# OPINION OF MR ADVOCATE GENERAL CRUZ VILAÇA
delivered on 8 March 1988 *

*Mr President,*
*Members of the Court,*

1. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has submitted to the Court of Justice for a preliminary ruling four questions concerning the rules governing the nullity of companies laid down in the First Council Directive (68/151/EEC) of 9 March 1968 [1] on coordination of the safeguards required of companies by national law in order to protect the interests of members and others (which I shall refer to as the First Directive).

## I — Summary of the facts leading to the request for a preliminary ruling

2. At the time of the facts which led to the proceedings before the national courts Ubbink Isolatie was registered in the commercial register of the Netherlands as a private limited liability company in the course of being formed, under the name 'Ubbink Isolatie BV, i. o.'

3. By contrast, there was no mention in the commercial register of a private limited liability company trading under the name of 'Ubbink Isolatie BV'. Ubbink failed to meet either of the two conditions laid down by Dutch law for the constitution of a private limited liability company: it had no authentic instrument of constitution and no ministerial authorization. Nevertheless, it was able to operate lawfully as a partnership.

4. However, it was under the name of 'Ubbink Isolatie BV' (without the addition of 'i. o.', meaning 'in formation') that Ubbink made an agreement with Dak- en Wandtechniek and it was thus under that name that an action was brought against it by the latter company before the Arrondissementsrechtbank (District Court) of Arnhem for termination of the agreement and for a determination of contractual liability thereunder. Ubbink Isolatie objected that the private limited liability company Ubbink Isolatie BV did not lawfully exist since it was neither constituted nor registered in the commercial register under that name; actions undertaken in that name had therefore been carried out unlawfully.

5. Before considering the substance of the case the national court decided that even if Ubbink Isolatie BV had never been constituted or if the instrument of constitution was defective, that did not mean that there was no private limited liability company of that name: it existed until such time as it was wound up in accordance with Dutch legislation (Arts 181 and 182 of the Civil Code).

6. Ubbink Isolatie appealed against that decision first to the Gerechtshof (Regional Court of Appeal), Arnhem and then to the Hoge Raad. The latter considered that the interpretation of Article 182 of the Civil Code depended on the scope of Section III of the First Directive, and therefore referred to this Court the four questions set out in the Report for the Hearing.

* Translated from the Portuguese.

1 — OJ, English Special Edition 1968 (I), p. 41.

**II — Examination of the questions referred by the Hoge Raad**

7. The four questions referred by the Hoge Raad seek essentially to know whether and to what extent the rules contained in Section III of the First Directive apply to a company in formation which does not satisfy the requirements for valid constitution laid down by national law.

8. *A* — The first question referred by the national court is the most important one. It asks whether, when actions have been carried out in the name of a private limited liability company which has not been validly constituted, inasmuch as it does not satisfy either of the requirements for valid constitution laid down by national law, the rules laid down in Section III of the First Directive require that 'company' to be regarded as being in existence so long as its nullity has not been declared in proceedings initiated for that purpose.

9. Both the Commission and Ubbink suggest that the reply to that question should be in the negative.

10. The argument put forward by the Commission is particularly persuasive: it submits that, with the exception of some of its provisions, in particular Article 2 (1) (a) and (d), Article 7 and Article 10, the First Directive applies solely to companies which exist and which have legal personality, and it may apply to those which have been entered in the commercial register as if they had legal personality.

11. One of the provisions of the directive applicable to such cases would be, precisely, Article 11, the purpose of which is, in order to protect the interests of third parties, to limit the cases in which the nullity of companies covered by the directive may be declared under the legislation of the various Member States.

12. The Commission submits that in principle Article 11 does not apply to a declaration of nullity in the case of an entity which has no legal personality.

13. Since the moment of acquisition of legal personality is a matter governed by national law, and the directive contains no provision in that respect, the first question put by the national court can only be answered in the negative.

14. That is also my view as regards the answer to be given to that question.

15. That is because, as the Commission rightly points out, the directive has nothing to say regarding the acquisition of legal personality or legal capacity for companies covered by its provisions: that is a matter which is left in principle to each national legal system to regulate as it will.

