JUDGMENT OF THE COURT
12 OCTOBER 1982 [1]

Commission of the European Communities v Ireland

(Failure to implement Directive 77/91/EEC)

Case 151/81

Member States — Obligations — Implementation of directives — Failure to comply with time-limits for their implementation — Justification for failure — Not possible
(EEC Treaty, Art. 169)

A Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations resulting from Community directives.

Since the governments of the Member States participate in the preparatory work for directives they must be in a position to prepare, within the period prescribed, the draft legislative provisions necessary for their implementation.

In Case 151/81

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Anthony McClellan, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

IRELAND, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, assisted by James O'Reilly, Barrister at Law, with an address for service in Luxembourg at the Irish Embassy,

defendant,

1 — Language of the Case: English.

APPLICATION for a declaration that by not adopting, within the prescribed period, the provisions needed to comply with Directive 77/91, the second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, Ireland has failed to fulfil one of its obligations under the EEC Treaty,

THE COURT,

composed of: J. Mertens de Wilmars, President, A. O'Keeffe, U. Everling and A. Chloros (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart and T. Koopmans, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

I — Summary of the facts

Article 54 (3) (g) of the EEC Treaty provides that the Council and the Commission are to carry out the duties devolving upon them regarding the right of establishment, in particular by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 (companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private

law, save for those which are non-profit-making) with a view to making such safeguards equivalent throughout the Community.

On 18 December 1961 the Council drew up a General Programme for the abolition of restrictions on freedom of establishment (Official Journal, English Special Edition, Second Series, IX, p. 7). In Title VI of that programme it is stated that the safeguards required by Member States of companies and firms for the protection of the interests of members and others should, to the extent necessary and with a view to making such safeguards equivalent, be coordinated before the end of the second year of the second stage of the transitional period.

To give effect to those provisions, the Council, after issuing a first directive, Directive 68/151 of 9 March 1968, adopted a second directive on 13 December 1976, Directive 77/91, on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (Official Journal 1977, L 26, p. 1).

Directive 77/91 was notified to the Member States on 16 December 1976. In accordance with Article 43 thereof, the Member States were required to bring into force the laws, regulations and administrative provisions needed in order to comply with the directive within two years of its notification, that is to say by 16 December 1978, and forthwith to inform the Commission that they had done so.

Since it appeared that Ireland had not, within the prescribed period, adopted the necessary measures for implementation of the directive and that in any case the Commission had been given no information with regard thereto, the Commission, by letter of 8 January 1980, commenced the procedure provided for in Article 169 of the EEC Treaty against Ireland.

In its letter the Commission stated that by failing to adopt the measures necessary to incorporate the directive into its national law, Ireland had failed to fulfil its obligations and invited the Irish Government to submit its observations within a period of two months.

By letter of 24 March 1980, the Permanent Representation of Ireland to the Communities informed the Commission that preparation of the legislation necessary to implement the directive was in progress and that a bill combining the provisions of the first and second directives might within a short period be presented to the national Parliament.

The Commission, pursuant to the first paragraph of Article 169 of the EEC Treaty, issued a reasoned opinion on 29 September 1980, which was notified on 8 October 1980, recording Ireland's failure to fulfil its obligations and inviting it to adopt within a period of two months from notification of the opinion, the measures needed to implement the directive.

By letter of 21 November 1980 the Permanent Representation of Ireland informed the Commission that the bill incorporating the first two directives into domestic law could not be laid before Parliament until the beginning of 1981, since the procedure for harmonization of company law would entail a very large number of steps at the various stages;

primary legislation would have to be adopted rather than secondary legislation; it would be necessary to make a considerable number of complex technical amendments to Irish law.

II — Written procedure

By application lodged on 12 June 1981, the Commission, pursuant to the second paragraph of Article 169 of the EEC Treaty, brought before the Court the matter of Ireland's alleged failure to fulfil one of its obligations by not giving effect to Directive 77/91.

The written procedure followed the normal course; the Commission waived its right to submit a reply.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it invited the Irish Government to state, in writing, the exact date on which it had commenced the legislative procedure with a view to implementation of the directive; it appears from the Irish Government's reply that the matter had not yet been placed before Parliament at the end of 1981.

III — Conclusions of the parties

The *Commission* claims that the Court should:

(a) Declare that Ireland, by not adopting within the prescribed period the provisions necessary to conform with the second Council Directive 77/91/EEC, of 13 December 1976, has failed to fulfil one of its obligations under the Treaty;

(b) Order Ireland to pay the costs.

The *Irish Government* claims that the Court should:

(a) Dismiss the application;

(b) In the alternative, stay the proceedings pending the adoption of the Irish legislation necessary for implementation of the directive.

IV — Submissions and arguments of the parties during the written procedure

The *Commission* observes that according to the third paragraph of Article 189 of the EEC Treaty directives are binding, as to the results to be achieved, upon the Member States to which they are addressed, whilst leaving to the national authorities the choice of form and methods. The mandatory nature of directives imposes upon Member States the obligation to observe the periods which they prescribe for the adoption of national implementing provisions.

Infringement of the Treaty by a Member State exists no matter which organ of the State it is whose act or omission is responsible for the failure. The Member State in question may not plead provisions or practices existing in its internal legal system or special circumstances at national level in order to justify its failure to fulfil an obligation.

Those principles are well established in the case-law of the Court.

