

OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER

delivered on 17 September 2002¹

1. The legal interest presented by these infringement proceedings is primarily procedural. There can be no serious doubts as to the substance, that is to say, as to whether the defendant really did fail to fulfil its obligations by failing to transpose into its national law Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained² ('Directive 98/5' or 'the Directive').

Background

2. Directive 98/5 provides lawyers with an easier means whereby they can integrate into the profession in the host Member State.³ The Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive *by 14 March 2000*, and forthwith to inform the Commission thereof, making reference to the Directive in the new legislation.⁴

3. Since it had received no notification from the Irish authorities of any measure transposing the Directive into the domestic legal system, on 8 August 2000 the Commission sent them a letter of formal notice inviting them to submit observations within two months.

4. On 16 January 2001, more than three months after the period prescribed had expired, the Permanent Representation of Ireland to the European Union answered the letter of formal notice, acknowledging, in particular, that the drafting of the measures implementing the Directive was not yet complete and that it was necessary to involve the legislature, a circumstance which had become apparent only at a late stage.

5. As the Permanent Representation states in its letter, the Irish Constitution authorises the executive, even in areas where the law normally requires enactment by the national parliament of primary legislation, to adopt measures which are necessary in order to comply with obligations imposed by membership of the European Union. Article 6(3) of Directive 98/5 gives the

¹ — Original language: Spanish.

² — OJ 1998 L 77, p. 36.

³ — Fifth recital in the preamble to the Directive.

⁴ — Article 16 of Directive 98/5.

Member States power to require lawyers practising under their home-country title either to take out professional indemnity insurance or to become a member of a professional guarantee fund. Ireland proposed to make use of that possibility but, precisely because it is optional, could not have recourse to the special legislative process. In those circumstances, the Government's legislative action must be preceded by the corresponding authorisation given by the Irish Parliament (Oireachtas). According to the letter, the stages involved in the Parliament's giving its authorisation and in the adoption of the implementing legislation were to be completed early in 2001.⁵

6. The reply of the Irish authorities was received at the Commission's registry on 17 January 2001.

7. Seven days later, on 24 January of the same year, the Commission sent Ireland a reasoned opinion requesting it to take the measures necessary to comply with the provisions of Directive 98/5 and the Treaty within a further period of two months. In paragraph 3 of that opinion, the Commission stated that it had not received an official reply to its letter of formal notice.

5 — Parliament's authorisation was in fact granted on 13 April 2002 by means of the Solicitors (Amendment) Act 2002, section 20 of which contains the relevant provisions for the transposition of Directive 98/5 into national law. By virtue of section 23(2) those provisions entered into force on the very day the legislative instrument was promulgated.

8. The Permanent Representation of Ireland answered the Commission's reasoned opinion by letter of 29 January 2001, pointing out that it had indeed responded to the first request, enclosing a copy of its statement of 16 January without adding any further facts.

Examination of the application

9. As I have already observed, the crux of Ireland's defence is the allegation of a procedural irregularity constituted by the Commission's failure to take into consideration the Irish Government's observations submitted in reply to the letter of formal notice. Referring to the order of 11 July 1995 in *Commission v Spain*,⁶ Ireland

6 — Case C-266/94 *Commission v Spain* [1995] ECR I-1975. In that case the issue was the entire transposition of Directive 92/44/EEC. The Commission had sent a letter of formal notice to which Spain replied with the acknowledgement that the domestic measures necessary to effect the required implementation had not yet entered into force; it did, however, refer to resolutions already adopted in order to ensure, as a transitional measure, the fulfilment of obligations imposed by that directive. The Commission ignored that reply and sent a reasoned opinion in which it stated that it had received no answer to its first letter. Spain then wrote again to the Commission, recalling its reply to the letter of formal notice. In its application, the Commission claimed that the fact that it had taken no account of the response to the letter before action was due to communication problems, and in its reply argued that its application, unlike its reasoned opinion, did take into consideration the observations submitted by Spain, so that there was no mention in the subject-matter of the application of those provisions of the directive to comply with which Spain had adopted transitional implementing measures. The Court nevertheless declared the application inadmissible.

requests the Court to declare the application inadmissible or, at least, to dismiss it on account of that defect.

when to take any one of those procedural steps.⁸ What characterises those proceedings most strongly is, therefore, the discretionary nature of the Commission's powers.

