JUDGMENT OF THE COURT OF 11 APRIL 1978 [1]

Commission of the European Communities v Kingdom of the Netherlands

"Metrology"

Case 95/77

Member States — Failure to apply a directive — Effect on the functioning of the common market — Absence thereof — Justification for failure to fulfil obligations under a directive — Not permissible
(EEC Treaty, Art. 169)

A Member State may not invoke, for the purpose of justifiying a failure to fulfil obligations under a harmonizing directive, the argument that the failure to apply that directive has had no adverse effect on the functioning of the common market.

In Case 95/77

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by R. C. Fischer, Legal Adviser to the Commission, acting as Agent, with an address for service in Luxembourg at the offices of Mario Cervino, Legal Adviser to the Commission, Jean Monnet Building, Kirchberg, Luxembourg,

applicant,

v

KINGDOM OF THE NETHERLANDS, represented by A. Bos, Assistant Legal Adviser at the Ministry for Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Embassy of the Kingdom of the Netherlands,

defendant,

APPLICATION for a declaration that, by not putting into force within the prescribed period the laws, regulations or administrative provisions needed in order to comply with the provisions of Council Directive No

1 — Language of the Case: Dutch.

71/347/EEC 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 (Official Journal, English Special Edition 1971 (III), p. 852 *et seq.*, as amended by Annex I to Article 29 of the Act concerning the Conditions of Accession and notified to the Member States on 15 October 1971), the Kingdom of the Netherlands has failed to fulfil an obligation under the Treaty establishing the European Economic Community,

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts, procedure, conclusions and submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

Council Directive No 71/347/EEC 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 (published in the Official Journal of the European Communities, English Special Edition 1971 (III), p. 852 *et seq.*, as amended by Annex I to Article 29 of the Act concerning the Conditions of Accession and notified to the Member States on 15 October 1971) is one of the Council directives aiming to eliminate technical barriers to intra-Community trade which result from disparities between the provisions laid down by law, regulation or administrative action in Member States making the marketing or use of goods subject to compliance with certain technical conditions.

The directive is one of a series of directives relating to measuring instruments and was provided for in the General Programme for the elimination of technical barriers to trade which result from disparities between the provisions laid down by law, regulation or administrative action in Member States (Official Journal, English Special Edition, Second Series, IX, Resolutions of the Council and of the Repres-

entatives of the Member States, p. 25 *et seq.)* adopted by the Council on a proposal from the Commission on 28 May 1969.

The system which forms the basis of the Community directives on measuring instruments was introduced by an "outline directive" adopted by the Council on 26 June 1971 on the approximation of the laws of the Member States relating to common provisions for both measuring instruments and methods of metrological control (Official Journal, English Special Edition 1971 (II), p. 707, amended by Council Directive No 72/427/EEC of 19 December 1972, Official Journal, English Special Edition 1972 (28-30 December), p. 71), the basic objective of which is to harmonize the provisions on national controls carried out prior to the placing on the market of those instruments. The outline directive is based on the mutual recognition of controls. It provides for an "EEC pattern approval" and the affixing of a corresponding mark after verification. An instrument bearing that mark may move freely within the Community without control at the frontiers.

The objective of Directive No 71/347/EEC is more particularly to "approximate" the laws of the various Member States relating to the standard mass per storage volume of grain, in particular by giving a uniform definition of the EEC standard mass per storage volume, by introducing a reference standard instrument and by laying down the requirements which must be satisfied by the measuring instruments used to determine the EEC standard mass per storage volume.

Directive No 71/347/EEC differs from the other measures adopted within the same context because it creates a standard by means of which the weight of a quantity of cereals contained in a receptacle of a specific volume may be established; this in fact provides information as to the quantitative and commercial value of the grain in question; moreover, that directive aims at the "full harmonization" and not the "optional" harmonization of the measure (standard mass per storage volume) which it defines and which thus becomes the only measuring unit permitted in trade in grain between Member States.

So far as the incorporation of the directive in national law is concerned, Article 7 provides that:

"1. Member States shall put into force the laws, regulations or administrative provisions needed in order to comply with this directive within 18 months of its notification and shall forthwith inform the Commission thereof.

2. Member States shall ensure that the texts of the main provisions of national law which they adopt in the field covered by this directive are communicated to the Commission."

The period within which the Member States, to whom Directive No 71/347/EEC was addressed, had to comply with the provisions thereof expired on 15 April 1973.

