3. **Directive No 73/173 must be interpreted as meaning that it is not permissible for national provisions to prescribe that containers shall bear a statement of the presence of ingredients of the products in question in terms going beyond those laid down by the said directive.**

4. **National provisions going beyond those laid down in Directive No 73/173 are compatible with Community law only if they have been adopted in accordance with the procedures and formalities prescribed in Article 9 of the said directive.**

5. **Directive No 77/728 of the Council of the European Communities of 7 November 1977, in particular Article 9 thereof, cannot bring about with respect to any individual who has complied with the provisions of the said directive before the expiration of the adaptation period prescribed for the Member State any effect capable of being taken into consideration by national courts.**

Mertens de Wilmars Mackenzie Stuart Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 5 April 1979

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber
acting as President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 20 FEBRUARY 1979 [1]

Mr President,
Members of the Court,

The reference for a preliminary ruling on which I have to deliver an opinion today concerns two Council Directives which were issued in order to eliminate obstacles to trade between Member States due to differences in national provisions of a technical nature. We are

1 — Translated from the German.

concerned with Directive No 73/173 of 4 June 1973 on the approximation of Member States' laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous preparations (solvents) (Official Journal 1973, No L 189, p. 7) and Directive No 77/728 of 7 November 1977 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of paints, varnishes, printing-inks, adhesives and similar products (Official Journal 1977, No L 303, p. 23).

The first of the above-mentioned directives contains provisions in its first two articles concerning certain toxic and harmful substances. These are grouped into classes and sub-classes to which particular indices are assigned. Articles 4 to 6 deal with questions of packaging and labelling, and prescribe in particular that an indication of certain information concerning the toxic and harmful substances shall be given. Under Article 7 Member States may, to a certain extent, permit derogations from these requirements. Article 3 provides that "Member States shall take all necessary measures to ensure that dangerous preparations (solvents) cannot be placed on the market unless they comply with the provisions of this directive and the annex thereto". Article 8 provides that "Member States shall not prohibit, restrict or impede on the grounds of classification, packaging or labelling as defined in this directive, the placing on the market of dangerous preparations which satisfy the requirement of this directive and the annex thereto". Article 11 requires Member States to "introduce the provisions necessary to comply with this directive within eighteen months from its communication".

Directive No 77/728 enacts analogous provisions for paints containing certain dangerous substances. For its implementation, however, Article 12 lays down a period of 24 months from its notification; this period, unlike the one prescribed in Article 11 of Directive No 73/173, has not yet expired and will not do so until November of this year.

Italy has not yet provided for the implementation of these directives. There is merely a Law No 256 of 29 May 1974 and a Ministerial Decree of 17 December 1977 pursuant to the outline Directive No 67/548 of 27 June 1967 (Journal Officiel 1967 No 196, p. 1) — amended by Directive No 73/146 — which forms the basis of the two directives on solvents and varnishes with which we are concerned now. So in Italy, as regards those substances, Law No 245 of 15 March 1963 is still in force, applying both to goods produced and marketed in Italy and to imported goods. It makes mandatory provisions for labelling which in part are less stringent than the provisions of the directives — because only certain substances (benzene, toluene and xylene) require an indication — and in part exceed the requirements of the directives, in that they refer to concentrations, which are not dealt with in the directives, and they require, moreover, that the quantities of the substances concerned be indicated in percentages. Article 12 of the Law provides that anyone failing to comply with these provisions may be fined.

That is what faces the accused in the main action, the legal representative of the Italian undertaking Silvam. Criminal proceedings were instituted against him in the Pretura in Milan, because Silvam had begun to apply the labelling pre-

scribed in Directive No 73/173 to its containers of solvents and to comply with Directive No 77/728 as regards varnishes. Apparently the products concerned include varnishes imported from the Federal Republic of Germany where the directives are already applied.

In his defence the accused relies upon the said Community directives. He points out that according to the case-law of the Court individuals may acquire rights under directives if certain requirements are fulfilled. He submits that that applies to Directive No 73/173 which should already have been implemented. Only in Article 7 does it leave a narrow latitude for derogations, and presumably the derogations themselves created absolute obligations. At all events it must be assumed that the obligation contained in Article 8 has direct effect. But the same applies also to the corresponding obligation contained in Article 9 of Directive No 77/728. Therefore the fact that the period prescribed in Article 12 has not yet expired is irrelevant; for the Member States did not need to adopt any measures in order to comply with Article 9. Any other interpretation would make it permissible to prohibit use of the labelling prescribed by the directive until expiry of the period laid down in Article 12 which would — since the directives were already applied in Germany — result in an unacceptable restriction of the free movement of goods.

