OPINION OF ADVOCATE GENERAL MISCHO

delivered on 18 June 1998 *

1. This action for failure to fulfil obligations against the Italian Republic is one of a series of such actions brought by the Commission in relation to the implementation by the Member States of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (hereinafter 'the Directive'). [1]

2. More particularly, the Commission complains that the Member States in question have, in breach of Article 7 of the Directive, failed to establish programmes with quality objectives to reduce pollution.

3. This case is unusual in that it is one of a minority of actions in which the Court is called upon to give judgment by default, the Italian Republic having failed to lodge a defence in the proper form and within the time prescribed.

4. In these circumstances, the Commission requests the Court, pursuant to Article 94(1) of the Rules of Procedure, to allow its application and to

'— declare that, by failing to establish pollution reducing programmes with quality objectives for the 99 substances listed in the annex, and failing to communicate summaries of the programmes and the results of the implementation to the Commission in breach of Article 7 of Directive 76/464/EEC, and failing to provide the requisite information to the Commission in breach of Article 5 of the EC Treaty, the Italian Republic has failed to fulfil its obligations under that Treaty;

— order the Italian Republic to pay the costs'.

* Original language: French.

1 — OJ 1976 L 129, p. 23.

General background to the Directive

5. The Directive, which was adopted on the basis of Articles 100 and 235 of the EEC Treaty, states in its first recital that

'there is an urgent need for general and simultaneous action by the Member States to protect the aquatic environment of the Community from pollution, particularly that caused by certain persistent, toxic and bioaccumulable substances'.

6. Article 2 of the Directive provides:

'Member States shall take the appropriate steps to eliminate pollution of the waters referred to in Article 1 by the dangerous substances in the families and groups of substances in List I of the Annex and to reduce pollution of the said waters by the dangerous substances in the families and groups of substances in List II of the Annex, in accordance with this Directive, the provisions of which represent only a first step towards this goal'.

7. List I contains certain individual substances which belong to the families and groups of substances set out therein, selected mainly on the basis of their toxicity, persistence and bioaccumulation. Under Article 6 of the Directive, the Council is to lay down the limit values which the emission standards must not exceed, together with quality objectives for the substances in List I.

8. According to the Annex to the Directive, List II contains:

'— substances belonging to the families and groups of substances in List I for which the limit values referred to in Article 6 of the Directive have not been determined,

— certain individual substances and categories of substances belonging to the families and groups of substances listed below,

and which have a deleterious effect on the aquatic environment, which can, however, be confined to a given area and which depend on the characteristics and location of the water into which they are discharged'.

9. Article 7 of the Directive provides:

'1. In order to reduce pollution of the waters referred to in Article 1 by the substances within List II, Member States shall establish programmes in the implementation of which they shall apply in particular the methods referred to in paragraphs 2 and 3.

2. All discharges into the waters referred to in Article 1 which are liable to contain any of the substances within List II shall require prior authorisation by the competent authority in the Member State concerned, in which emission standards shall be laid down. Such standards shall be based on the quality objectives, which shall be fixed as provided for in paragraph 3.

3. The programmes referred to in paragraph 1 shall include quality objectives for water; these shall be laid down in accordance with Council Directives, where they exist.

4. The programmes may also include specific provisions governing the composition and use of substances or groups of substances and products and shall take into account the latest economically feasible technical developments.

5. The programmes shall set deadlines for their implementation.

6. Summaries of the programmes and the results of their implementation shall be communicated to the Commission.

7. The Commission, together with the Member States, shall arrange for regular comparisons of the programmes in order to ensure sufficient coordination in their implementation. If it sees fit, it shall submit relevant proposals to the Council to this end.'

10. Pursuant to Article 12 of the Directive:

'1. The Council, acting unanimously, shall take a decision within nine months on any Commission proposal made pursuant to Article 6 ...

...

2. The Commission shall, where possible, within 27 months following notification of this Directive, forward the first proposals made pursuant to Article 7(7). The Council, acting unanimously, shall take a decision within nine months.'

11. Finally, Article 13 provides that, for the purposes of the Directive, Member States are to supply the Commission, at its request, *inter alia*, with additional information on the programmes referred to in Article 7.

12. The Directive, which entered into force on the date of its notification, namely 5 May 1976, does not expressly provide for a time-limit for the actual performance of the obligations it sets out.

13. In its application, the Commission alleges that the Italian Republic failed to establish pollution reduction programmes with quality objectives for the 99 substances listed in annex I to the application.

14. The 99 substances in question do, according to the Commission, fall within List I, but since the Council has not yet laid down the limit value for emissions or quality objectives pursuant to Article 6 of the Directive, they fall within List II.

15. In fact, because List I essentially comprises families and groups of substances (apart from mercury and cadmium), it is not possible to lay down limit values for emissions and quality objectives without first identifying the individual substances within those groups and families.

16. The work carried out by the Commission in cooperation with the Member States to achieve this has resulted in a list of 129 substances being drawn up. This is appended to the communication from the Commission to the Council of 22 June 1982 on dangerous substances which might be included in List I of Directive 76/464. [2]

17. Meanwhile three further substances were added to the list, thus bringing the total to 132. Of these, 18 are the subject of a Council Directive laying down limit values for emissions and quality objectives and 15 have resulted in a proposal for a Council Directive

2 — OJ 1982 C 176, p. 4.

amending Directive 76/464/EEC submitted by the Commission on 14 February 1990. [3]

18. This action therefore relates to the 99 substances remaining on the list annexed to the communication from the Commission referred to above.