By letter of 14 February 1975, the Commission gave the Government of the Kingdom of the Netherlands the opportunity to submit its observations under the first paragraph of Article 169 of the Treaty. The Permanent Representation of the Kingdom of the Netherlands replied by letter of 7 April 1975 that as the Netherlands law on weights and measures (the IJkwet 1937) did not permit the directive to be implemented it might be possible to do so within the context of uniform Benelux regulations which were the subject-matter of a Convention signed in Brussels on 11 March 1970 and ratified by the Netherlands by law of 1 November 1972. Since however it was

still not possible to foresee at what date the two other parties would ratify it, the Government of the Netherlands had decided to give itself the necessary power to amend the IJkwet and to inform the Commission thereof when the draft amendment had been approved. The Netherlands Government also promised that there would be an accelerated parliamentary procedure.

As the promised amendment was not made, the Commission sent a reasoned opinion to the Netherlands Government on 22 December 1975 requesting it to take the necessary measures within one month. By letter of 22 January 1976, the Permanent Representation of the Kingdom of the Netherlands informed them that a draft law amending the IJkwet was to be submitted to the Parliament within a short period.

The Permanent Representation of the Kingdom of the Netherlands then, by letter of 27 July 1976, sent the Commission a copy of the Staatsblad 1976 No 324 containing the law of 2 June 1976 amending the IJkwet. It added that the implementing orders were in preparation. In the absence of the implementing orders, the Commission considered that the Kingdom of the Netherlands had not complied with the reasoned opinion. Its application was registered at the Court of Justice on 28 July 1977.

The Court, after hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *Commission* claimed that the Court should:

"1. Declare that, by not adopting within the prescribed periods the laws, regulations or administrative provisions needed in order to comply with the provisions of Council Directive No 71/347/EEC of 12 October 1971, the Kingdom of the Netherlands has failed to fulfil an obligation under the Treaty;

2. Order the Kingdom of the Netherlands to pay the costs."

The Kingdom of the Netherlands left "to the discretion of the Court" the action to be taken with regard to the conclusions contained in the application lodged by the European Commission.

III — Summary of the submissions and arguments of the parties put forward during the written procedure

The *Commission* recalls that according to Article 189 of the Treaty a directive is binding in nature and refers to the case-law of the Court with regard to compliance with the periods within which enactments must be implemented, in particular the judgment given on 26 February 1976 in Case 52/75 *Commission of the European Communities* v *Italian Republic* [1976] ECR 277). Since it did not adopt within the prescribed periods the laws, regulations or administrative provisions needed in order to comply with the provisions of Directive No 71/347/EEC of 12 October 1971, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive.

The *Government of the Netherlands* recognizes that "there is no difference of opinion" between the parties over the fact that the directive was not implemented within 18 months of its notification. It "wonders however whether it was really necessary for the Commission to bring this matter before (the) Court". It recalls the correspondence which it claims proves that the Commission was kept informed of

the "progress of the implementing measures". Moreover, the absence of laws, regulations and/or administrative measures has had no adverse effect on the Common Market.

The defendant government recalls that initially the intention was to implement the EEC directives in the field of metrology on the basis of the Benelux Convention on metrology and of the Protocol amending that Convention, these two enactments having been ratified by the Netherlands on 30 November 1972. Since, however, in 1975 it was impossible to foresee at what date the States who were parties thereto would ratify them it was decided at that time to amend the IJkwet, which was done by law of 2 June 1976. The preparation of the implementing orders had taken some time because of the structure of the IJkwet and the fact that the EEC directives in the field of metrology could not all be implemented with equal ease on the basis of the outline directive.

The failure to implement them *de jure* did not *de facto* have any adverse effect on the Common Market. No enactment adopted by a State is capable of causing discrimination in intra-Community trade because the Netherlands neither refuses nor restricts the placing on the market of the measuring instrument in question. "The Netherlands verification authorities have until now received no applications for EEC pattern approval and no applications for EEC initial verification in respect of instruments referred to in the directive. As far as is known such instruments are not manufactured in the Netherlands". *De facto*, they are used there; the royal association Het Comité van Graanhandelaren (committee of grain merchants) possesses such an instrument which is determining in the case of disputes relating to standard mass per storage volume. That association carries out the necessary analyses as laid down in the conditions of purchase of the Voedselvoorzienings Interventiebureau (intervention and supply office for foodstuffs), an organization which deals with intervention procedures in the Netherlands within the context of the Common Agricultural Policy. Discrimination, the danger of which was pointed out by the Court in Case 52/75, is therefore impossible. The concern for effectiveness shown by the Court in Case 30/72 *(Commission of the European Communities* v *Italian Republic)* with regard to compliance with periods within which enactments must be implemented should not arise in connexion with a failure to fulfil an obligation which has no adverse effect on the Common Market, especially since "the Kingdom of the Netherlands is conscientiously preparing the necessary provisions" and is keeping the Commission informed thereof.

The *Commission* replies by taking note of the statements of the Government of the Kingdom of the Netherlands.

