OPINION OF ADVOCATE GENERAL COSMAS

delivered on 20 January 2000 *

I — Introduction

1. In the present action brought pursuant to Article 169 of the EC Treaty (now Article 226 EC), the Commission requests the Court to declare that, by failing to establish, within the period prescribed, action programmes pursuant to Article 5 of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources [1] (hereinafter 'the Directive'), the Kingdom of Spain has failed to fulfil its obligations under the Treaty.

II — Legal framework

A — *The Community legal framework*

2. Article 1 of the Directive states that its objective is to reduce water pollution caused or induced by nitrates from agricultural sources and to prevent further such pollution.

3. Article 3 of the directive provides, *inter alia*, that:

'...

2. Member States shall, within a two-year period following the notification of this Directive, designate as vulnerable zones all known areas of land in their territories which drain into the waters identified according to paragraph 1 and which contribute to pollution. They shall notify the Commission of this initial designation within six months.

...

4. Member States shall review and if necessary revise or add to the designation of

* Original language: Greek.

1 — OJ 1991 L 375, p. 1; corrigendum to the Spanish version in OJ 1993 L 92, p. 51.

vulnerable zones as appropriate, and, at least every four years, to take into account changes and factors unforeseen at the time of the previous designation. They shall notify the Commission of any revision or addition to the designations within six months.'

4. It is apparent from a footnote to Article 12(1) that the Directive was notified to Member States on 19 December 1991.

5. According to Article 5(1) of the Directive, '[w]ithin a two-year period following the initial designation referred to in Article 3(2) or within one year of each additional designation referred to in Article 3(4), Member States shall, for the purpose of realising the objectives specified in Article 1, establish action programmes in respect of designated vulnerable zones.'

6. Lastly, Article 10 of the Directive provides that:

'1. Member States shall, in respect of the four-year period following the notification of this Directive and in respect of each subsequent four-year period, submit a report to the Commission containing the information outlined in Annex V.

2. A report pursuant to this Article shall be submitted to the Commission within six months of the end of the period to which it relates.'

B — *The national legal framework*

7. Article 6 of the Real Decreto sobre protección de las aguas contra la contaminación por los nitratos procedentes de fuentes agrarias (Royal Decree No 261/1996 of 16 February 1996 on the protection of waters against pollution caused by nitrates from agricultural sources), which transposes the Directive into Spanish law, provides that, in zones designated as vulnerable, the competent authorities of the autonomous communities are to establish action programmes to prevent and reduce pollution by nitrates from agricultural sources. Those action programmes are to be drawn up within two years of the initial designation of zones as vulnerable or within one year after each new extension or modification and are to be implemented within four years of being established.

III — The pre-litigation procedure

8. On 4 April 1997 the Commission sent the Kingdom of Spain a letter of formal notice (No SG(97) D/2548) inviting it to

submit its observations regarding an alleged failure to fulfil a series of obligations under the Directive, including, in particular, the obligation to monitor the concentration of nitrates in fresh water (Article 6 of the Directive), the obligation to establish action programmes relating to vulnerable zones (Article 5 of the Directive) and the obligation to submit an initial four-year report (Article 10 of the Directive).

9. The reply of the Spanish authorities to the letter of formal notice enabled the Commission to ascertain that the monitoring of the concentration of nitrates in fresh water had been carried out. Nevertheless, according to the Commission, that reply acknowledged that the action programmes provided for in Article 5(1) of the Directive had not been established and that the report provided for in Article 10(1) of the Directive had not been submitted.

10. Following that reply, the Commission on 21 November 1997 addressed a reasoned opinion to the Kingdom of Spain [2] alleging that, by failing to communicate a report to the Commission containing the information referred to in Annex V to the Directive, in accordance with Article 10, and by failing to establish the action programmes provided for in Article 5, the Kingdom of Spain had failed to fulfil its obligations under the Directive.

2 — C(97) 3415 final.

