OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 7 April 1987 *

Mr President,
Members of the Court,

1. The Commission complains that the Kingdom of Denmark has not fully implemented Council Directive 79/831/EEC of 18 September 1979 amending for the sixth time Directive 67/548/EEC on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances. [1]

2. The Commission considers that Denmark has not fully implemented the provisions of the directive; for that purpose, it should make certain amendments to the national implementing provisions, in particular Law No 212 of 23 May 1979 and Ministerial Decree No 409 of 17 September 1980.

3. I — The Danish Government contends that the Commission brought the action with unnecessary haste, since previous contacts and discussions had shown that it would be possible to reach an amicable solution to the dispute, and there was even a draft decree which might have been capable of satisfying the Commission's requirements and which Denmark withdrew when the Commission failed to react to it.

4. It is clearly regrettable that this action could not have been avoided by an agreement between the parties as to the method of implementing the directive.

5. However, according to Article 169 of the Treaty the Commission is entitled to bring an action if it finds that a State has failed to fulfil its obligations within the period specified in the reasoned opinion, and the Court cannot substitute its view for the Commission's as to when the action should be brought.

6. II — The first two complaints of the Commission concern Article 11 (2) and (3) of Law No 212/79, which are cited in the Report for the Hearing.

7. According to the Commission, Article 11 (2), by providing that 'a chemical substance shall be regarded as new if it has not been placed on the market or imported into Denmark before 1 October 1980', extends the obligation to notify laid down in Article 6 of the directive, in so far as it refers to a date prior to the date specified in that directive (18 September 1981).

8. The Danish Government does not deny that the definition of a 'new substance' laid down in the national legislation may in certain cases create an obligation to notify that is wider than that provided for by the directive. It does, however, deny that such an obligation is contrary to the directive, since — as is clear from the preamble to the directive and from Article 1 (4) — the directive was not intended to regulate 'old substances', which are therefore still subject to national rules.

* Translated from the Portuguese.

1 — Official Journal 15.10.1979, L 259, p. 10.

9. In particular, Article 1 (4) lists the areas which are outside the field of application of the directive as regards harmonization of provisions on notification.

10. The Commission also criticizes the Danish Government on the ground that Article 11 (3) of Law No 212/79 extends to substances marketed in Denmark before 1 October 1980 the rules laid down in Article 6 (4) of the directive for 'new substances', where such substances are used, after the said date, for an essentially different use or in substantially larger quantities.

11. According to the Commission, that provision is contrary to Article 1 (4) (a) of the directive, which exempts from the obligation to notify substances placed on the market before 18 September 1981. Under those circumstances, and since Article 22 provides that 'the Member States may not, . . . , prohibit, restrict or impede the placing on the market of substances which comply with the requirements of this directive', it is clear that 'old substances' are not to be subject to notification — or fresh notification — except in any cases provided for by the directive itself.

12. Once again, the Danish Government does not deny that the text of the Danish legislation differs from the directive. However, it argues that the obligation in question is essential to achieve the objectives of the directive, namely to protect man and the environment, since a substantial increase in the quantities sold or an essentially different use may lead to risks identical to those arising from the introduction of a new substance.

13. In answer to the argument put forward by the Danish Government with regard to the two complaints, the Commission states that, in the absence of a proper system of authorization for dangerous substances, the obligation introduced by Directive 79/831/EEC to notify 'new substances' (that is to say, substances placed on the market after 18 September 1981) constitutes the best possible compromise at Community level between the need to protect man and the environment (the basic aim of the directive) and the free movement of goods (reflected in particular in the provisions of Article 22).

14. For that reason, only 'new substances' are subject to the obligation imposed by Article 6 on manufacturers and importers to notify the competent authority of the Member State concerned; that authority will, in turn, inform the Commission, which is responsible for drawing up a *list* of all substances notified in those conditions (Article 13 (2)). As regards 'old substances' (placed on the market before 18 September 1981), the directive provides only for an *inventory* to be drawn up by the Commission, on the basis in particular of information provided by the Member States (Article 13 (1)).

15. The Danish Government replies to the Commission's view in the rejoinder by repeating its original arguments in terms set out in the Report for the Hearing.