The fact that it is informed does not alter the delay in the implementation of the directive of more than four years which has been established. Moreover, the Commission would have found it difficult to suspend the procedure which has already been initiated since the information supplied gave no indication as to the date envisaged for the implementation of the directive. The evidence of the uncertainty existing in this respect is that even the defence did not mention any date. This uncertainty is caused partly by the method followed. In 1975 when the periods within which the directives were to be implemented had already expired two years earlier and when the Commission had already initiated the procedure under Article 169, the Netherlands authorities chose a method invoking three stages: the amendment of the IJkwet; the adoption of an outline decision; and the introduction of specific supplementary regulations. The second stage has still not been completed whilst the drafts of

specific regulations have not yet been communicated to the Commission. The defendant government should therefore have chosen another method or in any case have implemented it earlier. In other fields and with regard to other comparable directives the Netherlands Government has in fact found *ad hoc* solutions.

The argument relating to the Benelux Convention is no longer relevant in any case since Belgium and Luxembourg have in the meantime implemented the directive. Nor, finally, is the argument relating to the particular difficulty of implementing the directive in question on the basis of the outline directive at all convincing since the latter was adopted unanimously by the Council in accordance with Article 100 of the Treaty.

The Common Market has in fact been affected by the failure to fulfil the obligation:

— The Netherlands has not provided for an "EEC pattern approval" or an "EEC initial verification" for the measuring instruments in question. The fact that the Netherlands authorities for the verification of weights and measures have received no applications is not surprising since those concerned were no doubt aware of the absence of legal provisions in that connexion. This fact may hinder the development of the production in the Netherlands of those instruments which must in fact be approved or verified in another Member State which is normally more difficult than in the country itself;

— Any use in Netherlands trade of the measure in question is in the present circumstances an actual use of a "standard mass per storage volume" which cannot be recognized, because of the absence of the formalities and of the mark laid down in the directive, as an "EEC standard mass per storage volume".

In addition it is not necessary to prove that the application is appropriate in order to use the procedure under Article 169.

The *Netherlands Government*, in its rejoinder, maintains that the Commission has brought the matter before the Court needlessly since the reason why it kept the Commission informed of the progress of the implementing measures was not by way of excuse but so that the conclusion could be drawn from the information which it gave that it was using all means in order to adopt those measures. It has not shown needless delay and the "first stages" of the implementing measures are of interest: thus, the law of 2 June 1976 contains a certain number of specific provisions revealing a link with the application of Directive No 71/347. Specific provisions of the same type are contained in a draft EEC general decision on metrology (in which standard masses per storage volume are expressly mentioned as being capable of obtaining the EEC approval and in which their use is subject to guarantees), a draft of which the Netherlands Government offers to produce in this procedure.

With regard to the system of implementation used, the Netherlands Government recognizes that the legislative technique chosen cannot exempt if from complying with a prescribed period. However, it mentions the possibility of having the periods extended in the future and of using the unanimity rule so that a directive corresponds to the concepts established in national legislation, which would in no way help to facilitate the Council's deliberations. In this case it preferred to insert the directive in question into a suitable legal framework enabling a large number of EEC directives to be applied fully, wholly and rapidly.

The directive in question is particularly difficult to implement, as shown by the

very frequent meetings of the working party responsible for the preparation of the measures implementing the IJkwet which was amended in 1976. The *ad hoc* or provisional measures could not anticipate the necessary amendment of the IJkwet. Finally, the exchange of views within the context of the Benelux Convention had begun within the required time but Belgium and Luxembourg had apparently, in contrast to the Netherlands, an appropriate and sufficient legal basis to implement the directives in the field of metrology.

The Netherlands Government maintains that the absence of implementing measures has had no effect on the functioning of the Common Market. As there is no solution with regard to metrology in Netherlands legislation those concerned directly contact the weights and measures authorities; however, the latter have until now had no matters brought before them. The suppositions mentioned by the Commission with regard to the conduct of those concerned, allegedly influenced by the existence of a lacuna in the legislation, are pure hypotheses.

With regard to the progress of the work relating to the adoption of the Netherlands implementing measures, the Netherlands Government wishes to take stock: the law of 2 June 1976 (Staatsblad No 324) came into force on 1 January 1978 as follows from the Royal Decree of 28 October 1977 (Staatsblad No 615), which is annexed to the rejoinder; the drafts of a general EEC decision on metrology and of a decision amending the decision on standard measures (necessary to enable designation of the standard mass per storage volume which, as a standard instrument for the determination of the EEC natural weight, comes within the jurisdiction of the Comité van Graanhandelaren) were presented to the Council of Ministers at the end of last November; finally, work on the draft decision on measuring units, which was necessary in order to provide the designation "EEC natural weight" with the necessary guarantees, is at quite an advanced stage.

The Netherlands Government hopes that the complete series of measures will be ready towards the middle of 1978.

