JUDGMENT OF THE COURT (Sixth Chamber)

16 November 2000 *

In Case C-214/98,

Commission of the European Communities, represented by M. Condou-Durande, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic, represented by I.K. Chalkias, Deputy Legal Adviser in the Legal Council of State, and N. Dafniou, Assistant in the Special Department for Community Legal Affairs in the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

* Language of the case: Greek.

APPLICATION for a declaration that,

— by failing to mention, among the meat to which the fees fixed by Council Directive 93/118/EEC of 22 December 1993 amending Directive 85/73/EEC on the financing of health inspections and controls of fresh meat and poultrymeat (OJ 1993 L 340 p. 15) apply, the category corresponding to solipeds/equidae,

— by fixing the amounts of the fees to be charged for health checks on the slaughter of animals and of those connected with cutting operations of fresh meat at 50% of the standard Community rates, without giving reasons for that reduction in accordance with the requirements of Chapter I of the annex to Directive 93/118, and

— by exempting poultrymeat from the fee for the cutting of fresh meat,

the Hellenic Republic has failed to fulfil its obligations under the EC Treaty and the said directive, in particular points 1, 2 and 5 of Chapter I of the annex thereto,

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissochet, R. Schintgen (Rapporteur) and F. Macken, Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 6 June 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 10 June 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that,

— by failing to mention, among the meat to which the fees fixed by Council Directive 93/118/EEC of 22 December 1993 amending Directive 85/73/EEC on the financing of health inspections and controls of fresh meat and poultrymeat (OJ 1993 L 340 p. 15) apply, the category corresponding to solipeds/equidae,

— by fixing the amounts of the fees to be charged for health checks on the slaughter of animals and of those connected with cutting operations of fresh

meat at 50% of the standard Community rates, without giving reasons for that reduction in accordance with the requirements of Chapter I of the annex to Directive 93/118, and

— by exempting poultrymeat from the fee for the cutting of fresh meat,

the Hellenic Republic had failed to fulfil its obligations under the EC Treaty and the said directive, in particular points 1, 2 and 5 of Chapter I of the annex thereto.

Legislation applicable

Directive 93/118

2 As appears from its preamble, the purpose of Directive 93/118 is to amend Council Directive 85/73/EEC of 29 January 1985 on the financing of health inspections and controls of fresh meat and poultrymeat (OJ 1985 L 32, p. 14) by extending its scope to ensure that the system of health checks operates effectively and to avoid distortions of competition.

3 To that end, the Member States are obliged, in accordance with Article 1(1) of Directive 85/73 as amended by Directive 93/118, to charge standard Community fees to cover the costs occasioned by health inspections and controls relating to fresh meat from certain animal species. Under Article 1(2), the fees are to be fixed

so as to cover the salary costs, including social security costs, and administrative costs incurred by the competent national authority for carrying out the controls and inspections referred to in that directive.

4 Chapter I of the annex to Directive 93/118 fixes the amounts and conditions of charging of those fees for meat covered by Council Directive 64/433/EEC of 26 June 1964 on health problems affecting intra-Community trade in fresh meat (OJ, English Special Edition 1963-1964, p. 185) and Council Directive 71/118/EEC of 15 February 1971 on health problems affecting trade in fresh poultrymeat (OJ, English Special Edition 1971(I), p. 106).

5 According to point 1 of Chapter I of the annex:

'Without prejudice to the application of points 4 and 5, Member States will collect for inspection costs relating to slaughter

— the following standard amounts:

(a) beef and veal

— adult bovine animals: ECU 4.75 per animal,

— young bovine animals: ECU 2.5 per animal;

(b) solipeds/equidae: ECU 4.4 per animal;

(c) pigs: ECU 1.3 per animal;

(d) sheepmeat and goatmeat: animals of a carcase weight

(i) of less than 12 kilograms: ECU 0.175 per animal;

(ii) of between 12 and 18 kilograms: ECU 0.35 per animal;

(iii) of more than 18 kilograms: ECU 0.5 per animal.

