similar and sufficiently specific terms the infringement alleged and the reasons for which it considers that the Member State has failed to fulfil the obligations imposed on it by the Treaty.

3. It is clear from the scheme of framework Directive 71/316 on the approximation of the laws of the Member States relating to common provisions for both measuring instruments and methods of metrological control and of the implementing Directive 76/891 relating to electrical energy meters that those directives were intended, as a first step, to go no further than a programme of "optional harmonization" which exempts Member States not in possession of the necessary control equipment from having themselves to issue, in pursuance of Articles 2 (2) and 8 (2) of Directive 71/316, the EEC type-approval signs and the EEC initial verification marks in respect of the instruments presented. It is for each Member State which finds itself in that situation to assess, having regard in particular to the interests of traders established within its territory, whether it ought to provide itself with the necessary equipment and thus become subject to the obligations laid down by Articles 2 and 8 of Directive 71/316.

In Case 211/81

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser Rolf Wägenbaur, assisted by Hans Peter Hartvig, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

applicant,

v

KINGDOM OF DENMARK, represented by Laurids Mikaelsen, Legal Adviser at the Ministry of Foreign Affairs, with an address for service in Luxembourg at the office of the Chargé d'Affaires *ad interim*, Ib Bodenhagen, Ministerial Adviser, Embassy of Denmark, 11b Boulevard Joseph-II,

defendant,

APPLICATION for a declaration that the Kingdom of Denmark has failed to fulfil its obligations under the Treaty by not implementing, within the prescribed period, Council Directive 76/891/EEC of 4 November 1976 on the approximation of the laws of the Member States relating to electrical energy meters (Official Journal 1976, L 336, p. 30),

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore and U. Everling (Presidents of Chambers), Lord Mackenzie Stuart, O. Due, K. Bahlmann and Y. Galmot, Judges,

Advocate General: G. F. Mancini
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure, the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

For the purpose of eliminating technical barriers to intra-Community trade in measuring instruments, the Council adopted on 26 July 1971, Directive 71/316 on the approximation of the laws of the Member States relating to common provisions for both measuring instruments and methods of metrological control (Official Journal, English Special Edition 1971 (II), p. 707). That directive provides that separate directives are to lay down, in respect of each category of measuring instruments, the metrological qualities and the specifications relating to technical production and operation. Council Directive 76/891 of 4 November 1976 relating to electrical energy meters is one of those separate implementing directives.

Article 4 of Council Directive 76/891 provides that "Member States shall put into force the laws, regulations and administrative provisions needed in order to comply with this directive within 18 months of its notification and shall forthwith inform the Commission thereof."

As the directive was notified to the Kingdom of Denmark on 9 November 1976, that poeriod expired on 9 May 1978.

On 30 March 1978, Denmark's Permanent Representative, in reply to a letter from the Commission dated 18 January 1978, stated that there was no Danish legislation relating to electrical energy meters. Consequently, Denmark satisfied the obligations imposed on it by Directive 76/891 since, in accordance with the first paragraph of Article 3 of that directive, the Danish authorities might not "prevent, prohibit or restrict the placing on the market or entry into service of electrical energy meters bearing the EEC type-approval sign and

the EEC initial verification mark". Thus the Danish authorities took the view that Directive 76/891 required no specific implementing measures in Denmark.

By a letter dated 7 June 1978 the Commission informed the Danish Government that the obligations imposed on the Member States by Directive 76/891 were not confined to those laid down in Article 3 thereof but also concerned the admission into Denmark of the electrical energy meters referred to in the directive. Furthermore, Directive 76/891 required the Member States to introduce provisions to the effect that meters, manufactured in Denmark, might be supplied in that country with the EEC signs and marks after the carrying out of the control measures provided for by the directive.

Since the Commission had not been informed that the Kingdom of Denmark had implemented the measures needed to comply with the directive, it invited the Danish Government, by a letter dated 23 May 1979, in pursuance of the first paragraph of Article 169 of the Treaty, to submit its observations within a period of two months.