16. Thus whilst some legal systems — the majority — make the acquisition of legal personality subject to registration of the company in the commercial register, others do not.

17. Dutch legislation does not impose that condition, but requires private limited

liability companies (of the type known in Portugal as 'sociedades por quotas') and public limited liability companies to satisfy two conditions in order to be validly constituted: an authentic instrument of constitution must have been executed and the company must have passed a prior administrative scrutiny, evidenced by a ministerial authorization.

18. It may be said that a system of that type, in which the acquisition of legal personality for companies is not dependent on completing registration formalities, fits awkwardly into the scheme of the directive, which is conceived largely on the basis that the commercial register is an important means of safeguarding the interests of third parties and protecting business transactions, especially in international trade. It may be noted, for example, that the absence of such registration is not listed among the grounds of nullity in Article 11, a reflection of the fact that in most of the Member States there is legislation linking the acquisition of collective personality to registration on such a register.

19. However, that does not mean that the national legislation linking the acquisition of legal personality to events prior to registration is incompatible in any way with the directive.

20. On the other hand, the directive itself contains no provisions — whether procedural or substantive — concerning the conditions under which a company may be deemed to exist prior to the acquisition of legal personality.

21. Article 12 refers only to the effects of a declaration of nullity made in accordance with Article 11.

22. The latter does not require the national legislature — subject to the provision in Article 12 — to choose between the various kinds of nullity which may attach to any of the defects listed in Article 11 (2) (nullity, declaration of nullity, non-existence). Similarly, as regards procedure, no preference is expressed in the directive for a system whereby such kinds of nullity may be pleaded by way of a preliminary objection or for a system whereby they may be declared only in the context of separate proceedings.

23. It is thus clear that the first question put by the national court cannot be answered in the affirmative: from the directive there is nothing to be inferred as to whether a company which does not fulfil the conditions for valid constitution laid down by national law may be regarded as a company in existence so long as it has not been the subject of a declaration of nullity and whether, in order to obtain such a declaration, separate proceedings must have been instituted for the purpose.

24. Such a matter must be governed by national legislation and the directive itself allows the Member States ample freedom in that respect.

25. That conclusion reduces the importance of the question — expressly dealt with by the Commission — whether the restrictions contained in the rules regarding nullity laid down in Article 11 apply only to companies having legal personality or whether they may be applied to companies which do not yet have legal personality but which exist, in so far as they have commenced business and acts have been done in their name.

26. In order to examine that question it is necessary to consider the question of nullity in the case of anomalous companies.

27. The general scheme of the directive and a number of its provisions indicate, in fact, that the Community legislature intended to define and coordinate national rules on nullity for companies having legal personality or entered on the commercial register as if they had it (since, as we have seen, national legislation most often makes the acquisition of legal personality subject to such registration). The wording of Article 11 itself, as we have seen, supports that interpretation; and Article 7, the only one which expressly envisages acts carried out in the name of a company before it has acquired legal personality, appears to confirm it.

28. However, I do not consider it necessary to resolve that question in these proceedings.

29. Not only did the national court not expressly refer the matter to this Court (that is, the question whether the grounds for nullity before the acquisition of legal personality are restricted to those set out in Article 11), but the question is not pertinent to the circumstances concerned in the main action.

30. In the first place, Ubbink was not entered on the commercial register as a private limited liability company, but only as a private limited company in formation, subject to the rules governing partnerships; [2] in the second place, the two acts necessary for the valid constitution of a company and which, it is agreed, were lacking — the authentic instrument of constitution and the certificate of approval — are expressly referred to in the grounds of nullity given in Article 11 (paragraph 2 (a)), and no other was mentioned in the course of the proceedings.

31. *B* — Do any of the circumstances referred to in the other three questions put by the national court affect the conclusion I have reached as to the first question?

32. It will be recalled that in those questions the Hoge Raad asked whether the reply to the first question would be otherwise if:

(i) there was no authentic instrument of constitution or the rules of preventive control were not complied with, or both;

(ii) there was an organization of persons and assets which had the outward appearance of a company, and in whose name legal actions had been carried out;

(iii) activities had been carried on by an organization having a legal form other than those referred to in the First Directive (for instance, a partnership) and registered in that legal form in the commercial register, but under a name which, save as regards the indication of the legal form, was identical to the name of the company covered by the directive but not yet properly constituted.

