OPINION OF ADVOCATE GENERAL TESAURO

delivered on 25 September 1997 *

1. By an application under Article 169 of the EC Treaty lodged on 26 July 1996, the Commission seeks a declaration by the Court that the Kingdom of Belgium has failed to fulfil its obligations under Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products [1] (hereinafter the 'directive').

In particular, the Commission alleges that the Kingdom of Belgium has failed to adopt the laws, regulations and administrative provisions necessary for the harmonization, under the terms of the directive, of provisions relating to construction products.

The legislative background

2. The principal objective of the directive is to ensure that construction products in all the Member States have such characteristics 'that the works in which they are to be incorporated, assembled, applied or installed ... satisfy the essential requirements referred to in Article 3' of the directive. [2] In that connection Article 3 refers to Annex I to the directive which contains the list of those requirements. Those are also specified in 'interpretative documents' drawn up by the technical committees entrusted with that task by the Commission. The interpretative documents constitute a source of reference for the definition of technical specifications and guidelines for the purposes of obtaining European technical approval.

3. The directive was notified to all Member States on 27 December 1988 and its addressees ought to have complied with it within 30 months of the date of notification, [3] that is to say by not later than 27 June 1991, by adopting and bringing into force the laws, regulations and administrative provisions necessary.

The directive was subsequently amended by Article 4 of Council Directive 93/68/EEC of 23 July 1993, [4] intended to bring a number of directives removing technical barriers to

* Original language: Italian.

1 — OJ 1989 L 40, p. 12.

2 — See Article 2(1) of the directive.

3 — See Article 22 of the directive.

4 — OJ 1993 L 220, p. 1.

trade into line with the new system adopted by the Council and Commission in regard to certification, testing and conformity assessment of products. The Member States ought to have complied with the directive in 1993 by adopting and publishing the necessary measures by 1 July 1994 at the latest and by applying them with effect from 1 January 1995.

Procedure

4. Since the period for transposition of the directive had expired and the Belgian Government had failed to inform the Commission of the provisions adopted by it for the purpose of transposition, [5] the Commission on 20 May 1992 sent a formal letter to the Kingdom of Belgium alleging that it had infringed the directive, together with Articles 5 and 189 of the Treaty.

When it had received no reply to that letter, [6] the Commission on 18 June 1993 issued a reasoned opinion under Article 169 of the Treaty, alleging that the defendant State in these proceedings had failed to fulfil its obligations under the directive, inasmuch as it had not adopted the provisions necessary to comply with it.

5. The Belgian Government replied to the reasoned opinion in an initial communication in which, at the same time as pointing out that the failure to transpose the directive had not in any event created any obstacle to the free movement of goods on the internal market owing to the fact that the Commission had adopted no implementing decisions, it indicated that a ministerial working party had embarked on the drafting of a legislative bill and a draft royal decree which were in the process of being finalised. Those bills were not subsequently adopted.

In a subsequent communication addressed to the Commission in December 1993, the Belgian Government forwarded to it the abovementioned bills.

Not until June 1996 did the Belgian Government notify to the Commission the text of the law of 25 March 1996 which had been definitively adopted in order to adapt Belgian legislation to the directive. [7]

5 — Under Article 22 of the directive the Member States are 'forthwith to inform' the Commission of the provisions adopted in order to comply with the directive. Specific obligations to communicate matters to the Commission are provided for in other provisions of the directive (see, for example, Article 18 which requires Member States to forward to the Commission the names and addresses of certification bodies, inspection bodies and testing laboratories).

6 — As stated by the Commission in its originating application, without being contradicted.

7 — Law implementing the directive of the Council of the European Communities of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products.

6. Since the Commission took the view that the law adopted did not constitute an appropriate transposition of the directive in the Belgian legal order it brought these proceedings before the Court.

Substance

7. I am of the view that the Commission's claim is well founded and that it should therefore be upheld.

8. I would first of all observe that, upon expiry of the period allowed to the Kingdom of Belgium in the reasoned opinion, the Kingdom of Belgium had not even endeavoured to communicate to the Commission the draft legislative bill and royal decree which it subsequently forwarded.

9. In any event, even if regard is had to the law of 25 March 1996, that law does not constitute a correct transposition of the directive.

