding bilateral agreements. In my opinion, such bilateral agreements must be considered as 'provisions' which the Member States are to adopt in order to implement the directive and which, pursuant to Article 2(2) of the directive, must be communicated to the Commission.

(a) where the volume of traffic so warrants, frontier posts are open, except when traffic is prohibited, so that:

— frontiers can be crossed 24 hours a day, with the corresponding inspections and formalities, in the case of goods placed under a customs transit procedure, their means of transport and vehicles travelling unladen, save where frontier inspection is necessary to prevent the spread of disease;

The new Article 4(4) means that the Member States must organize a structure to permit the consultation required by that provision. I take the view that setting up such consultation requires the adoption of a number of organizational or procedural

— inspections and formalities relating to the movement of means of transport and goods which are not being carried under a customs transit procedure may be performed from Monday to Friday

during an uninterrupted period of at least 10 hours, and on Saturday during an uninterrupted period of at least 6 hours, unless those days are public holidays;

provided that the other posts in that zone are able to clear goods and vehicles effectively in accordance with that paragraph.

(b) as regards vehicles and goods transported by air, the hours referred to in the second indent of subparagraph (a) are adapted in such a way as to meet actual needs and for that purpose may be split in accordance with the flow of traffic;

4. For the frontier posts and customs services referred to in paragraph 1, and under the conditions laid down by Member States, the competent authorities of the Member States shall provide, if specifically requested during business hours and for sound reasons, for inspections and formalities to be carried out, as an exception, outside business hours, on condition that, where relevant, payment be made for services so rendered.'

(c) transshipments which, under existing regulations, customs services allow to be carried out without their immediate supervision can be effected at any time in such a way as to meet actual needs.

11. With regard to the transposition of this article, the Italian Government observes, in the first place, that the same *second indent* of Article 5(1)(a) was the subject of the application by the Commission in Case 340/87 in which the Court has in the meantime delivered judgment (see paragraph 2 above) with the result that, in accordance with the principle *nec bis in idem*, the Commission cannot charge the Italian Government with contravention of this obligation for a second time.

2. Where general compliance with the periods referred to in paragraph 1(a), second indent, and (b) poses problems for veterinary services, Member States shall see to it that, with at least 2 hours' notice from the carrier, a veterinary expert is available during those periods; in the case of the transport of live animals, however, this notice may be increased to 18 hours.

The Italian Government's argument on this point does not stand up. Case 340/87 concerned a provision of Italian law under which a charge representing the cost of the service was to be made for customs transactions carried out during the business hours of customs offices outside the normal working hours of civil servants. The Court held that the imposition of such a charge infringed Articles 9 and 12 of the EEC

3. Where several frontier posts are situated in the same port or airport zone, Member States may derogate from paragraph 1,

Treaty. However, the present case relates to the *correct transposition into national law* of the obligation laid down by the second indent of Article 5(1)(a) of Directive 83/643 to *maintain open* frontier posts so that inspections and formalities can be carried out from Monday to Friday during an uninterrupted period of at least ten hours and on Saturday during an uninterrupted period of at least six hours. I consider that that obligation should be transposed into national law by means of a specific, binding, published provision. The provision in question aims at ensuring that for economic operators inspections and formalities at frontier posts relating to the movement of means of transport can be carried out during a certain minimum period. With regard particularly to importers and carriers from other Member States, it is most important that they should have a clear perception of the rights conferred upon them by the Italian legislation adopted in order to implement Community law.

Nevertheless, in its reply the Commission withdrew its submissions on this point on the ground that the second indent of Article 5(1)(a) formed an integral part of the original version of Directive 83/643 (see the second indent of Article 5(1) of Directive 85/73).

12. With regard to the *first indent* of Article 5(1)(a), the Italian Government does not claim that this provision merely lays down guidelines which need not be transposed into national law by means of a legislative measure. In other words, the defendant has failed to show why that provision has not

been transposed into national law. On the same grounds as those relating to the second indent of Article 5(1)(a), I consider that a specific, binding, published measure is required to implement that provision.

13. As far as concerns Article 5(1)(b) and (c) and Article 5(2), (3) and (4) the Italian Government contends that these provisions merely lay down guidelines.

So far as Article 5(1)(b) is concerned, I consider that this ground of defence is unfounded for the same reasons as those I have mentioned above in relation to the first and second indents of Article 5(1)(a). That provision concerns information for carriers of goods with regard to the exact times during which they can present their goods for inspection and the carrying-out of formalities. The fact that Member States have a certain discretion (regarding adjusting opening times to suit actual needs) in relation to the transposition of Article 5(1)(b) does not prevent the requirement in principle for minimum opening hours from remaining in application, as a result of which that provision needs to be transposed by a specific, binding, published measure.

The same considerations apply with regard to the transposition of Article 5(1)(c). That provision is intended to confer upon carriers

of goods the right, under certain conditions, to tranship goods at any time without direct supervision by the customs services. The specific details of that right should be set out in binding, transparent provisions of national law.

14. Again, the same considerations arise with regard to Article 5(2). This obliges the Member States to ensure that a veterinary expert is available during certain minimum periods, subject to not less than 12 (or 18) hours' notice. Once again this provision is intended to confer a right upon carriers. Therefore a specific, binding, published, implementing measure is necessary.

