

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 8 DECEMBER 1982¹

*Mr President,
Members of the Court,*

The two cases now before the Court concern actions brought by the Commission, on the one hand, against the Italian Republic (300/81) and, on the other hand, against the Kingdom of Belgium (301/81) on the ground that those two Member States failed to adopt within the prescribed period the measures necessary to comply with Council Directive 77/780 of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions.

Although the two cases are separate I take the liberty of delivering a single Opinion because of the similarity in what I have to say.

I — (1) Article 52 of the EEC Treaty lays down the principle of the prohibition of any discrimination in relation to the establishment on the territory of a Member State of the nationals of other Member States. Article 54 (2) and (3) requires the Council to issue directives to achieve such freedom of establishment. Articles 59 *et seq.* are to the same effect with regard to freedom to provide services. According to the judgments in *Reyners* of 21 June 1974² and *Van Binsbergen* of 3 December 1974³ freedom of establishment and freedom to provide services have been effective and unconditional since 1 January 1970.

Directive 73/183, adopted by the Council on 28 June 1973, partly abolished certain restrictions in order to facilitate freedom of establishment and freedom to provide services "in respect of self-employed activities of banks and other financial institutions". However, it was found that the abolition of those restrictions could not be achieved unless previously or at least simultaneously a minimum of coordination of the national provisions governing that sector was brought about.

Finally, it became apparent that the progressive achievement of an economic and monetary union — or at least cooperation — and free movement of capital must go hand in hand with measures of coordination in the banking sector. The Treaty (Article 61) itself provides:

"(1) ...

- (2) The liberalization of banking and insurance services connected with movements of capital shall be effected in step with the progressive liberalization of movement of capital."

To that end, the Council adopted on 12 December 1977 a first directive (No 77/780), signed by the Belgian minister A. Humblet, aimed at coordinating the laws, regulations and administrative provisions of the Member States in relation to the taking up and pursuit of the business of credit institutions.

That directive refers in particular to Article 57 of the Treaty. It was unani-

¹ — Translated from the French.

² — [1974] ECR 631.

³ — [1974] ECR 1299.

mously adopted, for the credit sector — at least in the original Member States — is covered by legislative provisions and the measures relate to the protection of savings and, in particular, the distribution of credit and the banking profession. It was published in the Official Journal of the European Communities on 17 December 1977.

It is essential to cite its penultimate provision (Article 14), which is at the origin of the present cases:

“(1) Member States shall bring into force the measures necessary to comply with this directive within 24 months of its notification and shall forthwith inform the Commission thereof.

(2) As from the notification of this directive, Member States shall communicate to the Commission the texts of the main laws, regulations and administrative provisions which they adopt in the field covered in this directive.”

It thus appears that it was necessary to adopt certain measures in all the Member States, in various degrees, if only to achieve an initial approximation of the national provisions governing this sector. Further, since law cannot remain stationary in any Member State and to prevent divergencies between the States from reappearing, being perpetuated or even exacerbated, the Member States were required to inform the Commission of national provisions which, although strictly speaking not aimed at adapting the national system to the directive and although remaining compatible therewith, introduced changes in that sphere.

The Member States were granted a period expiring on 15 December 1979 (1 January 1981 in the case of Greece) in which to adopt the measures necessary to comply with the directive. Without awaiting that date, they were to inform the Commission of the essential provisions which they adopted after 15 December 1977 in the field covered by the directive, irrespective of whether such provisions constituted measures necessary to comply with the directive; the only difference is that if the measures were necessary they were to be notified to the Commission immediately.

(2) On 29 May 1980 the Commission sent the Belgian Government formal notice, under Reference No SG(80)D/6556, in which it expressed the view that Belgium had failed to fulfil its obligations under “those” directives since the Commission had so far received “no notification” that the necessary measures had been adopted.

In accordance with Article 169 of the Treaty, the Commission invited the Belgian Government to submit observations within a period of two months, that is to say before 1 August 1980. Without prejudice to the substance of such observations, it reserved the right to issue a reasoned opinion on the subject in the event of its receiving no observations within that period.

On the same day the Commission sent the Italian Government a letter in identical terms under Reference No SG(80)D/6558.

On 2 July 1980, that is before the expiry of the requisite period, the Permanent Representative for the Kingdom of Belgium replied as follows: “In all probability the bill amending the laws on

credit institutions pursuant to Directive 77/780 of 12 December 1977 ... will very shortly be submitted to the legislature. As you were recently informed, the delay for which complaint is made against Belgium is due not only to political circumstances but also to the complex nature of the subject and the existence of other proposals in relation to banking ...”

