OPINION OF ADVOCATE GENERAL MISCHO

delivered on 27 November 2001 [1]

1. It is not unusual for a Member State to challenge an accusation that it has failed to fulfil its obligations. What is unusual, however, is for the alleged failure to be challenged not by the defendant Member State, but by another Member State claiming to intervene in support of the first. That is the situation in the present case.

2. The Commission accuses Ireland of having failed to fulfil its obligations under the combined provisions of Article 300(7) EC and Article 5 of Protocol 28 annexed to the Agreement on the European Economic Area of 2 May 1992 [2] ('the EEA Agreement') in failing to obtain its adherence before 1 January 1995 to the Paris Act of the Berne Convention for the Protection of Literary and Artistic Works.

3. The EEA Agreement, which entered into force on 1 January 1994, was concluded jointly by the Community and its Member States pursuant to Article 300 EC. Article 300(7) EC provides that mixed agreements, like any other agreement concluded on the basis of that article, are to be binding on the institutions of the Community and the Member States.

4. Under Article 5 of Protocol 28 annexed to the EEA Agreement, the Contracting Parties undertook to obtain their adherence before 1 January 1995 to the multilateral conventions on industrial, intellectual and commercial property. Those conventions include the 'Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971)' ('the Paris Act of the Berne Convention' or 'the Berne Convention').

5. Ireland does not dispute the Commission's contention that it has still not complied with its obligation to obtain its adherence to that act. It states, in this respect, that a wide-ranging reform of national law is necessary. It points to the fact that a bill on copyright law is already at an advanced stage of scrutiny by the Irish Parliament and will therefore be enacted very shortly, and asks the Court to suspend

1 — Original language: French.
2 — OJ 1994 L 1, p. 3.

the proceedings for six months to enable the Commission to examine the law that Ireland will by then have enacted, and then to discontinue its action.

6. According to the Court's settled case-law, [3] where a Member State has failed to fulfil obligations imposed on it by Community law either on time or at all, it may not plead difficulties in its internal legal or administrative system in order to escape from those obligations. It follows that the Court cannot accede to the Irish Government's request.

7. However, I cannot end my Opinion there. That is because the United Kingdom of Great Britain and Northern Ireland, which has intervened in support of the defendant, claims, in essence, that the obligation alleged to have been breached is one of international law, but not falling within the scope of Community law. The Court is not therefore competent to hear and determine the matter.

8. It submits that the Paris Act of the Berne Convention does not fall wholly within the Community's competence. It necessarily follows, therefore, that neither does the obligation to adhere to it. It is only to the extent that there is Community competence that there can be a failure to fulfil an obligation of Community law to adhere to the measure in question.

9. Since the Commission's application refers to adherence to the Paris Act of the Berne Convention as a whole, without specifying those provisions falling within the scope of application of Community law, it should be dismissed on the ground that the Commission has not shown that the defendant failed to fulfil an obligation imposed on it by that law.

10. The Commission challenges both the merits of that line of reasoning, and the admissibility of the intervention.

11. It states, first, that it is clear from Article 93(1)(e) of the Rules of Procedure of the Court that an application to intervene must specify 'the form of order sought, by one or more of the parties, in support of which the intervener is applying for leave to intervene'.

12. It considers that the United Kingdom's application to intervene does not satisfy the requirements of that provision since its statement in intervention does not support

3 — See, for example, Case 254/83 *Commission* v *Italy* [1984] ECR 3395.

the forms of order sought by Ireland. The application must therefore be dismissed as inadmissible.

13. It cannot be the case that an application to intervene is held to be inadmissible on the basis of the text of a statement which was not yet known at the time when the application was made. It appears, therefore, that the Commission's first argument refers, in fact, to the content of the statement in intervention.

14. The Commission further claims that the United Kingdom also fails to set out the form of order it seeks in the statement, contrary to Article 93(5) of the Rules of Procedure, which provides that the statement in intervention must contain a statement of the form of order sought by the intervener.

15. It considers that instead of stating the form of order it seeks, the intervener 'contents itself with speculating as to the effect on the Commission's application of an acceptance by the Court of the [United Kingdom Government's] arguments' and refers, in this respect, to the final sentence of the statement in intervention.

16. The United Kingdom Government states there that, if the Court accepts its arguments, they 'should lead to the dismissal of the Commission's application, and not merely to the suspension of the procedure', which, it will be recalled, is the order sought by the defendant.

17. It is indisputable that that sentence cannot be read as a plea in support of the forms of order sought by the defendant since it expressly distances itself from them. On the other hand it may be asked whether it could not be read as a claim that the form of order sought by the Commission be rejected within the meaning of Article 93(5) of the Rules of Procedure, which provides that the statement in intervention is to contain a statement of the form of order sought in support of *or opposing* the form of order sought by one of the parties.

18. Nevertheless it should be noted that, under the final paragraph of Article 37 of the EC Statute of the Court of Justice, '[a]n application to intervene shall be limited to *supporting*[4] the form of order sought by one of the parties'. I would, accordingly, be inclined to conclude that the intervention is inadmissible.

