OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 6 June 1996 *

1. The present case may be described as a partly uncontested infringement action. While admitting that it has not yet adopted measures specifically to implement the relevant directives, Italy has claimed in its defence before the Court that a 1954 law contains provisions corresponding to those of the two directives. In the particular circumstances of this case, a question arises as to the admissibility of the Commission's action.

I — Facts and procedure

2. The deadlines for bringing into force the national provisions to implement Council Directive 92/35/EEC of 29 April 1992 laying down control rules and measures to combat African horse sickness [1] and Council Directive 92/40/EEC of 19 May 1992 introducing Community measures for the control of avian influenza [2] (hereinafter collectively 'the Directives') both expired on 31 December 1992, in accordance with the first paragraph of Articles 20 and 22 of the Directives respectively. As it had not been informed of the adoption of any implementing measures, as required by the second paragraph of each of these provisions, the Commission invited the Italian Government by letter of 12 March 1993 to communicate to it a complete and detailed table of such measures; the Commission did not receive any reply to this letter.

3. On 2 May 1994, the Commission sent the Italian Government a reasoned opinion in accordance with Article 169 of the Treaty. This recited the duties incumbent on the Member States by virtue of the third paragraph of Article 189 of the Treaty, which states that 'a directive shall be binding, as to the result to be achieved, upon each Member State', and the first paragraph of Article 5 of the Treaty, which obliges the Member States to 'take all appropriate measures ... to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community'. The Commission stated that, in the absence of any information to the contrary, it must assume 'that the Member State has not yet adopted the [necessary] provisions' to comply with the Directives and was therefore in breach of its obligations.

* Original language: English.

1 — OJ 1992 L 157, p. 19.

2 — OJ 1992 L 167, p. 1.

4. On 29 July 1994, the Italian Permanent Representation informed the Commission that the transposition of the Directives had been included in the annual Community law for 1993, and was therefore under way.

5. On 22 February 1995, the Commission initiated the present proceedings. In its application, it requests the Court 'to declare that, by not adopting within the deadline laid down the laws, regulations and administrative provisions needed in order to comply with [the Directives], the Italian Republic has failed to fulfil its obligations under the Treaty'.

6. In its statement of defence, for the first time, the Italian Government refers to Presidential Decree No 320 of 8 February 1954, laying down veterinary health regulations (hereinafter 'D.P.R. 320/54'). [3] According to the Government, the rules laid down in D.P.R. 320/54 'mirror' both the objectives pursued by the Community legislator and the specific provisions of the Directives. As the Government intended to adopt special measures concerning African horse fever and avian influenza, D.P.R. 320/54 had not been notified to the Commission as an implementing measure. Now that the matter has been referred to the Court, the Government relies upon D.P.R. 320/54 as a partial implementation of the Directives, though the adoption of the projected specific measures should complete the implementation process even before the Court has reached judgment in the case. The Italian Government none the less expressly concludes by accepting that the Court should find an infringement for an incorrect transposition of the Directives.

7. In its reply, the Commission expresses 'astonishment' that the Italian authorities should raise at this stage the prior existence of national provisions partially giving effect to the Directives at issue. Notwithstanding this development, it maintains its request that the Court declare that Italy has not adopted *the* measures *necessary* to comply with its obligations under the Directives (emphasis in original). The Commission adds that it has not been contested in either the pre-litigation procedure or in Italy's statement in defence that these measures have not yet been adopted.

8. The Italian Government states in its rejoinder that the forthcoming entry into force of the (new) transposition regulations will bring the 'infringements notified' [4] to an end, and expresses the hope that the Commission will withdraw its action.

3 — *Gazzetta Ufficiale della Repubblica Italiana*, No 142 of 24 June 1954, ordinary supplement.

4 — The original Italian is 'inadempimenti contestati'.

