OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 18 May 1994 *

Mr President,
Members of the Court,

1. The Commission has brought two actions before the Court for declarations that, by adopting various rules without notifying them at the drafting stage, the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 8 and 9 of Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations. [1]

Directive 83/189/EEC

2. The purpose of that directive is to forestall the introduction of new measures having equivalent effect to quantitative restrictions on the movement of goods resulting from the Member States' adoption of technical regulations relating to products. The method chosen for the attainment of that objective is the obligation for the Member States to communicate to the Commission any draft technical regulation and not to adopt that regulation for specified periods, giving time for the Commission and the other Member States to study the draft and to make observations if they consider that the draft regulation is likely to constitute a barrier to trade. A first amending directive was adopted in 1988 [2] and a second in March of this year. [3]

The Commission alleges that the Kingdom of the Netherlands has not complied with Articles 8 and 9 of the directive, in which the Member States' obligations are described as follows:

'*Article 8*

1. Member States shall immediately communicate to the Commission any draft technical regulation, except where such technical regu-

* Original language: French.

1 — Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8).

2 — Council Directive 88/182/EEC of 22 March 1988, amending Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1988 L 81, p. 75).

3 — Directive 94/10/EC of the European Parliament and the Council of 23 March 1994 materially amending for the second time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1994 L 100, p. 30).

lation merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a brief statement of the grounds which make the enactment of such a technical regulation necessary, where these are not already made clear in the draft.

(...)

Article 9

1. Without prejudice to paragraph 2, Member States shall postpone the adoption of a draft technical regulation for six months from the date of the notification referred to in Article 8(1) if the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged must be amended in order to eliminate or reduce any barriers which it might create to the free movement of goods.

2. The period in paragraph 1 shall be twelve months if, within three months following the notification referred to in Article 8(1), the Commission gives notice of its intention of proposing or adopting a directive on the subject.'

Pre-litigation procedure

3. In the action commenced by application of 26 January 1993 (Case C-52/93), the Commission alleges that the Kingdom of the Netherlands adopted on 9 October 1990 Amendment XIII to the PVS regulation on quality standards for flower bulbs (iris, lily) without giving notification of it at the drafting stage. On 31 July 1991 the Commission sent a letter before action to the Netherlands authorities, which submitted observations on 4 November 1991. The Commission then sent a reasoned opinion in accordance with Article 169 of the EEC Treaty on 18 May 1992, which was answered on 23 July 1992.

In the action commenced by application of 9 March 1993 (Case C-61/93), the Commission challenges three Netherlands regulations:

(1) a decree of 16 January 1989 concerning kilowatt hour meters, amending a royal decree of 1970 issued pursuant to the 1937 weights and measures law. As regards that decree, a letter before action was sent on 16 October 1989 by the Commission to the Kingdom of the Netherlands which submitted its observations on 17 November 1989. The

Commission sent a reasoned opinion on 30 October 1991 which was answered on 13 January 1992;

(2) a decree of 24 August 1988 amending the regulation concerning the strength requirements for soft-drinks bottles. A letter before action was sent on 27 October 1989 and a reasoned opinion on 2 April 1991. The Netherlands Government replied by letter of 9 July 1991;

(3) a decree of 21 October 1988 amending the decision on the composition, classification, packaging and labelling of pesticides. Again a letter before action was sent on 9 February 1990 and a reasoned opinion on 2 April 1991. The Netherlands Government replied by letter of 9 July 1991.

4. The letters before action sent by the Commission on 16 October 1989 (electricity meters), 27 October 1989 (bottles), 9 February 1990 (pesticides) and 31 July 1991 (flower bulbs) are almost identical. The Commission draws the Government's attention to the national technical measure, a copy of which it annexes to its letter. The Commission notes that that measure falls within the ambit of Directive 83/189 but that it has not been notified at the drafting stage in accordance with Article 8 of the directive, and that its adoption has not been postponed in accordance with Article 9. The applicant concludes, therefore, that this is 'an obvious case of non-compliance with the obligations imposed on the Member States by the said directive, requiring ... the immediate suspension of the measure'. Moreover, the Commission points out that, as it made clear in its communication 86/C 245/05, [4] 'it considers that as a result of that infringement of procedure, this technical regulation may not take legal effect and is unenforceable against third parties'. Consequently, the Commission, 'pursuant to Article 169 of the Treaty, requests your Government to put forward its observations on the views presented above ...', reserving the possibility of issuing a reasoned opinion later.

