OPINION OF ADVOCATE GENERAL MISCHO

delivered on 2 May 2001 [1]

1. In these Treaty-infringement proceedings, which it brought on 28 November 2000, the Commission of the European Communities has asked the Court to declare that, by failing to adopt the laws, regulations and administrative measures necessary to comply with Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [2] or, at all events, by failing to communicate the same to the Commission, the French Republic has failed to comply with its obligations under that directive.

Facts and pre-litigation procedure

2. Article 2(1) of Directive 98/4/EC requires the Member States to enact the laws, regulations and administrative provisions necessary to comply with the directive by 16 February 1999 at the latest, and immediately to inform the Commission of them.

3. In the absence of any notification of the measures transposing the directive by the expiry of the time-limit, the Commission, by letter dated 10 May 1999, gave the French Government formal notice to submit its observations within two months.

4. By letter dated 6 January 2000, the French Government informed the Commission that the process of adopting the draft decree providing for the transposition of this directive, among others, was in hand, that the draft decree would shortly be submitted to the Conseil d'État (The Council of State) (France) and that the directive had already been partially transposed by an order dated 22 April 1998.

5. On 18 February 2000 the Commission sent a reasoned opinion to the French Republic requesting it to adopt the measures necessary to comply with the obligations resulting from the directive within two months from the date of notification of the opinion.

6. Having received no further information as to whether the legislative procedure had

1 — Original language: French.
2 — OJ 1998 L 101, p. 1.

been brought to a conclusion and the decree enacted, the Commission brought the present action.

Analysis

7. Pointing out the obligations of the Member States under the third paragraph of Article 249 EC, the Commission submits that the French Republic was required to take the necessary measures to comply with the directive within the prescribed period.

8. In its defence the French Republic states that the transposition of the directive necessitates the amendment of the Code des marchés publics (Code of Public Procurement) as well as other legislative measures. A text amending the code has already been submitted to the Conseil d'État for consideration. The draft decree, which aims to transpose the directive so far as it concerns the contracting entities not subject to the Code des marchés publics, will also have to be submitted to the Conseil d'État, in the interest of consistency between the reform of the Code des marchés publics and the whole body of legislation governing public procurement.

9. It is clear, however, that, at the date of commencement of the action, the legislation had not been amended to comply with Directive 98/4, which, moreover, the French Republic does not deny.

Conclusion

10. In these circumstances, I can only suggest to the Court that it allow the Commission's application and, as a result:

(1) declare that, by not adopting all the necessary laws, regulations and administrative measures necessary to comply with Directive 98/4/EC of the

European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, the French Republic has failed to fulfil its obligations under that directive;

(2) order the French Republic to pay the costs.