OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 8 MARCH 1978 [1]

Mr President,
Members of the Court,

Differences in the national provisions whereby the marketing or use of certain goods depends upon the fulfilment of technical requirements may give rise to obstacles to intra-Community trade. Community directives are designed to eliminate them.

The case on which I am delivering my opinion today concerns Community measures relating to measuring instruments.

In this connexion an outline Council directive "on the approximation of the laws of the Member States relating to common provisions for both measuring instruments and methods of metrological control" was adopted on 26 July 1971 (Directive No 71/316/EEC, Official Journal, English Special Edition 1971 (II), p. 707). A characteristic feature thereof is the harmonization of the provisions on the control of measuring instruments before marketing. Provision is made for an "EEC pattern approval" and an "EEC initial verification" for new instruments. Another important feature is the affixing of a sign which must be recognized by all Member States and which ensures free movement of the goods.

In addition there are special directives for specific categories of measuring instruments. The present case concerns the Council Directive of 12 October 1971 "on the approximation of the laws of the Member States relating to the measuring of the standard mass per storage volume of grain" (Directive No 71/347/EEC, Official Journal, English Special Edition 1971 (III), p. 852 *et seq.*). This directive established on the one hand a standard measure because different provisions existed in this connexion in France and in the Federal Republic of Germany and in addition the practice of the other Member States was not uniform. This is the EEC standard mass per storage volume defined in Article 2, which designates the ratio of the mass expressed in kilogrammes to the volume expressed in hectolitres, as determined for any kind of grain by measurement with an instrument and according to a method which are in conformity with the provisions of that directive. It is an important factor in the fixing of the intervention price and is also relevant in trade in grain. Under Article 4 of the directive, for trading purposes, the term EEC standard mass per storage volume may in fact only be used to designate a grain characteristic which has been measured with instruments conforming to the requirements of the directive; that article also provides that for the purposes of trade in grain between the Member States the characteristic designated standard mass per storage volume may only be the EEC standard mass per storage volume defined in the directive. On the other hand, the elimination of obstacles to the free movement of measuring instruments for the determination of the standard mass per storage volume is involved. These measuring instruments must, according to Article 5 of the directive, fulfil the requirements of Annex II and they are subject to EEC pattern approval and to EEC initial verification and bear EEC marks and symbols. Accordingly, as Article 6 provides, no Member State may refuse, prohibit or restrict the placing on the market or the entry into

1 — Translated from the German.

service of such measuring instruments. Under Article 7 of the directive any additional national provisions necessary were to be put into force within 18 months of the notification of the directive, in other words, by 15 April 1973.

It is established, so far as the Kingdom of the Netherlands is concerned, that this obligation was not fulfilled within the prescribed period. For that reason the Commission, by letter of 14 February 1975 in which it requested the Kingdom of the Netherlands to submit its observations within one month, initiated a procedure under Article 169 of the EEC Treaty.

The Permanent Representation of the Kingdom of the Netherlands thereupon pointed out on 7 April 1975 that it was originally intended to implement the directive on the basis of a Benelux Convention of 11 March 1970 and a protocol of 16 March 1971 amending that Convention, in other words by means of a protocol directly and uniformly applicable in the Benelux States. It was, however, impossible to put this into effect because after the Convention had been ratified by the Netherlands in November 1972 Belgium and Luxembourg failed to do so and even in 1975 it was impossible to predict when ratification would take place. Since on the other hand the Netherlands law of 1937 on standardization of weights and measures did not directly permit purely national implementation of the directive, it was first necessary to envisage amendment of that law. The Netherlands Government had since decided to do so and a draft law along those lines would shortly be submitted to the Council of Ministers.

On 22 December 1975 the Commission delivered a formal reasoned opinion within the meaning of Article 169 of the EEC Treaty in which *inter alia* it reproached the Netherlands Government for the failure to implement the directive and fixed a period of one month for making good such omission.

The Permanent Representation of the Kingdom of the Netherlands thereupon informed the Commission in a letter of 22 January 1976 that a draft amendment to the Netherlands law on standardization of weights and measures, which was annexed thereto and in which special provisions were laid down for the implementation of the directive, would soon be put before parliament. In addition the Commission was informed in a letter of 27 July 1976 that a law amending the law on standardization of weights and measures had been passed on 2 June 1976 and that the powers necessary for the implementation of the directive had thus been created. Regulations for the implementation of the directive were since then in preparation but under Netherlands law another general implementing regulation, in other words the so-called general EEC decision on standardization of weights and measures, was still necessary, in this connexion and also in respect of other EEC directives. Finally, the Commission was further informed of further developments in a letter of 21 April 1977 and was sent the draft of a general EEC decision on standardization of weights and measures on the basis of which the provisions implementing the directive in question were to be adopted.

Since however it was impossible to predict when the provisions necessary under the directive of 12 October 1971 would actually be applied, the Commission brought the matter before the Court of Justice on 28 July 1977. In its application it requests a declaration that the Kingdom of the Netherlands, by not putting into force within the prescribed period the provisions needed for the implementation of the Council Directive of 12 October 1971, has failed to fulfil obligations under the Treaty.

