OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 5 April 2001 [1]

1. In this case, the Commission of the European Communities is seeking a declaration by the Court pursuant to Article 226 EC that the Republic of Austria has failed to comply with its obligations under Commission Directive 97/65/EC of 26 November 1997 adapting, for the third time, to technical progress Council Directive 90/679/EEC on the protection of workers from risks related to exposure to biological agents at work. [2]

2. Article 1 of the Directive amends Annex III to Directive 90/679/EEC. The amendments to the annex stem from new scientific evidence concerning the transmissibility to humans of the bovine spongiform encephalopathy (BSE) agent. Therefore, it is necessary to adjust the classification of the BSE agent and make reference to variant Creutzfeldt-Jakob disease. A second adjustment to the annex is connected with the possible occupational transmission of human and animal transmissible spongiform encephalopathies (TSEs).

3. Under Article 2 of the Directive, the Member States are required to bring into force all the necessary laws, regulations and administrative provisions by 30 June 1998.

4. The Austrian Government did not dispute the infringement either in the pre-litigation procedure or in the proceedings before the Court. It set out the situation as regards the legislative process and also pointed out that in view of Austria's constitutional structure a number of separate implementing measures were necessary internally, that is to say at *Länder* level. In its rejoinder the Austrian Government

1 — Original language: Dutch.

2 — OJ 1997 L 335, p. 17 (hereinafter: 'the Directive').

stated that the necessary measures had since been adopted at federal level and that matters were at an advanced stage at *Länder* level. The Commission took note of this information but nevertheless observed that the Directive had still not been transposed in full in all sectors and at all levels of the federal State.

5. In the case of an action under Article 226 EC, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned opinion. Since the Republic of Austria did not, and, moreover, still has not, complied with its obligations under the Directive, the Commission's application must be granted. In this regard I should also note that the Court has consistently held that a reference to the internal constitutional structure cannot be accepted as a defence. [3]

3 — See, most recently, judgment of 15 March 2001 in Case C-83/00 *Commission* v *Netherlands* [2001] ECR I-2351, paragraph 10.

Conclusion

6. In the light of the facts and circumstances set out above, I propose that the Court should:

(1) declare that, by failing to adopt the laws, regulations and administrative measures necessary to implement Commission Directive 97/65/EC of 26 November 1997 adapting, for the third time, to technical progress Council Directive 90/679/EEC on the protection of workers from risks related to exposure to biological agents at work, the Republic of Austria has failed to fulfil its obligations under that directive.

(2) order the Republic of Austria to pay the costs pursuant to Article 69(2) of the Rules of Procedure.