OPINION OF ADVOCATE GENERAL ALBER

delivered on 31 January 2002 [1]

I — Introduction

1. In these proceedings for failure to fulfil obligations, the Commission claims that the French Republic failed to adopt all the measures necessary to ensure that all waste incineration plants operated in France met the requirements laid down in Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants [2] and in Council Directive 89/429/EEC of 21 June 1989 on the reduction of air pollution from existing municipal waste incineration plants [3] upon expiry of the period prescribed for their implementation. Although France concedes that the requirements laid down in the directives have not in fact been met at some plants, it still considers that it has adopted all the legislative and administrative measures necessary under the directives.

II — Relevant legislation

2. Directives 89/369 and 89/429, which supplement Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants, [4] lay down specific standards applicable respectively to new and existing plants for the incineration of municipal waste. New plants within the meaning of Directive 89/369 are plants granted authorisation on or after 1 December 1990, as provided by Article 1(5) in conjunction with Article 12 of the directive. All plants granted authorisation previously are covered by Directive 89/429.

3. Article 4(1) of Directive 89/369 provides:

'All new municipal waste incineration plants must be designed, equipped and

1 — Original language: German.

2 — OJ 1989 L 163, p. 32.

3 — OJ 1989 L 203, p. 50.

4 — OJ 1984 L 188, p. 20.

operated in such a way that the gas resulting from the combustion of the waste is raised, after the last injection of combustion air, in a controlled and homogeneous fashion and even in the most unfavourable conditions, to a temperature of at least 850 °C [for] at least two seconds in the presence of at least 6% oxygen.'

4. Under Article 12(1) of the directive, Member States are required to 'bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 December 1990 ...'.

5. With effect from 1 December 1996, Directive 89/429 applies the standards imposed on new plants to existing plants:

'Article 2

In accordance with Article 13 of Directive 84/360/EEC, Member States shall take appropriate measures to ensure that the operation of existing municipal waste incineration plants [is] subject:

(a) in the case of plants with a nominal capacity equal to or more than six tonnes of waste per hour: by 1 December 1996, to the same conditions as those imposed on new incineration plants of the same capacity under the terms of Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants ... , except with regard to the provisions of Article 4, which shall be replaced by those of Article 4 of this Directive;

...

Article 4

1. (a) By 1 December 1996, existing municipal waste-incineration plants with a capacity of at least six tonnes per hour must comply with the following combustion conditions: the gases resulting from the combustion of the waste must be raised, after the last injection of combustion air and even under the most unfavourable conditions, to a temperature of [at] least

850 °C for at least two seconds in the presence of at least 6% oxygen. However, in the event of major technical difficulties, the provisions concerning the two-second period shall be implemented at the latest when the furnaces are replaced.

...'

6. The directives were transposed into national law by the ministerial order (arrêté ministériel) of 25 January 1991 concerning municipal waste incineration plants (hereinafter 'the ministerial order'). [5]

III — Pre-litigation procedure

7. The Commission received a complaint regarding the waste incineration plant at Maubeuge and registered it under Number 99/4014.

8. The Commission also learnt of a survey of 1 December 1996 compiled by the French Ministry of Regional Planning and the Environment which showed that approximately 40 waste incineration plants with a capacity of more than six tonnes of waste per hour did not meet the requirements laid down in the ministerial order. [6]

9. It was apparent from a press release issued by the Ministry of Regional Planning and the Environment on 18 February 1999 that the plants at Brive, Dijon, Toulouse, Blois, Maubeuge and Le Havre, which have a capacity of more than 6 tonnes of waste per hour, recorded a quantity of dioxins of between 13 and 99 ng I-TEQ/m^3 [7] (for the meaning and effect of the emission values, see points 39 to 41 below). The press release also indicated that 12 of the total of 75 waste incineration plants were continuing to operate in 1998 without complying, at least at times, with the requirements of the ministerial order. These were the plants at La Rochelle, Blois, Angers, Maubeuge, Mulhouse, Le Mans, Rouen, Le Havre, Belfort, Rungis, Douchy and Noyelles-sous-Lens.