By a decision of 8 May 1978 the Pretura stayed the proceedings and submitted the following questions for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

(a) Does Council Directive 73/173/EEC of 4 June 1973, in particular Article 8 thereof, constitute directly applicable legislation conferring upon individuals personal rights which the national courts must protect?

(b) It is lawful, notwithstanding the provisions set out in the said article, to prescribe in national legislation obligations and limitations which are more precise and detailed than, or at all events different from, those set out in the directive, and might the foregoing be considered an obstacle to the free movement of and trade in the goods and products covered by that directive, namely solvents, in that such obligations and limitations directly affect the establishment and operation of the common market, having regard to the obligation imposed by national legislation to affix to containers information which is not required by the directive?

(c) In particular, may the duty to indicate, on the container of the solvent or product offered for sale, that it contains benzene, toluene and xylene, specifying the total percentage of those substances and, separately, that of benzene alone, pursuant to Article 8 of Law No 245 of 5 March 1963, be considered incompatible with the said directive, either because of the obligatory nature of the duty to provide the information (failure to do so being punishable under the criminal law) or by reason of the detailed rules laid down for discharging that duty, having regard also to the general reasoning upon which the said directive appears to be based?

(d) Do the said national provisions, which are applicable without distinction to all goods placed on the domestic market, nevertheless constitute an obstacle, a prohibition or a restriction on trade in and the free movement of such goods, even if such provisions were enacted for the purpose of ensuring greater protection for the physical safety of users of the products in question (and indeed a considerable volume of scientific literature, at least from the 1960s onwards, emphasizes the dangers inherent in substances such as benzene, toluene and xylene, especially for workers who may often have to use solvents which, unknown to them, contain a high percentage of such substances, but not only for workers, since any consumer who uses a varnish containing the said substances may risk grave injury to his health)?

(e) Is Council Directive 77/28/EEC of 7 November 1977, in particular Article 9 thereof, immediately and directly applicable with regard to the obligations imposed on Member States to refrain from action as from the date of notification of that directive, in a case where a person, acting upon a legitimate expectation, has complied with the provisions of that directive before expiry of the period within which the Member State must comply with the said directive?

My opinion of these questions is as follows:

1. As regards the legal effects of Directive No 73/173, which should have been followed by internal implementing measures by the end of 1974 — which did not happen in Italy — it must first of all be pointed out, with regard to the formulation of the question, that it is certainly inappropriate to speak of the direct applicability of a directive. That term is used in Article 189 of the Treaty only for regulations, that is to say, for directly applicable Community legislation, which may also create legal relations between individuals. However, it is clear from the Treaty and has also been emphasized again and again in the case-law that a clear distinction must be drawn between regulations and directives, the latter creating obligations only for the Member States. So under no circumstances can one say — as the defendant in the main action has said — that directives may also have the content and effects of a regulation; at most directives may produce *similar* effects (cf. the judgments of 6 October 1970 in Case 9/70 *Franz Grad* v *Finanzamt Traunstein* [1970]2 ECR 825, of 4 December 1974 in Case 41/74 *Yvonne van Duyn* v *Home Office* [1974]2 ECR 1337 and of 1 February 1977 in Case 51/76 *Verbond van Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten en Accijnzen* [1977]1 ECR 113). The essence of such effects is that in certain cases, which however constitute the exception to the rule, Member States which do not comply with their obligations under the directive are unable to rely on provisions of the internal legal order which are illegal from the point of view of Community law, so that individuals become entitled to rely on the directive as against the defaulting State and acquire rights thereunder which the national courts must protect. So in such cases one should more properly speak — and that has always happened in the

case-law — only of the direct effect directives. Consequently the first question of the Pretura must be understood in this amended sense.

