OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 28 February 1991 *

Mr President,
Members of the Court,

1. By a judgment of 11 July 1985,[1] the Court declared that the Italian Republic had failed to fulfil its obligations by not compiling statistical returns in respect of carriage of goods by road in accordance with the rules laid down in Council Directive 78/546/EEC of 12 June 1978 on statistical returns in respect of carriage of goods by road, as part of regional statistics.[2]

2. The Commission now claims that the Court should declare that, by persisting in its failure to compile statistical data on carriage of goods by road in accordance with the rules laid down in the directive in question, the Italian Republic has failed to fulfil its obligations under Article 171 of the Treaty.

3. By letter of 22 June 1988, the Commission gave the Italian Government formal notice that the data supplied by it during the period from July 1985 to March 1988 was insufficient to reconstitute one or more of the six tables provided for by the directive. By letters of 4 and 18 July 1988, Italy's permanent representation forwarded several tables to the Commission.

4. Notwithstanding that information, the Commission considered that, from the data supplied by the Italian Government, it was possible to reconstitute only part of the data on national carriage and none of those on international carriage expressed in tonnes in accordance with the rules laid down in the directive in question. On 10 April 1989, it delivered a reasoned opinion to Italy. On 28 June 1989, Italy forwarded supplementary data which the Commission still considers to be incomplete with respect to national transport as well as to international transport. This action was brought on 21 August 1989.

5. It was only at the hearing that the Italian Government argued that the action was inadmissible on the ground that, given that it was brought pursuant to Article 171 of the EEC Treaty, it could not be based on conduct subsequent to the judgment of the Court of 11 July 1985. According to the Italian Republic, the failures to fulfil obligations were new and different from the subject-matter of that judgment.

6. The Commission contends that, given the stage at which the objection was raised, the Court should hold that it was too late to be considered. In any event, it regards it as unfounded.

7. The first question is whether that is a plea of inadmissibility? Article 171 does not lay down a specific form of action but imposes a clear obligation on the State concerned, namely to adopt the necessary measures to comply with the judgment of

* Original language: French.

1 — Case 101/84 *Commission* v *Italy* [1985] ECR 2629.

2 — OJ L 168, p. 29.

the Court. It is always under Article 169 that an action is brought when the Commission claims that a State has not correctly complied with a judgment. However, the Court is thereby asked to make a declaration on failure to comply with an obligation which is no longer the same obligation whose infringement formed the subject-matter of the first judgment of the Court, but the obligation for the State concerned to adopt the necessary measures to comply with the decision of the Court. In submitting that the present action has been wrongly brought under Article 171, Italy is claiming that, in reality, conduct subsequent to the judgment of the Court cannot be cited as constituting failure to comply with that judgment. In other words, the obligation allegedly not complied with cannot serve as a basis for a finding of infringement. Is this not, in the final analysis, tantamount to submitting that the necessary elements to constitute an infringement are not all present and that therefore the action is without foundation? However, it is true that in the judgment in *Commission* v *Belgium*,[3] when Belgium contended that an action under Article 171 was inadmissible since it related to an infringement different from that which formed the subject-matter of the first judgment, the Court apparently did not doubt that that constituted a plea of inadmissibility. And, after all, the defendant is opposing consideration of new proceedings based on the failure to comply with a judgment on the grounds that, precisely, the judgment cannot have the scope claimed by the applicant, something like an objection of *res non judicata*. Accordingly one might be led to consider that it is a plea of inadmissibility which, moreover, the Court can examine of its own motion, as it could an objection of *res judicata*.[4]

3 — Judgment in Case 391/85 *Commission* v *Belgium* [1988] ECR 579.

4 — Order in Joined Cases 159/84, 267/84, 12/85 and 264/85 *Ainsworth and Others* v *Commission* [1987] ECR 1579, paragraphs 3 and 4.

8. However, it may not be indispensable for the Court to rule on the legal nature of the 'objection' raised by the Italian Government. If it were a plea as to the substance, the Court would have to examine the merits of the arguments notwithstanding the stage at which Italy brought them up. It seems clear that the Court must, in any event, check that there are all the constituent elements of an infringement, even if the defendant government did not invoke the erroneous nature of the obligation allegedly not complied with.

9. First of all, I note that in its reasoned opinion the Commission referred to infringement of both the Directive and Article 171. The action, on the other hand, has been brought only for the failure to comply with Article 171 stemming from persistent failure to implement the directive in question.

10. Directive 78/546 provides in particular for the annual forwarding by each Member State to the Commission of annual statistical data in respect of carriage of goods by means of vehicles registered in the Member State on the territory of that Member State (national transport) and between that Member State and another Member State or a non-member country (international transport). The Member States were to take the measures necessary to comply with the Directive by not later than 1 January 1979.