Pending a review of the rules governing inspection for lambs, goats and piglets of less than 12 kilograms, and until 31 December 1995 at the latest, the Member States may collect an amount corresponding to the actual cost of inspection for the inspection of those slaughtered animals;

(e) Until 31 December 1995, the minimum amount to be collected for the ante-mortem and post-mortem inspection provided for in Directive 71/118/EEC shall be fixed:

(i) either at a standard rate as follows:

— for broilers, other young poultry for fattening weighing less than two kilograms and for cast hens: ECU 0.01 per animal,

— other young poultry for fattening of a carcase weight of more than two kilograms: ECU 0.02 per animal,

— other heavy adult poultry weighing more than five kilograms: ECU 0.04 per animal;

(ii) or, where a Member State decides not to make the distinction between categories of poultry as in (i), at ECU 0.03 per bird;

— a share of the fees for

(a) administrative costs may not be lower than ECU 0.725 per tonne;

(b) examination for the presence of residues may not be lower than ECU 1.35 per tonne.'

6 Point 2 of Chapter I of the annex provides:

'The controls and inspections connected with the cutting operations referred to in Article 3(1)(B) of Directive 64/433/EEC and Article 3(1)(B) of Directive 71/118/EEC shall be covered

(a) either at a standard rate by the addition of a standard amount of ECU 3 per tonne on meat entering a cutting plant.

This amount is added to the amounts referred to in point 1 above;

(b) or by collecting the actual costs of inspection per hour worked, any hour started being counted as an hour worked.

Where the cutting operations are carried out in the establishment where the meat is obtained, the amounts laid down in the first subparagraph may be reduced by up to 55%.'

7 Point 5 of Chapter I of the annex reads:

'Member States in which salary costs, the structure of establishments and the relationship between veterinarians and inspectors diverge from the Community average taken as a basis for calculation of the standard amounts fixed in points 1 and 2(a) may exceptionally reduce them to meet the real costs of inspection:

(a) in general, where there are substantial differences in the cost of living and salary costs;

(b) for individual establishments, where the following conditions are met:

— a minimum daily slaughter rate must enable the deployment of the relevant inspection staff to be planned in advance,

— the number of slaughtered animals must be constant, so that animal deliveries may be planned in advance thus enabling rational use to be made of the inspection staff,

— strict organisation and planning must prevail within the establishment together with a rapid slaughter rate and optimum use of inspection staff,

— there must be no waiting or otherwise non-productive periods for inspection staff,

— the animals for slaughter must so far as possible be uniform in age, size, weight and state of health.

In no case should the application of these exemptions result in reductions of more than 55% of the levels indicated in point 1.'

8 Under the first and third subparagraphs of Article 3(1) of Directive 93/118, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive not later than 31 December 1993 as regards the requirements in the annex, and were to inform the Commission forthwith of the provisions adopted.

The Greek legislation

9 Directive 93/118 was transposed in Greece by Presidential Decree No 34/94.

10 Article 2(1) of that decree lays down the categories of meat for which fees are chargeable, and the corresponding rates, namely:

'(a) beef and veal:

— adult bovine animals: ECU 2.25 per animal

— calves: ECU 1.25 per animal

(b) pigs: ECU 0.65 per animal

(c) sheepmeat and goatmeat:

— less than 12 kg: ECU 0.085 per animal

— 12 to 18 kg: ECU 0.175 per animal

— over 18 kg: ECU 0.250 per animal

(d) poultry:

— less than 2 kg: ECU 0.005 per bird

— over 2 kg: ECU 0.01 per bird

— over 5 kg: ECU 0.02 per bird.'

11 Under Article 3(1) of the decree, the part of the fee which covers the controls and inspections in connection with cutting operations mentioned in Article 4(1)(B)(b) of Presidential Decree No 599/85 and Article 3(1)(b) of Presidential Decree No 959/81 is fixed at a standard rate of ECU 1.5 per tonne of meat for deboning intended for cutting.

12 Under Article 3(2), the rate referred to in paragraph 1 is to be added to the rates referred to in Article 2(1)(a), (b) and (c).

