OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 5 April 2001 [1]

In the present case, the Commission of the European Communities asks the Court to declare, in accordance with Article 226 EC, that, by failing to adopt all necessary measures to implement Commission Directive 95/30/EC of 30 June 1995 adapting to technical progress Council Directive 90/679/EEC on the protection of workers from risks related to exposure to biological agents at work (seventh individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), the Republic of Austria has failed to fulfil its obligations under that directive. [2]

I — Procedure and forms of order sought

1. The time-limit for implementation of the Directive expired on 30 November 1996.

By letter of 30 May 1997, the Commission sent to the Austrian Government a letter of formal notice under Article 169 of the EC Treaty (now Article 226 EC) inviting it to submit observations regarding the alleged failure within two months. The Austrian Government informed the Commission that the Directive would probably be implemented in December 1997.

2. As Austria had still failed to take the necessary measures, the Commission sent a reasoned opinion to Austria on 2 July 1998, asking Austria to take the necessary measures within two months from the date of notification of the opinion. By letter of 3 September 1998, the Austrian Government informed the Commission that part of the necessary measures had already been adopted, and that the other part was in

1 — Original language: Dutch.
2 — OJ 1995 L 155, p. 41 ('the Directive').

preparation. Then, by letters of 4 and 15 September, 16 October and 23 November 1998, 10 February, 8 and 9 April 1999, the Austrian Government informed the Commission of the measures that had been adopted in order to implement the Directive.

3. The Commission's application was lodged at the Court on 10 December 1999. A hearing has not taken place. On the basis of the documents received the Court asked the parties on 20 November 2000 to provide further explanations in writing. Both parties have replied.

4. In its application, the Commission submits that the Republic of Austria did not adopt the laws and administrative provisions necessary to fulfil the obligations under the Directive by 30 November 1996. It claims that upon the expiry of the two month period given in the reasoned opinion, that is, 2 September 1998, various measures at federal level and in all nine *Länder* (Provinces) (Burgenland, Kärnten, Niederösterreich, Oberösterreich, Salzburg, Steirmark, Tirol, Wien and Vorarlberg) had not come into force or had not been communicated to it. Although Austria has adopted a number of implementing measures, also after 2 September 1998, implementation is still not complete.

5. The Austrian Government does not deny the infringement. It points out that under the Austrian Federal Constitution, implementation of the Directive is characterised by the splitting of competences between the Federal State and the *Länder*. In addition to the general division of powers under the Federal Constitution, the present case involves a particular division of the competences concerned between the Federal State, the *Länder*, and local authorities in the fields of education and civil service law. In particular, implementation requires close coordination between the *Länder* and the Federal State in order to ensure a uniform level of protection. It has provided the Court with a detailed list describing the state of implementation of the Directive. We may conclude from this information that implementation has been almost entirely completed on all administrative levels.

II — Assessment of the Commission's application

6. Under the first sentence of Article 2(1) of the Directive, the Republic of Austria had to implement the Directive in national law by 30 November 1996 and immediately inform the Commission thereof. This obligation also arises under the third paragraph of Article 249 EC, under which a Directive shall be binding on each Member State as to the result to be achieved, as well as under Article 10 EC. [3]

7. Austria does not dispute that it has not adopted all the measures necessary to implement the Directive in national law. Its argument that internal difficulties delayed implementation cannot be accepted. The Court has repeatedly held that a Member State may not plead provisions, practices or circumstances to justify its failure to comply with its obligations and time-limits in a directive. [4]

8. The Court has repeatedly held that the subject of an action under Article 226 EC is determined by reference to the reasoned opinion of the Commission. The existence of an infringement of the Treaty is to be determined by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned opinion. Subsequent changes may not be taken into consideration. [5] It follows from the documents in the case that the Republic of Austria had not, by the expiry of the time-limit on 2 September 1998, adopted all the measures necessary to fulfil its obligations under the Directive. The action brought by the Commission must be considered to be well founded.

3 — See, amongst others, Case C-439/98 *Commission* v *Italy* [2000] ECR I-1565.

4 — Case C-83/00 *Commission* v *Netherlands* [2001] ECR I-2351, paragraph 10.

5 — See, especially, Case C-185/96 *Commission* v *Greece* [1998] ECR I-6601, paragraph 18.

III — Conclusion

On the basis of the reasons set out above, I propose that the Court should:

(1) declare that, by failing to adopt, within the time-limit laid down by the Directive, the laws, regulations and administrative provisions necessary to comply with Commission Directive 95/30/EC of 30 June 1995 adapting to technical progress Council Directive 90/679/EEC on the protection of workers from risks related to exposure to biological agents at work (seventh individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), the Republic of Austria has failed to fulfil its obligations under that directive;

(2) order the Republic of Austria to pay the costs in accordance with Article 69(2) of the Rules of Procedure.