Save for the provisions relating to the establishment and prosecution of infringements and to penalties in that connection (Articles 4 to 6), the law of 25 March 1996 contains no provision which in actual fact transposes into the Belgian legal order the objectives laid down in the directive. In fact, Articles 2 and 3 simply delegate to the King the power to adopt by royal decree any measure necessary in order to ensure performance of the obligations under the directive.

In the absence of any indication as to the principles and guiding criteria with which subsequent implementing rules are to comply, the law in question may not even be described as a 'framework law', as the Belgian Government asserts, as that type of legislative enactment is commonly understood, given that it is simply an instrument whereby the Belgian legislature has identified the source called upon to implement the directive, to the extent that the subsequent royal decree will have to refer directly to the provisions of the directive, since the 1996 enactment contains no substantive mention of it.

10. There has thus hitherto been no transposition in the Belgian legal order of the 'essential requirements', of the concept of technical specifications of the meaning to be assigned to the EC mark on products and, in short, of any of the means provided for by the directive to secure the removal of technical barriers in the construction sector.

11. The defending State acknowledges in its pleadings that it did not comply correctly with the directive, but it seeks to justify that conduct by citing both reasons inherent in

its internal legal order and reasons connected with the Community legal order.

As to the former, which essentially concerned the setting up and notification of inspection bodies and the creation of a fund provided for in Article 7 of the law of 25 March 1996 and intended to ensure the functioning of those bodies, suffice it to recall that a Member State cannot justify a failure to fulfil obligations by reference to national legislative or administrative practices, or to difficulties encountered in the functioning of the institutional structure of the State or any other national contingency. [8]

12. With regard to justifications based on possible failings at Community level, even if they were found to exist, such justifications would not preclude the adaptation of the internal legal order to the directive, given that the Belgian legislature has merely to ensure in future that the provisions adopted are incorporated, once the Commission or the Community bodies entrusted with the task have adopted the necessary implementing measures.

As to the fact that the directive was amended in part by the 1993 directive, [9] in respect of which the periods for transposition granted to the Member States expire at a date later than that of the reasoned opinion, that fact is also entirely without relevance. In fact, the second directive simply gives rise to a new and additional obligation with regard to conformity on the part of its addressees, without however at the same time cancelling the corresponding obligations under the previous partially amended directive.

The possibility that the Council may in the future make additional amendments to the directive, possibly on the basis of the Slim Report, [10] thus simplifying its application in practice, cannot justify failure to adapt the national legal order and with it the infringement of the directive itself and Article 189 of the Treaty. [11]

It may, moreover, be observed in passing that the Belgian Government itself was alive to the need to comply with the directive in

8 — Nor does it avail the Member State to justify a temporary failure to fulfil obligations by reliance on force majeure. Moreover, no such reliance was placed. See judgment in Case 101/84 *Commission* v *Italy* [1985] ECR 2629.

9 — See paragraph 3 above.

10 — This is a report submitted on 26 November 1996 to the Council by a Working Party which stems from a pilot project set up by the Commission in regard to the sector covered by the directive and intended to simplify the legislation applicable to the internal market (*Simplification of Legislation for the Internal Market*).

11 — In a case in which the defendant government claimed in its defence that the reasoned opinion had been received at the same time as directives amending the directive which it had not transposed were in the course of being adopted, the Court held that '... the fact that the Community institutions amend directives is not sufficient to release Member States from their obligation to comply with those directives within the prescribed period' (see judgment in Case C-182/94 *Commission* v *Italy* [1995] ECR I-1465, paragraph 6).

another manner, since, at least initially (by means of the draft bills notified in 1993), it chose to draw up a draft royal decree containing detailed substantive provisions transposing the directive no trace of which is to be found in the text of the law of 25 March 1996.

13. In essence, difficulties of application, the absence of actual implementing measures (technical and other specifications), the possibility and the expectation of amendments in the near future are all factors which do not release the Member State from the obligation to comply with the directive within the period laid down by it.

Costs

14. The finding of a failure to fulfil its obligations entails the consequence that the Kingdom of Belgium has been unsuccessful in all its pleas, with the result that it must be ordered to pay the costs.

Conclusion

15. In the light of the foregoing observations I propose that the Court should:

— hold that, by not adopting the laws, regulations and administrative provisions necessary to comply with Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products, the Kingdom of Belgium has failed to fulfil its obligations under that directive;

— order the Kingdom of Belgium to pay the costs.