OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 19 September 1991 *

Mr President,
Members of the Court,

1. In these proceedings for failure to fulfil an obligation under the Treaty, the Commission accuses the Hellenic Republic of not transposing into national law Council Directive 82/470/EEC of 29 June 1982 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in certain services incidental to transport and travel agencies (ISIC Group 718) and in storage and warehousing (ISIC Group 720). [1]

2. That directive refers in the first recital of its preamble to the legal position under the EEC Treaty in the area of freedom of establishment and the provision of services:

'pursuant to the Treaty, all discriminatory treatment based on nationality with regard to establishment and provision of services is prohibited as from the end of the transitional period . . . '.

3. On that basis the third recital of the preamble describes the aim of the directive as follows:

'in the absence of mutual recognition of diplomas and of immediate coordination, it nevertheless appears desirable to facilitate the attainment of freedom of establishment and freedom to provide services in respect of the activities falling within ISIC Groups 718 and 720 by the adoption of measures intended primarily to avoid causing exceptional difficulties for nationals of Member States in which the taking up of such activities is not subject to any conditions'.

4. To that end the directive provides for a series of measures to be adopted in order to facilitate the exercise of the activities set out in Article 2. They concern, first of all, the obligations to which the Member States are subject as *host States.* Article 4(1) to (5) of the directive deals in that respect with the recognition of proof of good repute, of the fact that the person concerned has not previously been declared bankrupt and of his financial standing. Articles 5, 6 and 7 concern the requirements of the host State with regard to qualifications. Articles 6 and 7(1), (2) and (3) define for that purpose the cases in which a certain amount of professional experience is to be recognized as proof of the possession of the requisite knowledge and ability. Pursuant to Article 5, Member States in which the taking up or pursuit of any activity to which the directive applies is subject to the satisfaction of

* Original language: German.
1 — OJ 1982 L 213, p. 1.

certain requirements concerning qualifications are to ensure that any beneficiary who applies therefor is to be provided, before he establishes himself or takes up any activity on a temporary basis, with information as to the rules governing the activity which he proposes to pursue.

5. In order to ensure that the system envisaged by the directive operates correctly, the Member States are required as *States of origin*, pursuant to Article 4(6) and Article 7(4), to designate, within the prescribed period for implementation, the authorities and bodies competent to issue the respective certificates and forthwith to inform the other Member States and the Commission thereof.

6. Article 8 sets the period within which the directive is to be transposed at 18 months from its notification. Since the directive was notified to the Member States on 2 July 1982, that period expired on 2 January 1984.

7. Since the Commission did not receive any information within that period either from the defendant or in other way regarding implementing measures in Greece, it came to the conclusion that the defendant had not fulfilled its obligations under the directive. It therefore initiated the procedure under Article 169 of the EEC Treaty by a letter of 16 April 1985. Both in its letter of formal notice and in the reasoned opinion the Commission called for notification of the measures taken by Greece to implement the directive. The Commission considered the answers given by Greece in the pre-litigation procedure to be unsatisfactory and brought this action.

8. The Commission claims that the Court should

(i) declare that the Hellenic Republic has failed to fulfil its obligations under the EEC Treaty by not adopting within the prescribed period the laws, regulations and administrative provisions necessary to comply with Council Directive 82/470/EEC of 29 June 1982 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in certain services incidental to transport and travel agencies (ISIC Group 718) and in storage and warehousing (ISIC Group 720);

(ii) order the Hellenic Republic to pay the costs.

9. The defendant contends that the application should be dismissed and the applicant ordered to pay the costs. In the written procedure it took the view that it had complied with its obligations under the directive. In support of that contention it submitted with its defence a law, a presidential decree, a legislative decree and a circular. In the oral procedure, however, it conceded in response to questioning that delays did occur in transposing the directive, since responsibility in that respect was divided among a number of ministries.

10. I shall not here rehearse the facts and the submissions of the parties for which I refer to the Report for the Hearing.

