OPINION OF ADVOCATE GENERAL JACOBS
delivered on 16 March 2000 *

1. The main issue in this case is whether the Belgian State's failure to implement Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment [1] (hereafter 'the Directive') is excusable on grounds of force majeure.

2. The Commission seeks a declaration pursuant to Article 226 EC that the Kingdom of Belgium has failed to fulfil its obligations under the Directive by communicating to it a programme for implementation which does not comply with the provisions of the Directive, in particular Article 17, as regards the Région de Bruxelles-Capitale. The Kingdom of Belgium accepts that it has not implemented the Directive within the time-limits laid down therein, but it makes three submissions in defence.

(i) The failure to implement Directive 91/271 is excusable due to force majeure.

(ii) The Commission should have granted an extension of the time-limit for implementation set in the Directive. Alternatively, the Commission should have exercised its discretion under Article 226 so as to take no action in this case.

(iii) The Commission failed to give reasons for its (implicit) decision to refuse an extension of the time-limit for implementation of the Directive.

The relevant provisions of the Directive

3. Council Directive 91/271/EEC provides a set of general rules for the collection, treatment and discharge of urban waste water, and for the treatment and discharge of waste water from certain industrial sectors. According to Article 1, the Directive aims to protect the environment from the adverse effects of such waste water discharges. To that end, the Directive imposes on the Member States a duty to provide systems for collection and treat-

* Original language: English.

1 — OJ 1991 L 135, p. 40. Subsequently amended by Commission Directive 98/15/EC of 27 February 1998, OJ 1998 L 67, p. 29.

ment of urban waste water [2] for all 'agglomerations' [3] greater than 2 000 population equivalent (p.e.). [4]

4. General rules applicable to waste water covered by the Directive are set out in Article 4. The details of those rules are not important for this case. Waste water covered by the Directive must, in summary, be subject to at least a secondary treatment, i.e. a process generally involving biological treatment. [5]

5. Special rules for environmentally sensitive areas are set out in Article 5. The Member States must designate, at the latest by 31 December 1993, environmentally sensitive areas in accordance with the criteria laid down in Annex II to the Directive. Urban waste water which is discharged into those sensitive areas must be subject to a more stringent treatment than that required by Article 4. Discharges into sensitive areas from waste water plants must comply with requirements set out in Annex I B to the Directive.

6. Articles 4 and 5 are subject to certain limited exceptions, none of which appears to be of relevance to this case.

7. The time-limits for implementation of the Directive are to be found in various provisions of the Directive. In fact, the relevant provisions are Article 3(1), Article 4(1) and, in particular, Article 5(2). Article 3(1) and Article 4(1) provide general time-limits for the establishment of collecting systems and treatment of urban waste water. Depending on the size of the agglomeration in question, the time-limit is either 31 December 2000 or 31 December 2005. Article 3(1) and Article 5(2) provide a special time-limit for urban waste water from agglomerations of more than 10 000 p.e. which is discharged into sensitive areas designated in accordance with Article 5(1). The Member States were to ensure by 31 December 1998 at the latest that those agglomerations were provided with collecting systems and that the waste water from those agglomerations was subject to a more stringent treatment than that described in Article 4.

2 — Urban waste water is defined in Article 2(1) as 'domestic waste water or the mixture of domestic waste water with industrial waste water and/or run-off rain water'.

3 — An agglomeration is defined in Article 2(4) as 'an area where the population and/or economic activities are sufficiently concentrated for urban waste water to be collected and conducted to an urban waste water-treatment plant or to a final discharge point'.

4 — One p.e. is defined in Article 2(6) as 'the organic biodegradable load having a five-day biochemical oxygen demand (BOD5) of 60 g of oxygen per day'.

5 — Secondary treatment is defined in Article 2(8) as 'treatment of urban waste water by a process generally involving biological treatment with a secondary settlement or other process in which the requirements established in Table 1 of Annex I are respected'.

8. Article 8 allows for an extension of the time-limits laid down in Article 4(1). The Commission may grant extensions in exceptional cases to Member States facing technical problems in relation to geographically defined population groups. Extensions may, however, be granted only on the basis of a specific request from the Member State to the Commission, which must set out the difficulties experienced, an action programme to overcome them and a timetable for complying with the Directive.

9. Under Article 17 of the Directive the Member States were to establish programmes for the implementation of the Directive by 31 December 1993 and communicate those programmes to the Commission by 30 June 1994. Finally, Article 19 fixes 30 June 1993 as the date by which the provisions of the Directive were to be transposed into the laws of the Member States.