10. On 28 April 1999 the Commission consequently sent to the French Republic a letter of formal notice alleging that it had failed to adopt the measures necessary to ensure that all waste incineration plants in

5 — JORF, 8 March 1991, p. 3330.

6 — The French Government explained in its defence that that list related to existing plants alone.

7 — I-TEQ/m^3 stands for 'international toxicity equivalents per cubic metre of exhaust gas'. For the determination of toxicity equivalents in dioxins and furans, see the third sentence of Article 7(2) of, and Annex I to, Council Directive 94/67/EC of 16 December 1994 on the incineration of hazardous waste (OJ 1994 L 365, p. 34).

France were being operated in accordance with the conditions laid down by Directives 89/369 and 89/429.

11. The French Government replied by letter of 22 September 1999, explaining that, out of the 70 or so municipal waste incineration plants which were operating in France and had a capacity of more than 6 tonnes of waste per hour, at the beginning of 1998 some 27 still had not met the requirements of the ministerial order and, therefore, had not complied with Directives 89/369 and 89/429. Notwithstanding the measures prescribed by the Ministry, 12 plants still had not met the requirements at the beginning of 1999.

12. The French Government also stated that the results of dioxin measurements were announced in early 1998. According to those results, emissions from 19 plants were measured to be in excess of 10 ng I-TEQ/m^3. Fifteen of those plants did not conform with the ministerial order. Further measurements in early 1999 showed that nine plants were still exceeding the limit value, five of which were not complying with the legislation.

13. By letter of 21 October 1999 the Commission sent to the French Republic a reasoned opinion reiterating the complaint it had made in the letter of formal notice and setting a two-month time-limit for implementing the necessary measures.

14. In its response to that letter on 22 December 1999, the French Government stated that the number of plants not meeting the standards prescribed by law had dropped from 27 in 1998 to seven at the end of 1999; these seven were the plants at Angers, Douchy, La Rochelle, Le Havre, Le Mans, Maubeuge and Rouen. This proved, in the French Government's view, that the measures adopted had been neither ineffective nor insufficient. Dioxin emissions exceeded 10 ng I-TEQ/m^3 only at the plants at Dijon, Maubeuge, Rouen and Le Havre, although the plant at Dijon did in fact meet the statutory conditions.

In a communication of 11 February 2000 the French authorities notified the Commission of the measures it had adopted and those it intended to adopt as regards the seven non-compliant plants.

IV — Forms of order sought and procedure

15. The Commission brought an action on 12 February 2001. It claims that the Court should:

1. declare that, by failing to adopt all the necessary and appropriate measures to ensure either that all incineration plants currently operating in France are operated in accordance with the combustion conditions laid down by Directives 89/369 and 89/429 or that they ceased to operate by the due date, namely 1 December 1990 as regards new plants and 1 December 1996 as regards existing plants, the French Republic has failed to fulfil its obligations under Article 4(1) of Directive 89/369, Articles 2(a) and 4 of Directive 89/429 and the third paragraph of Article 249 EC;

2. order the French Republic to pay the costs.

16. The French Republic claims that the Court should:

1. dismiss the action as unfounded;

2. order the Commission to pay the costs.

17. A hearing has not been held.

V — Arguments of the parties

18. The *Commission* submits that the French Republic has failed to fulfil its obligations under Directives 89/369 and 89/429 and under Article 249 EC. Article 4(1) of Directive 89/369 and Article 2(a), in conjunction with Article 4(1), of Directive 89/429 imposed minimum standards governing the combustion process in waste incineration plants which had to be met from 1 December 1990 as regards new plants and from 1 December 1996 as regards existing plants with a capacity of at least six tonnes of waste per hour.

19. The Commission also considers that dioxin emissions exceed the limit value of 10 ng I-TEQ/m^3 where those combustion conditions are not complied with. In its reply the Commission explains that although this assertion is not proven scientifically, experience shows it to be true.

