OPINION OF ADVOCATE GENERAL ALBER

delivered on 29 September 1999 *

A — Introduction

1. In the proceedings brought against France for failure to fulfil its obligations, the Commission is pleading that France has not fully transposed two directives concerning direct insurance within the time-limits prescribed. The transposition measures communicated to the Commission did not apply to 'mutuelles' [1] governed by the Code de la Mutualité, as they should have done in order to comply with those directives.

2. In addition to insurance business, these 'mutuelles' engage in social activities, such as the operation of pharmacies, holiday homes, etc. The transposition of the directives requires in particular that the insurance business be separated, in legal and organisational terms, from these other types of business, with the consequences that entails for the conduct and solvency of the business, a requirement that has not been met.

3. The two directives concerned are Council Directive 92/49/EEC [2] on direct insurance other than life assurance, and Council Directive 92/96/EEC on direct life assurance, [3] amending the third non-life insurance directive and the third life assurance directive respectively.

4. The purpose of the directives is, through harmonisation of authorisation, the conditions governing authorisation and prudential control systems, to enable insurance undertakings to operate anywhere in the Community in accordance with the right of

* Original language: German.

1 — The 'mutuelles' are mutual societies.

2 — 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.

3 — 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.

establishment and the freedom to provide services.

5. The directives also apply to 'mutuelles'. In Articles 6 and 5 respectively[4] they stipulate that the home Member State — the State in which the head office of the insurance undertaking covering a risk is situated — must require every insurance undertaking for which authorisation is sought to adopt one of a list of forms set out in the directives. In the case of the French Republic, these forms include 'mutuelles régies par le code de la mutualité'.

6. In Article 51(1) and Article 57(1), the directives provide as follows:

'Member States shall adopt the laws, regulations and administrative provisions necessary for their compliance with this Directive no later than 31 December 1993 and bring them into force no later than 1 July 1994. They shall forthwith inform the Commission thereof.

...'

4 — These articles amended Article 8 of Directives 73/239 and 79/267.

B — The facts

7. France had informed the Commission of its transposition measures, Laws No 94/678 and No 94/679, both dated 8 August 1994. However, neither law contains any provisions for 'mutuelles régies par le code de la mutualité'.

8. By letter of 31 March 1995, the Commission informed France that in its opinion the transposition was incomplete. In its reply of 8 June 1995, France stated its intention of transposing the directives completely and mentioned a draft law on the subject.

9. However, since the Commission was not subsequently notified that the two directives had been transposed, it began the pre-litigation procedure in respect of both instruments, and sent the French Republic a reasoned opinion on 5 March 1997. By letter of 18 November 1997, France informed the Commission that it was taking the necessary steps to comply with the two directives. In this letter the French authorities pointed, *inter alia*, to the need to take account of the special features of the 'mutuelles'. These were not joint stock companies, but associations of individuals, so that the insured persons should be regarded as members of the insurance company. The 'mutuelles' were non-profit-making and were bound by the concept of

solidarity. They operated as welfare institutions for the mutual support of the members, and as a result there could be no selection of the risks to be covered. Their insurance activities were indissolubly linked to health and social welfare. As supplementary insurance agencies, they were part of the public social security system.

10. By letter of 3 December 1997, France announced that by the end of 1998 it would be enacting technical regulations and provisions on the supervision of direct insurance activities.

11. In two further letters of 11 February 1998 and 11 March 1998, France informed the Commission of the content of the draft legislation.

12. Since however the Commission has received no further notification of the enactment of the planned transposition measures, it has brought the present action for a declaration of failure to fulfil obligations.

13. The Commission claims that the Court should:

(1) declare that, by failing to adopt (or implement) all of the laws, regulations and administrative measures necessary in order to comply 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 omitting to transpose those directives as regards 'mutuelles régies par le code de la mutualité', the French Republic has

failed to fulfil its obligations under the EC Treaty and under those directives;

(2) order the French Republic to pay the costs.

14. The French Government claims that the Court should:

(1) dismiss the Commission's application to the extent that it relates to the problem of reinsurance;

(2) order the Commission to pay the costs.

15. France pleads that the case is inadmissible. It claims that the Commission's plea that the French provisions applying to the reinsurance system of the 'mutuelles' were not compatible with Community law was presented for the first time in the application. Since this objection was not raised in the reasoned opinion delivered by the Commission, it was not admissible.

16. In the oral procedure the Commission withdrew this objection, which concerns a defective transposition of Directive 64/225/EEC. [5]

17. The French Government also draws attention to the difficulties involved in transposing the directives in question, because of the particular features of the 'mutuelles'.

18. During the oral procedure, the French Government placed on the file a report prepared on its behalf in May 1999, dealing with the 'mutuelles' and Community law (the 'Rocard' report). This report emphasises the need to transpose the directives as quickly as possible into French law. According to the information in the report, the transposition is to take place by the end of 1999.

