OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 10 October 1989 *

Mr President,
Members of the Court,

1. Leaving aside the background and details of the dispute in the main proceedings, as described in the Report for the Hearing, the preliminary question which is the subject of this opinion raises a point of principle which is precise and clear: can a recommendation within the meaning of the fifth paragraph of Article 189 of the EEC Treaty have direct effect?

2. This question calls for an equally precise and clear negative response. It is true that the Court has consistently held that 'whilst under Article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of measures covered by that article can never produce similar effects'.[1] In its judgments the Court has recognized that a number of provisions of directives, in particular, have such effects, stating that 'wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State fails to implement the directive in national law at the end of the period prescribed or where it fails to implement the directive correctly'.[2]

3. However, the Court has always stated that these judgments were based on the *binding nature* which Article 189 confers on directives and that it would be incompatible with that binding nature to hold as a matter of principle that the obligation imposed by a directive could not be relied on by the persons concerned. It would be unacceptable for a Member State to be able to plead, as against individuals, its own failure to perform the obligations imposed by the directive.

4. According to the fifth paragraph of Article 189 of the EEC Treaty 'recommendations . . . have no binding force'. As a general rule, a recommendation as defined in that article cannot therefore have direct effect, since it if could there would be no difference between the measures listed.

5. Nevertheless, the Court has consistently held that it is not the description of the measure which matters but its content and scope. Does this mean that it is necessary to ascertain the true nature of the provisions of a recommendation and in particular those referred to by the national court?

6. I think not. It is indeed necessary to check whether the measure, leaving aside its title, does in fact merely recommend that the persons to whom it is addressed adopt a certain action. But I do not think that it is necessary to pursue the examination any further. However clear, unconditional,

* Original language: French.

1 — See, in particular, the judgment of 19 January 1982 in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, paragraph 21.

2 — See judgments of 26 February 1986 in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, paragraph 46, and of 8 October 1987 in Case 80/86 *Criminal proceedings against Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 7.

precise and unequivocal (to adopt the terms used by the national court) the substantive provisions of a recommendation may be, a recommendation by definition does not impose any *obligation* as to the result to be achieved. The Member States to which it is addressed are therefore not only free to choose the form and methods by which it is implemented in national law, as they can do in the case of a directive, but they are entirely free to act on it or not. Thus it is unnecessary to examine whether or not the provisions of a recommendation leave Member States a discretion as regards their implementation in national law or enable Member States to restrict or place conditions on their application.

7. There is no doubt that the recommendations at issue in this case are true recommendations. Both the Commission Recommendation to the Member States of 23 July 1962 concerning the adoption of a European schedule of occupational diseases (*Journal officiel* 1962, 80, p. 2188) and the Commission Recommendation of 20 July 1966 on the conditions for granting compensation to persons suffering from occupational diseases (*Journal officiel* 1966, 147, p. 2696) are based on Article 155 of the EEC Treaty, which confers on the Commission a general power to 'formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary'.

8. Moreover, both recommendations are in the field of social policy and expressly refer to Article 117 or Article 118 of the EEC Treaty, or both. The Court has already pointed out that the objectives of social policy laid down in Article 117 are essentially in the nature of a programme and it has stated that Article 118, which entrusts to the Commission the task of promoting close cooperation between Member States, does not encroach upon the Member States' powers in the social field in so far as the latter is not covered by other provisions of the Treaty.[3] In its judgment of 9 July 1987 on migration policy,[4] the Court stated in particular that although the Commission is entitled to initiate consultation procedures within the social field referred to in Article 118 and to require the Member States to participate, the subject-matter of such procedures remains within the competence of the Member States, and the result to be achieved by the procedures in question cannot be imposed upon them (see paragraphs 29, 30 and 34).

9. Prevention of occupational diseases is one of the matters expressly listed in Article 118. With a view to harmonizing the national lists of occupational diseases and ultimately replacing them with a European schedule, the Commission therefore intervened in a field which is within the competence of the Member States. Thus it was impossible for the Commission to adopt binding provisions in this case. The adoption of a recommendation in the proper sense of the word was its only option.

10. I would add that the fact that the recommendations in question are more than or very nearly 25 years old cannot have any bearing on their effects in the absence of implementation by the Member States. It may, indeed, seem regrettable that after a

3 — See in particular the judgment of 29 September 1987 in Case 126/86 *Giménez Zaera* v *Instituto Nacional de la Seguridad Social y Tesoreria de la Seguridad Social* [1987] ECR 3697, paragraphs 13 and 16

4 — Judgment of 9 July 1987 in Joined Cases 281, 283, 284, 285 and 287/85 *Germany, France, the Netherlands, Denmark and the United Kingdom* v *Commission* [1987] ECR 3203

quarter of a century not all the Member States have adopted the measures needed to attain the objectives which the Commission thought it necessary to promote in the field concerned. But since recommendations are not binding on the Member States, they cannot impose upon the Member States compulsory time-limits either. The third point in the substantive part of the Recommendation of 1966, which 'requests the governments of the Member States to inform [the Commission] every two years, beginning with the next communication on the action taken on the Recommendation of 23 July 1962 concerning the European schedule of occupational diseases, of the measures adopted for the application of this recommendation', shows that the Commission wished to proceed, and could proceed, only by means of encouragement.