In their reply of 22 August 1979 the Danish authorities, referring to their letter dated 30 March 1978, stated in particular that, in their view, the directive imposed no obligation on Member States to set up authorities which would be in a position to issue EEC type-approval and to carry out the EEC initial verification and furthermore the directive in no way required the prescribed controls necessarily to be carried out on the territory of the Member State in which the electrical energy meters were manufactured. In the opinion of the Danish authorities that point of view is corroborated by the joint statement of the Council and the Commission included in the minutes of the Council meeting at which the directive was adopted. According to the terms of the statement "the Council and the Commission note that the second paragraph of Article 2 refers only to the electrical energy meters mentioned in the first paragraph of the same article, and that the directive therefore does not oblige Member States to obtain EEC pattern-approval for electrical energy meters or to submit them for EEC initial verification where no equivalent national controls are prescribed".

Since the Danish Government's observations did not alter the view taken by the Commission that Denmark had not implemented the measures needed to comply with Directive 76/891 the Commission issued on 6 October 1980 a reasoned opinion which was transmitted to the Danish authorities by a letter dated 8 October 1980.

On 2 February 1981, in reply to the Commission's reasoned opinion the Danish Government stated that it maintained its view that the obligations imposed on Member States by Directive 76/891 were confined to those contained in Article 3. It added that the Commission's interpretation ran counter to framework Directive 71/316 of the Council, in particular Article 2 (2) and Article 8 (2) thereof, from which it was clear that Denmark was in no way obliged to instal control equipment on its territory. The Danish Government finally emphasized that the joint statement of the Commission and the Council, mentioned above, had been adopted because Denmark had clearly stated at the time of the negotiations that it was unable to accept a directive requiring it to instal control equipment on its territory.

The Commission brought these proceedings by application registered at the Court Registry on 13 July 1981. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *Commission* claims that the Court should:

(1) Declare that, by not implementing within the prescribed period the laws, regulations and administrative provisions needed to comply with Council Directive 76/891 on the approximation of the laws of the Member States relating to electrical energy meters, the Kingdom of Denmark has failed to fulfil the obligations imposed on it by the EEC Treaty;

(2) Order the Kingdom of Denmark to pay the costs.

The *Kingdom of Denmark* contends that the Court should:

(1) Declare the application inadmissible;

(2) In the alternative, declare the application to be unfounded;

(3) In any event order the Commission to pay the costs.

III — Submissions and arguments of the parties

A — Admissibility

The *Danish Government* claims that the Commission's application is inadmissible on the ground that, on the one hand, the Commission issued a reasoned opinion without first enabling the Danish Government to submit its observations, and, on the other hand, formulated the application in terms different from those contained in the reasoned opinion.

In the Danish Government's view the Commission has failed in its duty of diligence which is necessarily involved in action taken in implementation of Article 169. The objective of the Article 169 procedure is not to bring as many actions as possible but to attempt to settle them amicably by means of a fruitful dialogue opened by the Commission with the Member State in question. In the present case, the course of the pre-contentious phase of the procedure leads to the conclusion that the Commission formed a clear idea of the obligations which the combined provisions of the framework Directive 71/316 and of the specific Directive 76/891 impose on Member States only at the time when it was formulating its application.

The Danish Government considers that, in so far as there was a difference of opinion as to the interpretation of the provisions and the definition of the default the Commission ought to have described and given a reasoned explanation of the nature of the infringement alleged in the letter of 23 May 1979 giving formal notice in order that a useful dialogue with the Danish authorities might take place. Formulated as a simple letter of reminder of the alleged infringement, without taking account of the state of the discussions between the Danish authorities and the Commission's officers, the letter giving formal notice was not in conformity with its purpose and with the objective assigned to the different stages of the pre-contentious phase of the procedure provided for by Article 169. In the Danish Government's view, it was not open to the Commission, in those circumstances, to issue a reasoned opinion, a step which presupposes that the Member State in question has had the opportunity of submitting its observations on the basis of clear information.

According to the Danish Government, the reasoned opinion and the application are formulated in different terms both from the point of view of the content of the infringement alleged and the grounds on which the allegation is based.

Only at the stage of the application did the Commission base its interpretation on the combined provisions of the framework Directive 71/316 and of specific Directive 76/891. The Commission ought to have taken care to do that when the pre-contentious phase of the procedure was initiated.

