OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 17 March 1987 *

Mr President,
Members of the Court,

1. The questions which have been referred to the Court by the Arrondissementsrechtbank (District Court) Arnhem, once again raise the question of the legal nature of the provisions of a directive within the meaning of Article 189 of the Treaty establishing the EEC and the difference between directives and regulations.

2. Moreover, it seems that the present case has its origin in the somewhat improper use which is sometimes made of the terms 'direct effect' and 'direct applicability' with regard to directives.

3. It is true that in the past the Court has stated on several occasions that 'whilst under Article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of acts covered by that article can never produce *similar effects*'. [1]

4. By using the expression 'similar effects', however, the Court in my view intended to emphasize that there could be no question of attributing to directives a 'directly applicable' character in the fullest sense in which that term is used in Article 189 with regard to regulations, or of eroding the distinction drawn by that article between the two types of measure.

5. The Court has laid down the limits of these 'similar effects' by stating that where the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, *individuals* may rely on those *provisions* if implementing measures are not adopted within the prescribed period or if the provisions are incorrectly implemented against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.

6. The Court has also explained the reasoning on the basis of which it reached that conclusion.

In particular, in paragraph 14 of its judgment of 4 December 1986 in Case 71/85 *Netherlands State* v *Federatie Nederlandse Vakbeweging* [1986] ECR 3855, it expressly stated as follows:

'That principle is based on the fact that it would be incompatible with the binding effect which Article 189 of the EEC Treaty ascribes to directives to exclude in principle the possibility of the obligation imposed by them being relied on by persons concerned. The Court therefore considered that a Member State which has not taken measures to implement the directive within the

* Translated from the French.

1 — See in particular the judgment of 5 April 1979 in Case 148/78 *Pubblico Ministero* v *Ratti* [1979] ECR 1629.

prescribed period may not, as against individuals, plead its own failure to perform the obligations which the directive entails'.

7. In a report published in 1980 in the *Recueil Dalloz Sirez* ('L'effet des directives communautaires, une tentative de démythification', Dalloz 1980, pp. 171 to 176), Judge Pescatore expressed this idea in the following way:

'According to the Court's analysis, directives may be relied upon in the Courts by individuals because they are binding on Member States and *as a reflection of their binding nature.* That is certainly much less than the direct applicability of regulations (. . .). In short, the judgments of the Court on this question simply express the principle that is customarily described by the English legal term "estoppel", in the wide sense, and that lawyers of the Latin tradition like to identify with the maxim *venire contra factum proprium,* or *nemo auditur* . . . .'

8. The replies to be given to the questions put to the Court by the Arrondissementsrechtbank, Arnhem, follow from definition and from this explanation of the 'similar effect' which directives may have.

A — First and second questions

9. The first question asked by the Arrondissementsrechtbank, Arnhem, is as follows:

'Can an authority of a Member State (in this case the prosecuting body) rely as against nationals of that Member State on a provision of a directive in a case which is not covered by the State's own legislation or implementing provisions?'

10. With uncommon unanimity, the Commission and the three governments which have submitted observations to the Court have proposed that that question should be answered in the negative.

11. I have no hesitation in endorsing that view.

12. I can best summarize my reasons for doing so by citing once again Judge Pescatore, who has succeeded in setting out the main arguments in a few lines:

'Although directives are binding on Member States, they certainly do not bind individuals. Directives are not addressed to them. They are published for information in the *Official Journal of the European Communities*; this is not a question of "statutory publication" and, unlike the publication of regulations, it has no legal effect. *Individuals will be bound only by the laws and regulations adopted by the State for the application of the directive. A directive as such cannot be relied upon as against individuals, who can never be bound by its effects with regard to the State* or other individuals.'

13. That view was shared by Mr Advocate General Verloren van Themaat in his Opinion in Case 89/81 *Staatssecretaris van Financiën* v *Hong Kong Trade Development Council* [1982] ECR 1277.

14. Some three weeks after the Arrondissementsrechtbank, Arnhem, submitted the questions before the Court in the present case, the Court had an opportunity of considering the issue in its judgment of 26 February 1986 in Case 152/84 *M. H.*

Marshall v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, in which it stated as follows:

'With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to "each Member State to which it is addressed". It follows that *a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.* It must therefore be *examined whether, in this case, the respondent must be regarded as having acted as an individual*' (paragraph 48).

15. The Arrondissementsrechtbank also asks, in its second question, whether a *national court* is obliged, where a directive has not been implemented, to give direct effect to provisions of the directive which lend themselves to such treatment even where the individual concerned does not seek to derive any right from those provisions.

16. The reply to the second question follows from the negative reply which must be given to the first.

17. Since a directive cannot itself impose obligations on individuals, who are bound only by the laws and regulations adopted by the State for the application of the directive, it is clear that a national court may never directly apply the provisions of a directive as against an individual and *a fortiori* is not obliged to do so.

18. Like the Commission, I propose that the Court should answer the first two questions asked by the Netherlands court essentially by repeating the words used in *Marshall*:

'A directive may not of itself impose obligations on an individual and a provision of a directive therefore may not be relied upon as such against such a person against a national authority or applied in their regard by a national court.'