11. The Commission called on that Member State to take the necessary measures to comply with the reasoned opinion within two months from its receipt. As the Commission states, the Spanish authorities, by letter of 23 January 1998, requested an extension of the above time-limit.

12. The Kingdom of Spain finally replied to the reasoned opinion by forwarding to the Commission a document dated 6 March 1998, entitled 'Informe Cuatrienal del Reino de España sobre cumplimiento de la Directiva 91/676/EEC relativa a la protección de las aguas contra la contaminación por nitratos de origen agrícola' ('Four-Yearly Report on the application of Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources').

13. In the light of that report, the Commission limited the subject-matter of the present action, which was commenced by application lodged at the Court Registry on 17 July 1998. In these proceedings it is seeking, first, a declaration that, by failing to establish the action programmes provided for in Article 5 of the Directive, the Kingdom of Spain has failed to fulfil its obligations under the Treaty, and, second, an order that the defendant should pay the costs.

IV — Arguments of the parties

14. The Commission states that the mandatory nature of the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC) and of the first paragraph of Article 5(1) of the EC Treaty (now the first paragraph of Article 10 EC) is such that Member States to which a Directive is addressed are required to take the necessary measures to implement it within the time-limit.

15. The Commission points out that, in the present case, since the initial designation of the vulnerable zones should have been completed within two years of notification of the Directive (Article 3(2) of the Directive), the deadline for drawing up the action programmes provided for in Article 5 expired in December 1995.

16. According to the Commission, the Kingdom of Spain acknowledged in its 'Four-Yearly Report' of 6 March 1998 that the action programmes provided for in Article 5 of the Directive had not yet been drawn up, although the fixed time-limit for compliance with the reasoned opinion of the Commission had already expired.

17. In the Commission's view, the reasons put forward by the Kingdom of Spain for the above delay, namely that the designation of the vulnerable zones could not be put into effect by the autonomous communities until June 1997 and that the drawing-up of action programmes inevitably requires a certain amount of time, cannot be regarded as justifying the breach complained of. The Commission is of the opinion that, in essence, the Spanish authorities are relying on previous breaches by the Kingdom of Spain of other obligations imposed by the Directive — in particular, the failure to transpose it within the time-limit laid down by Article 12 of the Directive — in order to justify the breaches cited in the reasoned opinion issued by the Commission in the present case. However, it is inconceivable that a Member State should be able to pray in aid its culpable delay in transposing a Directive in order to justify the non-fulfilment or delayed fulfilment of other obligations imposed by that Directive. *Nemo auditur suam propriam turpitudinem allegans.*

18. Moreover, according to the Commission, even if it were accepted that the time-limits provided for in the Directive could have been determined differently, the provisions of the Directive are binding, as to the result to be achieved, upon each Member State to which it is addressed.

19. In addition, the Commission considers that the statement by the Kingdom of Spain that all necessary measures will be taken to comply with the obligations imposed by the Directive is irrelevant. Nor is it able to accept the suggestion by the Kingdom of Spain that no reference should be made to

the time-limits laid down in the Directive or the defendant's argument that the failure complained of is merely 'temporal' and not 'substantive'. According to the Commission, it is hard to see how any distinction can be drawn between a 'temporal' and a 'substantive' infringement. What is certain is that, upon the expiry of the period allowed by the Commission for compliance with the reasoned opinion, there was a clear failure to fulfil the obligations laid down in the Directive, and nothing has happened since then to alter the Commission's view that such a failure has occurred or to suggest that it is merely 'temporal'. In addition, the fact that the Spanish authorities are undeniably anxious to comply with the Directive does not mean that they should escape a declaration of such failure. *Facta potentiora sunt verbis.*

20. In its reply, the Commission points out that the Kingdom of Spain acknowledged in its defence that the action programmes referred to in Article 5 of the Directive had still not been established. In addition, the Commission observes that the review of the situations in the various autonomous communities shows not only that the action programmes have not been established in many of those communities, but also that, in some of them, the vulnerable zones have not yet even been designated.