13 Finally, under Article 3(3), where cutting is carried out in the establishment where the meat is obtained, the rates referred to in paragraph 1 are reduced by 50%.

The pre-litigation procedure

14 The Commission considered that Presidential Decree No 34/94 was not in conformity with certain requirements of the annex to Directive 93/118, since, contrary to the provisions of points 1, 2 and 5 of Chapter I of that annex, the decree failed to mention the category corresponding to solipeds/equidae, provided in all cases for a reduction of 50% of the standard Community rates although the Greek authorities had not communicated to the Commission the information on which the calculation leading to that reduction was based, and exempted poultrymeat from the fee for the cutting of fresh meat. In those circumstances, by letter of 14 September 1995, it gave the Hellenic Republic formal notice to submit its observations within a period of two months.

15 The Greek authorities did not reply to the letter of formal notice.

16 Consequently, on 19 August 1997, the Commission sent the Hellenic Republic a reasoned opinion inviting it to adopt the necessary measures to comply with its obligations under points 1, 2 and 5 of Chapter I of the annex to Directive 93/118.

17 Since the Hellenic Republic did not respond to the reasoned opinion, the Commission brought the present action.

The Commission's application

18 In support of its application, the Commission relies essentially on three complaints:

— failure to transpose point (b) of the first indent of point 1 of Chapter I of the annex to Directive 93/118, in that the category of solipeds/equidae is not mentioned in the list of meat to which the fees provided for by that directive apply,

— failure to transpose correctly the provisions of points 1, 2 and 5 of Chapter I of that annex, taken together, in that the Greek regulations fixed the rates of the fees to be charged for health controls on the slaughter of animals and of those connected with cutting operations of fresh meat at 50% of the standard Community rates, without giving reasons for that reduction in accordance with the requirements of Directive 93/118, and

— failure to transpose the provisions of point (e) of the first indent of point 1 in conjunction with point (a) of the first indent of point 2 of Chapter I of the annex to that directive, in that the Greek regulations did not refer to poultrymeat for the purposes of the application of the fee for the cutting of fresh meat.

The complaint that solipeds/equidae were not mentioned for the purposes of the application of Directive 93/118

19 The Commission submits that the Greek legislation did not fully transpose Directive 93/118, in that it failed to mention, among the meat to which the fees to be charged by the national authorities for the health inspections and controls referred to in that directive apply, the category of solipeds/equidae, although that category of animals is expressly mentioned in point (b) of the first indent of point 1 of Chapter I of the annex to that directive.

20 The Greek Government does not dispute the existence of that lacuna but contends that there was no need to include the category of solipeds/equidae in the national legislation transposing Directive 93/118, since no abattoir has been authorised in Greece for the slaughter of such animals. Solipeds/equidae therefore cannot as a matter of fact be slaughtered in that Member State, so that the failure to mention those animals has no legal consequences.

21 The Greek Government further states that, in any event, in view of the imminent implementation of Council Directive 96/43/EC of 26 June 1996 amending and consolidating Directive 85/73/EEC in order to ensure financing of veterinary inspections and controls on live animals and certain animal products and amending Directives 90/675/EEC and 91/496/EEC (OJ 1996 L 162, p. 1), a presidential decree in the course of adoption expressly mentions the category of solipeds/equidae.

22 In order to decide whether this complaint of the Commission is well founded, it must be recalled that, according to the Court's case-law, the fact that an activity referred to in a directive does not exist in a particular Member State cannot release that State from its obligation to adopt laws or regulations in order to

ensure that all the provisions of the directive are properly transposed (see, to that effect, Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851, paragraph 22).

23 In paragraphs 22 and 25 of *Commission* v *Netherlands* the Court held that both the principle of legal certainty and the need to secure the full implementation of directives in law and not only in fact require that Member States reproduce the rules of the directive in question in mandatory legal provisions.

24 As the Advocate General states in points 22 and 23 of his Opinion, that case-law is fully applicable to the present case.