20. The Commission states that it follows from the information supplied by the French authorities themselves in their reply to the reasoned opinion that at least seven waste incineration plants were still operating after expiry of the period specified in the reasoned opinion in spite of their failure to meet these requirements.

21. According to the Commission, the French authorities did not adopt any specific measures until April 1998 although the time-limit set for existing plants had expired on 1 December 1996. The measures were therefore adopted late and were also insufficient since, when the action was brought, that is to say almost four years after expiry of the time-limit, some plants still did not comply with the rules.

22. The *French Government* contends that it has properly transposed the directives into national law and has done everything to implement the provisions.

23. It explains that the plants covered by the directives are classified plants for the purposes of Law No 76-663 of 19 July 1976. [8] Article 23 of that Law (now Article L.514-1 of the Code de l'environnement (Environment Code)) provided for administrative penalties in the event of a failure to comply with the legislative provisions. The prefect may thus specify a period of time within which plant operators must remedy defects. Upon expiry of that period, the prefect may adopt coercive measures, in particular an order regarding that a sum of money be deposited equal to the amount required for carrying out the modernisation measures ('*consignation*'), or he may shut down the plant. Failure to meet the standards prescribed by Community law is thus subject to the same penalties as those imposed in respect of infringements of strictly national provisions. [9]

24. Member States cannot be held responsible for the conduct of independent natural and legal persons. Rather, it can at most be claimed that they have failed to deal with such conduct by imposing appropriate penalties.

25. However, from 1996 the ministry responsible for environmental protection implemented a 'rigorous programme' to ensure that the requirements laid down in the ministerial order were met. As a result, the number of plants operating unlawfully fell from 40 in 1996 to seven at the end of 1999 and to two when the rejoinder was lodged in August 2001. In view of the time required to refit the plants and the volume of waste, it had not been possible, however, to shut down the waste incineration plants concerned with immediate effect.

8 — JORF, 20 July 1976, p. 4320.

9 — In this connection the French Government cites the judgment in Case 68/88 *Commission* v *Greece* [1989] ECR 2965.

26. The wording of Article 2 of Directive 89/429 [10] gives rise only to an obligation on the Member States to ensure that the plants are subject to specific rules and that those rules are observed.

27. In its judgment in Case C-365/97 [11] the Court held that it could not in principle be inferred from the fact that the actual situation was inconsistent with the requirements of a directive that a Member State had necessarily failed to fulfil its obligations. Were the Member State to allow such a situation contrary to the directive to persist over a protracted period and were this to result in a significant deterioration in the environment, this might none the less be an indication that the discretion conferred on the Member States by the directive had been exceeded.

28. The French Government states that four years elapsed between 1 December 1996 and the expiry of the period laid down in the reasoned opinion. [12] Upon expiry of the period, only seven plants still did not meet the requirements laid down in the directive. Such non-compliance of the plant at Maubeuge will have continued for six years if the work is completed in 2002. Only the plant at Le Havre will not meet the standards required in the foreseeable future. All in all, there can therefore be no question of a protracted period or significant deterioration in the environment.

29. The *Commission*, on the other hand, considers that the French authorities acted too late and irresolutely. Considerable harm was caused as a result. Moreover, the question whether a Member State has failed to fulfil its obligations is determined by reference to the date on which the period laid down in the reasoned opinion expires. [13] Whether or not further plants have been refitted after expiry of that period is irrelevant.

30. The *French Government* also maintains that the Commission is claiming that it has exceeded the limit value of 10 ng I-TEQ/m^3 for dioxins although that limit value has not even been prescribed by the directive. That quantity of dioxins is admittedly a recognised precautionary value. However, the Commission has not furnished any scientific evidence to show that increased dioxin emissions necessarily indicate that the combustion conditions laid down in the directives are not being met. Dioxin emissions currently still exceed the above-mentioned value at three plants (Dijon, Chambéry and Benesse-Maremne) although no infringement of the directives has been recorded.