21. The Commission further observes that, in its judgment of 1 October 1998 in *Commission* v *Spain*,[3] the Court of Justice confirmed that proceedings may be brought in respect of each of the specific obligations imposed by the Directive, independently of any action which may be brought for failure to transpose it or delay in so doing. According to the Commission, the failure to respect those obligations threatens the realisation of the aims of the Directive. That is particularly true, in its opinion, in the case of the approval and implementation of plans and programmes which necessitate continuing efforts and active surveillance on the part of the national authorities with a view to attaining the objectives of the Directive.

22. The Commission states that it is alive to the fact that it is the delay on the part of the Kingdom of Spain in transposing the Directive that has caused the failure to fulfil the other obligations laid down therein. However, neither that fact nor the possibility of formulating the action in a different way can justify or legitimise the failure which is the subject of the present proceedings.

23. Finally, the Commission, referring to the settled case-law of the Court of Justice, according to which a Member State may not plead provisions or practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive, rejects the argument of the Spanish authorities that the autonomous communities, which are competent to draw up action programmes, have merely

3 — Case C-71/97 [1998] ECR I-5991.

followed the guidelines set out in Royal Decree No 261/1996 of 16 February 1996. The Commission also infers from this that the transposition of the Directive is not adequate. Consequently, the Commission considers that, although it has confined the present action to proceedings for failure to fulfil the obligation imposed by Article 5 of the Directive, if the Spanish authorities consider that a modification of the Royal Decree transposing the Directive — and, more particularly, of the timetable laid down in the decree — would constitute an acceptable solution for the avoidance of subsequent failures to fulfil the various obligations imposed by the Directive, then it is for them to take the appropriate measures to modify the above Decree

24. The Kingdom of Spain, whilst accepting that it has failed to fulfil the obligation imposed by Article 12 regarding the time-limit for the adoption of the laws, regulations and administrative provisions necessary in order to comply with the Directive within two years of its notification, states that it would have been difficult to draw up the programmes provided for in Article 5 of the Directive by the due date (December 1995), given that the transposition of the Directive in question into Spanish law did not take place until March 1996, which upset the timetable for fulfilment of the successive obligations imposed by that Directive.

25. According to the Kingdom of Spain, which requests the Court of Justice to dismiss the present action and to order the applicant to pay the costs, the Commission should have based its action upon the failure to transpose the directive into the Spanish legal system in due time. Since that was not done, there is no point in bringing successive actions directed against the failure to comply with the timetable set by the Directive, which was inevitably affected by the initial delay, so that the Kingdom of Spain cannot in any way escape a ruling against it.

26. The Kingdom of Spain states that the autonomous communities of Andalucia, Aragon, the Balearic Islands, the Canaries, Castille-La Mancha, Castille-León, Catalonia, Valencia and the Basque country have designated vulnerable zones pursuant to the obligation imposed upon them by Article 4 of Royal Decree No 261/1996 of 16 February 1996, such designation being a matter falling within their competence. For their part, the autonomous communities of Asturias, Cantabria, Extremadura, Galicia, Rioja, Madrid, Murcia and Navarra have declared that there are no vulnerable zones in their respective territories.

27. Next, the Kingdom of Spain states that, following the publication of the Royal Decree transposing the Directive, an inter-ministerial working group was set up, composed of representatives of the competent ministries, namely, the Ministry of the Environment and the Ministry of Agriculture, Fisheries and Food. That group laid down uniform criteria and steps to be taken by the autonomous communities as regards the official designation of their vulnerable zones, this being a condition precedent to the drawing-up of the action programmes provided for in Article 5 of the Directive. In

addition, the group in question drew up a 'Methodology of orientation for determination of the measures appearing in Annex 2 to Royal Decree No 261/1996 relating to the action programmes'. On that basis, the autonomous communities are working, pursuant to uniform criteria, on the drawing-up of their respective programmes. The General Directorate for Hydraulic Works and Water Quality of the Ministry of the Environment, as coordinator of the working group, is taking the appropriate measures for the autonomous communities, so that the action programmes can be submitted to the Commission as rapidly as possible.