Facts

10. The Belgian Région de Bruxelles-Capitale (hereafter 'the Region') communicated its programme for the implementation of Directive 91/271/EEC to the Commission on 28 May 1996. That programme was also communicated to the Commission by the Belgian State authorities on 3 July 1996. The programme envisaged the construction of two new water-treatment plants, one north and one south of Brussels. The programme stated that the northern plant would be completed by the end of 2003. While it is expected that the southern plant will be completed at an earlier date, it was not complete at the time these proceedings commenced. [6]

11. The waste water from the city of Brussels is discharged into the basin of the river Senne. A section of that basin, covering most of the Region's territory, has been designated by the Belgian authorities as a sensitive area under Article 5(1) of the Directive. As the population of that area exceeds 10 000 population equivalent, the facilities for collection and treatment of waste water should, in accordance with Articles 3(1) and 5(2), have been in place by the end of 1998. The Commission submits that Belgium has failed in its obligations under the Directive by communicating to it a programme for implementation which did not comply with that time-limit.

6 — It may be noted that the Court cannot take account of measures taken by a Member State after the expiry of the period for compliance laid down in the reasoned opinion. See Case 291/84 *Commission* v *Netherlands* [1987] ECR 3483, paragraph 15 of the judgment, Case 240/86 *Commission* v *Greece* [1988] ECR 1835, paragraph 14 and Case C-71/97 *Commission* v *Spain* [1998] ECR I-5991, paragraph 18.

Procedure

12. When the Region communicated its programme to the Commission, by letter dated 28 May 1996, it also asked the Commission to grant an extension of the time-limit laid down in the Directive. The Commission did not respond to that request, and it informed the Belgian State authorities, by letter dated 30 September 1997, that in its view the programme did not comply with the Directive. After receiving the reply of the Kingdom of Belgium, by letter dated 18 November 1997, and supplementary comments from the Region, by letter dated 28 October 1997, the Commission presented the Kingdom of Belgium with a letter of formal notice on 27 May 1998, calling on it to submit its observations within two months.

13. Having received no reply to its letter, the Commission issued a reasoned opinion on 17 December 1998 calling on the Kingdom of Belgium to take the necessary measures to comply with the opinion within two months. By letters dated 25 January 1999 and 17 March 1999 the Kingdom of Belgium informed the Commission of steps which were being taken to award the building contracts for the construction of the two water-treatment plants in the Region. The Commission found those replies unsatisfactory, and it proceeded to lodge this case with the Court on 23 June 1999.

The issues and arguments

14. The Kingdom of Belgium accepts the Commission's submission that it has not implemented the Directive, in particular Article 17, within the prescribed time-limit. However, it presents three arguments in defence.

Force majeure

15. The Kingdom of Belgium argues that exceptional circumstances, amounting to force majeure, prevented the Region from taking the necessary steps to implement the Directive on time. The delay is, therefore, excusable. To assess this argument, it may be useful to distinguish between three questions.

16. First, in what circumstances, as a matter of Community law, is the failure to implement a directive excusable on grounds of *force majeure? Force majeure* is a legal notion which exists, in different linguistic guises and with certain variations, in the legal systems of many of the Member States. It has the effect of relieving a person from a legal obligation or liability if, essentially, an unforeseeable change of circumstances has made it impossible to

fulfil the obligation. [7] The Court has never ruled explicitly that force majeure is a general principle of Community law, and it is doubtful whether one can deduce such a principle, applicable to all areas of Community law, from the existing case-law. [8]

17. This does not mean, however, that force majeure has no role in Community law. The Court has often ruled on the scope of force majeure, in particular in cases concerning the Common Agricultural Policy. [9] Agricultural regulations often provide explicitly that traders are exempt from fulfilling legal obligations, for example to export products in accordance with an export licence, if force majeure makes the fulfilment of the obligation impossible. It is settled case-law that a trader can plead force majeure only if circumstances which are unusual, unforeseeable and beyond his control create insurmountable difficulties for the fulfilment of the relevant legal obligation which could not have been avoided even if all due care had been exercised. [10] The application of those conditions is intimately linked with the facts of each individual case. Force majeure is by its very nature a flexible doctrine, which is more concerned with equitable outcomes than with precisely defined conditions. [11]

18. Whilst the definition of force majeure developed by the Court in the agricultural field may provide a useful starting point, the details of the agricultural case-law are not relevant in other contexts. As the Court held in *Schwarzwaldmilch* v *Einfuhr- und Vorratstelle*: [12]

'As the concept of force majeure is not identical in the different branches of law and the various fields of application, the significance of this concept must be determined on the basis of the legal framework within which it is intended to take effect.'