10. For its part, the Commission explains that it did not take Ireland's submissions into consideration because they did not arrive in good time. But, even if they had, their contents would not have led to any alteration in its stance. Furthermore, the circumstances which led the Court to rule as it did in *Commission v Spain*, cited above, are in its view quite different from those of the present case. In the earlier case, not only had the defendant Member State replied within the period prescribed but also its reply made it clear that certain steps had been taken to implement the Community legislation which was the subject-matter of the action.

12. While the purpose of the pre-litigation procedure is, according to settled case-law, to give the Member State concerned an opportunity to comply with its obligations under Community law or to avail itself of its right to defend itself against the complaints made by the Commission,⁹ it also makes it possible for the parties to open a dialogue concerning any issue of law or expediency capable of affecting the broad discretion possessed by the Commission. That is the sense in which the flexibility with which the Treaty has endowed infringement proceedings must be understood.

11. It is necessary to bear in mind the complex nature of the procedure laid down in Article 226 EC for seeking a declaration of failure to fulfil obligations: a pre-litigation or administrative stage is followed by a judicial stage, but there is no necessary link between them. Specifically, the Commission has complete freedom to request the Member State concerned to explain its position by means of a letter of formal notice, just as it is at liberty to send the reasoned opinion and to bring an action before the Court of Justice.⁷ Furthermore, it enjoys a similar discretion in deciding

13. Precisely because of the hybrid nature of this administrative stage, it is not possible to claim that it loses its practical effect if the defendant State does not in its defence avail itself of legal arguments, that is to say, of claims capable of supporting an objection in the judicial stage of the proceedings. As regards its nature, the pre-litigation

7 — See, *inter alia*, the judgments in Case 247/87 *Star Fruit v Commission* [1989] ECR 291, paragraph 11; Case C-191/95 *Commission v Germany* [1998] ECR I-5449, paragraph 46, and Case C-207/97 *Commission v Belgium* [1999] ECR I-275, paragraph 24.

8 — It is clear that in certain cases the excessive length of the pre-litigation procedure is capable of making it more difficult for the Member State concerned to refute the Commission's arguments, and of thus infringing the rights of the defence (Case C-96/89 *Commission v Netherlands* [1991] ECR I-2461, paragraph 16).

9 — See, in various wordings, the judgments in Case 85/85 *Commission v Belgium* [1986] ECR 1149, paragraph 11, Case 293/85 *Commission v Belgium* [1988] ECR 305, paragraph 13, and Case C-159/94 *Commission v France* [1997] ECR I-5815, paragraph 103, and the order in *Commission v Spain*, cited above, paragraph 16.

stage is clearly distinguishable from the judicial, just as the powers of the Commission with regard to the former are quite distinct from those of the Court with regard to the latter.

14. Irrespective of the efficacy of that practice, it is unarguable that the Treaty intended the document in the proceedings which defines the parameters of any action, namely, the reasoned opinion, to be preceded by an invitation to the State in question to submit its observations *which the Commission must take into account*.¹⁰

15. Failure to take into consideration in the reasoned opinion the observations submitted by a Member State in response to the letter of formal notice is, therefore, tantamount to depriving the State of that opportunity to participate fully in the proceedings.

16. According to consistent case-law, the opportunity for the Member State concerned to submit its observations constitutes an essential guarantee required by the Treaty and, even if the Member State does not consider it necessary to avail itself thereof, observance of that guarantee is an

essential formal requirement of the Treaty infringement procedure.¹¹

17. By issuing the reasoned opinion of 24 January 2001 in which it deliberately passed over the observations submitted a week earlier by the Permanent Representation of Ireland, the Commission acted in disregard of the proper conduct of the administrative procedure which preceded this action.

18. It remains to be considered whether the specific circumstances surrounding the documentation may have any bearing on the establishing of illegality.

19. First, the Commission offers as an explanation of its omission the fact that it received Ireland's reply three months after the expiry of the period prescribed in the letter before action.

20. In my opinion, that fact is irrelevant, unless to it is added proof that the Member State acted in bad faith or clearly failed in

¹⁰ — As is made clear in Case 353/85 *Commission v United Kingdom* [1988] ECR 817, paragraph 19.