By failing to adopt within the prescribed periods the measures needed for implementation of Directive 77/91, Ireland has incontestably failed to fulfil one of its obligations under the Treaty.

The *Irish Government* states that the legislative process necessary for incorporation of Directive 77/91 into its domestic law has been commenced. Substantial and detailed amendments will have to be made to Irish company legislation, as contained in the Companies Acts 1963 to 1977; the minister responsible has prepared and secured approval by the government of the heads of a parliamentary bill entitled the Companies (Amendment) Bill 1981 and drafting of the bill is in the hands of a parliamentary draftsman who is giving the matter his exclusive attention; when the draft has been prepared in this way it will be submitted to the Irish Parliament.

Exercise of the jurisdiction conferred on the Court by Article 169 of the EEC Treaty requires knowledge of all the facts of the case and some understanding of the difficulties which Member States may encounter. This form of action should be used reluctantly, especially where Member States have clearly indicated that they are doing all in their power to introduce the necessary legislative changes.

The changes required by Directive 77/91 are of a complicated nature and have taken a considerable time to prepare; the bill which is being drafted will be a lengthy and complex piece of legislation. The delay in implementing the directive is due not to any disregard of the obligation to adopt the necessary legislation but rather to the complexity of the matter which, moreover, relates to only one of the large number of initiatives in the field of company law at Community level. The genuine nature of the difficulties is underlined by the fact that several other Member States find themselves in a position similar to that of Ireland; all the Member States have taken steps to have the necessary legislation enacted but have found difficulty in complying with the directive within a given period. The time-limit prescribed for implementation of the directive has been found to be inadequate by most Member States.

The Court has jurisdiction to give due weight to those realities and in this case it should exercise its discretion. Whilst those facts do not, it is true, amount to a justification from a strictly legalistic point of view for delay in implementing the directive, account should nevertheless be taken of the fact that Ireland is taking steps to adopt the necessary legislation and the full legislative process has already been put into operation to that end.

The Commission's application should therefore not be considered but should be dismissed; at the very least, proceedings should be stayed pending the early enactment of the legislation in question.

V — Oral procedure

A. McClellan for the *Commission* and J. O'Reilly for the *Government of Ireland* presented oral argument at the sitting on 28 April 1982.

The Advocate General delivered his opinion at the sitting on 22 June 1982.

Decision

1 By application received at the Court Registry on 5 June 1981 the Commission brought an action under Article 169 of the EEC Treaty for a declaration that by not adopting within the prescribed period the national provisions needed to comply with Directive 77/91/EEC, the second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, (Official Journal, 1977, L 26, p. 1), Ireland had failed to fulfil one of its obligations under the EEC Treaty.

2 Pursuant to Article 43 of the directive, Member States were required to bring into force the laws, regulations and administrative provisions needed in order to comply with the directive within two years of its notification. It was notified to Ireland on 16 December 1976 and the above-mentioned period accordingly expired on 16 December 1978.

3 The Irish Government does not contest that it has not fulfilled that obligation. It emphasizes however that the delay in implementing the directive is due not to any lack of awareness on the part of Ireland or the competent Irish authorities of the need to implement the required legislation but rather to the complexity of the subject-matter, the directive, moreover, being only one of numerous complex measures adopted, at the Community level, within the field of company law. The difficulties encountered in implementing the directive in Ireland and in several other Member States show that the period prescribed for implementation of the directive was insufficient.

4 Those circumstances cannot expunge the failure to fulfil one of its obligations with which Ireland is charged. According to well-established case-law of the Court, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time-limits resulting from Community directives.

5 Attention should also be drawn to the fact that the governments of the Member States participate in the preparatory work for directives and must therefore be in a position to prepare within the period prescribed, the draft legislative provisions necessary for their implementation. It appears, however, from information produced in the course of the proceedings that no draft law had yet been placed before the Irish Parliament within the period prescribed for implementation of the directive or even when the Commission brought its action.

6 It must therefore be declared that by failing to adopt within the prescribed period the provisions needed in order to comply with Council Directive 77/91 of 13 December 1976, Ireland has failed to fulfil one of its obligations under the Treaty.

Costs

7 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT,

hereby:

1. Declares that, by not adopting within the prescribed period the provisions needed in order to comply with Council Directive 77/91/EEC, the second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the

Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, Ireland has failed to fulfil one of its obligations under the EEC Treaty;

2. Orders Ireland to pay the costs.

Mertens de Wilmars O'Keeffe Everling

Chloros Pescatore Mackenzie Stuart Koopmans

Delivered in open court in Luxembourg on 12 October 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 22 JUNE 1982

My Lords,

This is an application by the Commission, under Article 169 of the EEC Treaty, for a declaration that Ireland has failed to fulfil its obligations under the Treaty in that it has not brought into force the measures needed in order to comply with the second Council Directive on Company Law Harmonization (Directive 77/91 of December 13, 1976, OJ 1977, L 26, p. 1) within the period fixed for doing so by Article 43 of the latter. That period expired on 16 December 1978, two years after the date on which the directive was notified to the Member States.

Ireland has not claimed, either in its written or in its oral submissions, that it has yet brought into force the measures required to comply with the directive. It states that it has set in motion the drafting procedure necessary for that purpose. It draws the Court's attention to three difficulties to which it attributes the delay in implementing the directive. The first is the complexity of the subject-