In the case of the electricity meters, the Kingdom of the Netherlands has acknowledged that it had forgotten to notify the draft decree in accordance with the procedure laid down in the directive; it indicated, however, that the rules had been sent to the Commission in another connection. It observed, moreover, that the new rules were more favourable to the free movement of goods than the former rules. With regard to the flower bulbs as well, the defendant acknowledged that it was at fault, but it protested at withdrawing the rules, the result of which would be to create an inauspicious legal vacuum. In the cases of the bottles and pesticides, the Netherlands Government did not answer the letters before action.

4 — OJ 1986 C 245, p. 4.

5. In its various reasoned opinions, the Commission again states that the Kingdom of the Netherlands has failed to fulfil its obligations to notify draft technical regulations and to suspend their adoption for the periods provided for in the directive. In particular, it develops the argument that a regulation adopted without the prior notification required by Article 8 of Directive 83/189/EEC is unenforceable against third parties in the legal system of the Member State in question. It states that that principle is enshrined in the decisions of the Court concerning the direct effect of directives and embodies both the maxim *nemo allegans turpitudinem suam est audiendus* (reasoned opinions of 30 October 1991 and 18 May 1992), and the prohibition of *venire contra factum proprium* (reasoned opinions of 2 April 1991). The Commission concludes that 'in order to put an end to that situation, the measure at issue ought to be suspended. Subsequently, it could be notified at the drafting stage.' Finally it requested the Kingdom of the Netherlands to 'take the measures necessary to comply with this reasoned opinion within a period of two months'.

Written procedure before the Court

6. The requests made by the Commission in the forms of order sought in its applications are straightforward, since they can be summarized as seeking a declaration that the Netherlands has failed to fulfil its obligations under Articles 8 and 9 of the directive and an order that it should pay the costs of the action. It is nevertheless the case that it is the suspension of the legislation at issue which is the central problem in the case. As in its reasoned opinions, the Commission develops the argument that a national regulation of which prior notification was not given at the drafting stage is unenforceable against third parties and it seems to conclude that the failure is still continuing since 'in order to put an end to that situation, the measure at issue ought to be suspended. Subsequently, it could be notified at the drafting stage.'

In its replies to the reasoned opinions, the Kingdom of the Netherlands acknowledges that the decrees should have been notified at the drafting stage, observes that it is not always easy to distinguish what is a technical regulation from what is not, and undertakes to avoid such a mistake in future. However, it refuses to withdraw its decrees on the grounds that they do not constitute barriers to the free movement of goods (electricity meters, bottles, pesticides), which is not denied by the Commission, and that withdrawal would create an undesirable legal vacuum.

Irrespective of the arguments of fact specific to each decree, in its defences the Kingdom of the Netherlands challenges the scope of the Commission's applications. Since it has always acknowledged that it was at fault in forgetting to notify the draft regulations and has informed the Commission of its resolutions for the future, the Kingdom of the Netherlands concludes that the Commission's only interest in continuing the procedure for a declaration that the Member State has failed to fulfil its obligations is to obtain a judgment stating the principle that a regulation adopted without prior notification is unenforceable and that a Member State is

required to suspend the adoption of that regulation until it has been notified. The Kingdom of the Netherlands pleads an 'abuse' of the procedure for a declaration of failure to fulfil obligations and explains why, in its opinion, the Commission's position cannot be endorsed.

In its replies, the Commission challenges those allegations and states that it has not overstepped the bounds of its powers by submitting applications in which only the forms of order sought specify the subject-matter. The grounds contested by the Netherlands were there only to draw attention to the purpose and effect of the provisions of Directive 83/189.

Taking note of that limitation of the scope of the applications, the Kingdom of the Netherlands expresses doubt in its rejoinders as to whether the pleas, thus adapted, can be upheld. The alleged failures to fulfil obligations are mere omissions, dating back several years. Furthermore, they are only failures to comply with procedural rules, since no infringement of Article 30 of the Treaty has been alleged. The defendant pleads that the applications are inadmissible or at the very least unfounded, and requests that the Commission be ordered to pay the costs.

Previous cases on Directive 83/189

7. Before I come to consider whether the actions are well founded, I must mention the several cases concerning the application of Directive 83/189 which have been brought before the Court, and in which the question whether national regulations of which prior notification had not been given were unenforceable against third parties was raised.