B — Analysis

11. First of all, a word should be said about the subject-matter of these proceedings.

1. The abovementioned application raises the question of *the extent* to which, in the Commission's view, the directive has not been transposed. The Commission regularly chooses the formulation utilized here, as we know for example in the parallel proceedings for failure to fulfil obligations under the Treaty brought against two other Member States,[2] when it seeks to claim that *none* of the necessary measures has been adopted (within the prescribed period). It also used words to the same effect in its reply. That interpretation of the application may be questioned here, however, since in its application, which according to Article 38(1)(c) of the Rules of Procedure of the Court, is to delimit the subject-matter, the Commission is proceeding in respect of only certain of the activities listed in Articles 2 and 3 of the directive, namely the activities of shipping agent, travel agent, warehousekeeper and road accident expert, the other activities not being expressly mentioned. That is explained, however, by what took place during the pre-litigation procedure. In its letter inviting the defendant to submit its observations, the Commission requested the defendant to submit a *comprehensive survey* of the various national rules ensuring the transposition of each individual provision in the directive. The defendant thereupon gave details of the rules which applied to the activities mentioned in the application, without however communicating the text of the provisions. Furthermore, it also mentioned the activity of shipping charterer, which is not subject to any rules in Greece. On the basis of those details the defendant took the view that, although the directive had still not been transposed in full, having regard to the reform in progress, the legal position in Greece was not contrary to Community law.

12. In its reasoned opinion, the Commission examined in detail only the activities of shipping agents and road accident experts and rejected the argument of the Greek Government. At the end of that opinion, however, it stated in addition that, since the reply to its formal notice, it had received no communication from the defendant which would enable it to conclude that Greece had complied with its obligations under the directive. The Commission is thus of the opinion, as I understand the application, that the defendant has taken *none* of the measures necessary to transpose the directive.

13. *2.* In so far as it emerged at the oral procedure that the defendant — also in the opinion of the Commission — has enacted at least some of the necessary measures in the course of the proceedings before the Court, that can have no influence on the decision to be taken by the Court. The subject-matter of that decision is solely the legal position as it stood when the time-limit laid down by the Commission in its reasoned opinion expired.[3]

2 — Compare the judgment in Case 283/86 Commission v Belgium [1988] ECR 3271 and the judgment in Case 310/86 Commission v Italy [1988] ECR 3987.

3 — That is the view taken in the consistent case-law on the transposition of directives: see, for example, judgment in Case C-53/88 Commission v Greece [1990] ECR I-3917, paragraph 8.

14. *II.* I also regard the application with its subject-matter thus defined as entirely well founded, as might be expected in the light of the admission — albeit vague in scope — made by the defendant in the oral procedure and which I mentioned at the outset. None of the statements of the defendant and none of the texts submitted by it contains any indications that the transposition of the directive was even begun, still less completed, within the prescribed period.

15. *1.* With regard to the statements and text referring to individual activities *in Greece*, it was necessary to examine whether they satisfied the provisions of the directive that the Member States had to comply with as *host States*. Contrary to the opinion of the defendant, it is not sufficient in that respect to ensure equal treatment between Greek nationals and the nationals of other Member States. The obligations laid down in the directive for the recognition of certificates issued in the State of origin regarding, in particular, good repute, no previous bankruptcy and professional experience go further than the obligations under the Treaty, as is also clear from the aforementioned recitals in the preamble to the directive. On that basis the following points should be made.

16. *(a)* With regard to the activity of *freight forwarder* (Article 2(A) of the directive), the defendant submitted Presidential Decree 453/1984 of 5 October 1984. Pursuant to Article 1 thereof, it serves to implement Regulation No 11 of 27 June 1960.[4] It does not contain the rules laid down in Articles 4, 6 and 7 regarding the recognition of the certificates issued in other Member States concerning in particular good repute, no previous bankruptcy and professional experience of the person concerned and in that respect certainly cannot be regarded as an adequate transposing measure. It is questionable, however, whether such transposition was necessary here at all. The presidential decree lays down no requirement whatsoever regarding access to the activity of freight forwarder or for the exercise of that activity. The defendant has explained in its defence that access to the occupation of freight forwarder is not regulated in Greece and that the presidential decree which it submitted is the only rule in that area. If that is correct, there is no obligation in that respect to transpose the abovementioned provisions of the directive. That would not alter anything regarding the assessment of the application, however, since the Commission has raised no particular criticism with regard to the activity of freight forwarder and has complained about Greece's failure to act only in so far as implementing measures were *necessary*.