11. It therefore follows from all the considerations set out above that a recommendation cannot have direct effect.

12. For the sake of completeness, I would add that in my opinion the Court need not linger over the question whether it has jurisdiction to give a ruling on the interpretation of a recommendation in view of the fact that recommendations are not binding. First of all, the question asked by the national court raises the general question, by implication at least, whether a recommendation within the meaning of the fifth paragraph of Article 189 of the EEC Treaty can have direct effect, and it is therefore a question on the interpretation of the Treaty itself. Furthermore, since the question precisely concerns the effects of two particular recommendations, the jurisdiction of the Court cannot be contested on the ground that recommendations have no binding legal effects.[5] Lastly, the Court has already interpreted EEC recommendations without questioning its jurisdiction to do so. By way of example I would refer to the judgments of 15 June 1976 in Case 113/75 *Frecassetti* v *Amministrazione delle finanze dello Stato* [1976] ECR 983, and of 9 June 1977 in Case 90/76 *Van Ameyde* v *UCI* [1977] ECR 1091. Should the Court wish on this occasion expressly to confirm that it has jurisdiction, let me simply refer to the arguments set out by Mr Advocate General Warner in his Opinion of 26 May 1976 in the first of those cases ([1976] ECR 994, at p. 996):

'In contrast with Article 173 of the Treaty which provides that "the Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions", Article 177 confers on the Court "jurisdiction to give preliminary rulings concerning . . . the validity and interpretation of acts of the institutions of the Community" without any qualification. It is thus clear, in my opinion, that the reference to "acts" in Article 177 includes recommendations. Moreover I do not think it correct to say that the interpretation of a recommendation can never be relevant to a question at issue before a national court. Where, for example, a national statute has been passed for the express purpose of giving effect to a recommendation the correct interpretation of that statute may well depend on that of the recommendation. Whether it does so

5 — In this same context, it should be noted that it was in interpreting Council 'resolutions', which essentially only expressed the political will of the Council and of the representatives of the governments of the Member States, that the Court stated that they could not produce effects in law on which interested parties could rely before the courts (see judgment of 24 October 1973 in Case 9/73 *Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135, paragraph 40) and could not engender effects which could be used against individuals (see judgment of 3 February 1976 in Case 59/75 *Pubblico Ministero* v *Manghera* [1976] ECR 91, paragraph 21).

depend or not is a matter for the national court concerned. The position in this regard is, I think, analogous to that obtaining in regard to directives, as to which see Case 32/74 *Haaga* [1974] ECR 1201. The circumstance that directives are binding on Member States whereas recommendations are not cannot in my opinion make any material difference.' [6]

13. I should add that in its judgment of 20 May 1976 in Case 111/75 *Mazzalai* v *Ferrovia del Renon* [1976] ECR 657, the Court had already expressly stated with regard to a directive that,

'regardless of the effects of the directive, . . . an interpretation of the directive may be helpful to the national court so as to ensure that the law adopted for the implementation of the directive is interpreted and applied in a manner which conforms to the requirements of Community law' (paragraph 10).

14. In conclusion I propose that, in answer to the preliminary question referred by the tribunal du travail, Brussels, the Court should rule as follows:

'A recommendation within the meaning of the fifth paragraph of Article 189 of the EEC Treaty (such as the Commission Recommendation to the Member States of 23 July 1962 concerning the adoption of a European schedule of occupational diseases or the Commission Recommendation to Member States of 20 July 1966 on the conditions for granting compensation to persons suffering from occupational diseases) is not capable of producing direct effects.'

6 — In his study entitled 'Das Vorabentscheidungsverfahren vor dem Gerichtshof der Europaischen Gemeinschaften', Baden-Baden 1986, p 25, Mr Everling refers in this context to the judgment of 15 January 1986 in Case 44/84 *Hurd* v *Jones* [1986] ECR 29, in which the Court stated that it had jurisdiction to interpret measures such as those referred to in Article 3 of the Act of Accession of 1972 (in particular declarations, resolutions and other statements concerning the European Communities) even though they did not fall within the categories in Article 177 of the EEC Treaty, but only in so far as it was necessary to define them or examine them in order to determine the scope of Article 3 (see paragraphs 20 to 22).