10 — The French version of the first paragraph of Article 2 of Directive 89/429 reads: '... les États membres prennent les mesures appropriées pour que l'exploitation des installations existantes d'incinération des déchets municipaux soit soumise ... au plus tard le 1er décembre 1996, aux mêmes conditions que celles imposées aux installations d'incinération nouvelles ...'.

11 — *Commission* v *Italy* [1999] ECR I-7773, paragraphs 67 and 68.

12 — In fact only three, not four, years elapsed between 1 December 1996 and the expiry in December 1999 of that period.

13 — The Commission relies on the judgment in Case C-384/97 *Commission* v *Greece* [2000] ECR I-3823, paragraph 35.

31. In its rejoinder the French Government further contended that a distinction has to be made between two categories of plants:

— plants which do not comply with the combustion conditions laid down in the directives and in the ministerial order and

— plants which comply with the legislative conditions but whose dioxin emissions nevertheless exceed 10 ng I-TEQ/m^3.

32. Since the Commission conceded in its reply that an infringement of Community law arises only in respect of the first category, it has withdrawn part of its original action, the complaint therein having extended to plants belonging to the second category. This has to be taken into consideration in the decision as to costs.

VI — Legal assessment

A — *Subject-matter of the action*

33. The Commission's application is drafted in very general terms. Furthermore, according to its wording, it seeks a declaration concerning waste incineration plants 'currently' operating in France. However, according to settled case-law, the situation prevailing at the end of the period laid down in the reasoned opinion is decisive for determination by the Court of a failure to fulfil obligations. [14] Consequently, some observations must be made as regards determining the subject-matter of the dispute.

34. The subject-matter of proceedings for failure to fulfil obligations has already been determined by the pre-litigation procedure and may not be extended in the application; only in that way are Member States' rights of defence protected. [15]

35. In the present case the parties do not dispute that the national implementing provisions are entirely consistent with the requirements of Directives 89/369 and 89/429.

36. In the form of order sought by it, the Commission seeks rather a declaration that the French Republic has failed to adopt all the measures necessary and appropriate in order to ensure either that all incineration plants currently operating in France are

14 — See inter alia Case C-127/99 *Commission* v *Italy* [2001] ECR I-8305, paragraph 38, and Case C-207/00 *Commission* v *Italy* [2001] ECR I-4571, paragraph 27.

15 — Settled case-law; see, for example, Case C-365/97 *Commission* v *Italy*, cited in footnote 11, ECR I-5688, paragraph 23.

operated in accordance with the combustion conditions laid down in Directives 89/369 and 89/429 or that they ceased to operate by the due date.

37. Considered in isolation, the form of order sought is so vague that doubts could even be raised as to its admissibility. If it is taken literally, the French Republic can defend itself only by demonstrating that every single waste incineration plant operating in France, irrespective of size, actually meets the requirements of the directive. It can at most be inferred from the provisions put in issue, in particular from the reference to Article 2(a) of Directive 89/429, that the Commission confines its claim concerning existing plants to those which have a throughput of more than six tonnes of waste per hour.

38. The French authorities admittedly ought to have at their disposal, on the basis of the communications concerning measurement results pursuant to Article 6(3) of Directive 89/369, the data necessary for presenting such a case. However, under the general rules governing proceedings for failure to fulfil obligations, it is first for the Commission to adduce evidence of the infringement [16] and not for the Member State to adduce evidence showing that there is no infringement. By the negative wording of the form of order sought, the Commission effectively shifts the burden of proof onto the Member State.

39. However, the form of order sought must not be assessed in isolation from the Commission's statements in the pre-litigation procedure and the grounds of its application. Since the procedure was initiated, the Commission has been complaining that *specific* plants with a throughput of more than six tonnes of waste per hour, each of which is listed in the publications of the French authorities and can therefore be precisely identified, are not complying with the parameters stipulated in the directives. In this connection, it also inferred in the letter of formal notice and the reasoned opinion from the fact that the value of 10 ng I-TEQ/m^3 was exceeded that the combustion conditions laid down in the directives were not observed. [17]

16 — See Case C-147/00 *Commission* v *France* [2001] ECR I-2387, paragraph 27, and Case C-214/98 *Commission* v *Greece* [2000] ECR I-9601, paragraph 42.