According to the most recent state of developments the law of 2 June 1976 came into force on 1 January 1978 and the draft general EEC decision on standardization of weights and measures was sent to the Council of Ministers at the end of November 1977. Other necessary work, in particular on the units of measurement was, it was stated, far advanced and it was expected that all measures needed under the above-mentioned directive would be implemented by the middle of 1978.

It is accordingly clear that the period laid down in the directive of 12 October 1971 has expired without the Netherlands implementing provisions' having been adopted and there is also no doubt that the Netherlands legal situation still does not comply with the requirements of the above-mentioned directive. In view of the previous case-law on such cases which establishes that directives are binding on Member States and that the period laid down therein must be complied with so as to avoid different legal situations (see for example Case 52/75, *Commission of the European Communities* v *Italian Republic*, judgment of 26 February 1976 [1976] ECR 277 and Case 10/76, *Commission of the European Communities* v *Italian Republic*, judgment of 22 September 1976 [1976] ECR 1359), there is no choice but to conclude that it is necessary to comply with the Commission's request.

However, the Netherlands Government does not apparently entirely agree with this view and it is therefore necessary, in the interests of a complete explanation of the case, to deal in addition with the defence put forward by the Netherlands Government.

1. Thus the Netherlands Government takes the view that it is possible to doubt whether the application to the Court is necessary, if it is considered as a means of bringing pressure to bear. In fact, an important point is that it has not remained inactive; on the contrary it has set in motion the procedure for implementation of the directive and is also energetically expediting it. In addition, as may be deduced from the decisions of the Netherlands Government of 7 April 1975, 22 January 1976, 27 July 1976 and 21 April 1977, the Commission was left in no doubt of those facts.

This point of view however ignores the fact that the Commission has no need to prove that it has an interest in initiating a procedure under Article 169 of the EEC Treaty. The determining factor is whether the Member State concerned has complied with the Commission's request within the period laid down in the opinion. The Commission's view of the developments at that time and whether it is possible to see that the provisions of which notification was sent will be applied in the near future may possibly also be of importance.

In this respect the facts in the present case are however quite clear. In fact in December 1975/January 1976 the Netherlands Government had not even taken the first step towards the implementation of the directive, which was supposed to be achieved in three stages. The amendment to the law on standardization of weights and measures was passed only on 2 June 1976 and came into force on 1 January 1978. We know that, so far as the second stage is concerned, the adoption of an outline implementing regulation (general EEC decision on standardization), a draft along those lines was put before the Council of Ministers at the end of November 1977. It has evidently not yet come into force; nor have special provisions implementing the directive, scheduled as the third stage, yet been adopted and it is still impossible to predict with certainty the date on which they will come into force.

In these circumstances, having regard to a directive which should have been

implemented by 15 April 1973 at the latest, I cannot in fact understand how the Commission's right to lodge an application can be contested.

2. The Netherlands Government then referred in addition to the necessarily lengthy procedure for the implementation of the directive according to the legal situation, in other words under Netherlands law. It stated that an attempt was therefore first made to find a solution within the context of the above-mentioned Benelux Convention, but that that solution was unsuccessful because Belgium and Luxembourg failed to ratify the Convention. The Netherlands Government states that it is necessary to take into consideration, with regard to the purely national implementation of the directive subsequently commenced the fact that it virtually requires a three-stage programme, in other words, first an amendment to the law on standardization of weights and measures, then the adoption of an outline regulation on the basis thereof, which is also the case with regard to other directives, and only subsequently the adoption of special implementing provisions. In addition, it is necessary to bear in mind that, in view of the outline Council Directive of 26 July 1971 which was mentioned at the outset, not all directives may be implemented with equal ease.

However I am convinced that this attempt at justification cannot be successful either.

— First, so far as the Benelux Convention is concerned, it was not claimed that it precludes unilateral national measures; in fact, as the Court was told during the procedure, the directive in question has also in the meantime been implemented by Belgium and Luxembourg. Even if one assumes however that it may have seemed appropriate first to attempt to find a solution within the context of that Convention, the fact nevertheless remains that this could not in any case have been so time-consuming that only at the end of 1975 was there reason to choose another means of implementing the directive.

— The Netherlands Government refers in addition to the fact that the adoption of measures implementing the special directive of 12 October 1971 was particularly difficult because of the outline directive of 26 July 1971, but more detailed reasons are not put forward in this connexion. It may moreover be assumed that when the directive was adopted, and it presupposed unanimity, this fact was taken into consideration. When a period of 18 months was laid down therein for implementation of the directive it certainly seemed sufficient to all those concerned for the adoption of the necessary national provisions in this field. Moreover any mistake in this connexion could have been rectified by applying for extension of the period.