II — Analysis

9. The first matter which must be clarified in the present case is the exact scope of the declaration the Commission is seeking from the Court. In both the reasoned opinion and its initial application, the Commission refers to the failure of Italy to adopt the necessary provisions. In both cases it clearly meant that Italy had not adopted *any* of the requisite provisions to comply with the Directives. The Commission did not advert in any way to the possibility of a partial implementation.

10. The Commission's reply to Italy's defence is much less clear; in particular, it does not take any position whatsoever on the question of whether, and to what extent, Italian law could be considered as already being in conformity with the Directives by virtue of D.P.R. 320/54. By emphasizing the words '*the* measures *necessary*', the Commission appears to have amended its claim to one that the Italian Republic has failed to implement the Directives *completely*, rather than having completely failed to implement them. The Commission thus implicitly accepts the possibility that D.P.R. 320/54 might constitute a partial implementation of the Directives; [5] Italy's failure *fully* to implement the Directives is therefore the only matter which can be said not to have been contested.

11. In the absence of any indication in this regard from the Commission, and in the light of Italy's reliance on pre-existing provisions, I do not consider that the Court should assume that the Commission maintains that the Italian Republic has completely failed to implement any part of the Directives. It follows, in my opinion, that the Commission must be considered to have narrowed the scope of the declaration it is requesting, to one that the Italian Republic has not implemented all of the provisions of the Directives.

12. In these circumstances, the question of the admissibility of the Commission's application should be examined; though this has not been pleaded by the Italian Government in its defence, the Court can, and in my view in the present case should, consider this matter of its own motion. [6] The Court has consistently held that 'the scope of an action brought under Article 169 of the Treaty is delimited by the pre-litigation procedure provided for by that article. Consequently the action cannot be founded on any complaints other than those formulated in the reasoned opinion'. [7] In the present case, the

5 — The alternative would be to interpret the Commission's reply as maintaining its original request that Italy has not in any way complied with its obligations under the Directives, and to simply ignore the existence of D.P.R. 320/54.

6 — See, for example, Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraph 8 of the judgment.

7 — Case C-296/92 *Commission* v *Italy* [1994] ECR I-1, paragraph 11 of the judgment, citing the judgments in Case 76/86 *Commission* v *Germany* [1989] ECR 1021, paragraph 8, and Case C-157/91 *Commission* v *Netherlands* [1992] ECR I-5899, paragraph 17.

reasoned opinion and the Commission's application were drafted in ignorance of the existence of D.P.R. 320/54, and it is far from obvious that the Commission's present complaint respects the rights of the defence guaranteed under Article 169 of the Treaty. Furthermore, the exact scope of the alleged failure by Italy to comply with the Directives has not been identified with sufficient precision at any stage of the proceedings before the Court.

A. The pre-litigation procedure

13. In the past the Court has accepted that the Commission may amend its request for a declaration at the stage of its reply to the Member State's statement in defence to take account of subsequent developments, though of course it may only narrow, not extend, its original claim. In Case C-132/94 *Commission* v *Ireland* (hereinafter '*Ireland*'), [8] for example, the Commission withdrew its claim as regards part of the directive in question which had been the subject of the reasoned opinion and application under Article 169, as it accepted that the defendant Member State had in the meantime adopted some of the necessary measures. The Court upheld the Commission's amended application for a declaration that 'by failing to bring into force *all* the laws, regulations and administrative provisions necessary to comply with' the directive, Ireland had failed to fulfil its obligations under the directive (emphasis added).

14. Where, however, the change in the Commission's claim results in a request for a declaration which is different in kind, and not merely in scope, from that contained in the reasoned opinion, the Court will not admit the revised claim. This was the situation in Case C-274/93 *Commission* v *Luxembourg* (hereinafter '*Luxembourg*'). [9] There the Commission had received no reply to its letter of formal notice or reasoned opinion, and the Luxembourg Government did not file a statement of defence; however, some two weeks after the application had been lodged, Luxembourg notified the Commission of a national law which had been adopted some years before the directive had been adopted, and which governed a number of the matters dealt with in the directive. The Commission applied for a judgment in default, in accordance with Article 94(1) of the Court's Rules of Procedure, though amending its original claim of a failure to adopt the necessary measures to a request that the Court declare that 'by not adopting within the prescribed period all the measures necessary to comply with [the directive] ... the Grand Duchy of Luxembourg ha[d] failed to fulfil its obligations under Article 25 of that directive and under Articles 5 and 189 of the EEC Treaty'. [10]

8 — [1995] ECR I-4789, paragraph 9 of the judgment.