The Danish Government points out that, in its reasoned opinion of 6 October 1980, the Commission stated that Council Directive 76/891 required the Member States "to make it possible for the manufacturer or the importer wishing to obtain the EEC marks and signs provided for by the directive to submit themselves to approvals and verifications." In the Danish Government's view it is clear from the terms used by the Commission that Member States were required to install appropriate control equipment. In its application of 3 July 1981 the Commission presented matters differently by stating in particular that the Danish authorities were not "obliged themselves to install control equipment in the form of laboratories or technical equipment" and that it was sufficient "to approve the tests carried out in certain laboratories either in Denmark or in other Member States or to require the person making the request to make available the means in material and personnel necessary for the tests, for example at the place of manufacture."

The Danish Government considers that although the observations of the Member State may lead the Commission in its reasoned opinion to alter its point of view both as regards the scope of the infringement of the Treaty and the reasons which in law militate in favour of the position it has adopted, that is not the case at the stage of the application. If the Commission feels the need to amend the application in any decisive respect it should serve an amended reasoned opinion on the Member State concerned. According to the Danish Government an action for failure to fulfil an obligation under the Treaty constitutes such a serious step on the part of the Commission that a prior and exhaustive investigation is necessary. The importance of the exchange of letters preceding the contentious phase of the procedure was stressed by the Court in Cases 45/64 *Commission* v *Italy* [1965] ECR 857 and 7/69 *Commission* v *Italy* [1970] ECR 111 and 31/69 *Commission* v *Italy* [1970] ECR 25 and acknowledged by the Commission in its answer to Written Question No 557/76 by Mr Fletcher, a member of the European Parliament (Official Journal 1976, C 300, p. 39).

In the *Commission's* view, Article 169 institutes a dialogue between the Commission and the Member State for the purpose of investigating the case. It considers however that the legal dispute arising as a result of the alleged default must not be restricted in the course it takes so that the Commission and the Member State concerned may develop their legal arguments and elaborate their points of view, particularly by adducing new interpretative factors.

The Commission states that whilst the letter of 23 May 1979 giving formal notice was formulated in brief terms that was because the Danish Government, as a result of the exchange of correspondence which preceded that formal notice, was aware of the subject-matter of the infringement alleged against it and the grounds on which the allegation was based. In a letter dated 7 June 1978 the Commission claimed that the directive in question required

Denmark to establish machinery which would enable the Danish authorities to issue the EEC type-approval and to carry out the EEC initial verification. In the Commission's view it was not necessary to supply supplementary details relating to the form and methods of implementation of the directive since Member States are free to choose these.

The Commission would like to emphasize that both in the reasoned opinion and the earlier stages of the procedure it never stated that the Member States themselves had the duty to create authorities responsible for control and supplied with the necessary technical equipment since such an obligation would go beyond what is prescribed in Annexes I and II to Directive 71/316 of the Council, as amended by the Act of Accession of 1972, Annex I para. X. 12, to which the Commission refers in its application.

The Commission stresses that the considerations on the subject of the framework directive which are set out in the application were merely intended to reply to the observations which the Danish Government has made in that respect for the first time in its reply to the reasoned opinion. That did not in any way limit the Danish Government's opportunities of defending itself.

B — The substance of the case

After recalling that according to a consistent line of decisions of the Court the mandatory nature of the directive requires the Member States concerned to comply with its provisions within the prescribed period, the *Commission* states that the combined provisions of Directive 76/891 and of framework Directive 71/316 go further than the Danish authorities think.

The Commission emphasizes that, according to the first recital in the preamble to Directive 76/891 and the first and second recitals in the preamble to the framework Directive 71/316 the matter involved is one of harmonizing laws with a view to eliminating impediments to intra-Community trade in the products in question. The fact that there are no Danish provisions which prevent the placing on the market and entry into service of electrical energy meters only partially satisfies the objectives of the directive.

In the Commission's view, the technical barriers to trade may be eliminated only where the possibility for carying out the EEC type-approval and the EEC initial verification is provided for in each Member State. If it were otherwise, producers and dealers in the State which has not provided for that possibility would be obliged, if they wished to market electrical energy meters mentioned by the directive in other Member States, to call upon the authorities of one of the other Member States to enable the EEC type-approval and EEC initial verification to be carried out. The practical difficulties and additional expense which would result from this would constitute a restriction on trade which the directives are seeking to eliminate.

In the Commission's opinion, its point of view is confirmed both by the provisions of Directive 76/891 and by those of the framework Directive 71/316.