17. *(b)* With regard to the activity of *shipping agent* (Article 2(A) of the directive), the Greek Government admits that transposition of the provisions of the directive is necessary and that it has still not been done. It has produced the text of a circular from the Ministry of Merchant Shipping (No 3111.9/2407 of 22 April 1988) and indicates that a draft law has been prepared which guarantees access to the occupation of shipping agent to the nationals of other Member States without any discrimination in comparison with its own nationals.

18. It must in fact be stated that the circular submitted does not display the legal nature that, according to consistent case-law,[5] a

4 — Regulation of the Council concerning the abolition of discrimination in transport rates and conditions, in implementation of Article 79(3) of the Treaty establishing the European Economic Community (OJ, English Special Edition 1959-62, p. 60)

5 — See, for example, judgment in Case 239/85 Commission v Belgium [1986] ECR 3645, paragraph 7

transposing measure must have in order to satisfy the third paragraph of Article 189 of the EEC Treaty. In particular such circulars do not guarantee that the content of the directive takes the form of binding national law that, in addition to its binding effect on the administration, has direct effects vis-à-vis third parties.[6] Nor, incidentally, does the text of the circular correspond with the provisions of the directive. It is true that, in accordance with the content of the draft law as represented by the defendant, it is laid down in point No 3 of the circular that permission is to be granted to nationals of other Member States to carry on the occupation of shipping agent under the same requirements as those laid down in the Greek rules for Greek nationals. There is no provision, however, that can be regarded as having transposed the rules on equivalence in Articles 4, 6 and 7 of the directive. The defendant's infringement in that respect is thus established.

19. *(c)* With regard to the activity of *travel agent* (Article 2(B)(a) of the directive), the position is the same. For that activity, Law No 393/12976, which has been submitted in this connection, lays down requirements concerning good repute,[7] the fact that the applicant has not been declared bankrupt[8] and also his qualifications.[9] That forms the basis of the defendant's duty to transpose into national law the rules on equivalence in Articles 4, 6 and 7. That, however, has not been done. As far as the requirements of good repute and no previous bankruptcy are concerned, there is no provision determining what other certificates or declarations are recognized as extracts from the 'judicial record' (see the final part of Article 4(1) and Article 4(3) of the directive). With regard to evidence of qualifications, it was necessary to transpose Article 6(3) in conjunction with Article 7; in that respect also, however, there are no corresponding provisions in the Law submitted.

20. I consider it very doubtful, moreover, whether Article 3 of the law referred to, which governs the granting of permission to Greek and foreign persons, is compatible with the principle of equal treatment in Articles 52 and 59 of the EEC Treaty. In the case of Greek applicants it forms the basis of an absolute duty to grant permission,[10] if the requirements set out in Article 4 are satisfied; for foreign persons the grant of permission, except where the State of origin gives Greek nationals a right to a corresponding permission (reciprocity), is at the discretion of the competent authorities.[11] That question is not material in these proceedings, however, since the Commission complains only of the failure to transpose the directive and not of an infringement of the abovementioned provisions of the Treaty.

21. *(d)* In respect of the activity of *warehousekeeper* (Article 2(C) of the directive) the Greek Government submits Legislative Decree No 3077/1954. It lays down, as requirements for the grant of permission for

6 — See judgment in Case C-361/88 Commission v Germany [1991] ECR I-2567, paragraph 20.

7 — See Article 4(1)(b) of the Law, which requires that no prison sentence of more than three months may have been imposed for certain offences, evidence of which is to be furnished by an extract from the judicial record.

8 — See Article 4(2)(b), which requires a certificate from the registrar of the competent court of first instance.