28. Finally, both in its defence and in its rejoinder, the Kingdom of Spain provides an overview of the situation in certain of the autonomous communities which have designated vulnerable zones, namely Aragon, Castille-León, Castille-La Mancha, the Balearic Islands, Valencia, Andalucia and Catalonia.

29. In its rejoinder, the Kingdom of Spain states that it is unable to accept the Commission's argument that the Spanish authorities could, if need be, modify the timetable provided for in the Royal Decree, because that Decree recapitulates, as it is required to do, the successive stages prescribed in the Directive for setting in motion the various actions to which it refers. In any case, it would not be possible simultaneously to carry out actions which, for their correct implementation, necessarily require a certain period of time to elapse between each of them. Thus, once the vulnerable zones have been designated by the autonomous communities, the drawing-up of the subsequent action programmes requires — as the Directive itself states and in order to provide a guarantee of efficiency — a period of time, which was fixed by Royal Decree No 261/1996 to expire in February 1999.

V — Assessment

30. As the Commission correctly points out, the third paragraph of Article 189 of the EC Treaty provides that directives are to be binding on Member States as to the result to be achieved. The latter obligation involves compliance with the time-limits prescribed by directives. [4]

31. It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member

4 — See, in particular, Case 10/76 *Commission v Italy* [1976] ECR 1359.

State as it stood at the end of the period laid down in the reasoned opinion. [5]

32. In the present case, Article 5 of the Directive imposed upon Member States the obligation to establish action programmes relating to the designated vulnerable zones within a period expiring in December 1995.

33. The Kingdom of Spain accepts that, because of the delayed transposition of the Directive into Spanish law (March 1996), which affected the timetable for fulfilment of the successive obligations imposed by that Directive, the programmes provided for by Article 5 could hardly have been established by the date prescribed (December 1995). Thus it acknowledges, in essence, that it failed to establish the programmes in question by that date.

34. Moreover, it is apparent from the observations put forward by the Kingdom of Spain in its defence and in its rejoinder, and, more particularly, from the account given of the measures already taken and the description of the situations in the various autonomous communities, that the action programmes provided for in the Directive were not established within the time-limit provided for in the reasoned opinion of the Commission.

35. Although steps such as the designation, mentioned by the Kingdom of Spain, of vulnerable zones in certain autonomous communities, the setting-up of an interministerial working group to coordinate the criteria for designating the zones in question, the drawing-up of a 'methodology of orientation' relating to the action programmes or the measures adopted by the General Directorate for Hydraulic Works and Water Quality of the Ministry of the Environment of the Kingdom of Spain, as coordinator of the working group, may constitute positive measures in the light of the objectives of the Directive, and may possibly be necessary prerequisites for the establishment of the action programmes prescribed by Article 5 of the Directive, they cannot justify or make up for the acknowledged delay and thus cannot excuse the failure to establish those programmes.

36. That failure is confirmed by the situation prevailing in most of the autonomous communities, as described by the Kingdom of Spain. Specifically, save as regards the autonomous community of Valencia, which is reported to have established an 'action programme in the vulnerable zones designed to reduce pollution by nitrates from agricultural sources', the defence states that the autonomous community of Aragon established merely an indicative timetable of future measures; as regards the autonomous community of Castille-León, apart from the general authorising legislation, it is reported that the action programme relating to Zone 4 (Cantalejo, Cabezuela, Veganzones and Turégano) is at the stage of being drafted; as to the autonomous community of Castille-La Mancha, the defence states that it is in the course of co-ordinating the works necessary for the establishment of the action

5 — See, in particular, Case C-361/95 *Commission* v *Spain* [1997] ECR I-7351, paragraph 13, and Case C-364/97 *Commission* v *Ireland* [1998] ECR 1-6593, paragraph 8.

