JUDGMENT OF THE COURT
12 OCTOBER 1982 [1]

Commission of the European Communities v Italian Republic

(Failure to implement Directive 77/91/EEC)

Case 136/81

Member States — Obligations — Implementation of directives — Failure to comply with time-limits for their implementation — Justification for failure — Not possible
(EEC Treaty, Art. 169)

A Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations resulting from Community directives.

Since the governments of Member States participate in the preparatory work for directives they must be in a position to prepare, within the period prescribed, the draft legislative provisions necessary for their implementation.

In Case 136/81

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Antonino Abate, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

ITALIAN REPUBLIC, represented by Arnaldo Squillante, President of Section of the Consiglio di Stato [State Council] and head of the Department for

1 — Language of the Case: Italian.

Contentious Diplomatic Affairs, Treaties and Legislative Matters, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato [State Advocate General], with an address for service in Luxembourg at the Italian Embassy,

defendant,

APPLICATION for a declaration that by not adopting, within the prescribed period, the provisions needed to comply with Directive 77/91, the second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, the Italian Republic has failed to fulfil one of its obligations under the EEC Treaty,

THE COURT,

composed of: J. Mertens de Wilmars, President, A. O'Keeffe, U. Everling and A. Chloros (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart and T. Koopmans, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

I — Summary of the facts

Article 54 (3) (g) of the EEC Treaty provides that the Council and the Commission are to carry out the duties devolving upon them regarding the right of establishment, in particular by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 (companies or firms constituted under civil or commercial law, including cooperative societies, and other legal

persons governed by public or private law, save for those which are non-profit-making) with a view to making such safeguards equivalent throughout the Community.

On 18 December 1961 the Council drew up a General Programme for the abolition of restrictions on freedom of establishment (Official Journal, English Special Edition, Second Series, IX, p. 7). In Title VI of that programme it is stated that the safeguards required by Member States of companies and firms for the protection of the interests of members and others should, to the extent necessary and with a view to making such safeguards equivalent, be coordinated before the end of the second year of the second stage of the transitional period.

To give effect to those provisions, the Council, after issuing a first directive, Directive 68/151 of 9 March 1968, adopted a second directive on 13 December 1976, Directive 77/91, on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (Official Journal 1977, L 26, p. 1).

Directive 77/91 was notified to the Member States on 16 December 1976. In accordance with Article 43 thereof, the Member States were required to bring into force the laws, regulations and administrative provisions needed in order to comply with the directive within two years of its notification, that is to say by 16 December 1978, and forthwith to inform the Commission that they had done so.

Since it appeared that the Italian Republic had not, within the prescribed period, adopted the necessary measures for implementation of the directive and that in any case the Commission had been given no information with regard thereto, the Commission, by letter of 8 January 1980, commenced the procedure provided for in Article 169 of the EEC Treaty against the Italian Republic.

In its letter the Commission stated that by failing to adopt the measures necessary to incorporate the directive into its national law, the Italian Republic had failed to fulfil its obligations and invited the Italian Government to submit its observations within a period of two months.

By a telex message of 1 February 1980, the Permanent Representation of the Italian Republic to the Communities informed the Commission that the bill empowering the government to implement the directive, which had been tabled during the seventh legislature and had lapsed at the end of it, had been tabled again in Parliament in this legislature and was under consideration by the Commissioni Riunite della Giustizia e delle Finanze del Senato [Joint Committees on Justice and Finance of the Senate]; furthermore the *ad hoc* Inter-Departmental Committee, set up in the Prime Minister's office, had clarified the technical aspects of the directive which call for national implementing provisions in order to draw up without delay the decree to be enacted after the approval by both Houses of Parliament of the enabling legislation.

The Commission, pursuant to the first paragraph of Article 169 of the EEC Treaty, issued a reasoned opinion on

29 September 1980, which was notified on 8 October 1980, recording the failure of the Italian Republic to fulfil its obligations and inviting it to adopt within a period of two months from notification of the opinion, the measures needed to implement the directive.

By a telex message of 27 October and a letter of 19 December 1980 the Italian Permanent Representation informed the Commission that the bill for the delegated legislation had been approved by the Senate at its sitting on 16 July 1980 and was being considered in the Chamber of Deputies.

II — Written procedure

By application lodged on 5 June 1981, the Commission, pursuant to the second paragraph of Article 168 of the EEC Treaty, brought before the Court the matter of the alleged failure of the Italian Republic to fulfil one of its obligations by not giving effect to Directive 77/91.

