OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 3 FEBRUARY 1982 [1]

Mr President,
Members of the Court,

In this case the Commission requests the Court to declare that the Italian Republic has failed to fulfil its obligations under the Treaty in that it has failed to implement the Council Directive of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products (76/768/EEC, Official Journal, L 262, p. 169) within the prescribed period.

According to Article 14 of the directive the Member States must bring into force the provisions needed in order to comply with the directive.

So far as the facts, the course of the procedure and the contents of the directive are concerned, I refer to the report for the hearing.

The Italian Government has pointed out that on 22 December 1972 it had approved a draft law for the implementation of the directive and laid it before parliament. I note, incidentially, that this was only about one month before the expiry of the period for implementing the directive. However, the draft did not become law because in the meantime Parliament was dissolved. Thereafter the Italian Government again introduced a draft law which, however, some one-and-a-half years later has still not become law. Despite reassurances that this is to be expected within a short time it is to be inferred from remarks made by the representative of the Italian Government that a certain amount of time will again be involved. This appears to be connected with the fact that at present there is, within the Italian legal system, scarcely any sort of specific legislation in the field of cosmetics and with the complex nature of the subject-matter. It appears from what was said by the representative of the Italian Government in the course of the oral proceedings that there is, in addition to the government's draft law, a private member's bill as well.

Be that as it may, it may be stated as a fact that the Italian Government has at no time in the procedure disputed that Italy has failed to adopt the measures needed for the implementation of the directive.

This state of affairs is covered by the settled case-law of this Court to the effect that a Member State may not rely upon circumstances or practices in its national legal system in order to justify its failure to fulfil obligations imposed upon it by a directive.

My opinion might be terminated here but for two aspects which merit closer consideration.

The first is that the Italian Government requests the Court to take into consideration the fact that it endeavoured to implement the directive as far as was possible, within the limits of its existing powers in that field, and in anticipation of the adoption of the implementing law. Before considering the question of the extent of which the Court may in fact consider this matter, it is important, in my view, to examine more clearly the

1 — Translated from the Dutch.

content and purpose of the directive. I concur in the opinion of the Commission that the directive is intended to achieve a complete harmonization of the laws of the Member States concerning cosmetic products with regard both to their composition, and to their packaging and labelling. This follows in my view particularly from Article 3, which reads: "Member States shall take all necessary measures to ensure that only cosmetic products which conform to the provisions of this directive and its annexes may be put on the market"; and from Article 7, particularly the first paragraph thereof, according to which "Member States may not, for reasons related to the requirements laid down in this directive and the annexes thereto, refuse, prohibit or restrict the marketing of any cosmetic products which comply with the requirements of this directive and the annexes thereto." Moreover, Article 12 states the conditions under which the Member States are still permitted provisionally to prohibit the marketing of products, or to subject them to special conditions where they present a hazard to public health although they comply with the requirements of the directive. It follows from the purpose and content of the directive that as from the expiry of the implementing period cosmetic products must comply with the requirements of the directive. Having regard in particular to Article 3, it is my belief that the directive creates, with regard to products which have been placed on the market in a Member State, a presumption of conformity with its requirements where it had led in the Member State to the adoption of the necessary implementing measures.

The competent authorities in the Member States must also be able to have confidence that products from other Member States comply with the requirements of the directive. Only in that way is it possible for the restrictions on trade, apart from random spot-checks or checks carried out in response to complaints, to remain confined, in principle, to the cases which the directive permits. Where on the other hand cosmetic products are imported from another Member State in which the directive has not yet been implemented, it must always be permitted to verify whether the imported products comply with the provisions of the directive. Besides, manufacturers of cosmetic products also have an interest in the effectiveness of the directive in order that they may be able to foresee clearly that their products may be standardized throughout the whole Community and that they may adapt their production process accordingly. That also applies where they place their products only on the national market.

Finally, the scrupulous compliance with the directive is of great importance to consumers because the objective of legislation in this field is to protect public health and so very precise provisions are contained in the directive regarding both the composition of products and the requirements as to their labelling and packaging. In Annex II to the directive, for example, 361 substances are listed which may not be contained in cosmetic products.

All this implies that the provisions of the directive must be meticulously and clearly incorporated in the legal system of the Member States and that scrupulous checks must be carried out as to compliance with those provisions.

As I have previously remarked it is clear that there are no specific provisions in the Italian legal system in the field of

cosmetic products. The provisional measures which the Italian Government has adopted derive from its existing powers in the field of public health. According to the analysis which the Commission has provided these measures are, however, frequently unclear and, so far as can be ascertained, far from comprehensive. The Italian Government has not disputed this. Indeed on one occasion in the course of the proceedings the Italian measures were so described as if they amounted to a partial implementation of the directive. I question whether that is in fact an accurate description of these measures, inasmuch as they are not so much intended as a genuine implementation of the directive as provisional and incomplete measures in anticipation of the entry into force of the Law.

Be that as it may, it appears to me that this Court may not have regard to the present Italian measures in view of the fact that the Commission has requested it to declare that the Italian Republic has failed to adopt the provisions needed to implement Council Directive 76/768/EEC. Accordingly, the Court can only find whether or not there was a failure to implement the directive at the time of expiry of the prescribed period. Partial or other implementation which is not in accordance with a directive may not influence the finding of the Court that there has been a failure to implement the directive. Besides it is clear, as I have previously stated, that only complete implementation can ensure the effectiveness of the directive. I, too, am accordingly of the opinion that the Italian Republic has failed to implement the directive within the prescribed period.

A second aspect which merits closer consideration is the request made to the Court by the representative of the Italian Government in the course of the oral proceedings for the Italian Republic to be granted an extension of the time-limit for implementing the directive. In my opinion the Court cannot accede to that request, as the Court itself has also held in its recent judgment of 10 November 1981 in Cases 28 and 29/81 *Commission* v *Italian Republic*. The representative of the Italian Government, at any rate if I have understood him correctly, emphasized, however, on this occasion, that he did not have especially in mind the time-limit which the Commission fixes in its reasoned opinion under Article 169 of the EEC Treaty with which the above-mentioned judgments of the Court were particularly concerned.

I am, however, of the opinion that it is *a fortiori* not within the powers of the Court to fix a further definitive time-limit for the implementation of the directive when confronted with an express provision on the subject contained in the directive itself. It is the task of the Court, in the context of this procedure, where the Commission has decided to bring the case before the Court after the expiry of the period laid down in the reasoned opinion, to find whether or not there has been a breach of an obligation under the Treaty. Where there has been a failure to implement a directive in good time all that is relevant, with regard to the point in time, is what is laid down on that matter in the directive itself. Only an alteration of the time-limit in the directive itself can be relevant in law for the purpose of the Court's decision as to whether or not there has been implementation within the prescribed period.

In conclusion I am of the opinion that the application of the Commission should be granted and the Italian Republic should be ordered to bear the costs of the case.