The second paragraph of Article 2 of Directive 76/891 provides in general terms that the electrical energy meters mentioned by the directive are to be the subject of EEC type-approval and are to be submitted for an EEC initial verification. Annexes I and II to the framework Directive 71/316, as amended by the Act of Accession of 1972 Annex I, para. X, which prescribe the symbols of the EEC marks and signs, provide, at point 12 of the said

paragraph, that the EEC approval sign and the EEC initial verification mark are to contain in the upper half the distinguishing capital letter of the State, namely DK for Denmark.

In the Commission's view it follows from that provision that the Danish Government is obliged to adopt measures enabling the Danish authorities to issue the signs and marks referred to.

The Commission takes the view that the joint statement of the Council and the Commission inserted in the minutes of the Council meeting to which the Danish Government has referred was concerned only with the question whether the effect of the directive was that all electrical energy meters mentioned in the proposal must have obtained EEC type-approval and have passed the EEC initial verification as a pre-condition of their being placed on the market.

The Commission is at one with the Danish Government in considering that the framework Directive 71/316 determines the interpretation to be given to the specific Directive 76/891. It considers however that the interpretation by the Danish Government, particularly of Article 2 (2) and Article 8 (2) of the framework directive, is too narrow. Those articles provide respectively that "in so far as their control equipment permits, Member States shall, at the request of the manufacturer or his authorized representative, grant EEC pattern-approval ..." and "... shall carry out EEC initial verification ...".

The words "their" which the Commission says should be read in conjunction with the provisions of Annexes I and II to the framework directive has a very wide meaning and covers not only the possibility of having the necessary controls carried out by the authorities of the Member States but also other possibilities which do not require that the Member State itself should have the necessary equipment. In the Commission's view, the provisions of the directive do not require the Member States to install control equipment. The Danish authorities may approve the tests carried out either in Denmark or in other Member States or require that the person making the request should himself make available, for example at the place of manufacture, the means in material and personnel needed for the tests.

The Commission adds that the Community provisions in question relate to dealers wishing to export to other Member States electrical energy meters which have either been manufactured in Denmark or have been imported into Denmark from other countries, including non-member countries. The directives in question therefore concern both existing manufacturers and possible new manufacturers. Thus, in the Commission's view, the arguments of the Danish Government to the effect that the only Danish manufacturer or electrical energy meters shows no interest in the EEC type-approval and the EEC initial verification of his products, or that trade with Denmark in electrical energy meters where electrical energy meters of foreign origin account for approximately 40% of the total consumption, is carried on satisfactorily, cannot be upheld as justifying the failure to implement the provisions of Council Directive 76/891.

According to the *Danish Government* it is clear from Articles 2 (2) and 8 (2) of the framework Directive 71/316 that Member States are required to grant EEC type-approval and EEC initial verification only in so far as they themselves have the necessary control equipment for that purpose.

The Commission is seeking to evade the precise meaning of those provisions by maintaining in its application that, in order to satisfy the obligations resulting from the directive, it is sufficient for the Member States to make it possible for their national authorities to avail themselves of the control equipment of private laboratories which may be situated in other Member States. In the Danish Government's view, if that interpretation were correct, the existence of a single centre adequate for the purpose would be sufficient to enable the two directives in question to be implemented in all the Member States.

In the Danish Government's view there is no doubt that the aforementioned provisions must be understood in their natural meaning, namely that it is the authorities themselves which must in fact possess the equipment necessary for the technical controls. *A contrario,* that means that those Member States without such an infrastructure are not required to issue the EEC type-approval and carry out EEC initial verification.

According to the Danish Government the interpretation of the provisions advocated by the Commission rests on shaky foundations.

That is particularly so in the case of the second paragraph of Article 2 of Directive 76/891 which, in the Danish Government's view, simply means that to be able to bear the EEC signs and marks electrical energy meters must undergo the controls prescribed by the directive. The fact that the symbol applicable to Denmark was laid down in Annex I, para. X. 12, of the Act of Accession of 1972 has no effect on the content of the obligations imposed on the Member States which is clearly defined in Articles 2 (2) and 8 (2) of the framework Directive 71/316. That symbol is incorporated in the framework directive in case Denmark should decide to introduce an EEC type-approval and an EEC initial verification for the products in question.

In the Danish Government's view there is nothing to support the Commission's argument to the effect that the obligation to create the means for individuals to benefit from the EEC type-approval and EEC initial verification is inherent in the purpose of the directive.

