OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 19 September 1991 *

Mr President,
Members of the Court,

1. The present action brought against the Kingdom of Spain for failure to fulfil its obligations under the Treaty relates to the non-transposition into Spanish law of Directive 80/155/EEC [1] concerning the coordination of provisions laid down by law, regulation or administrative action relating to the taking up and pursuit of the activities of midwives.

2. Two charges are made: (1) the Directive was not transposed by 1 January 1986, the date of accession of the Kingdom of Spain; (2) no subsequent implementing provisions were taken or subsequent implementing provisions were inadequate.

3. The legislative background to the dispute, the facts of the case and the submissions of the parties are set out in the Report for the Hearing.

1. The charge that Directive 80/155 had not been transposed by 1 January 1986

4. Article 392 of the Act concerning the Conditions of Accession of the Kingdom of Spain provides: [2]

'Upon accession, the new Member States shall be considered as being addressees of and as having received notification of Directives and Decisions within the meaning of Article 189 of the EEC Treaty . . . '.

Article 395 of the Act provides:

'The new Member States shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of Directives and Decisions within the meaning of Article 189 of the EEC Treaty . . . '.

5. By 1 January 1986, the date of accession of the Kingdom of Spain, no implementing measures had been adopted. The Spanish Government does not deny that it infringed the Treaty by failing to transpose the Directive by the date of accession. Therefore it cannot matter whether the obligation to transpose legislation at such an early point in its membership of the Community was 'fair' and 'appropriate', for an undisputed infringement of the Treaty cannot subsequently be erased on equitable grounds.

6. Article 6 of the Directive admittedly allows a period of three years for compliance with it. At most, one could therefore ask whether the three-year transposition period for the new Member States began to run only from the fictitious notification provided for by Article 392 of the Act of Accession.

* Original language: German.

1 — OJ 1980 L 33, p. 8.

2 — Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Amendments to the Treaties (OJ 1985 L 302, p. 23).

7. That view is not supported by the wording of Article 395 of the Act, which obliges the acceding States to comply with the Directives from the date of accession. Furthermore, the transitional provision subsequently added to Directive 80/155 as paragraph 6 of Article 1 by Directive 89/594/EEC [3] provides that training courses falling within the scope of the Directive and begun before 31 December 1985 may still be completed in accordance with the previous provisions. That transitional provision implies that new provisions must come into force on 1 January 1986. Finally, in anticipation of the outcome of the examination of the second charge, it must be pointed out that the Directive had not been correctly incorporated into Spanish law even by 1 January 1989, three years after accession.

8. Moreover, in the reasoned opinion of 19 April 1989, the defendant Member State was granted a period of two months within which to meet the demands set out therein. Even during this period the defendant took no steps to fulfil the obligations under Community law of which it had been reminded by the Commission.

9. The defendant's argument that at the time of Spain's accession the training of midwives was not inferior to that prescribed in the Directive is therefore irrelevant, particularly as in certain respects the training did not meet the minimum requirements of the Directive.

2. The charge that the Directive was inadequately transposed

10. The parties adopt differing positions on the question of inadequate implementation of the Directive. In reply to the criticism that the Directive has not been transposed, the defendant Government contends that the issuing of a framework decree, Royal Decree 992/1987 of 3 July 1987, must be regarded as constituting transposition of the Directive. It points out that Article 3 of that decree provides that the provisions for implementing the Decree must comply with the Directive.

11. If the defendant's view were correct, there would be no grounds for prosecuting the alleged breach of the Treaty in these proceedings since transposition would have taken place before these proceedings were begun.

12. The applicant, on the other hand, contends that for several reasons the Decree cannot be regarded as a correct transposition of the Directive. First, in a number of respects the content of the Decree is incompatible with the provisions of the Directive, both as regards the transitional provisions and as regards the minimum period of training. Secondly, the Decree is not directly applicable, as it still requires the issue of implementing provisions by a National Council for Nursing Specializations, which has not yet even been established.

3 — Council Directive of 30 October 1989 (OJ 1989 L 341, p. 19).