9 — [1996] ECR I-2019.

10 — Paragraph 7 of the judgment.

15. The Court took the view that the Commission was now 'requesting the Court to hold, upon examination of the Luxembourg Law, that transposition of the Directive was incomplete and therefore defective, whereas in its application ... the Commission alleged failure to implement and to communicate implementing measures'. [11] The Court refused to do so. In its judgment, it enunciated a proposition highly relevant to the present case, stating that 'before it could make such a declaration, the Court would have to carry out a detailed examination of the Luxembourg Law to establish which provisions of the Directive [had] not been properly implemented .... The Court could carry out such an examination only on the basis of a pre-litigation procedure that allowed the defendant Member State to address the Commission's claims relating to the defective transposition of specific provisions of the Directive.' [12] As the pre-litigation procedure had not given Luxembourg the opportunity to address those specific claims, the Court held the application to be inadmissible.

16. It is difficult to draw any relevant distinction between the circumstances in *Luxembourg* and those of the present case as regards the consequences of the Commission's change of claim. In both, the Commission was, in effect, taken by surprise as regards its application for a declaration of a complete failure to transpose by late reliance on pre-existing national provisions of which it was unaware. Even the total failure of a Member State to provide any reply at the pre-litigation stage or to file any defence did not deprive it in this case of the protection provided by the former. Given the serious implications of a Court ruling that a Member State has failed to implement its obligations under a directive, which can establish 'the basis of a responsibility that a Member State can incur as a result of its default', [13] it is imperative, in my view, that the Member State be given the opportunity, at the pre-litigation stage, to counter the Commission's claim of a defective implementation, as opposed to a complete failure to implement.

17. The Court cannot therefore, in my view, be asked in such circumstances to declare that a Member State is partly in breach of its obligations, when the latter has not been able to present its views on the Commission's analysis of the extent of that breach. This follows from the first paragraph of Article 169 of the Treaty, in accordance with which the Commission can only send a reasoned opinion where the Member State has been given the opportunity to submit its

11 — Paragraph 10 of the judgment.

12 — Paragraphs 12 and 13 of the judgment.

13 — Case 39/72 *Commission* v *Italy* [1973] ECR 101, paragraph 11 of the judgment; see also Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, and Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

observations on *that* matter, and not a distinct, if perhaps related, matter. As the Court noted in Case C-266/94 *Commission* v *Spain*, '[the] proper conduct of the pre-litigation procedure constitutes an essential guarantee required by the Treaty ... so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter ... [it] is only on the basis of a properly conducted pre-litigation procedure that the contentious procedure before the Court will enable the latter to judge whether the Member State has in fact failed to fulfil the specific obligations which the Commission alleges it has breached'. [14]

18. The circumstances of the present case are, in my view, for the same reasons as those given by the Court in *Luxembourg*, quite different from those of *Ireland*. By accepting that Ireland had adopted some transposition measures, in effect the Commission only maintained its application as regards those provisions of the directive which concerned fish and fishery products, which Ireland did not claim to have implemented. The proceedings before the Court could therefore be said to have had a clearly defined and uncontested subject-matter; though this was different from that of the pre-litigation stage and the Commission's initial application, the defendant Member State had been given an opportunity at the pre-litigation stage to submit its observations on all the alleged breaches of its obligations, including its duty to implement veterinary checks on fish and fishery products. In *Luxembourg*, on the other hand, the defendant Member State had not been given a similar opportunity prior to the litigation to present its views on the Commission's contention that the national provisions did not give effect to the directive in question.