2 — The possibility that registration in that form might mislead third parties as to the true nature of the company falls outside the ambit of the questions referred by the national court.

33. As regards the first question (Question 2 of the reference for a preliminary ruling), it has no influence on the reply to be given to Question 1 since both the requirements referred to therein must be satisfied, as appears to be the case in Dutch law, in order to validly constitute a company. It would only be otherwise if only one of those requirements sufficed for the valid constitution of a company under national law: the reply to Question 1 must therefore stand in any case as regards the consequences of failure to fulfil the requirements necessary for the valid constitution of a company.

34. As far as the other two questions are concerned, the national court was referring directly to the situation with which the main proceedings are concerned.

35. In the first place, legal actions were carried out in the name of a private limited liability company which had not yet been properly constituted since it failed to fulfil the two requirements for that purpose imposed by Dutch legislation.

36. Whether, and to what extent, it is particularly important to recognize the outward appearance of a private limited liability company that that might present, is a matter for national law, since the directive contains no information in that respect.

37. However, in the case of a company in formation which has not yet acquired legal personality, the directive requires national law to comply with Article 7 of the directive, which provides that 'if, before a company being formed has acquired legal personality, action has been carried out in its name and the company does not assume the obligations arising from such action, the persons who acted shall, without limit, be jointly and severally liable therefor, unless otherwise agreed'. That, and only that, is what the First Directive requires as far as safeguarding the interests of third parties in the case of companies still in formation is concerned.

38. In other words, it is for each Member State to determine by its legislation whether and to what extent, regardless of the fact that a company is 'in formation' and apart from the personal liability of those who have so acted (Article 7 of the directive), the fact that such actions have been carried out in the name of the company which has not been properly constituted constitutes in law sufficient legal grounds for a declaration of nullity in respect of the anomalous or *de facto* company and, in particular, whether for that purpose there must exist an organization of persons or assets.

39. It appears from the documents on the file that Ubbink Isolatie was registered in the commercial register as a private limited liability company 'in formation', subject to the rules governing partnerships.

40. However, Article 11 of the directive makes no special provision for the case where a Member State's national legislation permits the registration of a company (whether public or private limited liability) yet to be constituted as a company 'in formation', regarding it as a partnership and having its own rules regarding the nullity of such an entity.

41. Moreover, the First Directive applies solely to the types of company referred to in Article 1, which do not include partnerships; consequently, the definition of the

conditions to be satisfied for their constitution or their nullity falls, as a rule, outside the scope of the directive and is therefore a matter for national legislation to regulate.

42. I consider, however, contrary to the argument put forward by Ubbink, that when the existence of a partnership is equivalent, under an express disposition of national law or in accordance with the interpretation given of it by legal doctrine or the courts, to a company in formation, which is covered by the First Directive, Article 7 of the directive must apply. Were it otherwise, its aim of safeguarding the interests of third parties could be frustrated by the legal expedient of regarding such an organization as a partnership. The national legislature is therefore not at liberty to organize at will the rules governing liability for such entities (for example, by making solely the management or the shareholders liable); it has already been stipulated, by Article 7, that the persons who acted in the name of the company must be made liable.

## III — Conclusion

43. In the light of the foregoing I suggest that the replies to be given to the questions put by the Hoge Raad should be as follows:

'(1) Each Member State has power to lay down its own rules governing the nullity of companies in formation of the types listed in Article 1 of the First Council Directive of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies, provided that in so doing they comply with Article 7 of the directive. Consequently, there is nothing in the provisions contained in Section III of the First Directive which makes it necessary to regard a private limited liability in formation which does not satisfy the conditions for valid constitution of such a company laid down by national law, but in whose name actions have been carried out, as a company which exists until a declaration of nullity has been made in proceedings instituted for that purpose.

(2) The reply given above remains the same in all the circumstances referred to by the national court in the second, third and fourth questions.'