B — Third question

19. The third question asked by the Netherlands court is as follows:

'Where a national court is required to interpret a national rule, should or may that court be guided in its interpretation by the provisions of an applicable directive?'

20. In its observations, the United Kingdom very opportunely pointed out that according to the Court's judgment of 10 April 1984 in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1983] ECR 1891, at pp. 1909, 1910 and 1911, it is for the national court 'to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law in so far as it is given discretion to do so under national law'.

21. Special conditions apply where a Member State has adopted legislation to implement part of the directive and considered that certain existing provisions of its national law already fully assured the effective implementation of other provisions of the directive, or where it took the view that the position under its national law rendered any implementing measure unnecessary and informed the Commission accordingly. In that case it is clearly for the national court to interpret and apply the

national laws in question in accordance with the requirements of Community law.

22. On the other hand, in the case of a national law which existed before the directive was adopted and which therefore was not adopted in order to implement the directive or deemed to comply with provision of a directive, I agree with the view expressed by Advocate General Sir Gordon Slynn in his opinion of 18 September 1985 in Case 152/84 *Marshall* [1986] ECR 725, at p. 733, that there is no principle of Community law requiring the national court to interpret it in the light of the directive.

23. The only remaining issue is whether Community law *permits* national legislation to be interpreted in the light of the directive. In that regard a distinction must be drawn which I would like to illustrate by reference to the circumstances of this case.

24. The main proceedings concern a provision of national criminal law, namely Article 2 of the Keuringsverordening (Inspection Regulation) of the municipality of Nijmegen which prohibits certain conduct. Article 2 provides that it is prohibited to stock for sale and delivery goods intended for trade and human consumption which are of unsound composition. The regulation does not define the expression 'of unsound composition'.

25. According to the Officier van Justitie, Kolpinghuis misled customers who ordered mineral water in so far as the water supplied did not have the characteristics which customers might have expected it to have in view of its description.

26. The national court could therefore begin by examining the language normally used and trade usage, and establish, for example (this is pure conjecture), that the Dutch language contains the words 'mineral water' on the one hand, and 'fizzy' or 'sparkling' water on the other hand. It might then consider that to the majority of the population the expression 'mineral water' implies that the water in question comes from a specific area, that it contains certain minerals said to have beneficial effects on health and that it therefore could not be tap-water. It might then, *if national rules of interpretation permit,* refer to Directive 80/777/EEC in order to establish that the directive confirms that a strict interpretation of the term 'mineral water' corresponds to the traditional view adopted in the majority of Community countries, since that was the interpretation adopted in the directive, which has since been implemented in the Netherlands. The court might then draw the conclusion that at the material time, that is to say before the directive was implemented, a drink sold as 'mineral water' but obtained from tap-water should be regarded in the Netherlands as a 'product of unsound composition'.

27. In other words the court may, in my view, if national rules of interpretation permit, have recourse to the directive to *confirm* an interpretation of national law based primarily on other considerations.

28. Conversely, the Arrondissementsrechtbank might equally take the view that

in the Netherlands 'mineral water' and 'fizzy water' are used interchangeably, without the first being any more precise than the second, or that there is no expression other than a 'mineral water' to describe water with a quite specific composition and water which has simply been carbonated. In the latter case the court could not use the very specific meaning attributed to the term 'mineral water' by the directive to interpret the words 'product of unsound composition' without replacing the interpretation which may be obtained from the national context (which in this case is favourable to the accused) by the contrary interpretation arising from the directive (which is unfavourable to the accused).

29. By doing so, the Court would indirectly rely upon the provisions of a directive which has not been implemented against an individual which, according to *Marshall*, is not permissible.

30. In conclusion I propose that the Court should answer the third question as follows:

'There is no principle of Community law obliging a national court to be guided by the provisions of a directive which is applicable but which has not yet been implemented by the Member State in question in order to interpret a rule of national law which is insufficiently precise. The question whether it may do so in order to confirm the interpretation obtained from purely national elements of appraisal must be resolved on the basis of the national rules of interpretation. On the other hand, a court cannot rely on such a directive to alter, to the detriment of the individual, the interpretation obtained from national elements of appraisal.'

C — Fourth question

31. Lastly, the Arrondissementsrechtbank, Arnhem, asks whether the answer to the first three questions would be different if on the material date the period which the Member States had in which to adapt national law to the requirements of the directive had not yet expired.

32. As a directive may not of itself impose obligations on an individual and a national court is not bound to be guided by a directive which has not yet been implemented, it is clearly, as has been stated by the Commission, *irrelevant whether or not* the period prescribed for national legislation to be adapted to comply with a directive *has expired.*

33. I therefore propose primarily that the Court should answer this question as follows:

'The answer to the first three questions would not be different if on the material date the period which the Member State had in which to adapt national law had not yet expired.'

34. However, as the national court in asking the fourth question probably considered that the expiry of that period would in fact enable the directive to be applied against the accused in the main proceedings, and as in my view that could not be so, the Court might possibly also reply that, in the light of the Court's replies to the first three questions, the fourth question has no purpose.