JUDGMENT OF THE COURT (Fifth Chamber)

16 December 1999 *

In Case C-239/98,

Commission of the European Communities, represented by C. Tufvesson, Legal Adviser, and B. Mongin, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and C. Chavance, Secretary for Foreign Affairs in the same directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

APPLICATION for a declaration that, by failing to adopt (or bring into force) and communicate all the laws, regulations and administrative provisions

* Language of the case: French.

necessary in order to comply fully with Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) (OJ 1992 L 228, p. 1) and with Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive) (OJ 1992 L 360, p. 1) and, in particular, by not transposing those directives with regard to mutual societies governed by the Code de la Mutualité, the French Republic has failed to fulfil its obligations under the EC Treaty and under those directives,

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, J.C. Moitinho de Almeida (Rapporteur), L. Sevón, J.-P. Puissochet and P. Jann, Judges,

Advocate General: S. Alber,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 7 July 1999,

after hearing the Opinion of the Advocate General at the sitting on 29 September 1999,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 7 July 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 adopt (or bring into force) and communicate all the laws, regulations and administrative provisions necessary in order to comply fully with Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) (OJ 1992 L 228, p. 1) and with Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive) (OJ 1992 L 360, p. 1) and, in particular, by not transposing those directives with regard to mutual societies governed by the Code de la Mutualité, the French Republic has failed to fulfil its obligations under the EC Treaty and under those directives.

2 According to the first recital in their preamble, Directives 92/49 and 92/96 have as their purpose to complete the internal market in the insurance sector as regards both the right of establishment and the freedom to provide services, in order to make it easier for insurance and assurance undertakings with head offices in the Community to cover risks and commitments situated within the Community.

3 According to the fifth recital in their preamble, those directives lay down the principle of mutual recognition of authorisations and prudential control systems,

making it possible to grant a single authorisation valid throughout the Community and to apply the principle of supervision by the home Member State.

4 Under Article 6 of Directive 92/49 (which replaces Article 8 of First Council Directive 73/239/EEC of 24 July 1973 (OJ 1973 L 228, p. 3)):

'1. The home Member State shall require every insurance undertaking for which authorisation is sought to:

(a) adopt one of the following forms:

...

— in the case of the French Republic: "société anonyme", "société d'assurance mutuelle", "institution de prévoyance régie par le code de la sécurité sociale", "institution de prévoyance régie par le code rural" and "mutuelles régies par le code de la mutualité".'

5 Article 5 of Directive 92/96 (which replaces Article 8 of First Council Directive 79/267/EEC of 5 March 1979 (OJ 1979 L 63, p. 1)) contains the same provision.

6 Under the first subparagraph of Articles 57(1) of Directive 92/49 and 51(1) of Directive 92/96, the Member States were to adopt the laws, regulations and

administrative provisions necessary to comply with Directives 92/49 and 92/96 not later than 31 December 1993 and were to bring them into force no later than 1 July 1994. They were to inform the Commission thereof forthwith.

7 By letter of 31 March 1995, the Commission drew the attention of the French authorities to the fact that neither Law No 94/678 of 8 August 1994 on supplementary social protection for employees and the transposition of Directives No 92/49 and 92/96 of 18 June and 10 November 1992 of the Council of the European Communities (*Journal Officiel de la République Française* No 184 of 10 August 1994, p. 11 655), nor Law No 94/679 of 8 August 1994 laying down miscellaneous economic and financial provisions (*Journal Officiel de la République Française* No 184 of 10 August 1994, p. 11 668), transposed Directives 92/49 and 92/96 with regard to mutual societies governed by the Code de la Mutualité.

8 In reply to that letter, the French authorities stated on 8 June 1995 that a draft law transposing those directives with regard to mutual societies governed by the Code de la Mutualité would shortly be submitted to the French Parliament.

9 Since no law was adopted, the Commission called upon the French Republic, by letter of formal notice of 31 January 1996 and pursuant to the procedure provided for under Article 169 of the Treaty, to submit its observations within two months on the failure to transpose Directives 92/49 and 92/96 with regard to the aforesaid societies.

10 In their reply of 2 July 1996, the French authorities intimated that the transposition of the directives with regard to the Code de la Mutualité was at a preparatory stage.

11 On 5 March 1997 the Commission sent the French Republic a reasoned opinion calling upon it to adopt the measures necessary to comply fully with Directives 92/49 and 92/96 within two months.

12 On 18 November 1997 the French authorities set out, *inter alia*, the principles of French law governing mutual societies, and sent the Commission a draft law on the transposition of Directives 92/49 and 92/96 enabling them to be applied to mutual associations falling within the ambit of the Code de la Mutualité; on 3 December 1997, they indicated their intention to submit at the beginning of 1998 a draft law laying down general principles and designed to transpose those two directives into national law. The legislation transposing the technical and prudential rules in Directives 92/49 and 92/96 was to be made public before the end of 1998.

