OPINION OF ADVOCATE GENERAL LA PERGOLA
delivered on 17 June 1997 *

I — Introduction

1. The present proceedings for failure by a Member State to fulfil obligations, instituted by the Commission, are concerned with the question whether or not Directives 91/371/EEC and 92/49/EEC have been transposed into the law of the Kingdom of Spain within the prescribed time-limits. I will consider both actions together. The legislation adopted by the Kingdom of Spain to comply with those obligations and challenged by the Commission is in fact the same in the case of both directives.

II — Facts

2. Council Directive 91/371/EEC of 20 June 1991 on the implementation of the Agreement between the European Economic Community and the Swiss Confederation concerning direct insurance other than life assurance, [1] lays down, in Article 1, an obligation for the Member States to amend their national provisions to comply with that Agreement within a period of 24 months following the notification of the directive and immediately inform the Commission thereof. The deadline for transposition was 4 July 1993.

3. Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive), [2] provides, in Article 57, that the Member States are to adopt the laws, regulations and administrative provisions necessary for their compliance with the directive not later than 31 December 1993 and forthwith inform the Commission thereof.

4. The Commission, having received no information relating to the transposition of the two directives at the expiry of the abovementioned periods, initiated the pre-litigation procedure which resulted in reasoned opinions concerning the two directives being sent to the Kingdom of Spain on 31 October 1994 and 24 October 1994 respectively. The Kingdom of Spain then informed the Commission, by letter of 18 January 1995, that the competent authorities were preparing the measures necessary to comply

* Original language: Italian.

1 — OJ 1991 L 205, p. 48.

2 — OJ 1992 L 228, p. 1.

with the two directives. However, on 22 November 1995 the Commission had still received no information concerning the transposition of the directives and, accordingly, on 23 November 1995, brought the two actions now under consideration.

5. In these actions the Commission is asking the Court to declare that, by failing to adopt the provisions necessary to comply with the Directives concerned or, alternatively, by failing to communicate those provisions, the Kingdom of Spain has failed to fulfil its obligations under Articles 5 and 189 of the Treaty.

6. The Kingdom of Spain asserts that it has transposed the directives in question by adopting Law No 30/1995 which was notified to the Commission on 5 December 1995 (therefore after the actions had been brought). For its part, the Commission has denied that Law No 30/1995 fulfils the transposition obligations laid down by the two directives, putting forward on that point various observations in its reply and criticizing deficiencies in the Spanish legislation. The Commission alleges, in particular, that certain provisions of Directive 91/371 have not been transposed, such as those intended to guarantee the automatic right to pursue the business of insurance or to prevent the economic needs of the market from being taken into account. Moreover, as far as Directive 92/49 is concerned, the Commission complains of failure to transpose the provisions of the directive relating to the prohibition on taking account of the economic needs of the market in issuing the authorization to engage in the business of insurance, to provisions relating to technical reserves, to the rules on asset ratios in Article 23 of the directive, to the rules concerning the guiding principles as regards reinsurance and to those concerning the possibility of legal action. In its reply the Kingdom of Spain contends that it has fully transposed the Community provisions at issue by referring, with respect to matters not expressly provided for in Law No 30/1995, to the general system in force in Spain in the sector in question.

7. At the hearing, which took place on 15 May 1997, the Commission confirmed its point of view, albeit in general terms: the directives at issue have not been appropriately transposed by the Kingdom of Spain. The Commission did not, however, specify with sufficient clarity how and up to what point the arguments put forward by the defendant to establish transposition of the directives were ill-founded. For its part, the Kingdom of Spain maintained that the obligations imposed by the two directives are fully satisfied by the complex and detailed Spanish system governing the sector in question, into which the derogating provisions of Law No 30/1995 were inserted.

III — Analysis

8. The parties agree that there has been a failure to fulfil obligations to the extent that the two directives were not transposed within the prescribed time-limits. On this point, the Commission's application should

therefore be allowed and it should be declared that the Kingdom of Spain has failed to fulfil its obligations under the Treaty by failing to transpose the two directives within the prescribed time-limits.

9. More complicated, however, is the question whether the two directives were fully and correctly transposed by the adoption of Law No 30/1995.

