OPINION OF ADVOCATE GENERAL COSMAS

delivered on 28 January 1999 *

I — Introduction

1. In this action under Article 169 of the EC Treaty, the Commission asks the Court for a declaration that, by retaining national legislation under which there must be a member of Belgian nationality on the governing board of an association or a minimum number of members of that nationality in order for the legal personality of an association to be recognised, the Kingdom of Belgium has failed to fulfil its obligations under Article 6 of the EC Treaty.

II — National provisions at issue and procedure

2. Under the Belgian Law of 25 October 1919 'conferring legal personality on international associations which pursue philanthropic, religious, scientific, artistic or pedagogical objectives', legal personality may be granted to such associations where at least one member of their governing body is a Belgian national.

3. Under Article 26 of the Law of 27 June 1921 'conferring legal personality on non-profit-making associations...', an association may not rely on its legal personality against third parties unless three fifths of the members have Belgian nationality.

4. By letter of 25 March 1996, the Commission pointed out to the Kingdom of Belgium that the two abovementioned Laws appeared to be inconsistent with Article 6 of the EC Treaty and asked it to submit its observations within two months.

5. By letter of 9 August 1996, the Kingdom of Belgium informed the Commission that it intended to amend the Laws at issue and to conform with the Commission's observations. For that purpose it forwarded to the Commission on 26 February 1997 two preliminary draft Laws containing such amendments.

6. On 19 June 1997 the Commission, having established that the national provisions at issue were still in force, sent a reasoned opinion to the Kingdom of Belgium, calling

* Original language: Greek.

on it to adopt, within a period of two months from notification thereof, the measures necessary in order to comply with Article 6 of the EC Treaty.

7. On 11 August 1997 the Kingdom of Belgium forwarded to the Commission a draft Law to amend the Law of 1921 and on 27 February 1998 it forwarded a preliminary draft Law for the amendment of the Law of 1919.

8. Since the Commission had no specific information as to whether provisions amending the abovementioned Laws of 1919 and 1921 had finally been adopted, it brought this action in which it asks the Court, first, to find that the Kingdom of Belgium has committed the above infringement, and, secondly, to order that State to pay the costs.

9. The Kingdom of Belgium observes in its defence that the procedure for the adoption of the amending Laws, which will bring national legislation into line with the requirements of Community law, is still in progress; it also undertakes to inform the Court once that procedure has been completed.

10. The Commission points out in its reply that the Belgian Government indirectly acknowledges that the national legislation in force is contrary to Community law.

III — Merits of the action

11. First of all, as the Commission correctly states, the national legislation at issue clearly falls within the scope of the EC Treaty even though it relates to non-profit-making associations. While those associations do not have the objective of maximising or redistributing profits, they may provide services in return for payment or receive income, thus participating in economic life. They are therefore governed by the Community rules on freedom of establishment.

12. The second paragraph of Article 58 of the EC Treaty could be set against the above approach. Under that provision, the companies or firms covered by the right of establishment, which is set out in Article 52, are not to be understood as including those which 'are non-profit-making'. However, in accordance with the prevailing view in Community law, the notion of a profit-making objective, as a purely Community law concept, must be construed broadly. Even legal persons whose main

objective is not to increase their profits are covered by the right of establishment in so far as they participate in economic life.

13. That view was also expressed by the Court in *Walrave and Koch*, [1] in *Donà* [2] and in *Steymann*. [3] Furthermore, the Court has frequently been called on to apply provisions of Community law in cases where non-profit-making organisations have been pursuing an economic activity. [4]

14. Of course, it does not follow from the above that all the associations concerned by the Belgian Laws of 1919 and 1921 — which may potentially participate in economic life — fall within the scope of Community law and are entitled to freedom of establishment. However, a number of them present the relevant characteristics and therefore, from the point of view of Community law, are discriminated against as regards recognition of their legal personality under national law. [5] The Belgian legislation at issue therefore falls within the scope of Community law.

15. It need only be added that, in accordance with settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the internal legal order of that State as it stood at the end of the period laid down in the reasoned opinion. [6] It has also been consistently held that a Member State may not rely on provisions, practices or circumstances existing in its internal legal order in order to justify a failure to observe the obligations and time-limits laid down by a directive. [7]

16. In this case, the Kingdom of Belgium does not dispute that, notwithstanding the expiry of the time-limit laid down in the reasoned opinion, it failed to take the appropriate measures to comply with the Commission's advice and thus failed to fulfil its obligations under Article 6 of the EC Treaty. I accordingly consider it proven that the Kingdom of Belgium has committed the infringement upon which the Commission relies.

1 — Case 36/74 *Walrave and Koch* v *Union Cycliste Internationale* [1974] ECR 1405.

2 — Case 13/76 *Donà* v *Mantero* [1976] ECR 1333.

3 — Case 196/87 *Steymann* v *Staatssecretaris van Justitie* [1988] ECR 6159.

4 — Case 221/85 *Commission* v *Belgium* [1987] ECR 719 and Case C-70/95 *Sodemare and Others* v *Regione Lombardia* [1997] ECR I-3395.

5 — In Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, the Court expressly stated that the fundamental principle of equal treatment applies to every person in a situation governed by Community law.

6 — See, for example, Case C-361/95 *Commission* v *Spain* [1997] ECR I-7351, paragraph 13, and Case C-364/97 *Commission* v *Ireland* [1998] ECR I-6593, paragraph 8.

7 — See, for example, Case C-208/96 *Commission* v *Belgium* [1997] ECR I-5375, paragraph 9, and Case C-8/97 *Commission* v *Greece* [1998] ECR I-823, paragraph 8.

IV — Conclusion

17. I accordingly propose that the Court should:

— declare that, by retaining national legislation under which, in order for the legal personality of a non-profit-making association to be recognised, there must be a member of Belgian nationality on the governing body of that association or three fifths of the members must be of Belgian nationality, the Kingdom of Belgium has failed to fulfil its obligations under Article 6 of the EC Treaty;

— order the Kingdom of Belgium to pay the costs.