25 The Greek Government, far from showing that it is not possible for slaughter of solipeds/equidae to take place on Greek territory, merely points to a factual situation which exists at a given point in time, but may subsequently change. Moreover, Presidential Decree No 410/94, produced by the Greek Government as an annex to its defence, expressly provides in Article 1(4) for the possibility of authorisation for the slaughter of solipeds/equidae.

26 In those circumstances, the Commission is right to submit that the Hellenic Republic was obliged in the present case to mention solipeds/equidae expressly in its national legislation for the purposes of applying the fees charged under Directive 93/118.

27 Such an obligation applies to the Member State concerned, not only in order to anticipate any change in the purely factual situation existing at a given point in time which that Member State relies on in its defence, but also above all in order

to establish a framework of laws or regulations which is sufficiently precise, clear and transparent to ensure in law, in all circumstances, the full application of Directive 93/118 and to enable individuals to know their rights and obligations.

28 In the light of paragraphs 22 to 27 above, the Commission's first complaint is well founded.

The complaint that the fees were fixed without justification at 50% of the standard Community rates

29 The Commission submits that Presidential Decree No 34/94 disregarded the provisions of points 1, 2 and 5 of Chapter I of the annex to Directive 93/118, taken together, in that it fixed the rates of the fees chargeable for health inspections and controls in connection with the slaughter of animals and the cutting of fresh meat at 50% of the standard Community rates provided for in that annex, without the Hellenic Republic giving reasons for that reduction or, in particular, informing the Commission of the specific factors which might justify such a reduction.

30 The Greek Government contends, in reply to that complaint, that point 5 of Chapter I of the annex to Directive 93/118 allows Member States to derogate from the rates of the fees fixed at Community level by that annex, provided that they do not reduce them by more than 55%. In the present case, that requirement was scrupulously observed. Moreover, that directive does not contain any obligation on the Member States to communicate to the Commission the information justifying a reduction of the fees. In any event, it is well known that in Greece the cost of living and salary costs differ noticeably from the Community average, and the relevant information on this point is easily accessible to the Commission.

31 It is common ground that Presidential Decree No 34/94 fixed the rates of the fees to be charged on the basis of the annex to Directive 93/118 at 50% of the standard Community rates.

32 It may be seen from point 5 of Chapter I of the annex to Directive 93/118 that the directive allows a Member State, if the cost of living and salary costs differ substantially there from the Community average taken as a basis for calculation of the standard rates, exceptionally to reduce them to meet the real costs of inspection, provided that the reduction is not more than 55% of those rates.

33 In the present case, the Commission does not claim that the reduction by the Greek authorities exceeds that limit, but complains that they did not communicate to it the detailed information to justify that reduction.

34 The Commission relies here more particularly on Article 2(5) of Directive 85/73, as amended by Directive 93/118, on points 1, 2 and 5 of Chapter I of the annex to the latter directive taken together, and on Article 5 of the EC Treaty (now Article 10 EC).

35 With respect, first, to Article 5 of the Treaty, it is sufficient to note that the Commission relied on it for the first time in its reply, and that its argument on this point is particularly sketchy. Since the Commission did not explicitly rely on Article 5 during the pre-litigation procedure or even in its application, the argument alleging failure to comply with that provision must be disregarded, as the Greek Government has not been enabled to put forward a proper defence to that part of the Commission's complaint.

36 Next, it must be noted that Chapter I of the annex to Directive 93/118 does not include any provision such as to give rise to an obligation on the Member States to communicate to the Commission the information to justify a reduction in the level of the Community fees.

37 Finally, Article 2(5) of Directive 85/73, as amended by Directive 93/118, provides:

'The Member States shall forward information — initially two years after the introduction of the new system and subsequently at the Commission's request — to the Commission concerning the distribution and use of the fees and must be able to justify their method of calculation.'

38 As the Advocate General observes in points 37 to 39 of his Opinion, it follows from the very wording of that provision that, while the Member States are obliged, two years after the implementation of Directive 93/118, to inform the Commission of the distribution and use of the fees provided for in that directive, they are required to justify the method of calculation of the level of those fees under their national legislation only if the Commission first requests them to do so.