The conditions in which such direct effect can be recognized have already been laid down with sufficient clarity in the case-law of the Court. I refer to the judgments cited above and also to the judgment of 17 December 1970 in Case 33/70 *SACE* v *Ministry for Finance of the Italian Republic* [1970]2 ECR 1213 and the judgment of 23 November 1977 in Case 38/77 *Enka BV* v *Inspecteur der Invoerrechten en Accijnzen* [1977]2 ECR 2203. According to those cases the decisive test is whether it may be said from the nature, general scheme and wording of a directive that it imposes clear, complete and precise obligations on the Member States, does not lay down any conditions other than precisely defined ones and does not leave the Member States any margin of discretion in the performance of the obligations.

With the guidance afforded by those criteria it is easy to judge to which provisions of Directive No 73/173 which, as I have already said, the Member States should have complied with some time ago, direct effect may be attributed.

This certainly applies to Articles 1 and 2. In those articles, as I have already stated, the substances concerned are specified, the toxic and harmful substances used as solvents are divided into classes and sub-classes with indices for each sub-class and rules are laid down to determine precisely when preparations are to be considered toxic or harmful. The same applies also to Article 4, which governs packaging and provides at the end: "Packages meeting these requirements shall be considered as satisfactory." Articles 5 and 6, which deal with the labelling of the packages and the addition of safety advice, should be regarded in the same way. On the other hand different considerations apply to Article 7, which permits Member States to prescribe a different form of labelling for very small packages and for preparations which contain such small quantities as to be harmless.

As regards Article 8, to which the question refers in particular, theretoo the wording of the provision seems to argue in favour of direct effect. However, the Commission is in my opinion right to point out that basically that provision has no significance of its own, but merely contains confirmation of the principle, deducible from other provisions of the directive and from its general purpose, that products conforming to the directive may be freely marketed and trade in them may not be impeded. Therefore it is necessary to ascertain whether other provisions of the directive have direct effect, since such effect can be ascribed to Article 8 only in conjunction with other provisions of the directive.

Therefore the first question must be answered as a whole in the way indicated above.

2. With regard to the second question the Commission rightly pointed out that Directive No 73/173 aims to secure *total* harmonization. That can be deduced from Article 3, from the last paragraph of Article 4 and from Article 8. Accordingly — disregarding Article 7, which permits limited exceptions which have no relevance to this case — it is not permissible for a Member State to maintain, as regards the home market, derogative regulations in general and in particular to apply to the classification,

packaging and labelling of solvents conditions more restrictive than those of the directive. As regards imports from other Member States, the maintenance of regulations in derogation from the directive should certainly be considered contrary to the principle of the free movement of goods, which of course is supposed to be guaranteed by Article 8 if the requirements of the directive and annex thereto are satisfied.

3. In order to answer the third question it is sufficient to refer to Article 5 of Directive No 73/173. It provides that the packages of solvents must indicate the presence of certain substances considered toxic within the definition contained in Article 2 and that in certain cases the names of harmful substances must be stated. But there is no requirement to indicate percentages. So Article 8 of the Italian Law of 15 March 1963 is clearly more restrictive than the directive and constitutes a derogation therefrom. It is also clear that as a result the said national provision is not in conformity with the directive and in particular with Article 8 thereof, already mentioned several times, which provides that the placing on the market of dangerous preparations which satisfy the requirements of the directive and the annex thereto may not be prohibited, restricted or impeded on the grounds of classification, packaging and labelling as defined in the directive.

4. The fourth question obviously alludes to Article 36 of the EEC Treaty, whereby measures having equivalent effect within the meaning of Article 30 may be justified on certain grounds, including for example the protection of the health of consumers. However, such justification can surely not succeed when a Community measure for the harmonization of such provisions has been adopted, that is to say when the attainment of the objectives of Article 36 has been undertaken at Community level. Thus it is clear that the standard laid down in the Community measure guarantees sufficient protection and so, when the period prescribed by the directive for the adaptation of internal law has expired, there is in principle no longer any place for additional protective measures at the national level. This is clear from the judgment of 15 December 1976 in Case 35/76 *Simmenthal S.p.A.* v *The Italian Minister for Finance* [1976]2 ECR 1871 and the judgment of 25 October 1977 in Case 5/77 *Carlo Tedeschi* v *Denkavit Commerciale s.r.l.* [1977]2 ECR 1555. In those cases it was emphasized that Article 36 has by no means reserved certain matters to the exclusive jurisdiction of Member States; exceptions to the principle of the free movement of goods may be justified thereunder *only* if measures are *necessary* for the protection of the things mentioned in Article 36 which, however, is no longer the case when harmonizing directives with the same objective have been adopted.