17 — The fact that the French authorities themselves apparently accept that there is a relationship between compliance with combustion conditions and dioxin emissions shows that that inference is not sheer invention. Accordingly, it is stated on the internet site of the Ministry of Regional Planning and the Environment:
'Ainsi, pour les usines d'incinération, le respect des conditions de combustion imposées par la réglementation assure une réduction des émissions des dioxines ou de leurs précurseurs... Les valeurs mesurées en France pour les incinérateurs d'ordures ménagères de grosse capacité, en conditions normales de fonctionnement, et respectant les conditions d'exploitation fixées par l'arrêté ministériel du 25 janvier 1991 sont comprises entre 1 et 10 ng/m^3 (les installations non conformes ont ou avaient des rejets de l'ordre de 10 à 100 ng/m^3) ...'
(http://www.environnement.gouv.fr/actua/cominfos/dos-dir/DIRPPR/dioxine/infodiox.htm)
A relationship is also established in the directives between compliance with specific combustion conditions and dioxin emissions. Under Article 4(3) of Directive 89/369 and the corresponding provision of Directive 89/429, Member States may authorise combustion conditions different from those laid down in Article 4(1) if equivalent emission levels for dioxins and furans are obtained.

40. After the French Government had conceded in its response to the reasoned opinion that the combustion conditions at seven plants did not in any event meet the requirements, in the application the Commission no longer had to infer that the combustion conditions were not complied with from the fact that the limit value had been exceeded in order to prove the failure to fulfil obligations. Accordingly, in paragraph 33 of the application, in the section headed 'Law', it stated that it could be concluded from the French Government's response that numerous plants had been operating in breach of the combustion conditions laid down in the directives and at least seven were continuing to operate notwithstanding their non-compliance with those conditions.

41. Even if one wished to regard the exceeding of the value of 10 ng I-TEQ/m^3 as an independent complaint on the part of the Commission, the latter did not retain the complaint as such in the application. Although in setting out the facts the Commission repeated the inference that it had made in the pre-litigation procedure linking dioxin emissions to the combustion conditions, it did not in its legal arguments conclude from that inference that there was any containing wider failure to fulfil obligations. The complaint made by the Commission in the application now relates only to the fact that seven plants have been operating in breach of the combustion conditions. Regarded in that light, the subject-matter is sufficiently specific.

42. At the same time, it is apparent from these observations that the Commission did not in its reply withdraw part of its action, as maintained by the French Government.

43. The application still requires clarification on a second point. The Commission seeks a declaration by the Court regarding all plants 'currently' operating ('actuellement en fonctionnement') in France. In this regard, the application adopted the wording of the operative part of the reasoned opinion. In the context of the reasoned opinion the wording was in fact accurate. However, it is the date of expiry of the period specified in the reasoned opinion which is relevant for the Court when it determines whether or not there has been a failure to fulfil obligations. [18]

44. If the form of order sought by the Commission were taken literally, the Court would have to take as the basis for its deliberations the date on which the action was brought or even the date of its own decision. At the time of its decision at any rate, the Court will not, however, have any up-to-date information as to whether or not all the plants have been refitted. The Commission would, furthermore, be unsuccessful in its action if the failure to fulfil obligations has been remedied after the end of the period laid down.

45. The form of order sought cannot therefore be taken literally, but must be interpreted in accordance with the objective actually pursued by the Commission. The action can sensibly only be seeking to obtain a declaration by the Court in respect of the time at which the two-month period from service of the reasoned opinion expired.

18 — See the references in ECR I-5689, footnote 14.

B — *Merits*

46. The action is well founded if, on expiry of the period laid down in the reasoned opinion, a situation obtained which was contrary to Community law and that infringement is objectively attributable to the Member State because it failed to fulfil its obligations.

47. The French Government concedes that at the material time seven waste incineration plants were in any event operating without complying with the combustion conditions laid down in the directives. However, it presents two arguments in defence against the complaint that it has failed to fulfil its obligations under the directives and under the third paragraph of Article 249 EC.