7 — See Case 68/77 *IFG* v *Commission* [1978] ECR 353, paragraph 11 of the judgment.

8 — See Advocate General Capotorti's Opinion in Case 68/77, cited in note 7, at p. 380. Compare Advocate General Mayras' Opinion in Case 32/72 *Wasaknäcke* v *Einfuhr- und Vorratstelle Getreide* [1972] ECR 1181, at p. 1197.

9 — See, for example, Case 64/74 *Reich* v *Hauptzollamt Landau* [1975] ECR 261 and Case 68/77, cited in note 7. See also Commission Notice C (88) 1696 on force majeure in agricultural law, OJ 1988 C 259, p. 10; T.E. Thompson '- Force Majeure: The Context and Approach of the Court of Justice' (1987) *C.M.L.Rev.*, p. 259.

10 — See, for example, Case 42/79 *Milch-, Fett- und Eierkontor* v *BALM* [1979] ECR 3703 and the Opinion of Advocate General Capotorti and Joined Cases 98/83 and 230/83 *Van Gend & Loos* v *Commission* [1984] ECR 3763. The Court's case-law is inspired by the definition of force majeure which prevails in most of the legal systems of the Member States. See, for example, G. Cornu, *Vocabulaire Juridique*, Sixth Edition, 1996, p. 375, and B.A. Garner, *A Dictionary of Modern Legal Usage*, Second Edition, 1995, p. 366.

11 — See Case 64/74, cited in note 9, and Case 6/78 *Union Française de Céréales* v *Hauptzollamt Hamburg-Jonas* [1978] ECR 1675 where force majeure provisions were applied by analogy to circumstances not covered by their wording.

12 — Case 4/68 [1968] ECR 377, at p. 385. See also the Opinion of Advocate General Gand, at p. 392.

19. While the agricultural case-law is concerned with the relationship between individual traders and public authorities, Article 226 actions, such as the present, are concerned with the obligations owed by the Member States towards the European Community. These are different legal contexts, which are necessarily subject to different rules. The application of the notion of force majeure is likely to be stricter in the latter than in the former context.

20. What, then, is the scope of force majeure in the context of Member States' failure to implement Community directives? In *Commission* v *Italy* [13] the Italian State had failed to provide the Commission with statistical data about road transport as required by certain directives. Italy was able to prove that all the relevant files in its transport ministry had been destroyed as a result of a terrorist bomb attack, and in its pleadings to the Court, the Commission conceded that that amounted to force majeure. In those circumstances, the Court ruled: [14]

'Although it is true that the bomb attack, which took place before 18 January 1979, may have constituted a case of force majeure and created insurmountable difficulties, its effects could only have lasted a certain time, namely the time which would in fact be necessary for an administration showing a normal degree of diligence to replace the equipment destroyed and to collect and prepare the data. The Italian Government cannot therefore rely on that event to justify its continuing failure to comply with its obligations years later.'

21. While the Court, by that statement, appeared willing to accept that force majeure might be a valid excuse for failing to implement a directive within the prescribed time-limit, it did not define precisely what constitutes force majeure. [15] Subsequent cases about Member States' failure to implement Community directives do not define the scope of force majeure either.

22. It is none the less clear that the notion of force majeure is, in this context, very narrowly circumscribed. Indeed, force majeure has never been pleaded successfully by a Member State to excuse its failure to implement a directive within the prescribed time-limit. In general directives must be implemented on time even if that proves extremely difficult.

23. Thus, if the period allowed for the implementation of a directive proves to be

13 — Case 101/84 [1985] ECR 2629.

14 — Paragraph 16 of the judgment.

15 — See also Case 70/86 *Commission* v *Greece* [1987] ECR 3545, paragraphs 9 and 10 of the judgment.

too short, the Member State must take appropriate initiatives within the Community in order to obtain the necessary extension. [16] The Court has often held that a Member State cannot rely on technical, financial or administrative difficulties to excuse its failure to fulfil Community law obligations. [17] The same applies to provisions, practices or circumstances related to the Member State's own internal legal system. [18] A Member State cannot, therefore, rely on difficulties caused by the federal nature of its constitutional order to excuse such a failure. The fact that the fulfilment of a particular Community law obligation is the responsibility of a semi-autonomous local body, such as the Belgian Region, rather than of the central state administration, does not exonerate the Member State from its obligation towards the Community.