19. The essential distinction seems to me to lie in the definition of the Member State's failure to respect its obligations which is the subject of the application. Where the extent and nature of the actual compliance, and consequently of the alleged outstanding failure, is not in dispute, there need be no objection to the Commission's narrowing its original claim; the defendant Member State has been given the opportunity in such circumstances to contest *that* failure within the framework of the reasoned opinion. Where the extent and nature of the alleged failure to comply is in doubt, the defendant Member State must be afforded an opportunity, even if it is in default procedurally or does not contest the existence of the failure, to submit its observations on a reasoned opinion seeking to establish this failure before the Court can properly consider whether or not the Member State is in breach of its Treaty obligations.

20. At no stage in the present proceedings has the Commission presented 'a coherent and detailed statement of the reasons which led [it] to conclude' that Italy is in breach of its obligations under the Directives notwithstanding D.P.R. 320/54, such as the

14 — [1995] ECR I-1975, paragraphs 17 and 18 of the order.

reasoned opinion is intended to provide, [15] and on which Italy would have had the opportunity to present its comments. In these circumstances, I am of the opinion that the Commission's application should be dismissed as inadmissible.

B. Lack of precision of the Commission's claim

21. Even if the first objection to the admissibility of the Commission's amended claim could somehow be overcome, the Court would, in my view and for related reasons, still not be in a position to come to a decision on the merits, owing to the failure of the Commission to clarify which of the obligations of the Directives Italy is alleged to have breached. The necessity for the Commission to advance *specific* allegations of breaches by a Member State of its obligations is inherent in the nature of the Article 169 procedure, and was adverted to by the Court, for example, in C-266/94 *Commission* v *Spain*. [16] Even if D.P.R. 320/54 was drawn to its attention at a very late stage, the Commission could have given some indication of its bearing on the matters covered by the Directives. It is established case-law that 'in proceedings under Article 169 ... it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption'; [17] in the present case, it therefore fell to the Commission to establish the extent of Italy's failure to implement the Directives.

22. The circumstances of the present case are, if anything, more extreme than those in *Luxembourg*, where the Commission had sought to identify a number of provisions of the directive which had not been implemented by the national law, and Advocate General Jacobs had conducted a systematic comparative analysis of the prior Luxembourg law and the directive, and of the Commission's revised claim. [18] In its reply in this case, the Commission has merely expressed its astonishment at the Italian Government's behaviour, without proceeding to any examination whatever of the provisions relied upon in the Italian defence; while the parties

15 — Case 274/83 *Commission* v *Italy* [1985] ECR 1077, paragraph 21 of the judgment.

16 — Cited in footnote 14 above, paragraph 18 of the order.

17 — Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6 of the judgment.

18 — Case C-274/93, cited in footnote 9 above, paragraphs 15 to 46 of the Opinion.

agree that the Directives have not been properly implemented, the Court has been given no indication of the extent of this omission.

23. It also appears to me that no judgment the Court could give on the substantive issues as they have been put before it in the present case would enable the purposes of Article 169 proceedings to be fulfilled. These were described by the Court in Joined Cases 15/76 and 16/76 *France* v *Commission* as being to 'obtain [] a declaration that the conduct of a Member State infringes Community law and [to] terminat[e] that conduct'. [19] If the Court declares that a Member State has partly failed to implement a directive in circumstances where it is impossible to identify the extent of that failure, the Member State will not be able to identify which measures are 'necessary ... to comply with the judgment', in accordance with Article 171(1) of the Treaty. Nor could the Commission properly operate the mechanism provided in Article 171(2) of the Treaty, amended as a result of the Treaty on European Union, if the first judgment of the Court were to leave open the question of the extent of the failure to implement.