¹¹ — See Case 31/69 *Commission v Italy* [1970] ECR 25, paragraph 13; Case 211/81 *Commission v Denmark* [1982] ECR 4547, paragraph 9; Case 124/81 *Commission v United Kingdom* [1983] ECR 203, paragraph 6; Case 51/83 *Commission v Italy* [1984] ECR 2793, paragraph 5; Case 274/83 *Commission v Italy* [1985] ECR 1077, paragraph 20; Case C-135/94 *Commission v Italy* [1995] ECR I-1805, paragraph 6; Case C-340/96 *Commission v United Kingdom* [1999] ECR I-2023, paragraph 36; Case C-365/97 *Commission v Italy* [1999] ECR I-7773, paragraph 23, and Case C-225/98 *Commission v France* [2000] ECR I-7445, paragraph 69.

its duty to cooperate in good faith. Article 226 EC simply requires that the Commission should deliver its reasoned opinion 'after giving the State concerned the opportunity to submit its observations'. The periods allowed for the Member States to prepare those observations, freely fixed by the Commission within reasonable limits,¹² may not be absolute. They serve, rather, to bind the Community institution in the sense that, save for good reason, it is not to deliver the corresponding reasoned opinion until the period has elapsed. Even if, when that time comes, the Commission prefers not to make use of that option, it is nevertheless obliged by the Treaty itself to have regard to the observations submitted by the Member State. Furthermore, that obligation is consistent with the fact that the Commission's taking action is not subject to any time-limit either.

by a Member State in connection with the reasoned opinion does not, therefore, affect the administrative stage which has already ended. That is the construction which must be placed on the judgment in Case C-3/96 *Netherlands v Commission*.¹³

22. Second, the Commission pleads that Ireland's reply does not detract from the legal reasoning of the opinion, since the arguments it contains have no bearing on the obligations imposed on it under the Treaty.

21. The period prescribed by the Commission once the reasoned opinion is delivered is different in kind. Since its purpose is to define the subject-matter of any dispute and since it presupposes the end of the pre-litigation stage, the new time-limit allowed presents the features of a 'period of grace' during which the effects of the reasoned opinion are suspended. On the one hand, the Commission undertakes not to institute legal proceedings and, on the other, it is still possible for the Member State effectively to fulfil its obligations. Once the administrative phase is complete, dialogue gives way to action. Failure to take into consideration the observations submitted

23. It is true that in *Commission v Spain*, cited above, upon which Ireland bases its argument, the statements made by the defendant in response to the letter of formal notice revealed that the obligations had been partly fulfilled; that as a result the parties could not define with the necessary precision the nature and scope of their dispute even after the reasoned opinion had

12 — Case C-293/85 *Commission v Belgium*, cited in footnote 9 above, paragraph 14.

13 — Case C-3/96 *Commission v Netherlands* [1998] ECR I-3031, paragraphs 14 to 21. The Court held that, in such circumstances, 'even assuming that the contentious procedure was opened by a Commission application which took no account of any new matters of fact or law put forward by the Member State concerned in its reply to the reasoned opinion, that State's right to a fair hearing has not been infringed. It is fully open to the State to raise those matters in the contentious procedure, to begin with in its first pleading in defence. It will be for the Court to examine their relevance for the outcome of the action for failure to fulfil obligations' (paragraph 20).

been delivered. The defendant State was thus deprived of an opportunity to avail itself of its right to due process.

24. None the less, in light of the content of the reply addressed to the Commission by Ireland on 16 January 2001, the contrary cannot be asserted without further evidence. While it contained no information which might destroy, wholly or in part, the validity of the infringement proceedings, once initiated, it did allow Ireland to harbour the hope — taking account of the hybrid nature of this stage of the procedure — that its observations might have some effect on the Commission's position, for example, that the despatch of the reasoned opinion might be deferred or that the pre-litigation correspondence might be extended. In short, if Ireland had known at the appropriate time that the reasons which it put forward in its reply would not prevent the institution of proceedings, it could at that point have made other choices, such as expediting the transposition measures so that they were adopted before the date on which the period prescribed in the opinion for fulfilment of obligations expired.

25. I intend that concatenation of hypotheses to be purely illustrative. The one truly important point is that the failure to take Ireland's response into consideration deprived that State of a procedural right granted by the Treaty. It is of no relevance to ask what use the defendant State could have made of that right. As the Court has

so often declared, the requirement that a Member State be given the opportunity to present its observations in response to the letter of formal notice is an essential procedural requirement 'even if the Member State does not consider it necessary to avail itself thereof'.¹⁴

26. Now that I have reached this point, it remains for me only to determine whether the irregularity found to exist may lead to any result other than the inadmissibility of the action. I think not.