The first case was settled by a judgment of 2 August 1993.[5] The Italian Republic had adopted a decree which was originally intended to implement a directive but which did not in fact achieve that result. Since the decree laid down technical standards, the Commission had required it to be notified and it is apparent from a note in Advocate General Gulmann's Opinion that the Italian Republic had not sent the decree to the Commission until after the period allowed in the reasoned opinion for taking the necessary measures. Although the question of the decree's being unenforceable against third parties had been argued at length by the parties, Advocate General Gulmann pointed out that, in accordance with the decisions of the Court, it was not open to the Court to state its views on anything but the subject-matter of the forms of order sought by the Commission in its application. Consequently, the Court merely held that the Italian Republic had failed to comply with Articles 8 and 9 of Directive 83/189.

5 — Case C-139/92 *Commission* v *Italy* [1993] ECR I-4707.

Two questions submitted for a preliminary ruling in the *Decoster* [6] case concerned the direct effect of Directive 83/189 and the unenforceability against third parties of a national provision of which prior notification was not given at the drafting stage. However, it seemed to the Court more relevant to the subject-matter of the case to answer a different question, which enabled it to supply a ruling on Community law sufficient for the national court, thus making it unnecessary to answer the questions relating to Directive 83/189. It was, nevertheless, apparent that Germany, France and the United Kingdom were set resolutely against the Commission on those questions.

The problem was again argued before the Court in Case C-317/92 *Commission* v *Germany*, in which Advocate General Darmon presented his Opinion on 15 December 1993. The question appeared, however, from a quite different perspective since the national legislation of which notification was not given at the drafting stage was contrary to Article 30 of the Treaty. According to Advocate General Darmon, the failure to fulfil obligations under Article 30 of the Treaty was coupled with failure to comply with Article 8 of the directive. He did not accept that there was a failure to comply with Article 9 of the directive, since that provision did not apply until after the communication under Article 8(1) of the directive, which was precisely what was lacking in the case in point. Regarding the question of unenforceability against third parties, the Advocate General did not think it appropriate to answer it in the course of those proceedings.

Ascertaining the subject-matter of the actions

8. Although the forms of order sought by the Commission refer only to a declaration that the defendant has failed to fulfil its obligations under Articles 8 and 9 of Directive 83/189, the Kingdom of the Netherlands' defence refers to different subject-matter. The defendant has never denied that it forgot to notify its various draft laws in accordance with the procedure laid down in Directive 83/189. What it does challenge is the obligations which the Commission has sought to impose on it by virtue of its argument that the directive has direct effect and that national regulations which have not been notified are unenforceable against third parties.

At the hearing, the Commission's representative confirmed the strictly limited purpose of the action, namely to obtain a declaration that the failure to notify the draft regulations constituted a failure to fulfil obligations. According to him, that was also the object of the letters before action and the reasoned opinions. However, careful consideration of the various documents annexed to the Commission's applications reveals that the object of those documents could be interpreted as going beyond a mere request for observations regarding the existence of such a failure. The Commission expressly referred to the suspension or withdrawal of the legislative provisions (in the original Dutch text: 'dient te worden opgeschort' [7] and 'moet

6 — Case C-69/91 *Decoster* [1993] ECR I-5335.

7 — Letter before action of 16 October 1989 in the proceedings relating to the decree concerning electricity meters.

worden ingetrokken' [8]) and argued that technical standards not notified at the drafting stage were unenforceable against third parties.

9. That theory, to which the Commission seems to attach great importance, is undeniably interesting. It may be wondered why, if the Commission regards that proposition as being essential to the proper working of the procedure established by Directive 83/189, it has never proposed to the European Parliament and the Council that it should be adopted in an amending directive. In any case, like Advocate General Darmon, [9] I consider that it is not appropriate to consider the validity of that argument in the course of an action under Article 169. The Court's task is to decide whether or not the Member State in question has failed to fulfil its obligations under Community law, in this particular case Articles 8 and 9 of the directive. In such actions, it is not for the Court to decide on the consequences that a finding of such failure may have in the national legal systems of the Member States. National courts will be bound by virtue of Article 171 of the Treaty to draw the necessary inferences from the judgments of the Court and to take all appropriate measures to enable Community law to be given full effect. [10]

The Commission is therefore right to concede that the subject-matter of its actions was strictly defined by the wording of the forms of order sought in its applications, in accordance with the Court's case-law.