19. In its reply the Commission contends that the French Government's defence does not state the form of order sought by the defendant, within the meaning of Arti-

5 — 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 (OJ, English Special Edition 1964, p. 131).

cle 40(1)(c) of the Court's Rules of Procedure. The Commission, however, has not applied for judgment by default under Article 94(1).

20. In the view of the French Government, the defence does state the form of order sought by the defendant in accordance with the requirements of the Rules of Procedure. The form of order sought is that the application be dismissed as inadmissible as far as the issue of reinsurance is concerned. In its rejoinder, the French Republic also submits an application for costs.

C — Analysis

I — *Admissibility and the objection that the defence is formally defective*

21. The plea of inadmissibility entered by France, on the ground that the Commission introduced an additional plea in its application which had not been submitted in the pre-litigation procedure, does not call for a decision by the Court, because in the oral procedure the Commission withdrew the statement in support of this plea from its application.

22. As to the Commission's argument that the French Government's defence does not state the form of order sought by the defendant, within the meaning of Article 40(1)(c) of the Court's Rules of Procedure, [6] the first point to make is that in spite of this, the Commission did not apply for a judgment by default under Article 94(1) of the Rules of Procedure. [7] Moreover, the Court is asked in the French Government's defence to rule that the Commission's application is inadmissible to the extent that it deals with reinsurance.

23. Contrary to the Commission's view, this must certainly be regarded as a statement of the form of order sought by the defendant, within the meaning of Article 40(1)(c) of the Rules of Procedure, because if the French Government's claim were to be upheld, the application would have to be dismissed, at least in part. Since in addition no application was made for judgment by default, the Court is free to decide the case in its judgment. The infor-

6 — Article 40(1) states: 'Within one month after service on him of the application, the defendant shall lodge a defence, stating:
(a) ...
(b) the arguments of fact and law relied on;
(c) the form of order sought by the defendant;
(d) ...'.

7 — Article 94(1) states: 'If a defendant on whom an application initiating proceedings has been duly served fails to lodge a defence to the application in the proper form within the time prescribed, the applicant may apply for judgment by default.
...'

mation required from the defendant is moreover available in the rejoinder and from the statements made in the oral procedure. As regards any counter-submissions which may be made, it should be borne in mind that the defendant does not deny that the directives have been incompletely transposed.

II — *Substance*

24. The parties agree that the two directives in question were not fully transposed within the set time-limit.

25. The measures so far introduced by France do not contain any provisions to ensure that the 'mutuelles' meet the requirements of Community law.

26. The essential aim and purpose of the directives in question is to complete the internal market in the direct insurance sector from the point of view both of the right of establishment and of the freedom to provide services, to make it easier for insurance undertakings with head offices in the Community to cover risks situated within the Community. This is to be done by bringing about such harmonisation as is essential, necessary and sufficient to achieve the mutual recognition of authorisations and prudential control systems, thereby making it possible to grant a single authorisation valid throughout the Community and to apply the principle of supervision by the home Member State. The home Member State is to be responsible for monitoring the financial health of insurance undertakings. The competent authorities of the Member States must therefore have at their disposal such means of supervision as are necessary to ensure the orderly pursuit of business by insurance undertakings throughout the Community, whether carried on under the right of establishment or the freedom to provide services. [8]

27. According to Article 6 of Directive 92/49 and Article 5 of Directive 92/96, these directives also apply to 'mutuelles régies par le code de la mutualité'. Moreover, the home Member State — in this case, France — must require insurance undertakings for which authorisation is sought to limit their objectives to the business specified in the directives and operations directly arising therefrom, so that there is to be a clear legal separation and, as regards the securities and reserve funds, a financial separation between the operations. The insurance businesses must also submit a scheme of operations, they must possess a minimum guarantee fund, and they must be run by persons of good

8 — See the first, fifth, seventh and ninth recitals in the preamble to Directive 92/49 and the first, fifth, seventh and tenth recitals in the preamble to Directive 92/96.

repute with appropriate professional qualifications or experience.

28. However, rules of this sort have not yet been laid down in France for the 'mutuelles', as the French Government itself admits. The statement that legislation is in preparation does not alter the fact that there is a failure to fulfil obligations under Community law. Even the 'Rocard' report, which was placed on the file during the oral procedure and which urges the rapid adoption of such rules and anticipates that this would be done at the end of 1999, does not invalidate the objection that the directives were not fully transposed within the time-limit. What matters here is the legal position at the time the action was brought.

29. Since it is clear from the foregoing that France has not completely fulfilled its obligations under Directives 92/49 and 92/96 within the prescribed time-limit, the Commission's application should be upheld.

Costs

30. According to Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. The Commission has sought an order for the French Republic to pay the costs. Since the French Republic has been unsuccessful, it must be ordered to pay the costs.

D — Conclusion

31. I therefore propose that the Court should rule as follows:

(1) By failing to adopt (or implement) all of the laws, regulations and administrative provisions necessary in order to comply 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 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 omitting to transpose those directives as regards 'mutuelles' régies par le code de la mutualité, the French Republic has failed to fulfil its obligations under the EC Treaty and under those directives;

(2) The French Republic is ordered to pay the costs.