It follows from that letter:

That the national *legislative* provisions in force when the directive was notified were not, at least on certain points, in accord with the directives;

That legislation, not yet agreed upon at that time by the Government, was intended to remedy that state of affairs;

That delay in the enactment of that legislation was due to political vicissitudes, the complexity of the subject and the existence of other proposals in the same field; and

That the Commission had already been informed of the circumstances.

There is obviously a contradiction between the last statement and that of the Commission to the effect that it had received no communication on the subject. At the end of the reply which it gave on 8 October 1982 to a question put to it by the Court, the Belgian Government observed that “the national authorities consulted the Commission *unofficially* in October 1979 upon the

draft proposal for a law in preparation”. Further, the Belgian Government produced as an annex to its defence minutes of a meeting on 17 and 18 March 1980 concerning the application of the directive in the Member States, where there is mention that a bill *had been* placed before the Belgian Parliament and that it was expected to become law before the end of 1980. Since an official from the Commission presided at the meeting the Commission must have been aware of that date. Nevertheless the bill in question could not have been placed before the Parliament at that date since, as we shall see, it was not adopted by the Government until 12 December 1980.

Whatever the position on that issue, the Belgian Government did not say at that stage that the legislative provisions in force complied with the directive, nor that a bill to remedy that situation had been placed before the Parliament, still less adopted before, 15 December 1979, even supposing that it had been notified to the Commission.

The Permanent Representative for the Italian Republic replied on 10 September 1980, that is after the expiry of the requisite period, that the Government had approved on 19 June 1980 and submitted to the Senate (on 1 July 1980, as we shall see) a bill (No 976) intended to implement, interpret and supplement Directive 77/780. That bill empowered the Government to adopt, within three months from the entry into force of the law, the provisions necessary to implement the directive.

The reply added that “it ought not to be long before the legislative process is concluded”, which attested to “the firm

intention of the Italian Government to translate into the national legal system the principles contained in the directive”.

provisions which, under Community law, are directly applicable.”

It follows from that letter:

That the national provisions in force when the directive was notified were not, at least on certain points, in accord with the directive;

That the Government did not approve a bill to remedy that state of affairs until 19 June 1980; and

That the bill had not been adopted — and *a fortiori* not introduced into Parliament — before 15 December 1979 and was not notified to the Commission until 10 September 1980.

On 29 December 1980 the Belgian Government informed the Commission that the bill to amend national legislation in accordance with the directive had been approved by the Government on 12 December 1980 and that it was intended “to request the Parliament to expedite the enactment of the law”. At the end of the written procedure the Belgian Government in fact produced a bill bearing the signature of the Minister for Finance and published in the documents of the Chambre des Représentants on 4 May 1982. According to its title, it is a bill “to amend the laws on credit institutions so as to adapt them to the law of the European Communities”. According to its preamble, the bill “is confined to translating into Belgian legislation only the requirements of the directive ... which are *new* to Belgian national law. Nor does it include certain

(3) On 24 March 1981 the Commission issued two reasoned opinions pursuant to the first paragraph of Article 169 of the Treaty, the one to the Kingdom of Belgium (C (81) 397) and the other to the Italian Republic (C (81) 398), drafted in identical terms to the effect that, by failing to adopt the provisions necessary to comply with the directive, those States had failed to perform their obligations under Article 14 (1) thereof. They were invited, pursuant to the second paragraph of Article 169, to take the necessary measures to repair that omission within a period of two months from notification, that is to say before 24 May 1981.

On 24 July 1981 the Permanent Representative for the Italian Republic once again wrote to the Commission to inform it that, since the Government crisis was settled for the time being, it was expected that the Committee for Finance and Treasury Affairs of the Senate of the Republic would resume work without delay and once again deal with the bill to empower the Government to adopt measures to implement the Community directive.

The Commission waited until 30 November 1981 before bringing the two separate actions now before the Court.

II — (1) The Belgian Government challenges the admissibility of the Commission’s action on the grounds that inadequate reasons are given for it and that the periods laid down in the directive and the reasoned opinion which was sent to it were obviously insufficient.

Although those objections involve considerations of the substance, the admissibility of the Commission's actions raises a real problem.