27. The incomplete set of positive procedural rules governing actions brought before the Court does not provide any specific remedy. Nor has the Community judicature the power to impose penalties on the party in default, other than to order it, even if successful, to pay costs which the Court considers that party to have unreasonably incurred.

14 — See the judgments cited in footnote 11, above. Advocate General Fennelly expressed himself to the same effect in considering whether the Court should examine, with the aim of defining an essential procedural defect, the concrete effects on the interests of the person alleging such breach, or whether the outcome would have been any different if that requirement had been respected. 'In some cases,' says the Advocate General, 'it is clear that there was no such effect, or that the outcome would not in any case have been any different. In the context of infringement proceedings, for example, the Court has held that the requirement that a Member State be given the opportunity to present its observations is an essential procedural requirement "even if the Member State does not consider it necessary to avail itself thereof". The fact that the adopting institution may re-enact a measure annulled for failure to comply with such a requirement does not affect its qualification as "essential".... Nor can an institution escape the consequences of failing to comply with such a requirement by seeking to demonstrate that compliance would have added nothing to its examination of the measure under consideration' (Opinion in Case C-286/95 P *Commission v ICI* [2000] I-2341 and Joined Cases C-287/95 P and C-288/95 P *Commission v Solvay* [2000] ECR I-2391, point 26, emphasis added).

onably or vexatiously caused the opposite party to bear.¹⁵ Even if they did exist they would not provide a satisfactory solution, since they necessarily imply the delivery of a decision on the course that the infringement proceedings would have followed *if the Commission had taken into consideration* the observations that were in fact passed over. That would constitute a breach of the principle that the opportunity for the Member State concerned to submit its observations constitutes an essential guarantee non-observance of which vitiates the infringement proceedings which have been instituted, *even if the Member State does not consider it necessary to avail itself of that opportunity*.¹⁶ And with all the more reason where, as in this case, the Member State did so avail itself.

29. My view is borne out by the fact that Advocate General Mischo reaches the same conclusion in his analysis of Case C-120/01 *Commission v Ireland*, in which judgment has not yet been delivered. On the basis of facts which are in essence comparable to those in the present case, the Advocate General declared in his Opinion of 28 May 2002 that *Commission v Spain*, cited above, ought to be 'interpreted as making the proper conduct of the pre-litigation procedure a self-sufficient requirement, breach of which can result only in the application's being inadmissible'.¹⁸ Like Mr Mischo, I believe that it is for the Commission to consider thoroughly the arguments set out in the reply to the letter of formal notice and, if these are not such as to cause it to alter its position, to refute them in a convincing manner, since although, unfortunately, the pre-litigation procedure too often gives the impression of being a dialogue of the deaf, the Commission must not be responsible in any way for that absence of constructive dialogue.¹⁹

28. The inadmissibility of the action is the only remedy available to the Community legal order which can restore the proceedings to where they were before the invalidating defect occurred.¹⁷ The undeniable gravity of that sanction is the corollary of the breach of what the Court considers 'an essential guarantee' inherent in the proceedings, and at the same time it serves a clear 'preventive' purpose, encouraging the Commission to avoid such conduct in the future.

30. For those reasons I consider that this application for a declaration of failure to fulfil obligations must be held to be inadmissible and the applicant must be ordered to pay the costs in accordance with Article 69(2) of the Rules of Procedure.

15 — Second paragraph of Article 69(3) of the Rules of Procedure.

16 — See point 16, above.

17 — In the order in *Commission v Spain*, cited above, the Court held as follows: if one of the essential conditions for the admissibility of an action pursuant to Article 226 EC, namely the proper conduct of the pre-litigation procedure, is not satisfied, the action must be dismissed as manifestly inadmissible (paragraphs 25 and 26).

18 — Point 44.

19 — *Ibid.*, paragraphs 58 and 59.

31. If, on the contrary, the Court should be persuaded otherwise and decide to consider the substance of the case, it would be right, in my view, to declare the infringement to have been established, given that it is plain

that Ireland has not fulfilled its obligations under Directive 98/5. In that case, the costs would be borne by the defendant State, pursuant to the same provision.

Conclusion

32. In the light of the foregoing considerations, I suggest that the Court should declare the application inadmissible and order the Commission to pay the costs.