13. Until the day of the oral procedure, 2 July 1991, in other words more than five and a half years after Spain's accession to the European Communities, provisions implementing the decree governing the training of midwives, *inter alia*, had still *not* been issued. It must therefore remain an open question whether a framework decree or framework law can be regarded as a correct transposition of a directive if the content and entry into force of the implementing provisions are such that upon their adoption it must be assumed that the directive has been fully transposed.

14. A reference made in a Member State's national legislative act to the provisions of the directive as a binding requirement for the validity of the implementing measures could be regarded as a standing reference and thus as constituting incorporation of the directive's provisions into the Member State's legislation. However, as long as the national implementing measure requires further implementing provisions for the decree to have direct legal effects, the Directive cannot be considered to have been transposed into national law.

15. Since no definitive provisions regulating the training of midwives in accordance with the Directive have been adopted in Spain and the necessary transitional provisions have not even been issued in Spain by the competent Minister, the Kingdom of Spain has committed a breach of the Treaty. Moreover, five and a half years after Spain's accession, there is no more latitude for any transitional arrangements. [4]

16. If 'major difficulties' were encountered in applying the Directive, a dialogue between the defendant and the Commission in accordance with Article 7 of the Directive might have been possible at an earlier stage. In fact, the defendant Government proved rather uncooperative during the pre-litigation procedure in that it responded neither to the formal notice nor to the reasoned opinion.

17. In the proceedings before the Court, the defendant Government denied infringing the Treaty — at least as regards late transposition of the Directive — but then requested postponement of the oral procedure, which had originally been set for 20 March 1991, in order to meet the requirements of the Directive. Despite this considerable delay, which gave the defendant a further opportunity to incorporate the Directive into national law and thus to avoid censure by the Court, no provisions regulating the training of midwives in Spain in accordance with the Directive were issued.

4 — See the transitional provisions in Royal Decree 992/1987 of 3 July 1987, and especially point 4: 'Pending the establishment of the National Council for Nursing Specializations for which Article 9 of this Royal Decree provides, the Ministry of Education and Science shall be authorized to lay down provisionally, subject to receiving a favourable report from the Ministry of Health and Consumption, the training courses for the nursing specialities specified in this Decree and to adopt the measures necessary for their implementation during 1987.'

18. At the hearing on 2 July 1991 the representative of the defendant Member State produced a legislative act, Royal Decree 1017/1991, which, he claimed, related to the transposition of Directive 80/155 into Spanish law.

19. After examining the legislative act, the applicant informed the Court that this decree could likewise not be regarded as transposing Directive 80/155. In the applicant's opinion, the duration and content of the training of midwives in Spain continue to be unregulated. Furthermore, the training programmes required by the Directive have not been established, nor have measures been taken to adapt diplomas awarded for training courses begun after 1 January 1986.

20. The transitional provision subsequently added to Directive 80/155 by Article 24 of Directive 89/594 (authorization for training courses begun before 31 December 1985 to be concluded in accordance with the old provisions) did not have the effect of extending the time-limit for transposition in favour of the defendant Member State. Its purpose was merely to protect the expectation of students who had already begun their training. More far-reaching transitional arrangements, especially a prolongation of the transitional provisions, were not to be adopted unilaterally by the Spanish legislative bodies.

21. Finally, the objection of the defendant Government that only Spanish nationals are disadvantaged by non-transposition of the Directive should be dismissed; according to the Spanish Government, neither the freedom of establishment nor the freedom to supply services for nationals of other Member States is affected. This defence cannot excuse an infringement of the Treaty. The argument overlooks the purpose of the coordination measures, which are intended to ensure the equivalence of certain training courses throughout the Community.

22. Since complete and correct transposition of the Directive has not taken place five and a half years after the prescribed date, it should be held that the Kingdom of Spain has infringed the Treaty.

Conclusion

23. I am of the opinion that the Court should:

'(1) Declare that the Kingdom of Spain has infringed the Treaty by not adopting within the prescribed period all the measures necessary to implement Directive 80/155 concerning the coordination of provisions laid down by law, regulation or administrative action relating to the taking up and pursuit of the activities of midwives.

(2) Order the Kingdom of Spain to pay the costs.'