24. It may be added that the absence of an intention, on the part of the Member State's authorities, to violate Community law obligations is of no relevance for the procedure laid down in Article 226. That procedure is concerned with the objective finding that a Member State has failed to fulfil its obligations, and not with questions of subjective fault or negligence. [19]

25. A failure to implement a directive is, therefore, excusable only in very exceptional circumstances. A plea of force majeure might at most be accepted if, as a result of unforeseeable circumstances, which were extraneous to and beyond the control of the Member State, that State was faced with insurmountable difficulties preventing it from implementing the directive. Moreover, such difficulties would excuse the failure to implement only for as long as it would take a normally diligent administration to overcome them. Those conditions are likely to be applied very strictly in practice. The circumstances in which a Member State may plead force majeure are, as noted above, narrower than the circumstances in which a trader can plead this notion in the context of agricultural law.

26. The second question which must be answered in relation to the plea of force majeure is this: was the Region faced with circumstances amounting to force majeure as defined above? The Belgian Government relies upon the complexity of Belgian constitutional history to support its contention that it was.

16 — See, for example, Case 52/75 *Commission* v *Italy* [1976] ECR 277, paragraph 10 of the judgment, and Case C-71/97, cited in note 6, paragraph 16.

17 — See, for example, Case C-42/89 *Commission* v *Belgium* [1990] ECR I-2821, at p. I-2841.

18 — See, for example, Case 77/69 *Commission* v *Belgium* [1970] ECR 237, paragraph 15 of the judgment, Case 8/70 *Commission* v *Italy* [1970] ECR 961, Case C-259/94 *Commission* v *Greece* [1995] ECR I-1947, paragraph 5, Case C-71/97, cited in note 6, paragraph 17, Case C-298/97 *Commission* v *Spain* [1998] ECR I-3301, paragraphs 13 and 14, and Case C-326/97 *Commission* v *Belgium* [1998] ECR I-6107, paragraphs 6 and 7.

19 — See, for example, Case 301/81 *Commission* v *Belgium* [1983] ECR 467, paragraph 8 of the judgment, and Case C-71/97 *Commission* v *Spain*, cited in note 6, paragraph 14.

27. The Belgian Government has explained, both in its written pleadings and at the hearing, that a process of constitutional devolution, or regionalisation, has taken place in Belgium over the last thirty years. While many constitutional issues were resolved by legislation in 1980, the status of the Region remained uncertain and contested by the different linguistic groups which make up the Belgian population. Indeed, it was not until 1988 that the status of that region was finally resolved by legislation.

28. The Belgian Government contends that, due to the long-lasting uncertainty about the status of the Region, it became impossible to take the measures necessary to comply with Directive 91/271/EEC on time. The Kingdom of Belgium also submits that the uncertainty surrounding the Region led to financial problems, which made it difficult to comply with the Directive. The Region's annual budget for environmental purposes is, according to the file, BEF 800 000 000 of a total budget of BEF 65 000 000 000. Finally, it was argued at the hearing that the Region's authorities are faced with technical difficulties, linked to the marshy nature of countryside surrounding the city of Brussels, which have delayed the process of identifying appropriate locations for the two water-treatment plants.

29. I cannot accept that argument. As explained above, it is settled case-law that technical, administrative and financial difficulties cannot excuse a Member State's failure to implement a Community directive. The difficulties faced by the Region, however serious and regrettable, do not amount to force majeure for the purposes of Article 226 proceedings. They were clearly not the result of unpredictable and extraneous circumstances, such as the bomb attack in the case of *Commission* v *Italy* mentioned above.[20] The Region's failure to implement Directive 91/271/EEC was rather the predictable outcome of a purely internal problem.

30. The third question which should be examined in relation to the plea of force majeure is this: was the Belgian State prevented, by circumstances amounting to force majeure, from assisting the Region in its efforts to implement Directive 91/271/EEC?

31. The relevance of that question, which would arise only if the Court were to find that the Region was faced with a case of force majeure, is easily explained. The duty to implement Community law rests upon the Kingdom of Belgium. The force majeure argument should, therefore, be upheld only if it can be shown that the Belgian State was faced with a situation of force majeure which prevented it from helping the Region out of its financial and practical plight.