— With regard to the procedure in three stages which must be followed according to Netherlands law, the Commission observed above all and correctly that according to the case-law of the Court of Justice a Member State cannot plead the provisions and practices of its internal order in order to justify failure to observe obligations and time-limits arising under Community law (see for example Case 30/72, *Commission of the European Communities* v *Italian Republic*, judgment of 8 February 1973 [1973] ECR 161). In addition it seems doubtful in this case whether such a lengthy procedure was really essential and whether it would not have been possible to adopt an *ad hoc* regulation for the implementation of the directive until the law on standardization of weights and measures had been amended. The Netherlands Government seems in any case to have done so in the case of other directives,

and such provisional measures, if I have understood correctly, would in the view of the Netherlands also have been possible until the Benelux Convention had been ratified. An important factor in this connexion is that even if in law there was no other way to implement the directive it is necessary to accept that even such a lengthy procedure could have been completed long before the Commission's opinion was delivered and the period laid down therein had expired, had it been started in good time.

3. It is accordingly only necessary still to deal with the third question raised by the Netherlands Government. It is claimed in this connexion that, according to the relevant case-law, the important factor is whether the failure to implement a directive leads to discrimination; importance is attached to compliance with prescribed periods solely because only thus can the effectiveness of measures of Community law be guaranteed. It is necessary however to state with reference to the Council directive relevant in this case that the absence of corresponding implementing provisions in the Netherlands has had no adverse effects on the Common Market.

It is possible to state this first because there are no provisions of Netherlands law in the field covered by the directive which led to discrimination in intra-Community trade. In fact, the Netherlands authorities have not refused to allow the marketing or use of measuring instruments for the determination of the standard mass per storage volume of grain, such instruments are not manufactured in the Netherlands and until now in any case no corresponding application for approval has been lodged.

Secondly, it is impossible to record any adverse effects on the Common Market because a standard measure, as provided for in the directive, has long been used in the Netherlands. The royal association "Het Comité van Graanhandelaren" to which Netherlands grain merchants are affiliated possesses such an instrument and ascertains the standard mass per storage volume of grain in cases of dispute and, upon request, in other cases. The conditions of purchase of the Netherlands intervention agency also provide that the above-mentioned royal association shall determine the standard mass per storage volume.

In my opinion these submissions are likewise based on a fundamental misunderstanding. I am convinced that the case-law quoted by the Netherlands Government cannot be interpreted as meaning that in the case of implementation of a Community directive it may be decisive to examine the question whether discrimination actually exists in the absence of the required amendment to national law and whether even before implementation of the directive there was a situation without legal provisions which by and large corresponded to that sought by the directive. According to the Treaty, and this has been repeatedly emphasized in case-law, directives are binding on Member States in so far as the objective to be obtained is concerned. They therefore necessitate a corresponding amendment to the legal situation if it does not already immediately correspond completely to the directive. In the present case this is however obviously out of the question since the Netherlands Government, and this is shown by the extensive efforts which have been described, also considers that an amendment of the legal situation is necessary. In such circumstances however the decisive factor with regard to a procedure under Article 169 of the EEC Treaty can in fact only be whether the amendments to the legal situation considered necessary are made within the prescribed period; other considerations relating to the actual effects of the existing legal

situation appear on the contrary to be completely irrelevant.

Quite apart from this, it is also however possible to have considerable doubts that without the amendment to the legal situation no adverse effects on the functioning of the Common Market can be recorded or that there is no such danger, which in my opinion is sufficient.

With regard to the establishment of freedom of movement of goods for the measuring instruments covered by the directive, it is important that under Netherlands law no provision has been made for any approval and inspection procedure in respect thereof, in other words that there is no administrative infrastructure, as the Commission has called it. This makes it impossible for such instruments to be manufactured in the Netherlands and sold in other Member States unless, and this must however be regarded as an obstacle, an approval procedure is initiated in another Member State, as provided for in the directive. The legal situation in force may therefore very well adversely affect the development of the manufacture of such instruments in the Netherlands and it is therefore certainly necessary to speak of material effects on the functioning of the Common Market.

On the other hand, so far as the EEC standard measure is concerned, it is necessary to bear in mind that as a result of the directive only the EEC standard mass per storage volume may be used for the purposes of intra-Community trade and that the designation "EEC standard mass per storage volume" is only permitted in respect of grain which has been measured with instruments which correspond to the directive and to which a mark has been affixed after control. This obviously requires clear national rules and in this connexion the existence of a national commercial practice along these lines and the availability of such an instrument at the offices of the association of grain merchants is insufficient.

For this reason I consider that the observations of the Netherlands Government on the actual effects of the failure to adapt its national law to the provisions of the directive cannot provide a sufficient justification either and do not make the application appear unfounded.

In conclusion it only remains to state that the Commission's application is well founded. Accordingly, the Court of Justice must declare that the Kingdom of the Netherlands, by not putting into force within the prescribed period the provisions necessary for the implementation of the Council Directive of 12 October 1971, has failed to fulfil an obligation under the Treaty. In accordance with the application, the defendant must in addition be ordered to pay the costs of the action.