OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 14 November 2002 [1]

1. In the present case the Commission of the European Union is asking the Court to declare that the Federal Republic of Germany has failed to bring into force and notify within the prescribed time-limit the laws, regulations or administrative provisions necessary to comply with Council Directive 98/56/EC of 20 July 1998 on the marketing of propagating material of ornamental plants [2] ('the Directive'). In accordance with Article 19 of the Directive, the period prescribed for transposition of the Directive expired on 1 July 1999.

2. The Directive applies to the marketing in the Community of propagating material of ornamental plants. It lays down rules relating to the quality and the health of materials used for the propagation of such plants.

3. Article 2(1) of the Directive provides:

'For the purpose of this Directive, the following definitions shall apply:

(1) "Propagating material": plant material intended for

— the propagation of ornamental plants,

or

— the production of ornamental plants; however, in the case of the production from complete plants, this definition applies only to the extent that the resulting ornamental plant is intended for further marketing,

— "Propagation": Reproduction by vegetative or other means.'

1 — Original language: Dutch.
2 — OJ 1998 L 226, p. 16.

4. As the Commission had received no information whatsoever on measures taken by the German Government regarding the implementation of the Directive, it sent a letter of formal notice to the Federal Republic of Germany on 16 November 1999. The German Government replied on 18 January 2000. In its reply, the Commission was informed that the Directive was to be implemented by means of an amendment to the Law on the trade in seeds ('the Seeds Marketing Law') and to the regulation on ornamental plants (the marketing of vegetable and fruit plants). The relevant amendments were being prepared. The delay could be traced to the difficulties experienced by the German Government in connection with the interpretation of the definition of 'propagating material'.

5. The Commission responded, on 19 July 2000, by sending a reasoned opinion in which it requested the German Government to adopt within two months from the notification thereof the measures necessary in order to comply with that opinion. In a response, dated 10 October 2000, to the reasoned opinion, the German Government once again referred to the difficulties of interpretation. In a letter dated 15 December 2000 that response was supplemented and a speedy implementation was indicated.

6. In its application the Commission claims that the German Government has still not adopted the required laws, regulations or administrative provisions necessary in order to comply with the obligations under the Directive.

7. In its defence, the German Government does not contest that the Directive has not been transposed within the prescribed time-limit. However, it takes the view that the application is inadmissible on account of a defect in the pre-litigation procedure. In its response to the letter of formal notice it had already drawn attention to the essential concept of 'propagating material', the content of which was unclear. That lack of clarity related to differences in the language versions of the Directive. Nor was that lack of a uniform interpretation resolved after a meeting of the Standing Committee on 25 November 1999, as provided for in Article 17 of the Directive. The Commission had at no stage of the pre-litigation procedure mentioned these problems of interpretation, which entails a lack of reasoning. In its rejoinder the German Government deals in greater detail with the ambiguities found and with the meeting of the Standing Committee. It also refers to the judgment in *Commission* v *Germany*[3] in which the Court commented on difficulties of interpretation mentioned by the German Government. The Court took no account of those difficulties as they were raised after the expiry of the period prescribed for transposing the directive in question. In the present case, in contrast, the Commission had already been informed prior to the expiry of the period prescribed for transposition.

3 — Case C-344/96 [1998] ECR I-1165.

8. I cannot see how the difficulties of interpretation mentioned by the German Government could lead to the inadmissibility of the application.

9. First, I should like to recall the purpose of the pre-litigation procedure. According to settled case-law, that procedure is designed to enable the Member State concerned to comply with its obligations under Community law and to defend itself against the complaints formulated by the Commission. Furthermore, the subject-matter of the contentious proceedings is defined in the pre-litigation procedure. In that connection, a pre-litigation procedure in a case must satisfy two requirements: the Member State must have the opportunity of defending itself, and the subject-matter of the procedure must be clear. For me there can be no doubt that both these requirements are fulfilled in the present. What the German Government is complaining of *vis-à-vis* the Commission is not so much that it could not defend itself but rather that the Commission did not find its defence to be valid.

10. In that respect, the present case is different from two recent cases brought against Ireland for failure to fulfil Treaty obligations[4] in which Advocates General Mischo and Ruiz-Jarabo Colomer found applications of the Commission to be inadmissible as the Commission had failed to react in the pre-litigation procedure to the arguments which the Irish Government had put forward in its reply to the letter of formal notice. In both cases the Advocates General stressed that the Commission, as guardian of the Treaty, was under a duty to examine thoroughly the arguments put forward by a Member State. I share the view of both the Advocates General concerning the Commission's duty to examine. However, the Commission's non-compliance with that obligation plays no role in the present case.

11. Furthermore, I consider it wholly irrelevant for the purposes of the present case that the German Government, as it claims, informed the Commission prior to the expiry of the period prescribed for implementation. At that time the content of the Directive had already been determined. So had the obligation of the Member States to transpose the Directive into national law by 1 July 1999 at the latest. That is not an obligation with respect to the Commission but an obligation arising directly from the EC Treaty. A Member State may therefore also not hide behind the views of the Commission concerning the content of a directive or, as in the present case, the Commission's failure to express a view. Views of the Commission can never be such as to lead to the suspension of the obligation of a Member State to transpose a directive by the date prescribed for that purpose.

4 — Opinions of Advocate General Mischo of 28 May 2002 in Case C-120/01 *Commission* v *Ireland* (removed from the register by order of 9 September 2002) and of Advocate General Ruiz-Jarabo Colomer of 17 September 2002 in Case C-362/01 *Commission* v *Ireland* [2002] ECR I-11433.

12. Nor do the terms of the judgment in *Commission* v *Germany* cited in point 7 above lead to a different conclusion. In that judgment the Court simply did not address the situation in which a Member State gives notice to the Commission, prior to the expiry of the period prescribed for implementation, of its difficulties with regard to implementation. Nor was there any need for it to do so.

13. In short, when a Member State has difficulties relating to lack of clarity of a directive, it may, as a Member of Council, before the directive is adopted, take action to have its text amended.

14. Nor does it follow from Article 10 EC that the Commission must refrain from initiating a Treaty-infringement procedure where a Member State encounters problems of interpretation when transposing a directive. To take a different view would mean that the Commission would not be able to discharge its task of ensuring correct implementation in all Member States within the period prescribed. A consequence of this, furthermore, would be an unjustified inequality between Member States which encounter problems of interpretation and those which do not.

15. Since it has been shown that the application is admissible, I now turn to considering whether it is well founded.

16. It is settled case-law that the existence of a failure to fulfil obligations must be assessed on the basis of the situation of the Member State at the end of the period laid down in the reasoned opinion.[5] In the present case, the reasoned opinion was issued on 19 July 2000. In it the German Government was requested to inform the Commission within two months of the measures that were to be adopted. The Court cannot therefore take into account changes occurring after 19 September 2000.

17. Problems of interpretation do not relieve a Member State of its obligation to transpose a directive into its national law within the period prescribed. According to Article 249 EC, a directive is binding, as to the result to be achieved, on a Member State. The failure to fulfil obligations is therefore established.

5 — See the recent judgment of 30 May 2002 in Case C-323/01 *Commission* v *Italy* [2002] ECR I-4711.

Conclusion

18. I therefore propose that the Court should:

— declare that, by failing to adopt and notify within the prescribed period the laws, regulations or administrative provisions necessary in order to implement in full Council Directive 98/56/EC of 20 July 1998 on the marketing of propagating material of ornamental plants, the Federal Republic of Germany has failed to fulfil its obligations under that directive;

— order the Federal Republic of Germany to pay the costs.