20 — Case 101/84, cited in note 13.

32. The Belgian State argues, essentially, that it could not assist the Region because doing so would upset the delicate balance of power between the various federal bodies in Belgium, and seriously undermine its efforts to maintain Belgium as one peaceful legal entity. That argument does not withstand scrutiny. The need of the Belgian State to maintain a balance of power so as to uphold peaceful relations between different groups is an entirely internal and predictable problem which cannot amount to force majeure.

33. I conclude on that basis that the Kingdom of Belgium's failure to implement Directive 91/271/EEC was not excusable on grounds of force majeure.

Extension of the time-limit

34. The Kingdom of Belgium's second argument in defence is that the Commission should have granted, or sought from the Council, an extension of the time-limit for implementation set in Directive 91/271/EEC. This argument has two strands.

35. First, Belgium initially argued that the Commission should have granted an extension on the basis of Article 8 of the Directive. That argument appears to have been abandoned, and for good reason. As pointed out by the Commission, the wording of Article 8 allows extension only of the general time-limits set in Article 4. The special time-limit laid down in Articles 3(1) and 5(2) for sensitive areas designated in accordance with Article 5(1) of the Directive cannot be extended in that way.[21] Moreover, the letter sent by the Region to the Commission on 28 May 1996 does not appear to comply with the formal requirements laid down in Article 8.

36. Secondly, Belgium argues that the Commission should have sought, from the Council, an amendment of the Directive granting it an extension of the time-limits laid down in Articles 3(1) and 5(2). It refers thereby to the Commission's duty of cooperation laid down in Article 10 EC.

37. This argument also is unfounded. While the Commission has a discretionary power to propose amendments to directives, including a power to request extension of time-limits, it would only be under a duty to take such a step in the most exceptional circumstances. The difficulties

21 — See, for a similar issue, Case C-42/89, cited in note 17.

relied on by Belgium in this case fall far short of such exceptional circumstances.

38. Belgium argues, finally, that the Commission should have exercised it discretion under Article 226 so as to take no action in this case. It refers, again, to the Commission's general duty of cooperation.

39. That argument cannot be upheld. The Commission enjoys a wide discretion under Article 226 and may decide against which infringements of Community law it will initiate infringement proceedings. [22] It was, therefore, open to the Commission to delay, or completely abstain from, taking action against Belgium in this case. It is settled case-law that it is not for the Court to decide whether the Commission's discretion has been 'wisely exercised' [23] or to consider what objectives are being pursued in an action brought under Article 226. [24]

40. I conclude, on that basis, that Belgium's second set of arguments in defence is unfounded.

Failure to give reasons

41. Belgium's third line of defence is that the Commission failed to give reasons for its decision to refuse an extension of the time-limit for implementation laid down in the Directive.

42. Belgium points out that the Region explicitly requested an extension in its letter of 28 May 1996, and that its reasons for doing so were set out in a report annexed to this letter. The Commission did not reply to that request until, in its letter of 30 September 1999, it noted in general terms that the Commission could not grant any extension of the time-limit, or abstain from initiating infringement proceedings, since this would endanger the uniformity of Community law.

43. There is some force in Belgium's criticism of the Commission's conduct. It would, in my view, have been preferable as a matter of good administration if the Commission had replied earlier and given fuller reasons for its decision not to meet

22 — See, for example, Case 7/68 *Commission* v *Italy* [1968] ECR 423, at p. 428 of the judgment, and Case 416/85 *Commission* v *United Kingdom* [1988] ECR 3127, paragraph 9.

23 — Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299, paragraph 9 of the judgment.

24 — See Case 416/85, cited in note 22.

the Region's request. However, as the Commission rightly points out, a failure to give adequate reasons cannot exonerate Belgium from its responsibility to implement the Directive. The argument cannot, therefore, affect the outcome of the present case.

Costs

44. Under Article 69 of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Commission has applied for costs. I therefore consider that Belgium should be ordered to pay the Commission's costs.

Conclusion

45. In the light of the foregoing observations, I am of the opinion that the Court should:

(1) declare that the Kingdom of Belgium has failed to fulfil its obligations under Directive 91/271/EEC by communicating to the Commission a programme for implementation which does not comply with the provisions of the Directive, in particular Article 17, as regards the Région de Bruxelles-Capitale; and

(2) order the Kingdom of Belgium to bear the costs.