39 In contrast to Article 8(1) of Directive 85/73, as amended by Directive 93/118, which allows the Hellenic Republic to derogate in specified cases from the principles laid down in the directive, while expressly stating that information on such derogations must be provided by the Greek authorities to the Commission and that that information must be 'accompanied by any necessary explanations', Article 2(5) of that directive does not lay down any such obligation on the Member States, but merely states that they 'must be able to justify' their method of calculation of the fees.

40 It follows that, in the present case, a failure to comply with that provision may be found only if it is shown that the Hellenic Republic failed to respond to a prior request by the Commission for the detailed information to justify the reduced fees provided for in that Member State.

41 In this respect, however, the Commission merely submitted in its reply that it had made several requests to the Greek Government to communicate to it the evidence to justify the reduction in the rate of fees, but had received no answer.

42 It is settled case-law that in the context of proceedings under Article 169 of the Treaty for failure to fulfil obligations it is for the Commission to prove the existence of the alleged failure, and it may not rely on any presumption for that purpose (see, *inter alia*, Case C-217/97 *Commission* v *Germany* [1999] ECR I-5087, paragraph 22).

43 Since the Commission, in the present case, has not provided the Court with any detail concerning in particular the dates of the alleged requests to the Greek Government, it cannot be regarded as having substantiated its assertion that before the start of the pre-litigation procedure it asked to be given the specific data by which the Member State concerned could justify its reduction of the rates of the fees, so that the silence on the part of the Greek authorities constituted a breach of an obligation created by such an express prior request. The alleged infringement of Community law must necessarily already exist at the time of the letter of formal notice.

44 In those circumstances, the Commission's second complaint must be rejected.

The complaint that poultrymeat was not mentioned for the purposes of the fee for the cutting of fresh meat

45 The Commission submits that Presidential Decree No 34/94, in particular Article 3(2) thereof, does not refer to poultrymeat for the purposes of the application of the fee for the cutting of fresh meat. That is not in conformity with the provisions of Directive 93/118, since it follows from point (e) of the first indent of point 1 and point (a) of the first indent of point 2 of Chapter I of the annex, taken together, that poultry is subject to payment of the fee for cutting, which is added to the amount of the fee to be charged for the health controls on slaughter of poultry.

46 The Greek Government submits that this complaint is unfounded for two reasons. First, Article 3(1) of Presidential Decree No 34/94 refers to Presidential Decrees No 959/81 and No 599/85, since replaced by Presidential Decrees No 410/94 and No 291/96, which mention poultry for the application of the fee for cutting, in accordance with the provisions of Directive 93/118. Second, the administrative practice followed in Greece is wholly in conformity with the relevant national rules and hence with the directive in question, since fees for cutting are actually charged for poultrymeat throughout Greek territory.

47 It is clear, first, that Directive 93/118 applies to poultrymeat, as is apparent even from its title.

48 With respect more particularly to the fee for cutting, it applies not only to beef and veal, pigmeat, sheepmeat and goatmeat, and meat of solipeds/equidae, but also to poultrymeat, as follows from point (e) of the first indent of point 1 and

point (a) of the first indent of point 2, taken together, of Chapter I of the annex to Directive 93/118.

49 It must be observed, second, that the Court has indeed held that transposing a directive does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific express provision of a law or regulation, and that the general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see, *inter alia*, *Commission* v *Germany*, paragraph 31).

50 However, according to the case-law, it is necessary that the legal situation should be sufficiently precise, clear and transparent for the persons concerned to be able to know the full extent of their rights and obligations (see, to that effect, *Commission* v *Germany*, paragraph 32).

51 In the present case, point (e) of the first indent of point 1 and point (a) of the first indent of point 2 of Chapter I of the annex to Directive 93/118 impose an obligation on Member States to charge the Community cutting fee for fresh poultrymeat and to add the amount of that fee to the fee due for the health checks on the slaughter of the poultry. That provision thus lays an obligation on the Member States to achieve a precise result and directly regulates the legal situation of the individuals concerned.