24. While it might appear repugnant to what Advocate General Jacobs, in *Luxembourg*, termed 'the principles of procedural economy and proper administration of justice' [20] that a Member State should be able to delay a proper examination by the Commission and the Court of the compatibility of its legislation by recourse to tactics such as those employed in the present case, it is important to bear in mind that 'the admissibility of an action based on Article 169 of the Treaty depends only on an objective finding of a failure to fulfil obligations' and is not affected by 'any inertia or opposition on the part of the Member State concerned'. [21] As Advocate General Roemer noted in Case 7/71 *Commission* v *France*, 'the procedure under Article 169 of the EEC Treaty ... [is] concerned not with guilt and morality but simply with the clarification of the legal position'. [22] In the present case, the Commission has not at any stage produced an analysis of Italy's obligations under the Directives in the light of D.P.R. 320/54, and I do not consider that, in these circumstances, the Court is in a position to clarify the law, for the reasons adverted to in *Luxembourg*. [23]

25. I am sensitive to the force of the remarks of Advocate General Jacobs in *Luxembourg*, cited above, [24] and particularly the possible incentive in such circumstances for Member States 'to produce legislative texts only at a very late stage in the hope that the Commission's resultant modification of its claim would render the action inadmissible'. [25] The fact remains, however, that a Member State cannot be forced under the jurisdictional

19 — [1979] ECR 321, paragraph 27 of the judgment.

20 — Opinion of 23 November 1995, paragraph 12.

21 — Case 301/81 *Commission* v *Belgium* [1983] ECR 467, paragraph 8 of the judgment.

22 — [1971] ECR 1003, p. 1034.

23 — Paragraphs 12 and 13 of the judgment.

24 — Paragraph 24 of the present Opinion.

25 — Cited in footnote 9 above, paragraph 12 of the Opinion.

system of the Treaty to enter any kind of defence in Article 169 proceedings, nor prevented from entering a defence after the pre-litigation stage is over. If a Member State were unable to raise such matters after an application had been made to the Court, the Commission would in effect be able 'to determine conclusively ... the rights and duties of a Member State ... [whereas according] to the system embodied in Articles 169 and 171 of the Treaty, the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court'. [26]

26. It would have been open to the Commission in the present case to include in its infringement action an alternative claim that Italy had failed, in breach of Articles 20 and 22 of the respective Directives, and/or Article 5 of the Treaty, to inform it of the relevant national measures; [27] as noted above, [28] it assumed from Italy's silence that no such measures existed, and omitted such a claim from its application.

27. For the sake of completeness, I should add that I do not consider particularly significant the fact that the defendant Member State has expressly concluded that the Court should find that the Directives had not been correctly transposed. In the first place, this follows logically from its defence of a partial implementation based on D.P.R. 320/54 whether or not the defendant Member State expressly reaches such a conclusion. In the second place, the Italian Government has not given any indication of the extent to which the Directives can, in its view, be considered as having been transposed *ex ante*, as it were, by the Decree. Finally, as noted above, proceedings under Article 169 are objective in character, and the Court need not accept the concessions made by the defendant; thus in Case C-334/94 *Commission* v *France*, [29] the Court examined in detail the Commission's complaints, even those which had not been contested by the French Government.

28. I am therefore of the opinion that the Commission's application should be dismissed as inadmissible. As to costs, the lack of cooperation of the Italian Government has been flagrant, and has caused the misapprehension which led the Commission to initiate proceedings on the wrong basis. I therefore recommend that, as in *Luxembourg*, the defendant Member State be required to bear all the costs.

26 — Joined Cases 142/80 and 143/80 *Essevi and Salengo* [1981] ECR 1413, paragraph 16 of the judgment.

27 — As the Commission frequently does in actions under Article 169; see, for example, C-234/95 *Commission* v *France* [1996] ECR I-2415, paragraph 1 of the judgment.

28 — Paragraph 5 of the present Opinion.

29 — [1996] ECR I-1307, paragraphs 11 to 24 of the judgment.

III — Conclusion

29. In the light of the foregoing, I recommend that the Court:

(1) Dismiss the Commission's application as inadmissible, and

(2) Order the Italian Republic to pay the costs.