13 On 11 February 1998 the French authorities explained the particular features of mutual societies to the Commission and informed it of the course they intended to pursue in transposing Directives 92/49 and 92/96 to that sector.

14 On 11 March 1998 the French Government informed the Commission of the new course it intended to pursue whereby a distinction would be drawn in national law between mutual insurance activities carried on in the form of services provided for consideration in cash or in kind and falling within the scope of the prudential rules in Directives 92/49 and 92/96 on the one hand, and activities carried on by mutual societies which are unconnected with insurance and which ought to be managed by subsidiaries, on the other.

15 By letter of 6 May 1998 the Commission reminded the French authorities of its view that it was possible to preserve the special character of French mutual societies whilst giving full effect to Directives 92/49 and 92/96 in relation to those societies.

16 On 7 July 1998 the Commission brought this action.

17 In its application the Commission begins by pointing out that the French Republic has transposed Directives 92/49 and 92/96 incompletely, since their transposition does not extend to mutual societies governed by the Code de la Mutualité.

18 Next, it claims, *inter alia*, that the effect of their not having been transposed is that:

— French mutual societies are not subject to the prudential and financial requirements laid down in Directives 92/49 and 92/96 (adequate technical provisions, solvency margin);

— their insurance activities as such are not legally separate from their 'philanthropic' activities, particularly in relation to pharmaceuticals, optical centres, holiday centres and the renting of meeting rooms, in breach of the principle of specialisation of insurance companies laid down in Directives 92/49 and 92/96, which requires that the commercial and philanthropic activities pursued by mutual societies should not be managed by the same legal entity;

— their portfolio transfer system is not in conformity with that established by Directives 92/49 and 92/96;

— their reinsurance system does not comply with the requirements laid down by the Treaty.

19 In its defence, the French Government argues first of all that the application is inadmissible since it is clear therefrom that the Commission is widening the scope of the case inasmuch as it also relates to the compatibility with Community law — that is to say, with Council Directive 64/225/EEC of 25 February 1964 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession (English Special Edition, 1963-1964, p. 13) — of the reinsurance mechanisms in force under the national legislation applicable to mutual societies governed by the Code de la Mutualité, even though no such allegation was made during the pre-litigation procedure.

20 In that connection, the Commission stated in the reply and again at the hearing that the complaint contained in the letter of formal notice, the reasoned opinion and the application had remained unchanged and that both the entire pre-litigation procedure and the operative part of the application had always related to the French Republic's failure to adopt, or in any event to communicate, the laws, regulations and administrative provisions necessary to transpose Directives 92/49 and 92/96 with regard to mutual societies governed by the Code de la Mutualité. In addition, contrary to its erroneous statement in the application, the Commission acknowledged at the hearing that the failure to transpose Directives 92/49 and 92/96 into national law does not affect reinsurance, since the Community obligations imposed on Member States in that area derive not from those directives but from Directive 64/225, which was not referred to at all by the Commission in its application.

21 The French Government acknowledges that mutual societies governed by the Code de la Mutualité were included within the scope *ratione materiae* of Article 6

of Directive 92/49 and Article 5 of Directive 92/96 and that the implementing provisions were not rendered applicable to those societies. Moreover, the manner of their inclusion is still under discussion between the French authorities and the societies concerned, since the latter consider that the application of Directives 92/49 and 92/96 to their activities would call into question the specific nature of mutual societies. At the hearing, the French Government produced a report on mutual societies and Community law drawn up at its behest in May 1999 (the Rocard Report), which highlights the need to transpose Directives 92/49 and 92/96 into French law as soon as possible.

22 Suffice it to note that the French Government does not deny that the provisions necessary to transpose Directives 92/49 and 92/96 with regard to mutual societies have not yet been adopted.

23 In those circumstances, the Commission's action must be considered to be well founded.

24 It must therefore be held that, by failing to adopt the laws, regulations and administrative provisions necessary to comply fully with Directive 92/49 and Directive 92/96 and, in particular, by not transposing those directives with regard to mutual societies governed by the Code de la Mutualité, the French Republic has failed to fulfil its obligations under those directives.

Costs

25 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 applied for costs and the French Republic has essentially been unsuccessful in its submissions, the French Republic must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by failing to adopt all the laws, regulations and administrative provisions necessary in order to comply fully with Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) and with Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive) and, in particular, by not transposing those directives with regard to mutual societies**

governed by the Code de la Mutualité, the French Republic has failed to fulfil its obligations under the EC Treaty and under those directives;

2. Orders the French Republic to pay the costs.

Edward Moitinho de Almeida Sevón

Puissochet Jann

Delivered in open court in Luxembourg on 16 December 1999.

R. Grass — D.A.O. Edward

Registrar — President of the Fifth Chamber