Article 5(3) authorizes the Member States to derogate from Article 5(1), subject to certain conditions, when transposing it into national law. *As such* the option thus given to the Member States does not have to be transposed by means of a legislative provision. Nevertheless, *in the event that* a Member State wishes to avail itself of this option when transposing Article 5(1), it must set out the chosen derogations in clear, express legislative provisions. In any case, since Article 5(3) is ancillary to Article 5(1), it cannot be regarded as having been correctly transposed until Article 5(1) itself has been transposed.

Specific transposition is also required with regard to Article 5(4). That provision is

designed to ensure that, in exceptional cases to be determined by the Member States, carriers and importers can rely on being able to have inspections and formalities carried out at times other than during the prescribed minimum business hours, if they make a specific request to that effect for sound reasons. For the same reasons as were given in Article 5(1), this rule should be transposed into national law by means of a specific provision.

15. Directive 87/53 replaced Article 6 of Directive 83/643 by the following provision:

'Member States shall take the measures necessary to ensure that waiting time caused by the various inspections and formalities does not exceed the time required for their proper completion. To that end, they shall organize the business hours of the departments which are to carry out inspections and formalities, the staff available and the practical arrangements for processing goods and documents associated with the carrying out of the inspections and formalities in such a way as to reduce waiting time in the flow of traffic to a minimum.'

That provision imposes on the Member States a number of obligations relating to the internal organization of customs services. Although the efficient functioning of such services in accordance with those principles is of interest to individuals, I do not consider that a binding, published rule

of national law has to be laid down for the transposition of the provision in question. Nevertheless, Article 6 of the directive assumes that the organization of customs services is actually adapted to suit the mandatory principles listed therein. Such adaptation could be effected, for example, by adjusting the relevant administrative instructions for the customs services, unless the current version of such instructions already ensures compliance with those principles. However, the Italian Government has not referred to the existence or amendment of such instructions, nor has it sent any communication whatever to the Commission. On that ground, Article 6 cannot be regarded as having been correctly incorporated into domestic law.

16. Directive 87/53 added the following new Article 6a to Directive 83/643:

‘Member States shall as far as possible see to it that, by express delegation by the competent authorities and on their behalf, one of the other services represented, and preferably the customs service, may carry out certain tasks for which those authorities are responsible, relating in particular to requirements to carry the necessary documents, checking the validity and authenticity thereof and making a summary check on the identity of the goods declared in such documents. In that event the authorities concerned shall seek to ensure that

the means required for accomplishing those tasks are made available.’

With regard to this article, essentially the same considerations apply as those set out above relating to Article 6. Therefore I take the view that in this case also the Italian Government’s defence is unfounded.

17. Directive 87/53 replaced Article 7 of Directive 83/643 by the following:

‘Member States shall endeavour to establish at frontier posts, where technically possible and justified by the volume of traffic, express lanes reserved for goods placed under a customs transit procedure, for their means of transport and for vehicles travelling unladen.’

Essentially, the same considerations apply to this provision of the directive as have been raised in relation to the new Article 2(3) (see paragraph 8 above). If it had been transposed into the internal legal system by means of a ministerial order or a circular, the Italian Government ought to have forwarded the order or circular to the Commission. If the Italian Government took the view that the provision was merely a guideline, it ought to have informed the Commission accordingly in good time.

18. Directive 87/53 replaced Article 8 of Directive 83/643 by the following:

specific, published implementing provision is all the greater.

'1. Member States and the Commission shall see to it that persons involved in trade between Member States can rapidly inform the competent national and Community authorities of any problems encountered when crossing frontiers. The competent authorities shall examine those problems and, if they are not resolved, the Commission shall propose solutions to the Member States concerned.

With regard to Article 8(2), on the other hand, I consider the Italian Government's defence to be well founded. That provision concerns the Member States' obligation to cooperate in good faith in resolving difficulties connected with inspections and formalities, if necessary through the Commission. Consequently it is merely a guideline prescribing certain conduct, but not requiring the adoption of legislative measures.

2. With a view to resolving difficulties with inspections or formalities within the meaning of this directive, a Member State may request consultations with another Member State. If those consultations do not make it possible to resolve these difficulties, a Member State may inform the Commission so that the latter can submit such solutions as it deems appropriate to resolve the difficulties in question.'

19. Article 7 of Directive 87/53 added the following new Article 8a to directive 83/643:

'Member States shall supply the Commission in good time with up-to-date information on inspection posts.'

So far as paragraph 1 of this provision is concerned, the Italian Government's defence is manifestly unfounded. The provision imposes on the Member States an obligation to set up the necessary structures and/or procedures in order to enable persons involved in trade between Member States to inform the competent national authorities rapidly of problems arising when crossing frontiers. As such problems will mainly affect economic operators from other Member States, the need for a clear,

Once again the Italian Government's defence fails. *Either* this article, like the new Article 6 of Directive 83/643 (see paragraph 15 above), requires the adoption of administrative instructions (the text of which ought to have been transmitted to the Commission), *or* the Italian Government ought to have informed the Commission in

good time that it did not envisage providing for transposition measures (with the result that a text could not be communicated). As neither of these two eventualities has occurred, correct transposition has not taken place in this connection either.

20. My appraisal leads me to the conclusion that the Court should grant the Commission's application in its entirety, except with regard to the second indent of the new Article 5(1)(a) and the new Article 8(2) of Directive 83/643, and should order the Italian Government to pay the costs.