16. I would accept that the Danish Government's interpretation is plausible in the light of the provisions of the directive, which are far from clear. I would even consider that Denmark was right, if the aim of the directive was solely to protect man and the environment against the risks arising from the placing on the market of dangerous substances. If that were so, it

could be said that Denmark was fully satisfying the intention of the Community legislature, by actually reinforcing the protective effect of the directive's provisions.

17. By introducing restrictions in areas to which the directive does not apply, it could not then be said that the Danish legislature was infringing the directive. Any breach of Community law would then depend upon the infringement of other rules, in particular Article 30 of the Treaty.

18. The Commission would then have to rely upon that provision, so as to ensure that the State concerned was able to defend itself, in particular by relying upon Article 36 (protection of health and public security).

19. In my view, however, the situation is different.

20. A straightforward reading of the preambles to Directives 79/831/EEC and 67/548/EEC confirms that those directives (together with the directives by which the 1967 Directive has been amended) set up a system of rules governing dangerous substances for the dual purpose of protecting the population and the environment and eliminating obstacles to trade within the common market by harmonizing national legislation.

21. In particular, the 1979 Directive represents a compromise between those aims *ratione temporis*, requiring notification for substances placed on the market after 18 September 1981 and exempting other substances from the obligation to notify. As regards the latter, the directive provides only an obligation to draw up an inventory, in accordance with Article 13.

22. In weighing up the different objectives, this was the balance decided upon by the Community legislature.

23. In order to comply with the directive, it is therefore necessary to abide by the compromise embodied in it: if more weight is given to one or the other objective, the balance in the directive may be destroyed.

24. In my view, the relevant provisions of Directive 79/831/EEC must be interpreted in that light.

25. In the first place, it should be recalled that Article 1 (1) of the directive provides as follows:

'(1) The purpose of this directive is to approximate the laws, regulations and administrative provisions of the Member States on:

(a) the notification of substances,

(b) . . .

which are placed on the market in the Member States.'

26. Article 1 (4) then seeks — albeit in not wholly satisfactory terms — to clarify the two following points:

(a) the relevant date, for purposes of deciding what substances 'placed on the market' are covered by Article 1 (1) (a), is 18 September 1981;

(b) substances placed on the market before that date are not subject to the obligation to notify.

27. That conclusion must be drawn in the light of two details in the drafting of Article 1 (4):

(a) *Articles 5, 6* and *7* do not apply to the notification of substances referred to;

(b) those substances are, first, substances placed on the market before 18 September 1981 and, secondly, substances which appear in the inventory referred to in Article 13 (1).

28. With regard to both, the directive excludes the application not only of Articles 6 and 7, laying down detailed rules on notification, but also of Article 5, which imposes the obligation to notify as a condition for placing a substance on the market.

29. That means that, although in adopting the directive the legislature could have expressed itself better, it did not intend that the Member States should subject those substances to the obligation to notify.

30. Moreover, the adoption of different dates would introduce discrimination between the countries in which a substance is marketed, and would interfere with the aim of creating a common market for a given type of product.

31. It is possible, as would appear from the hearing, that the discrepancy in dates is attributable to the fact that the Danish legislation was published before the directive was approved, since the draft directive was amended during the final stage of discussions.

32. However, that does not alter the fact that Denmark has failed to fulfil its obligations, which have to be assessed by reference to the applicable provisions of the published directive.

33. The Court has consistently held[2] that the provisions of directives are binding on Member States, and 'the precise application of directives is all the more important as implementation is left to the discretion of Member States'.

34. All these considerations logically lead to the finding that the first part of the complaint, concerning Article 11 (2) of Law No 212/79, is well founded.

35. As regards Article 11 (3), it is difficult to consider that this provision is not intended to achieve exactly the same objectives as Article 6 (4) of the directive, since the risks are exactly the same, for both 'new substances' and 'old substances' (they may possibly be even more serious with regard to substances not yet notified, that is to say, under the Danish legislation, substances marketed before 1 October 1980).

36. That view finds support in the text of Article 1 (4) of the directive, which — though it is not entirely clear, it is true — only excludes the application of Articles 5, 6 and 7 *with regard to notification.*

37. Article 6 (4) does not refer, in this regard, to fresh notification but only to an obligation to inform the competent authority.

38. From the point of view of the aims of the directive, I do not consider it open to criticism to assimilate 'old substances' to 'new substances' as regards changes in use or changes of quantity provided for by the directive, which have occurred after 18 September 1981.