19. In the present case, however, it is not necessary to determine that issue, since it is apparent from the Court's case-law that the

4 — Emphasis added.

Court is required to address the arguments of the United Kingdom Government, without it being necessary to decide on the admissibility of its intervention. This is because it appears from the statement in intervention that that Government challenges the jurisdiction of the Court of Justice in this matter.

20. The Court has held that it may, of its own motion, raise an argument going to its jurisdiction, even where it has not been formally pleaded. [5] It is true that in that case, the argument in question was raised by a main party and not by an intervener. I take the view however that the solution adopted by the Court did not turn on that fact, but solely on the public policy nature of the arguments put forward, which required the Court to address them.

21. That finding is, to my mind, supported by the judgment of the Court in *Neotype Techmashexport* v *Commission and Council*, [6] in which it held that '[s]ince this is an objection of inadmissibility based on public policy, to be examined of the Court's own motion under Article 92(2) of the Rules of Procedure, there is no need to examine whether an intervener can raise an objection of inadmissibility which has not been raised by the party in support of whose conclusions it is intervening'.

22. Whilst the present case does not concern a plea of inadmissibility, it is nevertheless apparent from the above quotation that, in strictly logical terms, the Court's reasoning applies to any question of public policy to be examined of the Court's own motion. As has been noted, the argument of the United Kingdom Government falls within that category.

23. It is therefore necessary to examine that argument, without it being necessary to rule on the admissibility of the intervention.

24. Both the United Kingdom and the Commission point out that the EEA Agreement, breach of which is alleged, is a mixed agreement. The United Kingdom infers from this that the Member States are only bound, as a matter of Community law, by the provisions of that agreement falling within the Community's competence. However, that is only partly the case in respect of intellectual property.

25. It follows from Opinion 1/94 of the Court [7] that, in matters of intellectual

5 — Joined Cases 154/78, 205/78, 206/78, 226/78 to 228/78, 263/78 and 264/78, 39/79, 31/79, 83/79 and 85/79 *Ferriera Valsabbia and Others* v *Commission* [1980] ECR 907, paragraph 7.

6 — Joined Cases C-305/86 and C-160/87 [1990] ECR I-2945, paragraph 18.

7 — [1994] ECR I-5267, paragraphs 99 to 105.

property, the Community is only competent to conclude international agreements on specific matters in respect of which it has adopted harmonising measures at Community level.

26. That situation is reflected in Article 9 of Protocol 28 annexed to the EEA Agreement, which provides that '[t]he provisions of this Protocol shall be without prejudice to the competence of the Community and of its Member States in matters of intellectual property'.

27. The Commission puts forward various arguments in opposition to that line of reasoning. It relies in particular on the specific terms of the EEA Agreement from which it appears that the Member States have accepted that the Commission is empowered to monitor fulfilment of their obligations under that agreement. No exception is made in respect of intellectual property or any other matter.

28. It must however be emphasised that Article 109 of the EEA Agreement, referred to by the Commission, only accords a power of supervision to that institution on the condition that it acts 'in conformity with the Treaty establishing the European Economic Community'. That power is, therefore, necessarily limited by the extent of the Community's competence, as defined by the Treaty, and the provision in question gives no guidance in that respect.

29. The Commission also points out that, when the EEA Agreement was concluded by the Community and ratified by the Member States, their respective obligations to the other Contracting Parties were not defined. The latter are therefore entitled to expect that the Community will assume responsibility for monitoring the fulfilment of all of the obligations it has assumed. It would be strange if, in respect of a specific matter, the Community was responsible for a Member State's breach of an international agreement without being able to require that State to adopt the measures necessary to put an end to that breach.

30. It does not appear certain to me, however, that the simple fact that the respective obligations of the Community and the Member States to the other Contracting Parties have not been defined enables the latter to infer that the Community assumes responsibility for fulfilment of the whole of the agreement in question, including those provisions which do not fall within its competence. On the contrary, the very fact that the Community and its Member States had recourse to the formula of a mixed agreement announces to non-member countries that that agreement does not fall wholly within the competence of the Community and that, consequently, the Community is, *a priori*, only assuming responsibility for those parts falling within its competence.

31. The judgment in *Hermès*[8] and the Opinion of Advocate General Tesauro in

8 — Case C-53/96 [1998] ECR I-3603.

that case, to both of which the Commission referred, do not undermine that finding.

32. However, the other two arguments advanced by that institution seem to me to be more convincing.

33. It relies, first, on the specific nature of the association agreements, such as the EEA Agreement. In that context, it rightly refers to the *Demirel* decision, in which the Court held that 'since the agreement in question is an association agreement creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system, Article 238 must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty'. [9]

34. As the Commission also points out, the Court has held on many occasions that, in common with other intellectual and commercial property rights, the exclusive rights conferred by literary and artistic property come within the scope of the Treaty. [10]

35. That is particularly so for copyright and related rights, which, 'by reason, in particular, of their effects on intra-Community trade in goods and services', the Court has found come within the scope of application of the Treaty. [11]

36. The Commission also puts forward a second basis for Community competence by reference to the *'ERTA'* decision, [12] which lays down the principle that, in order to determine the extent of the Community's competence, it is necessary to establish whether there are Community rules capable of being affected by the agreement in question.