Procedure

19. Following a meeting with national experts, the Commission, by letter of 26 September 1989, requested the defendant State to send it the programmes relating to priority substances. The defendant State did not reply to that letter.

20. In a letter dated 4 April 1990 the Commission requested the Italian Government to send it an up-to-date list specifying which of the 99 substances had been discharged into the aquatic environment in Italy; the applicable quality objectives at the time when authorisation for discharging waste liable to contain one of those substances was granted; and, if applicable, the reasons for which those objectives had not been laid down, together with a timetable stating when the Italian Government would lay them down. No reply was received to that letter.

21. By letter of formal notice dated 10 July 1991 the Commission informed the Italian Government that it considered that, by failing to establish programmes with quality objectives, or by failing to communicate summaries of such programmes and the results of their implementation contrary to Article 7 of the Directive, and by failing to provide to the Commission information requested by it in this regard contrary to Article 5 of the EC Treaty, the Italian Republic had failed to fulfil its obligations under the EC Treaty. The Italian Government did not respond to the invitation sent to it to submit its observations within a time-limit of two months.

22. On 15 May 1993 the Commission sent to the defendant State a reasoned opinion repeating the complaint contained in the letter of formal notice. It requested the defendant State to take the necessary measures to comply with the reasoned opinion within two months. That reasoned opinion also elicited no response.

23. The Commission's application was lodged at the Court on 22 August 1996.

3 — OJ 1990 C 55, p. 7.

24. The Italian Republic did not respond to the application in the proper form and within the time prescribed.

25. In a letter dated 15 July 1997 the Commission applied, pursuant to Article 94(1) of the Rules of Procedure of the Court, for judgment in the terms sought in the application.

Admissibility

26. Under Article 94(2) of the Rules of Procedure, the Court, after hearing the Advocate General, is to consider whether the application initiating proceedings is admissible and whether the appropriate formalities have been complied with.

27. I have not been able to find any procedural irregularity affecting the admissibility of the application and therefore consider that I may go on to examine the merits of the Commission's claim.

Substance

First head of complaint

28. The Commission's first head of complaint is that the Italian Republic failed to fulfil its obligations under the EC Treaty by failing to establish pollution reduction programmes with quality objectives for the 99 dangerous substances listed by it in an annex, and failing to communicate to the Commission summaries of the programmes and the results of their implementation in breach of Article 7 of the Directive.

29. It is clear both from the general background to the Directive, which is set out above, and from the judgment in *Commission* v *Luxembourg* [4] that the Member States had an obligation to adopt the pollution reduction programmes referred to in Article 7 of the Directive and to communicate to the Commission summaries of those programmes and the results of their implementation. It is also clear from that judgment that the Member States had an obligation to include the 99 substances mentioned above in their pollution reduction programmes.

30. The Commission's first head of complaint must therefore be upheld.

4 — C-206/96 [1998] ECR I-3401.

Second head of complaint

31. The Commission's second head of complaint is that the Italian Republic breached Article 5 of the EC Treaty by not providing it with the information it requested in relation to the implementation of the Directive.

32. The Commission submits that, as a result of this, the Italian Republic failed to fulfil the obligation, laid down for Member States in Article 5 of the EC Treaty, to collaborate with the institutions of the Community to facilitate the Community in the achievement of its tasks.

33. The documents before the Court show that the Commission raises this head of complaint because the Italian Republic failed to reply to two letters dated respectively 26 September 1989 and 4 April 1990 in which the Commission asked the Italian Republic for information relating to the aforementioned 99 substances.

34. In this respect, I would point out that the Court has consistently held [5] that if a Member State has failed to fulfil its specific obligations under a directive, no purpose is served by considering the question whether it has thereby also failed to fulfil its obligations under Article 5 of the EC Treaty.

35. In this case, the information requested by the Commission does not substantially differ from the information which should have been available from the pollution reduction programme which the Italian Republic was, pursuant to Article 7 of the Directive, obliged to establish and communicate to the Commission.

36. Since it has been held in the context of the Commission's first head of complaint that the Italian Republic failed to fulfil this specific obligation under the Directive I propose that the Court reject the second head of complaint.

Costs

37. Since the main ground for the action is the failure by the Italian Republic to fulfil its obligations under Article 7 of the Directive, I suggest that the Court should order the defendant government to pay all the costs, notwithstanding the rejection of the second head of complaint.

5 — See, for example, Case C-133/94 *Commission* v *Belgium* [1996] ECR I-2323, paragraph 56.

Conclusion

38. In the light of the foregoing I propose that the Court:

— declare that, by failing to adopt pollution reduction programmes with quality objectives for the 99 dangerous substances listed in the annex to the Commission's application and failing to communicate to the Commission summaries of those programmes and the results of their implementation in breach of Article 7 of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, the Italian Republic has failed to fulfil its obligations under the EC Treaty;

— for the rest, dismiss the application;

— order the Italian Republic to pay the costs.