The written procedure followed the normal course; the Commission waived its right to submit a reply.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it invited the Italian Government to state, in writing, the exact date on which it had commenced the legislative procedure with a view to implementation of the directive; that invitation was complied with within the prescribed period.

III — Conclusions of the parties

The *Commission* claims that the Court should:

(a) declare that the Italian Republic, by not adopting within the prescribed period the provisions necessary to conform with the second Council Directive 77/91/EEC, of 13 December 1976, has failed to fulfil one of its obligations under the Treaty;

(b) order the Italian Republic to pay the costs.

The *Government of the Italian Republic* refrains from submitting any formal conclusions.

IV — Submissions and arguments of the parties during the written procedure

The *Commission* observes that according to the third paragraph of Article 189 of the EEC Treaty directives are binding, as to the results to be achieved, upon the Member States to which they are addressed, whilst leaving to the national authorities the choice of form and methods. The mandatory nature of directives imposes upon Member States the obligation to observe the periods which they prescribe for the adoption of national implementing provisions.

Infringement of the Treaty by a Member State exists no matter which organ of the State it is whose act or omission is responsible for the failure. The Member State in question may not plead provisions or practices existing in its internal legal system or special circumstances at national level in order to justify its failure to fulfil an obligation.

Those principles are well established in the case-law of the Court.

By failing to adopt within the prescribed periods the measures needed for implementation of Directive 77/91, the Italian Republic has incontestably failed to fulfil one of its obligations under the Treaty.

The *Government of the Italian Republic* observes that the incorporation into the Italian national legal order of Directive 77/91 requires the approval of legislation amending certain details of the company law in force which is embodied in statute. The Italian Government has initiated the necessary legislative procedure: after the early dissolution of Parliament in 1977 a new bill was tabled on 24 September 1979 which was approved by the Senate on 16 July 1980. The government has on a number of occasions taken steps to request that the parliamentary procedure be concluded and has expressed the great importance which it attaches to the bill.

The new provisions for the implementation of Directive 77/91 should soon enter into force. The delay which has occurred is caused by the constitutional hazards which have affected the continuity of the work of the agencies entrusted with the elaboration of the law. No doubt has ever existed as to the government's fixed purpose of incorporating Directive 77/91 into national law.

V — Oral procedure

At the sitting on 28 April 1982 oral argument was briefly presented by Mr Abate for the *Commission* and by Mr Ferri for the *Government of the Italian Republic.*

The Advocate General delivered his opinion at the sitting on 22 June 1982.

Decision

1 By application received at the Court Registry on 5 June 1981 the Commission brought an action under Article 169 of the EEC Treaty for a declaration that by not adopting within the prescribed period the national provisions needed to comply with Directive 77/91/EEC, the second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, (Official Journal, 1977, L 26, p. 1), the Italian Republic had failed to fulfil one of its obligations under the EEC Treaty.

2 Pursuant to Article 43 of the directive, Member States were required to bring into force the laws, regulations and administrative provisions needed in order to comply with the directive within two years of its notification. It was notified to the Italian Republic on 16 December 1976 and the above-mentioned period accordingly expired on 16 December 1978.

3 The Italian Government does not contest that it has not fulfilled that obligation. It states that it initiated the necessary legislative procedure by laying the appropriate bill before Parliament but that, despite its repeated interventions, the bill, which has already been approved by the Senate, is still under debate in the Chamber of Deputies. Its firm intention of incorporating the directive into national law has not been called in question in any way and the delay stems from the difficulties inherent in the legislative procedures.

4 Those circumstances cannot expunge the failure to fulfil one of its obligations with which the Italian Republic is charged. According to well-established case-law of the Court, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time-limits resulting from Community directives.

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

6 It must therefore be declared that by failing to adopt within the prescribed period the provisions needed in order to comply with Council Directive 77/91 of 13 December 1976, the Italian Republic has failed to fulfil one of its obligations under the Treaty.

Costs

7 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that by not adopting within the prescribed period the provisions needed in order to comply with Council Directive 77/91/EEC, the second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, the Italian Republic has failed to fulfil one of its obligations under the EEC Treaty;**

2. **Orders the Italian Republic to pay the costs.**

Mertens de Wilmars O'Keeffe Everling

Chloros Pescatore Mackenzie Stuart Koopmans

Delivered in open court in Luxembourg on 12 October 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President