The aim of the directive is to eliminate technical barriers to the marketing in the Community of electrical energy meters mentioned by the directive. However, the Commission found that such barriers never existed in Denmark. In the Danish Government's view the duty to contribute actively to the promotion of exports of Danish energy meters to other Member States cannot be regarded as inherent in the purpose of the directive.

According to the Danish Government it should be observed that, irrespective of the legal value of the joint statement of the Commission and the Council annexed to the minutes of the Council meeting at which Directive 76/891 was adopted, the Commission, during the course of these proceedings, has departed from a conception of the law which it had expressed and which it knew was of decisive importance to the Danish Government. That can only have a negative effect on future harmonization work within the Council.

IV — Oral procedure

The Commission of the European Communities, represented by H. P.

Hartvig, a member of its Legal Department, acting as Agent, and the Government of the Kingdom of Denmark, represented by L. Mikaelsen, acting as Agent, presented oral argument at the sitting on 12 October 1982.

The Advocate General delivered his Opinion at the sitting on 10 November 1982.

At the sitting on 12 October 1982 the Court was composed of: J. Mertens de Wilmars, President, U. Everling and A. Chloros (Presidents of Chambers), P. Pescatore. O. Due, K. Bahlmann and Y. Galmot, Judges.

Under the terms of Article 27 (2) of the Rules of Procedure, only those judges who were present at the oral proceedings may take part in the deliberation. As a result of the death of Judge Chloros, the Court, by order of 16 November 1982, decided to re-open the oral procedure before the Court in its new composition.

The Commission, by telex message dated 1 December 1982, and the Danish Government, by a letter dated 2 December 1982, stated that they would not appear at the sitting fixed for 9 December 1982 and confirmed the submissions and arguments put forward in their oral addresses at the sitting on 12 October 1982.

At the sitting on 9 December 1982 the Advocate General confirmed his Opinion which he had delivered at the sitting on 10 November 1982.

Decision

1 By application lodged at the Court Registry on 13 July 1981 the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that the Kingdom of Denmark had failed to fulfil its obligations under the third paragraph of Article 189 of the Treaty by failing to adopt, within the prescribed period, the measures needed to comply with Council Directive 76/891 of 4 November 1976 on the approximation of the laws of the Member States relating to electrical energy meters (Official Journal 1976, L 336, p. 30).

2 Directive 76/891 is one of the directives implementing Directive 71/316 of the Council of 26 July 1971 on the approximation of the laws of the Member States relating to common provisions for both measuring instruments and methods of metrological control (Official Journal, English Special Edition 1971 (II), p. 707). Adopted for the purpose of eliminating the technical barriers to intra-Community trade in measuring instruments and the risks of unequal conditions of competition, Directive 71/316, which is in the nature of a framework directive, provides that, in respect of each category of measuring instruments, a separate directive will establish the measurement characteristics of the technical requirements for design and functioning.

3 By virtue of Article 4 of Directive 76/891 relating to electrical energy meters, Member States had to put into force the measures needed in order to comply with the directives within 18 months of its notification which in the present case expired on 9 May 1978.

4 The Danish Government's primary submission is that the Commission's application is inadmissible. In the alternative it requests that the application be declared unfounded.

Admissibility

5 The Danish Government claims the application is inadmissible on the grounds that, in breach of Article 169 of the Treaty, the Commission on the one hand issued a reasoned opinion without first having enabled the Danish Government to submit observations in regard to a clearly defined obligation and, on the other hand, formulated the application in terms different from those of the reasoned opinion.

6 The Danish Government claims, in the first place, that the letter giving formal notice is formulated in terms which are insufficiently precise to constitute notice of initiation of the procedure under Article 169 of the Treaty.

7 It should be recalled that by virtue of Article 169 of the Treaty the Commission may bring before the Court an action for failure of a State to fulfil its obligations only after giving the Member State concerned the opportunity of submitting its observations.

8 It follows from the purpose assigned to the pre-contentious stage of the proceedings for failure of a State to fulfil its obligations that a letter giving formal notice is intended to delimit the subject-matter of the dispute and to indicate to the Member State which is invited to submit its observations the factors enabling it to prepare its defence.

9 As the Court held in its judgment of 17 February 1970 in Case 31/69 *Commission* v *Italy* ECR 25, the opportunity for the Member State concerned to submit its observations constitutes an essential guarantee

required by the Treaty and, even if the Member State does not consider it necessary to avail itself thereof, observance of that guarantee is an essential formal requirement of the procedure under Article 169.