It is just possible in the present case to consider an application of Article 9 of Directive No 73/173, which provides that:

"Where a Member State establishes that a dangerous preparation, although satisfying the requirements of this directive, presents a health or safety risk necessitating a classification or labelling other than those provided for by this directive, it may, for a period not exceeding six months, prohibit the distribution, sale or use of that preparation in its territory. It shall inmediately inform the other Member States and the

Commission thereof and give reasons for its decision.".

However, as the wording shows, the above provision merely concerns temporary measures for which — as was emphasized by the judgment in Case 5/77 on analogous facts — a Community procedure must be observed and which, in accordance with Article 9 (2), are subject to the supervision of the Commission, which makes the final decision regarding what steps it is appropriate to take. Moreover it is clear that in the present case we are not concerned with an application of that provision since the Italian Law was enacted long before the Community directive and so not as a reaction thereto or in reliance on the said Article 9.

5. Lastly we must determine whether Directive No 77/728 of 7 November 1977, Article 12 of which, as I have already said, provides that Member States must introduce the necessary laws, regulations and administrative provisions by November 1979 at the latest, has direct effect before that date, from the date of its notification in fact, since Article 9 thereof provides that:

"Member States shall not prohibit, restrict or impede, on the grounds of classification, packaging or labelling as defined in this directive, the placing on the market of dangerous preparations which satisfy the requirements of this directive and the annexes thereto."

That is correct in the view of the accused in the main action because the said article merely imposes on the Member States an obligation to refrain from action, which leaves absolutely no margin of discretion and requires no legislative measures. He relies in this context — as may be gathered from the way in which the question is formulated — *inter alia* on the protection of the legitimate expectation of undertakings which have complied with the directive before expiry of the aforesaid period. Apart from that, he considers any other interpretation intolerable because, with regard to imports from Member States which have already implemented the directive, it would constitute an obstacle to the free movement of goods.

The problems raised can be approached by establishing in the first place that Directive No 77/728 contains provisions which correspond to those of Directive No 73/173 and therefore, because they are clear and complete and leave the Member States no margin of discretion, judging from the manner in which their contents are set out, satisfy the requirements for direct effect. The provisions in question are Articles 3, 5, 6, 7 and 9. However, it is important to remember a point which I emphasized at the beginning of my opinion, namely that, as far as directives are concerned, direct effect is hardly an automatic consequence, but merely a reflex effect: it occurs when a Member State does not comply with its obligations and consists in the fact that the State is deprived of the possibility of relying as against individuals and undertakings on its failure to comply with Community law. Accordingly the fact that a directive becomes binding on its notification is not sufficient to produce that legal consequence, rather is it the expiry of the period laid down in the directive for the adaptation of national law which is material. But since that has not occurred in the present case and since therefore the Italian State cannot be accused of a failure to fulfil its obligations which would also justify the institution of proceedings under Article 169 of the EEC Treaty, it is not possible at present to ascribe direct effect to the said provisions.

Having first established that, we must ask ourselves — and this constitutes the real problem of the fifth question — whether a different solution may apply as regards the obligation contained in the aforesaid Article 9. Such a line is argued strongly by the accused in the main action. In particular he submits that a rational interpretation of Article 12 of the directive would hold that the period laid down therein applies only to Member States' *obligations to take action,* hence only when it appears necessary to amend internal law and account must be taken of the fact that the undertakings affected thereby need time to adjust to the new legal provisions. That, says the defendant, surely cannot be relevant as regards the obligation to refrain from action contained in Article 9.

However, I am no more persuaded of the correctness of that point of view than were the Council and the Commission.

In fact Article 12 cannot be interpreted so narrowly as the accused in the main action submits; it concerns not only provisions which affect the conduct of undertakings and other legal persons and which clearly require a period of adjustment. Article 12 embraces the entire conduct required of Member States by the directive and so must doubtless be taken to apply to Article 9 also. Here too one may properly speak of an obligation on Member States to take action because it is necessary for them to amend their law — in the present case the provisions of the Law of 15 March 1963, in particular its criminal provisions — not least in the interest of legal certainty and clarity.