48. Its first argument is that the Commission complained of a failure to observe a limit value for dioxin emissions of 10 ng I-TEQ/m^3 which had not been laid down in the directives. It is true that the directives do not set any such limit value. However, as already established, the Commission's complaint in fact concerns the failure to comply with the combustion conditions, not the fact that that emission value was exceeded. [19]

49. The French Republic states secondly that the infringement on the part of the operators of the plants cannot be attributed to it since it has taken every possible step to ensure that the requirements of Community law are met. Before the issue of attribution is considered in detail, brief consideration should be given to another aspect, that is to say whether the Commission has set out adequately and proved sufficiently the infringement of the two directives.

(1) Adequate account and sufficient proof of the infringement of Directives 89/369 and 89/429

50. The Commission claims that the French Republic has failed to ensure observance of the combustion rules laid down in Directive 89/369 and Directive 89/429 when new plants should have been operating in accordance with those rules from 1 December 1990 and existing plants from 1 December 1996.

51. The French Government has admitted that seven plants did not meet the requirements at the material time. However, it has not been established whether these were new plants within the meaning of Directive 89/369, or existing plants to which the deadline specified in Article 4(1)(a) of Directive 89/429 applies. It is consequently open to question whether the Commission has set out and proved adequately the allegation that both directives have been infringed.

19 — See above, point 40.

52. Although the Commission has complained of infringement of both directives ever since it sent the letter of formal notice, at no time has the French Government disputed with sufficient clarity that both new and existing plants are involved. In its defence the French Government mentioned, merely in passing, that the list drawn up in 1996 related to existing plants alone. However, it has not contested unequivocally the Commission's claim regarding new plants. Since the complaint was thus not contested in that respect, the Commission was not required to furnish evidence that plants in both categories were operating in breach of the combustion conditions prescribed in Article 4 of the respective directives.

53. It may consequently be regarded as an established fact that at the material time a situation obtained which was contrary to Directives 89/369 and 89/429.

(2) Responsibility of the French Republic for the failure on the part of the waste incineration plants' operators to observe the rules

54. The Treaty infringement is attributable to the French Republic if it is founded on a breach of its obligations.

55. The French Government considers that it has fulfilled all the obligations under the directives. It states that it has transposed the directives correctly into national law and safeguarded compliance with the provisions by prescribing penalties which are as harsh as those for infringements of national provisions without a Community law dimension. Moreover, it has adopted the measures necessary for all waste incineration plants actually to be refitted. As a result of those measures, the number of non-compliant plants has fallen considerably. In the French Government's view, it cannot be blamed for the fact that seven plants still had not been modernised by their operators on expiry of the period specified in the reasoned opinion.

56. The question accordingly arises as to what obligations are imposed on the Member States by the Treaty and the two applicable directives where the situation which is contrary to the Treaty does not directly result from action taken by the State or a failure on its part to act but is founded on the action of private economic operators.

(a) None of the plants run directly or indirectly by the State

57. Admittedly, this issue arises only where the party directly responsible, disregarding regulatory measures, is not actually subject to direct State influence. Should, on the other hand, the plants be operated by local or regional authorities themselves, the

Member State would have to accept responsibility for their conduct as that of a subdivision of the State. According to settled case-law, a Member State may not plead its internal structure as grounds justifying a failure on the part of its subdivisions to fulfil obligations under the Treaty. [20] This is also the case where the operators are undertakings financed by and under the direct control of the State. [21]

58. In the present case, however, the Commission has adduced no evidence that the waste incineration plants are operated directly or indirectly by public authorities. It must therefore be assumed in the following considerations that these proceedings concern strictly private operators which the State can influence only by means of regulatory measures.

(b) Previous case-law

59. The Court has on a number of occasions been concerned with the extent to which a Member State can be held responsible for actions by private individuals or situations which conflict with the requirements of Community law.