programmes; as regards the Balearic Islands, it is reported that a fresh study is currently being carried out into the necessity or otherwise of designating the area of Sa Pobla-Muro, which had originally been designated as vulnerable; similarly, as regards the autonomous community of Andalucia, it is stated that the action programmes are at the stage of being drawn up by the Ministries of Agriculture and Fisheries; and finally, the rejoinder merely states, as regards the autonomous region of Catalonia, that work on the establishment of the action programmes has begun. Generally, it is apparent from the survey of the situation in the various autonomous communities that the Kingdom of Spain, rather than fundamentally denying the failure complained of by the Commission, is in fact seeking to highlight the various initiatives and efforts which have been made in its territory in order to render practicable the establishment of the action programmes provided for, being fully conscious of the fact that they were not established within the time-limit prescribed.

37. The Kingdom of Spain maintains that, inasmuch as the Commission did not base its action on the failure to transpose the Directive into Spanish law in due time, there is no point in bringing successive actions directed against the failure to comply with the time-limits set by the Directive, which have inevitably been affected by that initial delay. In my view, that argument should be rejected as unfounded. As the Commission correctly points out, a Member State cannot plead its own delay in transposing a directive as justification for failure to fulfil, or late fulfilment of, other obligations imposed by that directive. As the Court of Justice has held, 'a Member State may not... plead the fact that it has not taken the necessary measures to implement a directive in order to prevent the Court from dealing with an application for a declaration that it has failed to fulfil a specific obligation flowing from that directive'. [6] In the present case, it is quite clear from the above-mentioned judgment in *Commission* v *Spain* [7] that the delayed transposition of the Directive by the Kingdom of Spain does not preclude the bringing of an action or the making of a declaration that that Member State has failed to fulfil the obligations imposed by the Directive in question. [8]

38. Thus, no legitimate justification for the failure to establish the programmes provided for by Article 5 of the Directive can be provided by pleading the delayed transposition of the Directive into Spanish law in conjunction with the alleged impossibility of altering the timetable provided for in Royal Decree No 261/1996 of 16 February 1996 transposing the Directive, for the

6 — Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 23.

7 — Cited in footnote 3 above.

8 — In that judgment, the Court granted the application brought by the Commission on 19 February 1997 and held that, by failing to designate the zones regarded as vulnerable and to notify the Commission of those designations, and by failing to establish the codes of good agricultural practice for the autonomous communities other than Andalucia, Cantabria, Madrid, Murcia, Navarra and Valencia and to notify the Commission thereof, the Kingdom of Spain had failed to fulfil its obligations under Articles 3 and 4 of the Directive.

reason put forward by the Spanish authorities. First, that timetable corresponds to the requirements of the Directive, and, second, the proper implementation of the various specific initiatives in any event requires a certain period of time, which the Royal Decree extended to February 1999.

39. The timetable for the performance of successive obligations imposed by a directive on Member States cannot be interpreted or extended arbitrarily by the national rules adopted by a Member State, particularly for the purposes of covering after the event failures and delays in the fulfilment of certain of those obligations. This applies *a fortiori* where the Directive imposes on the Member States the obligation to establish action programmes and to notify them to the Commission. In that way, parallel with the ongoing efforts and active following-up of the relevant matters on the part of the national authorities, it is also possible to ensure the requisite monitoring of the coordinated pursuit of the objectives of the directive within the Union. [9] In such circumstances, which moreover reflect the situation in the present case, a distinction cannot be drawn between 'temporal' and 'substantive' failures in the establishment of programmes. Inasmuch as the timetable constitutes an essential element of the very concept of the programme, [10] the failure to establish the programmes on time, that is to say, the failure to observe the time-limits and, consequently, to comply with the specific timetable laid down by the directive, constitutes in any event a 'substantive' failure to fulfil the obligations imposed on a Member State by that directive.