However, that wording still left doubts as to whether the alleged failure related to Article 8 of the directive and consisted of the failure to communicate the regulations at the drafting stage, when it also referred to Article 9 of the directive, relating to suspending the adoption of the draft technical regulation. In reply to the question put to him on this point, the Commission's representative stated that the actions related solely to the failure to communicate technical standards. It seems to me, therefore, that the judgments of the Court can apply only to Article 8 of the directive, since the reference to Article 9 is not relevant in the case in point. [11]

Assessment of legal interest in bringing proceedings

10. At the hearing, the representative of the Kingdom of the Netherlands several times expressed satisfaction with the details given by the Commission regarding the subject-matter of the actions. Just as in its rejoinders, it nevertheless disputed that the Commission had a legal interest in bringing an action

8 — Reasoned opinion of 30 October 1991, in the same proceedings.

9 — Opinion presented on 15 December 1993 in Case 317/92 *Commission* v *Germany* [1994] ECR I-2039, at p. I-2042, point 67.

10 — Judgments in Joined Cases 314/81, 315/81, 316/81 and 83/82 *Procureur de la République and Comité National de Défense contre l'Alcoolisme* v *Waterkeyn and others* [1982] ECR 4337, paragraph 16, and Case C-101/91 *Commission* v *Italy* [1993] ECR I-191, paragraph 24.

11 — See the Opinion presented by Advocate General Darmon on 15 December 1993 in Case 317/92 *Commission* v *Germany*, points 65 and 66.

under Article 169 concerning a failure that the defendant has always acknowledged.

However, such an argument cannot be accepted. It falls to the Commission to assess whether it is expedient to bring an action for failure to fulfil obligations and at the hearing its representative emphasized the Commission's concern with regard to non-compliance with the notification procedure laid down in the directive, in particular on the part of the Kingdom of the Netherlands and concerning legislation adopted after the letters before action and reasoned opinions sent in these cases. As Advocate General Tesauro stated in his Opinion in the case concerning the bridge over the Storebælt, [12] 'it must in any case be supposed that the Commission has an interest in proceedings that it brings under Article 169, even where the infringements are not disputed'.

That interest may, moreover, take the form of finding a failure in the past, in view of the consequences that may flow from such a finding in the legal systems of the Member States in which, as I have said, it is for the competent authorities and, in particular, the courts to take the measures necessary to enable Community law to be given full effect.

12 — Opinion presented on 17 November 1992 in Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353.

Costs

At the hearing, the representative of the Kingdom of the Netherlands asked the Court to take into consideration in deciding the costs the confusion caused by the Commission with regard to the actual subject-matter of the action. Under Article 69(3) of the Rules of Procedure, it is possible for the Court to order that the costs be shared, where the circumstances are exceptional.

It seems to me that such exceptional circumstances are to be found in this case. Even if the discrepancies between the object of the letters before action, the reasoned opinions and the applications for a declaration of failure under Article 169 did not prejudice the Kingdom of the Netherlands' right to a fair hearing, since of necessity the defendant had the opportunity to submit its observations with respect to the existence of the alleged breaches of Articles 8 and 9 of the directive, it should be noted that the absence of clarity on the part of the Commission made the defence more difficult. It was not completely clear even to the Commission itself what the object of the letters before action and reasoned opinions was, since, according to its representative, those documents did not mention 'suspending' the laws, while their actual wording could be construed as having a different meaning. I therefore propose that the Court should order the costs to be shared.

Conclusion

Following that analysis, I propose that the Court should:

In Case C-52/93

(1) Declare that, by introducing on 9 October 1990 Amendment XIII to the PVS regulation on quality standards for flower bulbs (iris, lily) without notifying that amendment to the Commission at the drafting stage, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 8 of Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations;

(2) Order the parties to bear their own costs.

In Case C-61/93

(1) Declare that, by adopting (1) on 16 January 1989 a decree concerning kilowatt-hour meters, (2) on 24 August 1988 a decree amending the regulation on the strength requirements for soft-drinks bottles and (3) on 21 October 1988 a decree amending the decision on the composition, classification, packaging and labelling of pesticides, without having notified them to the Commission at the drafting stage, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 8 of Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations;

(2) Order the parties to bear their own costs.