Certain Member States (Denmark, Ireland, Luxembourg, the Netherlands, the United Kingdom and Greece) have decided pursuant to Article 2 (5) and (6) of the directive to postpone its application with regard to certain groups or types of credit institutions, the list of which was published in the Official Journal of the European Communities by the Commission.¹ Moreover, even if certain States have *prima facie* complied with Article 14 (1) of the directive the measures which they have taken are perhaps not, as regards substance, completely compatible with the principles of the directive since the Commission informed us at the hearing that on 30 September 1982 it had sought explanations from some of them.

The question may therefore be asked whether there is a real difference between the two situations where both involve the postponed application of the directive, in the one case because no national implementing measures have been adopted and in the other case because the national measures adopted in due time do not substantially comply with the directive.

In those circumstances it may perhaps have been more expedient for the Commission to propose to the Council that the date should be postponed, as it did for example in the case of value-added tax. In this field it is highly desirable that Community law should be applied simultaneously in all Member States.

However, in view of the previous decisions of the Court, I shall disregard those objections.

As regards time-limits, it was held in the judgment of 26 February 1976 in Case 52/75 (*Commission v Italy* [1976] ECR 277):

"The correct application of a directive is particularly important since the implementing measures are left to the discretion of the Member States and would be ineffective if the desired aims are not achieved within the prescribed time-limits. Although the provisions of a directive are no less binding on the Member States to which they are addressed than the provisions of any other rule of Community law, such an effect attaches *a fortiori* to the provisions relating to the periods allowed for implementing the measures prescribed, in particular since the existence of differences in the rules applied in the Member States after these periods have expired might result in discrimination".²

It must be further pointed out that no bill had yet been put before either the Belgian or the Italian Parliament when the period for implementing the directive expired.

As regards the objection based on the absence of reciprocity, it was held in the same judgment:

"Furthermore, any delays there may have been on the part of other Member States in performing obligations imposed by a directive may not be invoked by a Member State in order to justify its own, even temporary, failure to perform its obligations. The Treaty did not merely

1 — Official Journal C 244, 14. 10. 1978, pp. 2 and 3, and C 254, 6. 10. 1981, p. 3.

2 — Paragraph 10, at p. 284.

create reciprocal obligations between the various subjects to whom it applies, but established a new legal order which governs the powers, rights and duties of the said subjects, as well as the procedures necessary for the purposes of having any infringement declared and punished".¹

"If the period allowed for the implementation of a directive proves to be too short the only means of action compatible with Community law available to the Member State concerned consists in taking the appropriate initiatives within the Community in order to obtain the necessary extension of the period by the competent Community institution".²

(2) Whilst not disputing that the directive was not formally incorporated into their legal systems by means of legislation within the period originally laid down, or even within the period specified in the reasoned opinions, the Belgian and Italian Governments plead:

The size of the task which the enactment of such legislation represents;

The fact that they are using the opportunity to amend their legislation in the field in question;

The fact that in practice the rules contained in the directive are already applied, even if not as the result of a statute ordinary national law provides all the necessary guarantees; in addition "internal instructions" ensure that the

directive is incorporated into national law;

In view of the fact that the majority of the provisions of the directive are "directly applicable" and do not require any translation into national law, the omission complained of is of a purely formal nature; and

Finally, their firm intention to endeavour to incorporate the directive into their national law as soon as possible.

Apart from the fact of their somewhat contradictory nature, those arguments call for the following answers:

(a) It is obvious that the incorporation into national law of a directive of this kind raises problems of a different scale from the application of directives concerned with technical harmonization, for example in connection with motor vehicles or agricultural tractors.

However, account was taken of the complexity of the subject when the period was fixed in the directive; the directive itself envisages the possibility of deferred application in certain cases.³

The Court held on 12 October 1982 in *Commission v Italy*:

"Attention should also be drawn to the fact that the governments of the Member States participate in the preparatory work for directives and must therefore be in a position to prepare, within the period prescribed, the draft legislative provisions necessary for their implementation. It appears, however, from information produced in the course of the proceedings that no draft law had yet

1 — Paragraph 11, at p. 284.

2 — Paragraph 12, at p. 284.

3 — See Article 2 (5) and (6).

been placed before the Italian Parliament within the period prescribed for implementation of the directive".

(b) Improvement may always be made in legislation. The Belgian and Italian Governments refer to draft legislation going beyond the requirements of the directive, but it would have been preferable for them to confine themselves initially to adopting measures to comply with the directive, which is itself described as a "first directive". Its wording thus calls for the adoption of supplementary measures, but does not mean that it is deprived of all effect.