It should be noted at once that the issue of the appropriateness of the transposition was first raised only in the Commission's reply. Nor, at the hearing, was the Commission able to explain satisfactorily its complaints against the defendant and thus to respond to the observations made by the defendant, which claimed that the Spanish legislation complied with the directives. In this respect, I would point out that the Court has on several occasions insisted that the complaints made against a Member State in an action for failure to fulfil obligations must always have first been raised in the pre-litigation procedure. [3] The purpose of this is to protect the right of a Member State to defend itself and to enable the Court to rule on well-defined complaints on which that same Member State has been able to adopt a position.

10. In this case, the conditions which would enable the Court to carry out a comprehensive analysis of the Commission's complaints, which were raised, let it be said, only in the second part of the written procedure, are not, in my opinion, satisfied. The Kingdom of Spain's defence, to the effect that its detailed system of domestic provisions satisfies the obligations imposed by the directives, has not been the subject of a real exchange of argument between the parties. However, I do not consider that the absence of thorough exploration in the course of the proceedings of the complaints made by the Commission against the Kingdom of Spain must necessarily lead the Court to conclude that the defendant has fulfilled its obligations under the two directives. Admittedly, the principle *actore non probante, reus absolvitur* applies also in proceedings before the Court for the failure by a Member State to fulfil obligations. However, it is just as certain that the difficulty encountered by the Commission in identifying the contentious points of the Spanish legislation, which, moreover, is neither easy to follow nor to interpret, cannot be attributed, at least to any great degree, to the Commission. At the most generous estimate, [4] the adoption of the Spanish law, the appropriateness of which is in dispute, was notified to the Community executive after the originating application had been lodged. To hold that the directives in question have been correctly transposed solely because the defendant Member State adopted new provisions during the proceedings, thereby obliging the applicant to reformulate the subject-matter of the action for failure to fulfil obligations, would run counter to the demands of substantive justice. [5] And it would be contrary to the principles of

3 — Judgments in Case C-132/94 *Commission* v *Ireland* [1995] ECR I-4789 and Case C-274/93 *Commission* v *Luxembourg* [1996] ECR I-2019, paragraph 12.

4 — In fact, in its reply, the Commission had initially accused the Kingdom of Spain of not communicating to it Law No 30/1995 until the lodging of the defence. In that respect, the Kingdom of Spain pointed out that the law in question was notified to the Commission by letter of 5 December 1995.

5 — In this respect, compare the considerations put forward by Advocate General Jacobs in Case C-247/93 *Commission* v *Luxembourg*, cited above, paragraph 12.

procedural economy and proper administration of justice to find the defendant Member State free from fault or simply not to rule on this point at all, and, in that case, force the Commission to initiate *ex novo* proceedings for failure to fulfil obligations on the same grounds as those in point in this case.

11. In conclusion, I consider that in such a situation and for the reasons set out above the Court cannot rule on the substance of the Spanish provisions at issue in order to ascertain whether or not they fulfil the obligations imposed by the two directives. On the other hand, the Court cannot absolve the Kingdom of Spain of the complaints raised against it in reliance on the principle *onus probandi incumbit ei qui dicit, non ei qui negat*; still less can it pronounce a *non liquet* on that part of the action, by restricting itself to ruling on the manifest failure to transpose the two directives within the prescribed time-limits.

12. On the other hand, it would in my opinion by helpful — and I refer to a judicial precedent for this [6] — if the Court were here to give only an interim ruling on the aspects relating to the compliance of the Spanish law with Community law and to prescribe for the parties a time-limit within which they are to report back to the Court on the contested points of the legislation in question which have not yet been sufficiently clarified in the course of the proceedings. That will enable the Court to give judgment on the actions only after the parties have, between them, defined the remaining differences with greater precision. Such a procedural device would enable the Commission to formulate its complaints with greater precision and would give the Kingdom of Spain a real possibility of fully exercising its rights of defence.

IV — Conclusion

13. In the light of the foregoing considerations, I propose that the Court should:

(a) by way of final judgment,

allow the Commission's application and declare that, by failing to adopt the necessary measures to transpose Council Directives 91/371/EEC of 20 June

6 — Judgment in Case 149/79 *Commission* v *Belgium* [1980] ECR 3881.

1991 on the implementation of the Agreement between the European Economic Community and the Swiss Confederation concerning direct insurance other than life assurance and Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) within the prescribed time-limits, the Kingdom of Spain has failed to fulfil its obligations under Articles 5 and 189 of the Treaty;

(b) by way of interim judgment,

declare and adjudge that the Kingdom of Spain and the Commission shall re-examine together the matters in dispute and report to the Court within six months from the date of delivery of this judgment. The Court will give final judgment after that date.