60. In Case C-265/95 [22] the Commission alleged that the French Republic had failed to take action against acts of violence by farmers obstructing imports of fruit and vegetables into France. The Court held that under Article 28 EC in conjunction with Article 10 EC Member States are required to take all necessary and appropriate measures in order to ensure the free movement of goods. [23] Although the Court conferred a margin of discretion on the Member States when they determine the measures most appropriate for maintaining public order and safeguarding internal security, it emphasised at the same time that the exercise of such discretion was subject to review by the Court. [24]

61. In his Opinion in that case, Advocate General Lenz emphasised that a Member State could not be required to achieve a certain result, namely the unobstructed movement of goods ('obligation de résultat'); rather, the Member State was required only to take all appropriate measures in order to achieve that result ('obligation de moyens'). [25]

62. The Court set out a similar line of reasoning in *Commission* v *Italy* [26] referred to by the French Government. In that case

20 — Case C-236/99 *Commission* v *Belgium* [2000] ECR I-5657, paragraphs 22 and 23 with further references.

21 — See Case 249/81 *Commission* v *Ireland* [1982] ECR 4005, 'Buy Irish', paragraph 15, and the Opinion of Advocate General Lenz in Case C-265/95 *Commission* v *France* [1997] ECR I-6959, point 9.

22 — *Commission* v *France*, cited in footnote 21.

23 — *Commission* v *France*, cited in footnote 21, paragraph 32.

24 — *Commission* v *France*, cited in footnote 21, paragraphs 33 to 35.

25 — Opinion in Case C-265/95, cited in footnote 21, point 45.

26 — Cited in ECR I-5688, footnote 11.

the Commission complained inter alia that the Italian authorities had taken no action against fly-tipping in the San Rocco valley and that Italy had thus infringed Council Directive 75/442/EEC of 15 July 1975 on waste [27] in its original version and as amended by Directive 91/156/EEC. [28] The Member States were required by those provisions to adopt the measures necessary to ensure that waste is disposed of without endangering human health and without harming the environment.

63. The Court held that it could not be directly inferred from the situation prevailing in the San Rocco valley that the Italian Republic had failed to fulfil its obligations under the directive. [29] The directive provided only that Member States were to adopt the requisite measures to ensure that waste was disposed of without endangering human health and the environment. However, if the situation persists and leads in particular to a significant deterioration in the environment over a protracted period, that might be an indication that the Member State has exceeded its discretion in assessing the need for measures. [30]

64. In those cases the Court therefore concluded that there had been a failure to fulfil obligations from the fact that the Member State had exercised improperly the discretion conferred on it as regards the measures to be adopted.

65. However, the provisions which gave rise to the obligations on the Member States contained only very general rules in both cases. In the first case, a general obligation for Member States to cooperate in safeguarding the free movement of goods arose out of Article 10 EC. In the second case, the Framework Waste Directive laid down only a vague objective and left it to the Member State to determine the detail of the measures required.

66. In contrast, the judgments of the Court [31] on Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water [32] go in an entirely different direction. Under Article 4(1) of that directive, Member States had to take all necessary measures to ensure that, within ten years following the notification of the directive, the quality of bathing water conformed to the limit values set in accordance with Article 3.

27 — OJ 1975 L 194, p. 39.

28 — OJ 1991 L 78, p. 32.

29 — *Commission* v *Italy*, cited in footnote 11, ECR I-5688 paragraph 67.

30 — *Commission* v *Italy*, cited in footnote 11, ECR I-5688 paragraph 68.

31 — See, in particular, Case C-56/90 *Commission* v *United Kingdom* [1993] ECR I-4109, paragraphs 42 to 46, Case C-198/97 *Commission* v *Germany* [1999] ECR I-3257, paragraph 35, and Case C-427/00 *Commission* v *United Kingdom* [2001] ECR I-8535, paragraph 14.

32 — OJ 1976 L 31, p. 1.