10 It appears from the documents before the Court that by a letter dated 23 May 1979 giving formal notice the Commission merely asserted that in its view the Danish Government had not put into force the measures necessary to transpose Directive 76/891 into national law but refrained from specifying the obligations which, in its view, were imposed on that State by virtue of the directive and which had been disregarded.

11 In the present case, however, that fact did not have the effect of depriving the Danish Government of the opportunity of submitting its observations to good effect. On 7 June 1978 the Commission had addressed to the Danish Government a letter setting out the precise reasons which led it to conclude that the Kingdom of Denmark had failed to fulfil one of the obligations imposed on it by Directive 76/891. It was by reference to the position adopted by the Commission in that letter of 7 June 1978 that the Danish Government submitted its observations on 22 August 1979.

12 That submission must therefore be rejected.

13 Secondly the Danish Government claims that the reasoned opinion and the application are not identical.

14 It should be remembered that the subject-matter of an application brought under Article 169 is determined by the Commission's reasoned opinion and that therefore the two documents must be founded on the same grounds and submissions.

15 It is clear from the documents before the Court that that obligation has been fulfilled. The terms of the application correspond to those of the reasoned opinion issued on 6 October 1980. In both documents the Commission, having re-stated the point of view of the Danish authorities, defines in

similar and sufficiently specific terms the infringement alleged and the reasons for which it considers that the Kingdom of Denmark has failed to fulfil the obligations imposed on it by the Treaty.

16 Although the Commission did plead, for the first time in the application, the provisions of framework Directive 71/316, it was merely replying to a defence raised by the Danish Government in response to the reasoned opinion and, in doing so, altered neither the definition nor the basis of the alleged failure to fulfil an obligation.

17 Therefore the second submission of the Danish Government must be rejected.

Substance of the case

18 The dispute is concerned with the content and scope of the obligations stemming from the combined provisions of framework Directive 71/316 and of Directive 76/891 relating to electrical energy meters.

19 In the Commission's view it follows from those provisions that the Member States, without being obliged to install control equipment, are nevertheless required to make it possible for EEC signs and marks to be issued at the request of manufacturers or importers. That obligation corresponds to the objective of the directives which were adopted for the purpose of eliminating technical barriers to trade and are intended to enable electrical energy meters bearing EEC signs and marks to be freely placed on the market and put into service in the whole of the Community.

20 The Commission emphasizes that in fulfilling its obligation Denmark may, in accordance with Annexes I and II to the framework directive either approve the tests carried out on its territory or in other Member States or require applicants to make available to it the means in material and personnel necessary for the tests. The existence of that obligation imposed on Denmark is confirmed by paragraph X, point 12, of Annex I to the Act of Accession of 1972 which assigns to Denmark the seal DK as the distinctive symbol to be

added to the EEC approved signs and the EEC initial verification marks granted by that State.

21 In the Danish Government's view it is clear from the combined provisions of framework Directive 71/316 and of Directive 76/891 that those directives require no specific implementing measure in Denmark since that country does not have at its disposal any equipment enabling it to carry out type-approval controls and initial verifications. According to the Danish Government it cannot be accepted that inherent in the purpose of a directive which seeks to eliminate technical barriers to trade in electrical energy meters there is an obligation to establish administrative machinery enabling EEC signs and marks to be issued on request and to ensure the functioning of a system of mutual recognition of control operations, where there is no equivalent control at national level.

22 The Danish Government considers therefore that the provisions of Annexes I and II to framework Directive 71/316, read in conjunction with those of Articles 2 (2) and 8 (2) of that directive, were adopted solely to cover the eventuality of Denmark's deciding to introduce a system of metrological control of measuring instruments.

23 It is necessary for the Court, in order to resolve the issue, to analyse the combined decisions of framework Directive 71/316 on the approximation of the laws of the Member States relating to measuring instruments and methods of metrological control and of the specific Directive 76/891 relating to electrical energy meters.

24 According to the wording of Articles 2 (2) and 8 (2) of the framework Directive 71/316, it is only "in so far as their control equipment permits" that Member States are obliged to grant, at the request of the manufacturer or his authorized representative, EEC type-approval or to carry out EEC initial verification of instruments submitted. It should also be noted that no provision in the framework directive imposes an obligation on Member States which do not have control equipment available to procure within a given period control equipment regulating the issue, by those States, of EEC marks and signs.