Moreover, considerations of principle — direct effect is not the rule in the case of directives — raise doubts about the attempt to isolate particular provisions of a directive in order to ascribe direct effect to them earlier than would otherwise be the case. In any event my conviction is that Article 9 of Directive No 77/728 does not permit that. In this respect I would recall something which I have pointed out with regard to Article 8, the corresponding provision of Directive No 73/173. In the same way Article 9 of Directive No 77/728 likewise has no independent value. It is, so to speak, nothing more than a reflection of the other provisions of the directive which impose obligations to take action. The stipulations which it contains seem obvious in view of the tenor and purpose of the directive; however, that legal consequence can be achieved only on attainment of the objective of harmonization, as is made explicit in certain provisions of the directive. Therefore direct effect cannot properly be ascribed to Article 9 in isolation, but only in conjunction with the other provisions of the directive which contain obligations to take action. But if direct effect is excluded in the case of those provisions because the period prescribed in Article 12 has not yet expired, the same must apply as regards Article 9.

The foregoing applies to domestic marketing in the same way as to imports from other Member States.

As regards the first point it is certainly not possible to plead the protection of the legitimate expectation of individuals who prematurely adapted their conduct in accordance with the provisions of the directive. To hold otherwise would be to mistake the legal nature of directives: they create obligations, not for individuals, but only for Member States, and, as has already been shown, individuals may acquire rights under directives only when Member States have failed to comply with their obligations.

Admittedly as regards imports from other member countries it seems natural to hold that internal measures contrary to Article 30 of the Treaty can no longer be justified under Article 36 of the Treaty when a Community standard has already been laid down by means of a directive and that standard is already being observed in other member countries. But that would be to misunderstand the basic purpose of the directive, which is to bring about through harmonization the removal of obstacles to the free movement of goods, meaning that the obstacles to the free movement of goods are to disappear only with the unification of the law. So, where a directive prescribes a period for that harmonization, it follows that internal provisions may be retained during that time and they may be justified under Article 36 of the Treaty, since Member States remain competent to act thereunder in the meantime.

Moreover, an examination of the case-law confirms that this view is correct. Thus, for example, it was emphasized in the judgment in Case 9/70 *Franz Grad* v *Finanzamt Traunstein*, [1970]2 ECR 825, that Member States retain their freedom of action until the time set for the harmonization is reached, and in Case 35/76 *Simmenthal S.p.A.* v *Italian Minister for Finance*, [1976]2 ECR 1871, it was held that national public health inspections only cease to be justified under Article 36 of the Treaty as from the latest date specified in a directive for the entry into force of the appropriate national provisions.

In this respect, however, considerations of legal certainty are relevant, for that principle requires that internal provisions cease to be applied only when they have been replaced by provisions conforming to the directive or the period prescribed in the directive has expired. Besides, it should not be overlooked that to hold otherwise and to accept the argument put forward by the accused in the main action would lead to discrimination in favour of imports from other Member States, because of course only they could rely on Articles 30 and 36 of the EEC Treaty, whereas domestic marketing operated in accordance with the directive, could still be prohibited.

6. Thus the questions submitted by the Pretura Penale, Milan, may be answered as follows:

(a) Articles 2, 4, 5 and 6 of Directive No 73/173, along with Article 8 in conjunction with the aforesaid articles, have direct effect in that after the expiry of the period laid down in the directive for its implementation individuals may rely thereon before national courts.

(b) National legislation may not prescribe obligations and limitations in derogation from the directive, even though they be more precise and detailed. With regard to goods imported from other Member States such derogations are to be considered obstacles to the free movement of goods.

(c) National legislation requiring that an indication be given on containers of solvents that they contain benzene, toluene and xylene, specifying the total percentage of those ingredients and the percentage of benzene alone, is incompatible with Directive No 73/173.

(d) The duty, arising under national law, to observe requirements derogating from the directive may not be justified by reference to the protection of the physical safety of users of the products in question.

(e) Articles 3, 5, 6 and 7 of Directive No 77/728, along with Article 9 in conjunction with the aforesaid provisions, have direct effect only upon expiry of the period laid down in Article 12 of the directive, that is to say, only as from 9 November 1979.