2 — See, for example, judgment of 21 June 1973 in Case 79/72 *Commission* v *Italy* [1973] ECR 667, at p. 672.

39. The situation is different as regards measures before 18 September 1981, since that seems to me to be the relevant date for distinguishing — after comparing the preamble with Article 1 (4) of the directive — between 'old' and 'new' substances and, therefore, to justify 'assimilating' old substances to new substances with regard to certain aspects of the rules laid down by the directive.

40. By specifying 1 October 1980 as the date from which ('after that date') the provisions in question for 'new substances' should be applied to 'old substances', the contested provision of the Danish Law does not, in that respect — and, in my view, in that respect alone — comply with Directive 79/831/EEC.

41. **III** — In the application, the Commission challenged the provisions of Article 17 of Law No 212/79 of 23 May 1979 and Article 9 (3) of Decree No 409/80 of 17 September 1980.

42. In the reply, the Commission amended the terms of its original complaint, stating that the criticism of Article 17 of the law was linked to the complaint concerning Article 9 (3) of the decree.

43. According to the Commission, the fact that Article 9 (3) of the decree required importers to inform the competent authority of the importation of substances which had already been notified in other Member States shows that Article 17 of Law No 212/79 may be interpreted in a manner incompatible with Directive 79/831/EEC.

44. It must be recognized that the Commission's complaint is not outstandingly clear, in either of the versions in which it has been presented.

45. Fundamentally, it appears to concern the two provisions combined and not one or the other individually.

46. In that case, the only reasonable interpretation of the Commission's complaint would seem to be that Article 17 of the Danish law is drafted in such a way that it can be interpreted as permitting the competent authority to require notification of a substance which has already been notifed in another Member State.

47. That means that the provision in question does not merely contain an authorization linked to a specific result compatible with the directive but only confers a discretionary power, from the use of which that result would be only one of the possible alternatives.

48. That would mean:

(a) that that provision may be interpreted as recognizing that, *in principle*, notification in another Member State is not the same as notification in Denmark, requiring a decision to that effect to be taken by the competent national authority;

(b) that the power conferred by it might be used for the wrong purpose.

49. The first of these two possibilities, which casts doubt on the binding nature of the scheme of the directive, in which notification in one Member State is valid throughout the Community, raises the compatibility with the directive of the provision contained in Article 17 considered separately.

50. However, the Commission has not formulated its complaint in those terms and I shall therefore confine myself to considering the infringement which might result from the combined provisions of the two rules.

51. In that connection, it may be stated that the use by the competent authority of the authorization conferred upon it by Article

17 of the law is accompanied, in Article 9 (3) of the decree, by the obligation imposed on importers to supply the National Agency for the Protection of the Environment with prior information concerning the importation of substances already notifed in another Member State.

52. The directive established a Community system for the notification and control of dangerous substances, in which notification to one Member State is valid throughout the Community (fifth recital in the preamble).

53. At the same time, Article 10 of the directive lays down machinery for transmitting information, which was regarded as sufficiently effective; Article 23 then provides for the use of a safeguard mechanism, which may be used by any Member State; Article 21 lays down rules on the procedure for adopting new measures which prove necessary, involving consultation of the Committee for adapting the directives to technical progress, established by Article 20.

54. However, it does not seem to me that the requirement contained in the Danish legislation may itself be regarded as manifestly incompatible with the directive.

55. Although not referred to by the directive, Article 36 of the Treaty could provide justification — in the light of any inadequacy, delay or difficulty incurred in applying other solutions — for the imposition by national legislation of an obligation on the importer to inform the competent authority in order to enable that authority to exercise its control quickly and easily.

56. The necessity merely to send a letter, informing the authorities that the substance in question has been notifed in another Member State, does not *necessarily* seem to be an exorbitant or disproportionate requirement, capable of constituting a restriction on trade prohibited by Article 30 of the Treaty.

57. However, the contested provision does not state the penalty for failure to comply with the obligation to provide information. Since it may follow from its terms that prior information is a condition for importation into Denmark of substances already notified in another Member State, this fact alone is the source of a regrettable ambiguity which must be established by the Court.

58. In that regard alone, I consider that Article 9 (3) of Decree No 409 must be declared incompatible with Community law.