52 As the Advocate General observes in points 52 to 55 of his Opinion, it is clear that in Greece the obligation to charge the cutting fee for poultrymeat is not laid down in a sufficiently clear, precise and transparent manner to ensure legal

certainty and enable the operators concerned to know the full extent of their rights and obligations.

53 Even if, as the Greek Government submits, Article 3(1) of Presidential Decree No 34/94 does indeed provide in a sufficiently clear manner for the charging of a cutting fee for poultrymeat, paragraph 2 of that article nevertheless states only that the amount of that fee is to be added to that of the fee chargeable for health controls in connection with the slaughter of bovine animals, pigs, sheep and goats. The latter provision thus does not refer explicitly to poultry, so that both the public authorities responsible for applying the provisions of Directive 93/118 and the economic operators concerned might construe Presidential Decree No 34/94 as meaning that, unlike cutting operations relating to other categories of meat, the cutting of poultry does not give rise to the charging of a fee which is added to the other fees due under that directive.

54 In those circumstances, the Greek legislation whose aim is to implement Directive 93/118 creates for those concerned a state of uncertainty as to the scope of the Community fee for the cutting of fresh meat and, because of that ambiguity, does not satisfy the obligation to transpose the directive clearly, precisely and transparently, especially as, with respect to the fee charged for inspection costs in connection with slaughter operations, Presidential Decree No 34/94 applies without distinction to beef and veal, pigmeat, sheepmeat and goatmeat, and poultrymeat.

55 With respect to the Greek Government's argument that the cutting fee is in fact charged for poultrymeat, it need merely be observed that this argument is not such as to invalidate the Court's conclusion that the provisions of Presidential

Decree No 34/94 are not sufficiently clear, precise and transparent to constitute a correct transposition of Directive 93/118.

56 It follows from the settled case-law of the Court that mere national practices which, even if they are consistent with the provisions of a directive, are by their nature alterable at will by the authorities, cannot be regarded as constituting the proper fulfilment of the obligation which Article 189 of the EC Treaty (now Article 249 EC) imposes on Member States to which a directive is addressed (see, in particular, *Commission* v *Netherlands*, paragraph 29, and Case C-221/94 *Commission* v *Luxembourg* [1996] ECR I-5669, paragraph 22).

57 It follows that the Commission's third complaint must be upheld.

58 In the light of all the foregoing, it must be held that,

— by failing to mention, among the meat to which the fees fixed by Directive 93/118 apply, the category corresponding to solipeds/equidae, and

— by not explicitly mentioning poultrymeat for the purposes of the application of the fee for the cutting of fresh meat fixed by that directive,

the Hellenic Republic has failed to fulfil its obligations under the provisions of the first and third subparagraphs of Article 3(1) of Directive 93/118 and points (b) and (e) of the first indent of point 1 and point (a) of the first indent of point 2 of the annex thereto, taken together.

59 The remainder of the application must be dismissed.

Costs

60 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has not applied for costs, each party must be ordered to bear its own costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. Declares that,

— by failing to mention, among the meat to which the fees fixed by Council Directive 93/118/EEC of 22 December 1993 amending Directive 85/73/

EEC on the financing of health inspections and controls of fresh meat and poultrymeat apply, the category corresponding to solipeds/equidae, and

— by not explicitly mentioning poultrymeat for the purposes of the application of the fee for the cutting of fresh meat fixed by that directive,

the Hellenic Republic has failed to fulfil its obligations under the provisions of the first and third subparagraphs of Article 3(1) of Directive 93/118 and points (b) and (e) of the first indent of point 1 and point (a) of the first indent of point 2 of the annex thereto, taken together;

2. Dismisses the remainder of the application;

3. Orders the Commission of the European Communities and the Hellenic Republic to bear their own costs.

Gulmann Skouris Puissochet

Schintgen Macken

Delivered in open court in Luxembourg on 16 November 2000.

R. Grass C. Gulmann

Registrar President of the Sixth Chamber