37. As regards copyright, with which this case is concerned, the Commission points out that various rules of Community law are capable of affecting the Member State's adherence to the Paris Act of the Berne Convention.

38. It refers in this respect to Article 12 EC, which prohibits the Member States from discriminating on grounds of the nationality of the author, and Article 5 of the Berne Convention which deals with the same point.

39. The Commission also rightly points to a number of directives concerning various

9 — Case 12/86 [1987] ECR 3719, paragraph 9.

10 — See, for example, Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145.

11 — *Phil Collins*, cited above, paragraph 27.

12 — Case 22/70 *Commission* v *Council* [1971] ECR 263.

aspects of copyright law,[13] which match various provisions of the Berne Convention. It gives as an example Directive 93/98, which concerns, *inter alia*, the term of protection of copyright, which is covered by Articles 7 and 7A of that Convention.

40. It is therefore indisputable that there are provisions of Community law capable of being affected by the agreement in question.

41. It will be noted, however, that the issue before the Court does not, as such, focus on the division of competence.

42. It is true that the United Kingdom and the Commission do not stress the same factors when they describe the division of competence in the copyright field. The former points to the fact that several provisions of the Berne Convention deal with questions that have not been harmonised at Community level. It refers, in that respect, to Article 11 of the Convention, which concerns, *inter alia*, the public performance of works. The latter, by contrast, points to the number and extent of the Community provisions on the subject.

43. Nevertheless neither of them disputes that the agreement is mixed. Thus, as has been seen, the United Kingdom cites Opinion 1/94 in which the Court held that the competence concerning the subject-matter covered by the Agreement on Trade-Related Aspects of Intellectual Property Rights (WTO) ('TRIPS')[14] was mixed. As for the Commission, it admits that it is not possible to find a Community law text to match every one of the provisions of the Berne Convention, which is nevertheless not an obstacle to the existence of Community competence.

44. The issue raised by the argument of the United Kingdom is not, however, the existence of a Community competence in the present case, but the Commission's obligation to set out in its application the extent of that competence.

13 — Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42); Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61); Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15); Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9), and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20).

14 — OJ 1994 L 336, p. 214.

45. Accordingly, whilst it is clear from the preceding discussion that the subject-matter of the dispute falls, at least partly, within the Community's competence, that observation is hardly conclusive in itself, since it has no bearing at all on the question whether the Commission was entitled not to specify in its application those provisions of the Paris Act of the Berne Convention governing the matters falling within the Community's competence.

46. The United Kingdom stresses, in this context, the fact that it is for the Commission to prove failure to fulfil obligations. It may be asked, however, whether in the present case it is not advocating an unduly strict interpretation of that burden. The United Kingdom's argument is that the Commission's action is wholly inadmissible. However, that action could equally be considered admissible to the extent that it concerns the Community's competence, and should only be dismissed to the extent that it does not.

47. In any case, the Commission cannot be required, in its application in this case, to distinguish between those provisions of the Paris Act of the Berne Convention dealing with matters falling within the Community's competence and those that do not.

48. It should be emphasised, as the Commission has done, that the Berne Convention is not divisible. A State cannot therefore adhere to it in part. Its adherence assumes, on the contrary, the acceptance of all of the obligations laid down by that Convention. It follows that if Community law requires that the Member States adhere, that can only be adherence to the Convention as a whole.

49. As has been noted, that Convention includes provisions which affect Community rules.

50. Accordingly, the obligation to adhere to the Paris Act of the Berne Convention laid down by the EEA Agreement should be regarded as an indivisible obligation to adhere to an agreement, various provisions of which affect Community rules.

51. It is necessarily therefore an obligation concerning the Member States' compliance with Community law and, as such, capable of forming the subject of an action for failure to fulfil obligations.

52. The United Kingdom's argument should therefore be rejected, since it would require the Commission to seek a declaration from the Court that Ireland ought to have adhered to certain specific articles of the Paris Act of the Berne Convention,

whilst such adherence can only be understood as the consequence of adherence to that Act in its entirety, given the indivisibility of the obligations which it lays down.

53. It follows that the Commission was entitled in its application to treat Ireland's non-adherence to the Paris Act of the Berne Convention as a failure to fulfil obligations, without distinguishing between those provisions dealing with matters falling within the Community's competence, and those that do not.

54. It will be recalled that the defendant does not deny that that adherence did not take place within the time-limit set by the reasoned opinion.

55. Consequently the Commission's application should be granted. The United Kingdom, as intervener, must bear its own costs pursuant to Article 69(4) of the Rules of Procedure of the Court.

Conclusion

56. I propose that the Court:

— declare that Ireland has failed to fulfil its obligations under the combined provisions of Article 300(7) EC and Article 5 of Protocol 28 annexed to the Agreement on the European Economic Area of 2 May 1992 in failing to obtain its adherence before 1 January 1995 to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971);

— order Ireland to pay the costs, with the exception of those of the United Kingdom of Great Britain and Northern Ireland, which it must pay itself.