59. IV — In the application, the Commission complains that Article 18 of Law No 212/79 conferred on the competent Minister a discretionary power enabling him to grant exemptions not provided for in the directive.

60. However, it is clear that the terms of the complaint do not correspond with the text of the provision at issue; furthermore, since this complaint was not discussed in the pre-litigation stage of the proceedings, the Danish Government objected in the defence to its admissibility, while at the same time recognizing that the complaint might possibly refer to Article 18 of Regulation No 409.

61. In the reply, the Commission acknowledged that it had not been clear and altered its complaint to one challenging Article 18 of Decree No 409.

62. The Court has consistently held [3] that the subject-matter of the action is fixed in

3 — See judgment of 25 September 1979 in Case 232/78 *Commission* v *France* [1979] ECR 2729 *et seq.*; judgment of 9 December 1981 in Case 193/80 *Commission* v *Italy* [1981] ECR 3019 *et seq.*; judgment of 8 February 1983 in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203 *et seq.*

the application (Article 38 (1) (c) of the Rules of Procedure) and cannot be altered by the parties in the course of the proceedings without adversely affecting the right to a fair hearing.

63. However, it must be recalled that in the letter of formal notice, the Commission correctly referred to Article 18 of Decree No 409.

64. It is certain that, in the reasoned opinion, the Commission confused the issue by referring simply to the 'Danish legislation', the 'Danish exemption clause' and 'Article 18'.

65. The Danish Government was, however, able to understand the complaint, in the light of the text of the letter of formal notice, and for that reason referred to it in the reply to the reasoned opinion.

66. The Danish Government stated that it was 'prepared to accept the Commission's criticism' and acknowledged that, ideally, it should be stated clearly that 'the provisions of Article 18 may not be applied to grant exceptions not provided for by the directive'.

67. Under those circumstances, it may be accepted that the defendant State's right to a fair hearing was not affected by the amendment of the complaint in the reply to such an extent as to render the complaint inadmissible.

68. However, it is certain that by contesting in the application Article 18 of Law No 212 in the terms in which it did, the Commission introduced an unfortunate confusion in the proceeding and clearly hampered the defence.

69. I consider that the Court cannot accept such conduct without imposing any penalty, if only in the order as to costs.

70. V — Lastly, the Commission challenges Article 6 (1) of Decree No 409 in so far as it extends to the importer the exemption from the obligation to notify granted to the manufacturer by the fourth indent of Article 8 (1), in relation to substances placed on the market in quantities of less than one tonne per year.

71. The Commission considers that the provision in the Danish decree may result in the enlargement of the limit fixed in the directive if a manufacturer uses different importers to place on the market a large number of individual quantities of less than one tonne.

72. For this reason, contrary to the situation previously, the majority of Member States (with the exception only of Denmark, Italy and, to some extent, the Federal Republic of Germany) have now complied with the Commission's interpretation of the directive.

73. The Danish Government relies upon a declaration by the Council and the minutes of two meetings between the Commission and the Member States for its contention that it was intended to assimilate the importer to the producer in this respect.

74. It does not, however, deny that there is a difference between the two provisions in question; in its reply to the reasoned opinion, it actually recognized 'that the Commission's interpretation of the Council declaration on the minutes of the meetings is plausible'.

75. Once again, the Commission's line of argument is not without ambiguity, since it accepts that in some cases manufacturers may delegate to importers the statement provided for in the fourth indent of Article 8 (1), and refuses to accept it in other cases.

76. In any event, it does not appear that the Danish Government has adduced sufficient evidence in support of its view to alter the conclusion to be drawn from the two provisions combined: namely, that the extension to importers of the exemption for small quantities is incompatible with the directive.

77. VI — In the light of the foregoing, I propose that the Court should declare that the Kingdom of Denmark has not fully implemented in national legislation the provisions of Council Directive 79/831/EEC of 18 September 1979 amending for the sixth time Directive 67/548/EEC of 27 June 1967.

78. However, since in my view the Commission's complaints are well founded only in part — and in the light of the ambiguities and defects of its argument, which have resulted in unnecessary disorder in the proceedings and in the defendant's arguments — I propose that the Court should make use of the power conferred upon it by Article 69 (3) of the Rules of Procedure and order the Commission to bear half of the costs.