OPINION OF ADVOCATE GENERAL DARMON
delivered on 7 July 1992 *

Mr President,
Members of the Court,

1. This application concerning a failure to fulfil obligations seeks a declaration that, by failing to bring into force within the prescribed period the laws, regulations and administrative provisions necessary to comply with the Eight Council Directive 84/253/EEC of 10 April 1984 [1] and to inform the Commission thereof without delay, the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty.

2. The object of the Eighth Directive is, in particular, to harmonize the qualifications of persons entitled to carry out the statutory audits of accounting documents of certain types of company. It provides in Article 4 et seq. for an examination of professional competence and governs very precisely the terms of approval of those concerned.

3. Article 30 lays down the period within which Member States must comply with the directive.

4. That period may nevertheless differ from that of the actual application of the provisions in question. Article 30 provides:

'1. Member States shall bring into force before 1 January 1988 the laws, regulations and administrative provisions necessary for them to comply with this directive. They shall forthwith inform the Commission thereof.

2. Member States may provide that the provisions referred to in paragraph 1 shall not apply until 1 January 1990.

3. Member States shall ensure that they communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this directive.

4. Member States shall also ensure that they communicate to the Commission, lists of the examinations organized or recognized pursuant to Article 4.'

5. In consequence, the Kingdom of the Netherlands was required to transpose the Eighth Directive into national law before 1 January 1988 and to inform the Commission thereof. It might, however, in the legislation transposing the directive into national law, defer its actual application until 1 January 1990.

* Original language: French.

1 — Based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents (OJ 1984 L 126, p. 20).

6. By a letter of 27 June 1989 the Commission gave the Netherlands formal notice to confirm that the transposition had been effected. The Netherlands replied on 26 September 1989 that only the practical training did not comply with the requirements of the directive and that the delay in implementing the training requirements was due to the fact that the political context had changed and to a desire to rationalize and simplify accounting legislation as a whole.

7. Not satisfied with that explanation the Commission sent the Netherlands Government a reasoned opinion on 2 May 1990 requesting it to adopt the necessary measures within the customary period of two months. The government repeated its previous arguments.

8. Let me specify in the first place the precise scope of the application before the Court.

9. As we have seen, the application in respect of failure to fulfil obligations refers to the failure to provide information, but that complaint is not contained in the operative part of the reasoned opinion, which refers only to the failure to transpose the directive.

10. As the Court will remember, 'the subject-matter of an application brought under Article 169 is determined by the Commission's reasoned opinion and that therefore the two documents must be founded on the same grounds and submissions'. [2] It follows that the question before the Court involves only consideration of the failure to transpose. When questioned in relation thereto the Commission moreover admitted at the hearing that the complaint of absence of communication was not sufficiently apparent in the reasoned opinion.

11. The Netherlands admits that in relation to practical training, and more particularly Articles 4 and 8 of the directive, the national law in force is contrary to the Community provisions. It alleges primarily that the failure complained of is confined to that sole issue and should not embrace, as the Commission claims, the whole of the directive. It is not denied that the practical training, which is an essential item of the system proposed, based on examination of professional competence covering not only theoretical knowledge but also practical training for at least three years (Article 8 of the directive), is not yet formally part of the instruction at issue, as organized in the Netherlands, although in fact it is often given. The reason put forward to excuse the delay, but not affecting the question of whether or not there is a failure to fulfil obligations, [3] is primarily the Government's intention, on implementation of the directive, to amend the legislative provisions relating to the profession of accountant (a draft law has been prepared and is in the process of adoption).

12. The Netherlands also cites Article 18(1) of the directive which states:

2 — Judgment in Case 211/81 *Commission* v *Denmark* [1982] ECR 4547, paragraph 14; see also the judgment in Case 290/87 *Commission* v *Netherlands* [1989] ECR 3083, paragraph 8.

3 — It should be remembered that, according to well-established case-law, a Member State cannot plead provisions, practices or circumstances existing in its internal legal system in order to defend a failure to comply with obligations and time-limits laid down in the directive. See in particular Case 329/88 *Commission* v *Greece* [1989] ECR 4159.

'1. For six years after the application of the provisions referred to in Article 30(2), Member States may apply transitional measures in respect of persons already undergoing professional or practical training when those provisions are applied who, on completion of their training, would not fulfil the conditions imposed by this directive and would therefore be unable to carry out statutory audits of the documents referred to in Article 1(1) for which they had been trained.'