25 It is impossible to accept, as the Commission would wish, that Annexes I and II to the framework directive are intended to alter or might have the effect of altering the scope of the obligations imposed on the Member States by Articles 2 and 8 mentioned above. The provisions of those annexes are limited to specifying the practical procedures for EEC type-approval and for EEC initial verification. The requirements which they lay down are thus applicable only to those Member States which have procured or will procure control equipment enabling them to issue EEC marks and signs.

26 It must therefore be recognized that the framework Directive 71/316 by itself only imposes on the Member States an obligation to issue EEC marks and signs which is conditional on and subject to the availability to each State of control equipment enabling those marks and signs to be issued.

27 It is true, however, that Article 1 (4) of the framework Directive 71/316 provides that separate directives may specify that the categories of instruments with which they are concerned "must undergo both EEC pattern approval and EEC initial verification or just one of these" in all Member States. That provision therefore leaves open the possibility that a specific directive concerning a category of instruments may, in respect of that category, transform the conditional obligation to issue EEC marks and signs into an unconditional obligation imposed on each Member State without distinction. The specific Directive 76/891 relating to electrical energy meters must therefore be examined to see whether it intended to alter in that way the scope of the obligations imposed on Member States by the framework directive in respect of that category of instruments.

28 According to the terms of Article 2 of Directive 76/891 "the electrical energy meters which may be given EEC marks and signs are described in the annex to this directive. They shall be the subject of EEC type-approval and shall be submitted for EEC initial verification". That very general provision must be regarded as merely being intended to bring electrical energy meters within the system of type-approval and initial verification established by the framework directive. It cannot be said that the conditional obligation defined by the framework directive has been transformed into an unconditional obligation since there is nothing in the statement of the reasons on which Directive 76/891 is based or in the documents before the Court, nor is there anything arising out of the oral procedure, to suggest that there are special reasons for increasing the burdens imposed on the Member States by the framework directive in respect of the issue of EEC signs and marks relating to electrical energy meters.

29 The Commission's argument to the effect that the objective pursued by the directive may be achieved only if all the Member States are obliged to issue on request EEC signs and marks cannot be upheld.

30 First, Article 3 of Directive 76/891 requires all the Member States without exception not to "prevent, prohibit or restrict the placing on the market or entry into service of electrical energy meters if such meters bear the EEC type-approval sign and the EEC initial verification mark". Any national legislation or rules contrary to those requirements must be adapted as necessary. As to the establishment of a system of national authorities empowered to issue EEC marks and signs, it is clear from the scheme of the directives in question that they were intended, as a first step, to go no further than a programme of mere "optional harmonization" which exempts Member States not in possession of the necessary control equipment from having themselves to issue EEC marks and signs. It is for each Member State which finds itself in that situation to assess, having regard in particular to the interests of traders established within its territory, whether it ought to provide itself with the necessary equipment and thus become subject to the obligations laid down by Articles 2 and 8 of Directive 71/316.

31 The Commission does not dispute that, in the absence of any Danish rules relating to electrical energy meters, the Kingdom of Denmark does not have to adopt any measure in order to comply with Article 3 of Directive 76/891 and that free access to the Danish market is guaranteed for electrical energy meters originating in other Member States, whether or not bearing EEC marks and signs. Nor does it dispute the fact that the Kingdom of Denmark does not have available to it the control equipment necessary for the issue of EEC type-approval and EEC initial verification of electrical energy meters. It follows therefore from the foregoing that the combined provisions of Directives 71/316 and 76/891 do not impose on the Kingdom of Denmark any obligation to establish the structures necessary for the issue, at the request of interested manufacturers or dealers, of EEC marks and signs relating to electrical energy meters.

32 Consequently, the Kingdom of Denmark has not failed to fulfil its obligations under the above-mentioned directives.

33 The Commission's application must therefore be dismissed.

Costs

34 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party shall be ordered to pay the costs. Since the Commission of the European Communities has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Mertens de Wilmars Pescatore Everling

Mackenzie Stuart Due Bahlmann Galmot

Delivered in open court in Luxembourg on 15 December 1982.

J. A. Pompe
Deputy Registrar

J. Mertens de Wilmars
President