OPINION OF MR ADVOCATE GENERAL LENZ

delivered on 15 December 1993 *

Mr President,
Members of the Court,

1. In these proceedings for failure to fulfil a Treaty obligation, the Commission alleges that the Kingdom of Belgium has not within the prescribed period transposed Directive 88/599/EEC [1] into national law and/or not informed the Commission of the text of the transposing provisions. That directive contains the minimum requirements as to checks carried out by the Member States to ensure compliance with Community social legislation relating to road transport.

2. Under Article 7 (1) of the directive, Member States [2] were to bring into force the laws, regulations and administrative provisions necessary to comply with the directive on 1 January 1989 at the latest. [3] Article 7 (2) obliges Member States to communicate to the Commission their laws, regulations and administrative provisions concerning the application of the directive.

3. In the pre-litigation procedure the Belgian Government maintained the point of view that no separate transposition was necessary, since the law [4] enacted on 18 February 1969 in the relevant field did not prevent implementation of the directive, and gave the competent official bodies extensive investigative powers. Internal administrative measures were therefore all that was needed.

4. The Commission challenged that opinion in the pre-litigation procedure and in its application to the Court. In the defence the Belgian Government no longer maintained

* Original language: German.

1 — Council Directive of 23 November 1988 on standard checking procedures for the implementation of Regulation (EEC) No 3820/85 on the harmonization of certain social legislation relating to road transport and Regulation (EEC) No 3821/85 on recording equipment in road transport (OJ 1988 L 325, p. 55).

2 — With the exception of Portugal, for which the time-limit was 1 January 1990.

3 — It may be noted in passing that the period of about six weeks for transposition appears remarkably short. The defendant Member State has not, however, objected to this. In this connection the judgment in Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437 should be noted, according to which a Member State, in the context of an action for failure to fulfil its obligations by reason of an infringement of a directive, cannot argue that the directive is unlawful, but only that it is legally non-existent (paragraphs 10 and 11). In any event, if it wishes to plead that implementation of the directive is absolutely impossible, it must substantiate that assertion (paragraph 12).

4 — This is the Law on measures for implementation of international treaties and acts relating to road, railway or waterway transport (*Moniteur Belge*, 4 August 1969).

the above opinion. Instead it merely drew attention to a draft Royal Decree which contained the necessary transposing provisions and which was currently before the Council of Ministers for approval.

5. It is therefore established that the defendant Member State has not within the prescribed period fulfilled its obligation to *transpose* the directive, and the Commission's application must consequently be upheld to that extent. On the other hand, the Court should not make any finding on the point of *failure to communicate* the provisions, since there were no provisions which could and should have been communicated.

6. I therefore propose that the Court:

(1) declare that, by not adopting within the prescribed period the laws, regulations and administrative provisions necessary for compliance with Directive 88/599/EEC, the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty;

(2) order the Kingdom of Belgium to pay the costs, in accordance with the application.