9 — See Article 4(1)(c) and (2)(d), where, as evidence of general knowledge (see Article 6(3) of Directive 82/470), a final diploma of secondary education of a certain level is required.

10 — See paragraph (2): That permission shall be granted . . . (emphasis added).

11 — See paragraph (3): Appropriate permission may . . . be granted . . . (emphasis added).

the operation of, *inter alia*, a 'general warehouse', that the applicant must not have been convicted of certain offences [12] and that he must not have been declared bankrupt or had a bankruptcy petition issued against him. [13] However, the Legislative Decree contains no rules regarding the transposition of Article 4(1) and (3) of the directive. Since, pursuant to Article 4(8)(2), the Minister for Trade can also demand evidence of financial standing, there was also a need for the transposition of Article 4(4) of the directive, which governs the recognition of certificates issued by the banks of other Member States; but that, too, has not been done.

22. *(e)* I now come to the activity of inspection or technical valuation of motor vehicles (Article 2(D)(a) of the directive; hereinafter referred to as the activity of *motor vehicle examiner*). In Greece, according to the undisputed submissions of the defendant, that activity is generally subject to no requirements. In so far as that is so, no transposition was necessary. However, the Commission complains specifically about the failure to transpose the directive as regards the field in respect of which Greece refers to Article 55 of the EEC Treaty. The activity in question is that of *road accident expert*, mentioned in Article 3(D) (under the heading 'Greece') of the directive.

23. According to the submissions of the defendant, that designation is based on Article 51 of the Greek Traffic Code. It is not accurate, however, since the activity mentioned in Article 2(D)(a) of the directive is not regulated in Greece and there is no occupation there bearing that designation. It relates, according to the defendant, only to the drawing up of specific expert's reports. All those observations have no significance for us, however, since the details given in Article 3 of the directive are, according to the introductory sentence of that provision, for guidance only.

24. All that need be examined is whether one of the alternatives of Article 2 is appropriate. The activity consists in certifying certain facts in connection with traffic accidents for courts and authorities when ordered to do so by them or when requested to do so by one of the parties. The Greek Government clearly assumes that that activity comes within Article 2(D)(a) of the directive. Without it being necessary to go into the details of the Greek provisions — which have not been submitted to the Court by either of the parties — it is in my view sufficient to find that at least part of the activities referred to — in so far, that is, as they are connected with road accidents — is included in the concept of traffic accident experts within the meaning of the Greek provisions as described to us by the defendant.

25. With regard to that activity as thus defined, Greece was required, according to the wording of the directive, to adopt implementing measures. Persons who wish to draw up expert's reports for courts and authorities in Greece as 'traffic accident experts' must be included in a list which, according to the information supplied by Greece itself, is possible only if the applicant possesses scientific and technical training or professional experience in traffic matters. Thus the possession of technical knowledge

12 — See Article 5(1)(a) of the Law
13 — See Article 5(1)(b) of the Law

and professional experience — which is to be established by training or professional experience — is required. Greece was for that reason obliged, pursuant to Article 6(2) of the directive, to transpose into national law the rules laid down therein, which prescribe in detail the conditions in which the actual exercise of the activity in question is to be recognized as evidence of the requisite knowledge and ability.

26. The Greek Government apparently disputes that consequence, as it explains that the Greek rule does not refer to the activity as a whole but only to the drawing up of specific expert's reports. That, however, is also irrelevant, since Article 6(2) refers in its unambiguous wording not only to the *taking up* but also to the *pursuit* of the activity in question.[14] Since the latter is subject to restrictive conditions in Greece — even if only in a certain sector — there is an obligation to adopt implementing measures in that respect.

27. In Greece's opinion, however, that activity comes within Article 55 of the EEC Treaty.

28. If that view were correct, the directive would not in fact extend to that activity. In that respect Article 57 of the EEC Treaty would not apply as a legal basis, and consequently interpretation in a manner in conformity with the Treaty, which, as is known, takes precedence over a finding of invalidity, causes the directive to have a correspondingly narrower area of application.

