Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, Ireland has failed to fulfil one of its obligations under the EEC Treaty;

2. Orders Ireland to pay the costs.

Mertens de Wilmars O'Keeffe Everling

Chloros Pescatore Mackenzie Stuart Koopmans

Delivered in open court in Luxembourg on 12 October 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 22 JUNE 1982

My Lords,

This is an application by the Commission, under Article 169 of the EEC Treaty, for a declaration that Ireland has failed to fulfil its obligations under the Treaty in that it has not brought into force the measures needed in order to comply with the second Council Directive on Company Law Harmonization (Directive 77/91 of December 13, 1976, OJ 1977, L 26, p. 1) within the period fixed for doing so by Article 43 of the latter. That period expired on 16 December 1978, two years after the date on which the directive was notified to the Member States.

Ireland has not claimed, either in its written or in its oral submissions, that it has yet brought into force the measures required to comply with the directive. It states that it has set in motion the drafting procedure necessary for that purpose. It draws the Court's attention to three difficulties to which it attributes the delay in implementing the directive. The first is the complexity of the subject-

matter, which entails substantial changes in Irish company law. The second is the time-limit prescribed by the directive, which Ireland regards as excessively short, as is said to be demonstrated by the fact that other Member States have also failed to comply with it in time. The third is the Irish political situation, which has entailed the loss of a considerable amount of parliamentary time as a result of two general elections in seven months. In these circumstances, Ireland contends that the Court has jurisdiction to "give due weight to these realities", even though "they do not amount to a strictly legal justification". It stresses that it is Ireland's wish to implement the directive as soon as possible and asks the Court to dismiss the application or to stay the proceedings pending the early enactment of the legislation.

In support of this argument, counsel for Ireland relied on a passage in the Opinion of Mr Advocate General Gand in Case 31/69 *Commission* v *Italy* [1970] ECR 25 at page 42, where he concluded that the Court should not lightly censure the course of action of a Member State, when the latter has a "wide margin of error ... in appraising a course of action". In that case, however, the Commission's complaint related to the delay occurring in practice in disbursing certain sums where it could be said that a margin of discretion existed. Here the obligation to implement the directive is clear and not discretionary and the passage relied on does not assist in this case. Counsel for Ireland also relied on Case 91/79 *Commission* v *Italy* [1980] ECR 1099 at page 1104, where (according to counsel) the Court said that domestic circumstances peculiar to one Member State may be taken into account by the Commission, when the decision to commence or to continue the procedure laid down in Article 169 has to be taken. The passage relied on is, however, a summary of the Commission's argument and is not part of the decision.

This Court has already stated, in Case 52/75 *Commission* v *Italy* [1976] ECR 277 at page 284, that any delays there may have been on the part of other Member States in performing obligations may not be invoked by a Member State in order to justify its own, even temporary, failure to perform its obligations. If the period allowed for the implementation of a directive proves to be too short, the appropriate means of action available to the Member State is to seek to obtain the necessary extension of the period by the competent Community institution. It has not been alleged that Ireland sought such an extension. Furthermore, it is well established by the cases decided by the Court that a Member State is not entitled to rely on circumstances or practices existing in its own internal system to justify failing to comply with obligations imposed on it by a directive.

Even if, as I said in Case 28/81 *Commission* v *Italy* (not yet reported) the Court can of its own discretion delay the making of a declaration because of circumstances explained to the Court, it seems to me that the decision whether and when to refer a failure by a Member State to fulfil its obligations is eventually one for the Commission, and if the

breach has been established in the ordinary way the Commission is entitled to its declaration, if it persists in the application.

The Court was informed at the hearing that Irish legislation to implement the directive has now been drafted but was still awaiting parliamentary time.

By a telex message sent to the President of the Court dated 18 June 1982 the Chief State Solicitor has stated that a bill implementing the second company directive was introduced in the Senate on 16 June 1982 and that it is confidently expected that the measure will have passed both houses towards the end of July 1982.

In the absence of an application by the Commission to discontinue the proceedings, it seems to me that, despite the steps which have been taken since the hearing, the Commission is entitled to the declaration sought and an order should be made in any event that Ireland should pay the costs. On the other hand, if an application were made by the Commission to discontinue the proceedings before the Court gave its judgment, that would be a matter for the Court to consider.