40. Moreover, where a Member State, such as the Kingdom of Spain in the present case, considers for whatever reason, even on account of the delayed transposition of the directive into its internal law, that the time-limits for fulfilling its obligations under the directive are proving to be excessively short or cannot be adhered to, it is not for the national authorities of the Member State, on their own initiative, to adapt the provisions of the directive to the new situation which has arisen. On the contrary, once the Member State concerned has informed the competent Community institutions of the problem, it is up to the latter to adopt, as the case may be, the necessary measures to resolve the matter. In that regard, the Court of Justice has held that 'if the period allowed for the implementation of a directive proves to be too short, the only means of action compatible with Community law available to the Member State concerned consists in taking

9 — As the Court held in its judgment in Case C-347/97 *Commission* v *Belgium* [1999] ECR I-309, relating to the failure of a Member State to establish the programmes provided for by Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances (OJ 1991 L 78, p. 38), 'It is important that the Member States under such an obligation notify the Commission of the measures which they intend to adopt or carry out in the sectors concerned. It is only in the light of such specific figures and timetables that the Commission can then assess whether the measures envisaged in pursuance of the Directive actually contribute to implementing the programmes designed to attain the objectives of the Directive' (paragraph 17).

10 — See the judgment in Case C-255/93 *Commission* v *France* [1994] ECR I-4949, paragraphs 24 to 27.

the appropriate initiatives within the Community in order to obtain the necessary extension of the period by the competent Community institution'. [11]

41. Moreover, neither the distribution of powers between the State and the autonomous communities nor the obligation to comply with Royal Decree No 261/1996 of 16 February 1996 relating to the transposition of the Directive can justify the failure by the Kingdom of Spain to establish within the prescribed time-limit the action programmes provided for in Article 5 of the Directive. First, the Court of Justice has held that 'each Member State is free to delegate powers to its domestic authorities as it sees fit and to implement directives by means of measures adopted by regional or local authorities. That division of powers does not, however, release it from the obligation to ensure that the provisions of the Directive are properly implemented in national law'. [12] Second, according to the settled case-law of the Court of Justice, a Member State cannot rely on provisions, practices or situations arising in its own internal legal order in order to justify its failure to respect the obligations and time-limits laid down by a directive. [13]

11 — See the judgment in Case C-71/97 *Commission* v *Spain*, paragraph 16, cited in footnote 3 above.

12 — See the judgment in Case C-131/88 *Commission* v *Germany* [1991] ECR 1-825, paragraph 71.

13 — See, in particular, Case C-208/96 *Commission* v *Belgium* [1997] ECR I-5375, paragraph 9, and Case C-8/97 *Commission* v *Greece* [1998] ECR I-823, paragraph 8.

42. As regards the fact that, in any event, the Kingdom of Spain had, and still has, the intention of fulfilling its obligations under Article 5 of the Directive, the following should be noted:

'the procedure laid down in Article 169 of the Treaty is based on the objective finding that a Member State has failed to fulfil its obligations under the Treaty or secondary legislation....

When such a finding has been made, as in the present case, it is irrelevant whether the failure to fulfil obligations is the result of intention or negligence on the part of the Member State responsible, or of technical difficulties encountered by it.' [14]

43. Given, therefore, that the action programmes provided for by Article 5 of the Directive have not been established either within the time-limit prescribed by the Directive or, moreover, within the period allowed in the reasoned opinion of the Commission, I am of the opinion that the failure by the Kingdom of Spain to fulfil its obligations, as alleged by the Commission, has been proved.

14 — See the judgment in Case C-71/97 *Commission* v *Spain*, paragraphs 14 and 15, cited in footnote 3 above.

VI — Conclusion

44. In consequence, I propose that the Court of Justice should:

— declare that, by not establishing within the prescribed time-limit the action programmes referred to in Article 5 of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, the Kingdom of Spain has failed to fulfil its obligations under that article of the Directive and under the EC Treaty;

— order the Kingdom of Spain to pay the costs.