29. However, that activity does not come within Article 55 of the EEC Treaty.

30. It must first of all be noted that the concept of official authority is a concept of Community law, because it defines the 'limits set by [Community law] . . . in order to prevent the effectiveness of the Treaty [in the area of freedom of establishment] from being undermined by unilateral provisions adopted by the Member States'.[15] On that basis alone the submission of the Greek Government in its defence, according to which the requirements connected with 'official authority' are satisfied, can be dismissed, because, according to the Greek provisions, preference is given to civil servants or former civil servants as regards inclusion in the list of experts. That objection amounts to saying that the scope of Article 55 falls to be determined according to national criteria and, in the light of the case-law mentioned, it is therefore unfounded.

31. Consideration of the case from the point of view of Article 55 of the EEC Treaty could end here, since the defendant has put forward no other argument on that point in the proceedings before the Court. However, it is apparent from the defence that the activity of expert witness in question is subject to the particular requirements of the Greek rules only in so far as it is exercised *for the courts or authorities*. Since in proceedings under Article 169 of the EEC Treaty the public interest in

14 — This wide scope is necessary to achieve not only the freedom to provide services but also the freedom of establishment: see judgment in Case 197/84 Steinhauser v City of Biarritz [1985] ECR 1819, paragraph 16.

15 — Judgment in Case 147/86 Commission v Greece [1988] ECR 1637, paragraph 8.

the observance of Community law by the Member States is paramount, I consider it appropriate to examine Article 55 from that point of view also, although Greece has not raised that aspect in its defence.

32. The Court has yet to give a general definition in the abstract of the concept of 'official authority' within the meaning of Article 55 of the EEC Treaty. In the *Reyners* case,[16] however, the Court decided on a factual situation comparable with that in the present action. Such a situation is characterized by the fact that the State, through its organs, is acting in the exercise of official authority, while the activity in question of the individual is in some way or other connected with that State action. In such a situation the activity of the person concerned is of the same legal nature as the State action in the exercise of official authority only if, 'taken on its own, [it constitutes] a direct and specific connexion with the exercise of official authority'.[17] The Court held that that condition was not met with regard to all the essential activities of the profession of *avocat*:

'professional activities involving contacts, even regular and organic, with the courts, including even compulsory cooperation in their functioning, do not constitute, as such, connexion with the exercise of official authority. The most typical activities of the profession of *avocat*, in particular, such as consultation and legal assistance and also representation and the defence of parties in court, even when the intervention or assistance of the *avocat* is compulsory or is a legal monopoly, cannot be considered as connected with the exercise of official authority'.[18]

33. The Court explained that by saying that

'The exercise of these activities leaves the discretion of judicial authorities and the free exercise of judicial power intact'.[19]

34. Those observations may be transposed to this case. In the absence of other indications we may thus assume that the findings of an accident expert in Greece who submits an expert's report pursuant to an order from an authority or a court are not binding on the authority issuing that order. There is at most an *indirect* involvement in the exercise of official authority. That conclusion is all the more justified as the State maintains control not only over the utilization of the content of each individual expert's report but also over the exercise of the activity as a whole.[20]

35. The submissions of the defendant with regard to the activities of traffic experts, according to which the activity of accident expert comes within Article 55 of the EEC Treaty, must consequently be dismissed.

16 — Judgment in Case 2/74 Reyners v Belgium [1974] ECR 631.

17 — Judgment in the Reyners case, cited above, paragraphs 45 and 54 and paragraph 2 of the operative part, confirmed in the judgment in Case C-3/88 Commission v Italy [1989] ECR 4035

18 — Judgment in the Reyners case, cited above, paragraph 51 et seq

19 — Judgment in the Reyners case, cited above, paragraph 53

20 — See, on that point, judgment in Case 147/86, cited above, paragraph 10

36. That also permits us to reject the argument put forward by the defendant during the pre-litigation procedure that the activity of accident expert is the subject of a declaration made by certain Member States and entered at their request in the Council minutes when the directive was drawn up, according to which the directive does not apply to the activity of traffic accident expert. Since that declaration, at least as far as Greece is concerned, is compatible with neither Article 55 nor the wording of the directive, its content is contrary to Community law. It is therefore, quite apart from its unilateral nature,[21] of no relevance.