11. In the 1985 judgment, the Court declared that by failing to compile statistical returns Italy had failed to fulfil those obligations. The Commission had asserted at that time, without being contradicted by the Italian Government (which pleaded persistent difficulties resulting from an attack which destroyed the statistical office of its Ministry of Transport at the end of 1979) that for the years 1979 and 1980 Italy

had provided only incomplete data in relation to international transport. No data for national transport had been forwarded to the Commission.

12. If one accepts the Italian Government's view, the judgment of the Court would therefore have no effect as regards compliance with those obligations for the period subsequent to its pronouncement. Its only effect would ultimately be to impose a duty to make good the failure to fulfil those obligations for the period prior to the judgment (or the reasoned opinion, or even the letter of formal notice). In this instance, what would be the value of making good that failure several years after the event?

13. The particularly restrictive construction which the Italian Republic seems to put on Article 171 of the Treaty is in contrast with the firmness of the words which the Court used to recall the effects of a judgment in infringement proceedings:

'the finding in a judgment having the force of *res judicata* that the Member State concerned has failed to fulfil its obligations under Community law amounts to "a prohibition having the full force of law on the competent national authorities against applying a national rule recognized as incompatible with the Treaty and, if the circumstances so require, *an obligation on them to take all appropriate measures to enable Community law to be fully applied*". It follows that by reason solely of the judgment declaring the Member State to be in default, the State concerned is required to take *the necessary measures to remedy its default* and may not create any impediment whatsoever.' [5]

5 — Order in Joined Cases 24/80 and 97/80 R *Commission* v *French Republic* [1980] ECR 1319, emphasis added.

14. I do not think that it is stretching that decision to hold that implementation of a judgment declaring that a State has breached an obligation incumbent on it under a directive requiring certain action from it entails *definitively* ending that breach by adopting all the measures needed to achieve the prescribed result. As long as the breach of obligations established by the judgment of the Court persists, the State has not complied with that judgment. The analysis cannot be different where the obligation has to be complied with not instantaneously (e.g. the adoption or amendment of legislation), but on successive occasions as is the case here.

15. It would be particularly paradoxical if, because of the 'continuous' nature of the obligation incumbent upon it, the State concerned could rely on the fact that the judgment must not produce effects subsequent to its pronouncement.

16. Clearly in this case the necessary measures to comply with the judgment coincide exactly with the fulfilment of the obligations which the directive imposes in any event. Consequently, the non-fulfilment of the latter obligations is precisely indicative of the absence of measures taken to comply with the judgment: *the infringement of that obligation has not been terminated.*

17. The question remains open, it is true, whether Article 171 can be invoked against a State which, after having actually ended the infringement of its obligations during a significant period, subsequently recommenced the infringement. In that case, there could be argument as to whether the effects of the judgment had been 'exhausted'. However, there can be no hesitation in a case such as this where there is *continuous* failure by a Member State to fulfil *the same obligation.*

18. All that remains to be examined therefore is precisely whether or not Italy has adopted the necessary measures to comply with the judgment.

19. My observations on this point will be succinct.

20. The Italian Government has not really contested its non-compliance and admits to not having supplied all the required data. Furthermore, its submissions consisted of an invitation to the Commission to withdraw its action in the light of the steps now being taken. It is clear that those steps, namely the study allegedly begun by the Instituto Centrale di Statistica (ISTAT), cannot have any bearing on the declaration of infringement as

'even though Article 171 of the Treaty does not specify the period within which a judgment must be complied with, it is clear that the process of complying with a judgment must be initiated at once and must be completed as soon as possible.' [6]

21. As to the limited importance of the data which was not supplied, I would merely point out that Italy itself considers that, on the one hand, the data relating to local transport was supplied 'in general terms', and on the other hand that the data relating to international transport for groups of countries is lacking.

22. Let me make two comments.

23. First of all, the Commission rightly stresses that statistics which are not complete or 100% accurate are of no use, and that, in any event, the *de minimis* rule is not applicable in the framework of the procedure under Article 169 of the Treaty.

24. Secondly, the Italian Republic explains that the absence of data classified by group of countries results from the way in which the study undertaken at the time was organized. It suffices to recall that:

'the Court has consistently held that a Member State cannot plead internal provisions, practices or situations to justify the failure to fulfil obligations under Community law'. [6]

25. Consequently, I suggest that the Court declare that by persisting in not implementing Council Directive 78/546/EEC of 12 June 1978 on statistical returns in respect of carriage of goods by road, as part of regional statistics, notwithstanding the judgment of the Court of Justice of 11 July 1985, the Italian Republic has failed to fulfil its obligations under Article 171 of the EEC Treaty and order Italy to pay the costs.

6 — See, most recently, Case C-375/89, *Commission* v *Belgium* [1991] ECR I-383.