

OPINION OF MR. ADVOCATE GENERAL MANCINI
DELIVERED ON 24 NOVEMBER 1982¹

*Mr President,
Members of the Court,*

1. The case to which this opinion refers arises from an action brought by the Commission, within the terms of Article 169 of the Treaty of Rome, for a declaration that the Kingdom of the Netherlands has failed to fulfil an obligation imposed by the EEC Treaty. That State failed to adopt, within the specified period, the provisions necessary to comply with the First Council Directive (73/239/EEC) of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance (Official Journal L 228, p. 3).

2. I shall state the facts which preceded the Commission's action.

The first paragraph of Article 35 of Directive 73/239 provides that "Member States shall amend their national provisions to comply with this directive within 18 months of its notification and shall forthwith inform the Commission thereof." The directive was notified on 31 July 1973; thus the specified period for implementing it expired on 31 January 1975. The Commission, with a notice of 11 February 1977, initiated the procedure under Article 169. On 16 January 1978, on the basis of assurances

given by the Government of the Netherlands, the procedure was suspended; it was re-opened on 29 November 1980 by a further formal warning. The reasoned opinion was given on 18 November 1981 and the Commission brought the matter before the Court by an action of 24 May 1982, which was registered on 27 May 1982.

3. It must immediately be stated that the Government of the Netherlands acknowledges its failure to fulfil its obligations. Nevertheless, it seeks to justify the failure or to minimize its importance in various respects. In particular, it maintains that the "complicated" contents of the directive entail the entire revision of the rules governing loss insurance and thus provide the opportunity to regulate matters outside the aims and the scope of Community law, too. Moreover, the necessity of referring to the legislative process involves the lengthy delays characteristic of parliamentary business.

The second argument is that, in practice, the directive is already applied in respect of all the undertakings with head offices in the Netherlands or in another Member State. Indeed, on 17 June 1976 the Verzekeringskamer [Netherlands Institute of Insurance] issued a circular concerning the cases of divergence between the legislation in force and the directive, in which it undertook to apply the latter to undertakings which met the requirements laid down therein. Thus neither foreign nor national companies were put at a disadvantage by the

¹ — Translated from the Italian.

absence of implementation. The third ground of defence is that certain fundamental provisions of the directive and, in particular, those referring to the solvency margin of insurance undertakings, are applied in practice because they have direct effect.

4. I consider that the arguments relied upon by the defendant government are unsound. Each is contrary to part of the established case-law of the Court. I shall merely restate that law.

5. Let us first examine the argument as to the delay resulting from the demands of parliamentary business. It is worth emphasizing that almost eight years have passed since the expiry of the period for the adoption of the directive into national law. The Commission has pointed out that the law implementing the directive will not be passed before 1984. Thus, if there are no further obstacles, the defendant government will succeed in bringing its own legislation into conformity with the obligations it undertook as a Member of the Community only after a delay of eleven years after the adoption of the directive. It seems to me that nothing can justify such a lengthy delay. In any case the Court has consistently maintained that "a Member State may not plead provisions, practices or circumstances in its internal legal system to justify failure to comply with obligations under Community directives" (judgment of 2 February 1982 in Case 70/81 *Commission v Kingdom of Belgium* [1982] ECR 169 at p. 173, paragraph 5 of the decision).

6. The argument that the directive is applied in practice on the basis of a circular from the Institute of Insurance must equally be rejected. It is well known that *de facto* application does not guarantee the legal certainty which the Court's case-law holds to be essential. The Court has stated: "It is . . . essential . . . that each Member State should implement the directives . . . in a way which fully meets the requirements of clarity and certainty in legal situations which directives seek. Mere administrative practices, which by their nature can be changed as and when the authorities please and which are not publicized widely enough cannot in these circumstances be regarded as a proper fulfilment of the obligation imposed by Article 189 on Member States to which the directives are addressed" (judgment of 6 May 1980 in Case 102/79 *Commission v Kingdom of Belgium* [1980] ECR 1473 at p. 1486, paragraph 11 of the decision). Moreover, as may be seen from the defendant government's own statement of defence, there is substantial divergence between the legislation in force in the Netherlands and the provisions of the directive.

7. The argument concerning the direct applicability of the relevant directive or elements thereof must also fail. To accept that the objectives of the directive may be achieved as a result of "automatic" integration into the national legal system is to exclude whatever difference there may be between a directly applicable legal act, such as a regulation, and a directive having direct effect: this would completely misrepresent the notion attributed to each Community measure by Article 189 of

the EEC Treaty. At any event the case before the Court is concerned with partial application. On this point, too, the Court has rejected theories which are incompatible with the system of law instituted by the Treaty of Rome. "The effect of the third paragraph of Article 189", it has stated, "is that Community directives must be implemented by appropriate implementing measures carried out by the Member States. Only in specific circumstances, in particular where a Member State has failed to take the implementing measures required or has adopted measures which do not conform to a directive, has the Court of Justice recognized the right of persons affected thereby to rely in law on a directive as against a defaulting Member State (cf. on this subject the judgment of 5 April 1979, *Ratti*, Case 148/78 ECR 1629). This minimum guarantee arising from the binding nature of the obligation imposed on the Member States by the effect of the directives under the third paragraph of Article 189 cannot justify a Member State's absolving itself from taking in due time implementing measures sufficient to meet the purpose

of each directive" (judgment of 6 May 1980 in Case 102/79, paragraph 12 of the decision) (cited above).

8. If the grounds of defence put forward by the defendant government are judged to be inadequate, the failure as regards adoption into national law within the period specified in the directive must be acknowledged. This period is not capable of extension and even less so of derogation. On the contrary, uniform application of the directive at Community level is a requirement. As indeed the Court has declared: "The mandatory nature of directives entails the obligation for all Member States to comply with the time-limits contained therein in order that the implementation shall be achieved uniformly within the whole Community" (judgment of 22 September 1976 in Case 10/76 *Commission v Italian Republic* [1976] ECR 1359 at p. 1365, paragraph 12 of the decision). Finally, it may be noted that, with the exception of Greece, all the other States have brought their own legal systems into conformity with the directive.

9. In conclusion, I propose that the Court declare that the defendant State has failed to adopt within the specified period the provisions required to comply with the Council Directive 73/239/EEC of 24 July 1973, and therefore has failed to fulfil an obligation imposed by the EEC Treaty.

As regards costs, they should be borne by the unsuccessful defendant in accordance with Article 69 (2) of the Rules of Procedure.