37. Purely for the sake of completeness, it should be pointed out that Greece is not justified according to the Treaty in reserving the activity of traffic accident experts to its own nationals. If the preferential treatment of civil servants and former civil servants concerning inclusion in the list mentioned above has such a consequence — although the defendant disputes it — that would constitute a further infringement of the Treaty, which, however, is not part of the subject-matter of this application; however, proper transposition of the directive logically requires every discrimination against nationals of other Member States to be removed.

38. All in all, it must be declared that, as the Commission claims, there is also an infringement on the part of the defendant with regard to the activity of traffic expert (Article 2(D)(a) of the directive).

21 — See in that respect judgment in Case 143/83 Commission v Denmark [1985] ECR 427, paragraph 12 et seq.

39. *(f)* It must be held that there has been no transposition of Article 5 of the directive, which concerns the information to be provided to interested parties regarding requirements as to qualifications, in relation to any of the activities discussed before the Court (see (a) to (e) above) the exercise of which is subject to such conditions.

40. *2.* With regard to the obligations of the Member States as *States of origin* under Articles 4(6) and 7(4) of the directive, which consist in *designating the authorities* which *are competent* to *issue the certificates* in accordance with Article 4(1) to (5), Article 6 and Article 7(1) and (2), it must be declared that the Greek Government has communicated no statutory provisions which serve to transpose those rules. In reply to a request from the Court, it merely stated that the Department for Relations with the European Community is competent to issue certificates to interested persons who wish to exercise an occupation in another Member State, which it does on the basis of diplomas concerning ability, on the basis of certificates from professional or trade associations and tax authorities, and so forth. That department was designated in the framework of the accession negotiations, following a request from the Commission concerning its communication of 13 July 1974.[22] First of all, there is no measure which has the legal form necessary for the transposition of the directive. Secondly, the designation of that

22 — Communication from the Commission concerning the proofs, declarations and certificates relating to:
— good repute,
— absence of previous bankruptcy,
— nature and duration of activity in country of provenance,
provided for in Council Directives adopted before 1 June 1973 in the field of freedom of establishment and freedom to provide services (OJ 1974 C 81, p. 1).

department as the competent authority to which the defendant refers has no connection with the certificates under Directive 82/470, which are at issue here.[23] In so far as the Greek Government refers in its rejoinder to the competence of certain authorities to *accept* certificates, it fails to appreciate, in my opinion, that that is not the object of the directive. The obligations of the Member States under Articles 4(6) and 7(4) of the directive concern them as *States of origin*, which *issue* the certificates which the *host States* must accept. The competence of the authorities which *accept* the certificates is determined by the rules of the host States concerning the individual activities. The remarks of the defendant at the hearing indicate that it has meanwhile come to share that point of view.

41. *3.* It must thus be declared that the defendant has not adopted the measures necessary to transpose Directive 82/470 within the prescribed period. In so far as the defendant refers, on the other hand, to the 'reservations' which it caused to be entered in the Council minutes in the form of a declaration (No 7889/82/ETS 40), those reservations also being the subject of a joint declaration by the Council and the Commission, I am of the opinion that, in the absence of precise information regarding the content of all those declarations, there is no need for us to go into the matter.

42. In so far as national circumstances such as the division of competences may have made it more difficult for the defendant to comply with its Community law obligations within the prescribed time, that, according to consistent case-law, is also irrelevant.

C — Conclusion

43. I therefore propose that the Court should:

(1) Declare that the Hellenic Republic has failed to fulfil its obligations under the EEC Treaty by not adopting within the prescribed period the laws, regulations and administrative provisions necessary to transpose Council Directive 82/470/EEC of 29 June 1982 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in certain services incidental to transport and travel agencies (ISIC Group 718) and in storage and warehousing (ISIC Group 720);

(2) Order the Hellenic Republic to pay the costs.

23 — See the list of directives to which the Commission's communication — see previous footnote — is applicable: Annex 2 to the communication.