13. Let me say straight away that those transitional provisions, which are intended to bridge the transition between the old and new training of persons responsible for carrying out audits already covered by the old system, are not to be interpreted as postponing the provisions which have to be immediately implemented under the Eighth Directive. Furthermore, in the absence of transposition, the Member State cannot rely on a provision which presupposes the existence of national measures adopted in application of the directive (more particularly Article 30(2)).

14. In brief, after first defining the scope of the application as limited to failure to transpose, I must now determine its extent and consider whether it relates to the whole or part of the directive.

15. The defendant Member State clearly recognizes that it has failed to transpose the directive and 'admits that there has been a failure on its part in relation to implementation of Directive 84/253/EEC but solely in relation to the provisions on practical training as part of the rules on approval'. [4] On being requested by the Court to define the extent of the failure the Commission stated in its reply of 30 April 1992 that it rejected 'the contention of the Kingdom of the Netherlands in relation to the limited scope of the infringement', [5] on the ground that Articles 4 and 8 affect the whole directive. However, at the hearing the Commission listed only Articles 4, 8, 28 and 30(1) of the directive.

16. Articles 4, 8 and 30 (the latter of which relates to the Member States' obligation to transpose the directive and notify the Commission thereof) do not call for any special discussion, since, subject to the issue of notification, the failure is acknowledged. On the other hand, Article 28 about which there was argument at the hearing needs still to be mentioned.

17. Article 28 requires the Member States to ensure that the names and addresses of all natural persons and firms of auditors approved by them to carry out statutory audits of the documents referred to in Article 1(1) of the directive are made available to the public.

18. The Commission maintains that a register of such a nature does not distinguish auditors who satisfy the requirement of practical training set out in the directive from those who do not.

19. The Netherlands' representative replied that that issue was raised very belatedly at the stage of the reply to questions from the

4 — Paragraph 14 of the defence.

5 — Paragraph 14 of the Commission's reply.

Court and that in any event Article 55 et seq. of the Netherlands Law on registered auditors met the requirements of the Community rule.

20. It may be noted that the Court has not at any time been supplied with a copy of the national laws in force and no analysis of the provisions applicable in the Netherlands and contrary to the Eighth Directive has been produced.

21. In a recent judgment delivered on 20 May 1992 [6] between the Commission and the Kingdom of the Netherlands it was held:

'The transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express specific legislation; an existing legal framework may, depending on the content of the directive, be adequate for the purpose, provided that it does guarantee the full application of the directive in a sufficiently clear and precise manner ...'. [7]

22. In consequence, since the Member State claims that its national law generally complies with the Eighth Directive, the Commission ought to have adduced evidence that the present Netherlands law is contrary to Article 28.

23. However no evidence has been adduced that the national law is incompatible with the directive in question.

24. It may be seen from the case-law that:

'the Court has decided on several occasions, most recently in its judgment of 22 September 1988 in Case 272/86 *Commission* v *Hellenic Republic* [1988] ECR 4875, that it is incumbent upon the Commission to prove that the obligation has not been fulfilled.' [8]

25. The Commission ought therefore to have determined which of the provisions of Netherlands legislation in force did not, in its view, comply with the Eighth Directive and to have substantiated its view in that respect, the more so since the Government of the Netherlands maintains in its defence (paragraph 6) that its legislation on the profession of auditors satisfies the requirements of the directive in relation to professional integrity, independence and advertising (the latter being precisely the purpose of Article 28 of the directive) and states that it supplied the Commission, which does not deny it, with all the relevant documents and explanations thus demonstrating its desire to collaborate with the Commission.

26. Since the Commission has not specifically rebutted those arguments it must be held that it has not adduced evidence either of the general failure alleged in the written procedure or of that in relation to Article 28 which was argued in the oral procedure.

27. Finally, as regards costs it is necessary to draw the consequences of a comparison of

6 — Case C-190/90 [1992] ECR I-3265.

7 — Paragraph 17.

8 — Case 141/87 *Commission* v *Italy* [1989] ECR 943.

the extent of the failure established with that of the failure originally alleged by the Commission. I suggest that the Court should apply the provisions of Article 69(2) and (3) of the Rules of Procedure and order the parties to bear their own costs.

28. I therefore propose that the Court should:

(1) declare that, by failing to adopt within the prescribed period the measures necessary to comply with Articles 4 and 8 of Council Directive 84/253/EEC of 10 April 1984, based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents, the Kingdom of the Netherlands has failed to fulfil its obligations under the Treaty;

(2) dismiss the remainder of the application;

(3) order the parties to bear their own costs.