In that respect the Italian Government observed at the hearing that the dispute with the Commission ought rather to have been resolved by the Advisory Committee established within the Commission by Article 11 of the directive.

That body had only an advisory capacity. When it deals with credit institutions¹ it "shall not concern itself with concrete problems".² But in every instance it only gives opinions or makes suggestions; it merely assists the Commission. The latter therefore retains all the powers which it derives from the Treaty, in particular from Article 169.

(c) The directive covers a sphere in which regulations and "internal instructions" are at least as important as legislative provisions. It is however apparent from the preamble to the directive and from the correspondence prior to action between the Commission and the governments in question that the

adoption of *legislative* provisions was in any event necessary to "remove the most obstructive differences between the laws of the Member States".

It is another matter to know what the content of those provisions should be. The question of the degree of harmony between national law in its present state, or even after the enactment of the draft legislation now before the respective Parliaments, and the directive was raised only in the defences lodged by the Member States; it was pursued during the oral procedure, partly as a result of the particulars which the Court sought from the Belgian Government. I do not think it possible to reach a definitive decision on that issue. Moreover, it does not seem to me to be necessary.

It has been claimed that the object of the directive is fully achieved as a result of an administrative practice. The Court has already dealt with that argument in the judgment of 6 May 1980 in Case 102/79 (*Commission v Belgium* [1980] ECR 1473):

"... a Member State has not discharged the obligation imposed upon it by the third paragraph of Article 189 of the Treaty if, for the purpose of fulfilling the requirements under the directives in question, it simply relies on existing practices or even just the tolerance which is exercised by the administration".³

"... Mere administrative practices, which by their nature can be changed as and when the authorities please and which are not publicized widely enough, cannot... be regarded as a proper fulfilment of the obligation imposed by

1 — Article 3 (5); Article 6.

2 — Article 11 (3).

3 — Paragraph 10, at p. 1486.

Article 189 on Member States to which the directives are addressed".¹

(d) The Court has already rejected the argument that the translation into national law of the terms of a directive is in no way indispensable to ensure the result to be achieved but, at most, desirable from the point of view of clarity and legal certainty.

The justification based on the "direct applicability" of the provisions of the directive cannot be accepted. It was held in the same judgment of 6 May 1980:

"The effect of the third paragraph of Article 189 is that Community directives must be implemented by appropriate implementing measures carried out by the Member State. 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".²

(e) The arguments based on national difficulties (parliamentary procedure, political crises and so forth) and the firm intention to adopt the necessary measures do not unfortunately constitute an excuse in strict law. A start at least must be made at implementation. The Court has repeatedly stated:

"... a Member State cannot rely upon domestic difficulties or provisions of its national legal system, even its constitutional system, for the purpose of justifying a failure to comply with obligations and time-limits contained in Community directives".³

Without prejudging whether the bills which the Belgian and Italian Governments mention comply, from the point of view of substance, with the provisions of the directive, it suffices to observe that those bills, the declared object of which was to adapt national law in accordance with the principles of the directive, were not approved by the respective governments until 12 December and 19 June 1980 and their contents were not brought to the knowledge of the Commission until after those dates.

As regards the Italian Republic, even if the bill had been passed before the expiry of the period laid down in the reasoned opinion and even before today, it would merely have *enabled* the government to adopt the measures necessary to make national law comply with the directive.

It was held in the judgment of 25 May 1982 in Case 96/81 (*Commission v Netherlands* [1982] ECR 1791) that:

1 — Paragraph 11, at p. 1486.

2 — Paragraph 12, at p. 1487.

3 — *Ibid.*, paragraph 15, at p. 1487.

“The information which the Member States are thus obliged (pursuant to the final provisions of the directive) to supply to the Commission must be clear and precise. It must indicate unequivocally the laws, regulations and administrative provisions by means of which the Member State considers that it has satisfied the various requirements imposed on it by the directive. In the absence of such information, the Commission is not in a position to

ascertain whether the Member State has effectively and completely implemented the directive. The failure of a Member State to fulfil that obligation, whether by providing no information at all or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure under Article 169 of the EEC Treaty in order to establish the failure to fulfil the obligation”.

In those circumstances I can only advise the Court:

To declare that, by failing to adopt within the prescribed period the provisions necessary to comply with Council Directive 77/780 of 12 December 1977, the Kingdom of Belgium and the Italian Republic have failed to fulfil their obligations under the EEC Treaty; and

To order the Kingdom of Belgium and the Italian Republic to pay the costs.