IV — Oral procedure

The parties appeared at the audience on 21 February 1978. They developed the arguments put forward during the written procedure. They replied to various questions put to them by the Court; in particular it was stated that the two other States who were parties to the Benelux Convention have applied the directive (Belgium on 14 March 1975).

The Advocate General delivered his opinion at the hearing on 8 March 1978.

Decision

1 By application lodged at the Registry on 28 July 1977, the Commission brought before the Court, under Article 169 of the EEC Treaty, an application for a declaration that the Kingdom of the Netherlands, by not adopting within the prescribed period of 18 months the laws, regulations or administrative provisions needed in order to comply with the provisions of

Council Directive No 71/347/EEC 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 (Official Journal, English Special Edition 1971 (III), p. 852 *et seq.),* has failed to fulfil an obligation under the Treaty.

2 This directive is one of a series of directives relating to measuring instruments expressly provided for in the General Programme for the elimination of technical barriers to trade which result from disparities between the provisions laid down by law, regulation or administrative action in Member States which was adopted by the Council on 28 May 1969 (Official Journal, English Special Edition, Second Series, IX, p. 25).

3 This general programme was implemented by an outline directive of the Council, Directive No 71/316/EEC of 26 July 1971 on the approximation of the laws of the Member States relating to common provisions for both measuring instruments and methods of metrological control (Official Journal, English Special Edition (II), p. 707), whose aim was essentially to harmonize the national provisions relating to the control of those instruments and which was based on the fundamental principle of mutual recognition of controls.

4 With this general objective in mind, Directive No 71/347/EEC aims more particularly to harmonize the legislation of the various Member States relating to the standard mass per storage volume of grain, in particular by giving a uniform definition of the EEC standard mass per storage volume by introducing a reference standard instrument and laying down the conditions which must be satisfied by the measuring instruments used to determine the EEC standard mass per storage volume.

5 Thus the exclusive and compulsory use of an EEC standard mass per storage volume in all Member States will have the effect of preventing disputes in intra-Community trade about the method of measuring grain.

6 Under Article 7 of Directive No 71/347/EEC, the Member States must adopt the appropriate measures for complying therewith within a period of 18 months of its notification; that period expired on 15 April 1973 without the Netherlands authorities' having put into force the laws, regulations or administrative provisions needed.

7 The Commission, in application of Article 169 of the EEC Treaty, gave the Kingdom of the Netherlands, by letter of 14 February 1975, the opportunity to submit its observations.

8 The defendant has not denied the failure to fulfil obligations under the Treaty complained of and has expressed its regrets at having been unable to adopt the necessary provisions of national law in due time and informed the Commission of the progress of the implementing measures, pointing out that the absence of laws, regulations or administrative provisions in the field covered by Directive No 71/347/EEC has had no adverse effect on the functioning of the Common Market.

9 Initially, the intention of the Netherlands Government had been to implement the EEC directives in the field of metrology on the basis of a Benelux Convention of 11 March 1970 ratified by the Netherlands on 30 November 1972.

10 As that Convention had not been ratified by Belgium and Luxembourg and because the Commission had continued the procedure under Article 169 of the Treaty on 22 December 1975 by sending the Netherlands Government the reasoned opinion provided for in that article, the Kingdom of the Netherlands decided to adopt another course and to amend the IJkwet (law on weights and measures) of 1937, Staatsblad No 627, so as to have available an appropriate enactment for the purpose of implementing the EEC directives in the field of metrology.

11 On 2 June 1976 the law amending the IJkwet was passed, enabling the Netherlands authorities to adopt a measure which, for the purpose of implementing Directive No 71/347/ EEC, had to be followed by specific and more detailed rules in respect of which the Netherlands Government declared in its pleadings and at the hearing on 21 February 1978 that it hoped to be able to bring them into force during 1978.

12 This does not alter the fact that the measures intended to implement the directive have not been adopted within the prescribed period.

13 The argument that the failure to apply that directive has had no adverse effect on the functioning of the Common Market cannot be accepted in view of the objective pursued by that directive.

14 It follows that, since the Kingdom of the Netherlands has not put into force within the prescribed period the provisions needed to comply with Council Directive No 71/347/EEC on the approximation of the laws of the Member States relating to the measuring of the standard mass per storage volume of grain, it has failed to fulfil an obligation under the Treaty.

Costs

15/17 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs, if they have been asked for. The defendant has failed in its submissions. It is therefore necessary to order it to pay the costs.

On those grounds

THE COURT

hereby:

1. **Declares that, by not putting into force within the prescribed period the provisions needed to comply with Council Directive No 71/347/EEC 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, the Kingdom of the Netherlands has failed to fulfil an obligation under the Treaty.**

2. **Orders the defendant to pay the costs.**

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 11 April 1978.

A. Van Houtte
Registrar

H. Kutscher
President