67. In the abovementioned judgments the Court held that there was a failure to fulfil obligations attributable to the Member State where the quality of individual bathing waters did not meet the required standards after expiry of the period prescribed. The Member States' argument that they had done everything to ensure compliance with the values was rejected by the Court as follows:

'The Directive ... requires the Member States to ensure that certain results are achieved and, apart from the derogations provided for, does not allow them to rely on particular circumstances to justify a failure to fulfil that obligation ...' [33]

68. The Court has left unanswered the question whether a Member State may rely on the fact that it was objectively impossible to comply with the values, since the Member States concerned have not proved such objective impossibility. [34]

69. In order to find a failure to fulfil obligations attributable to the Member State, it was sufficient in those judgments for the Member State to have failed to achieve a result, namely the attainment of a certain environmental state. In other words, an 'obligation de résultat' was owed by the Member States. Unlike the first set of cases, the second set was of course concerned with the achievement of very specific quantitative objectives. In addition, under the Bathing Water Directive Member States were granted a period of ten years to improve water quality.

70. It is therefore to be concluded from previous case-law that the question whether Member States are required only to take action, the choice of measures to be taken being at their discretion, or whether they must ensure that a certain result is achieved depends on the specific form that the Member States' obligations take.

(c) Member States' obligations under Directives 89/369 and 89/429

71. Before examining the directives at issue here with regard to the actual obligations arising from them for the Member States, it is necessary to recall the nature of directives. Under the third paragraph of Article 249 EC, directives are characterised by the fact that they lay down objectives which are binding on the Member States but leave to them the choice of form and methods.

33 — Case C-427/00 *Commission* v *United Kingdom*, cited in footnote 31, ECR I-5695, paragraph 14, with references to Case C-56/90 *Commission* v *United Kingdom*, cited in footnote 31, ECR I-5695, paragraphs 42 to 44, and to Case C-307/98 *Commission* v *Belgium* [2000] ECR I-3933, paragraphs 48 and 49. See also *Commission* v *Germany*, cited in footnote 31, ECR I-5695, paragraph 35. Case-law regarding compliance with Council Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States (OJ 1975 L 194, p. 26) is equally strict. See, in that regard, Case C-266/99 *Commission* v *France* [2001] ECR I-1981, paragraphs 26 to 28.

34 — Case C-56/90 *Commission* v *United Kingdom*, cited in footnote 31, ECR I-5695, paragraphs 45 and 46, and *Commission* v *Germany*, cited in footnote 31, ECR I-5695, paragraphs 40 and 41.

72. It follows that directives typically impose on Member States the very requirement to achieve a result. In order to attain uniform conditions in the common market it is often insufficient for there to be the same legal framework in all Member States; instead, the provisions also have to be enforced in order to create in practice the uniform conditions sought. It is somewhat unusual for a directive to require only that Member States take action without the simultaneous achievement of a certain result.

73. As is clear from the preambles to Directives 89/369 and 89/429, those directives form part of an overall Community strategy to protect the environment and to reduce air pollution. They are connected with various action programmes and other legal instruments. Municipal waste incineration plants were already dealt with in Directive 75/442 on waste and Directive 84/360 on the combating of air pollution from industrial plants before the directives at issue in these proceedings were adopted.

74. Under both Directive 75/442 and Directive 84/360 Member States had to introduce procedures for the authorisation and regular inspection of waste disposal plants by the authorities. Article 2 of Directive 89/369 reconfirms that authorisation is required for new municipal waste incineration plants.

75. Under Article 13 of Directive 84/360 Member States are under a general obligation progressively to adapt pollutant-emitting industrial plants to current technology. Directives 89/369 and 89/429 give tangible form to that obligation by laying down specific requirements for municipal waste incineration plants, derogations from which are permissible only in very limited circumstances (second sentence of Article 4(1)(a) and Article 4(3) of Directive 89/429 and Article 4(3) of Directive 89/369).

76. In that connection the second paragraph of Article 2 of Directive 89/429 makes it clear that the matter does not end on the adoption of the relevant provisions, as could be assumed if the first paragraph of that provision were read in isolation. On the contrary, the national authorities must see to it that the provisions are actually implemented.

77. The precise requirements of the directive suggest that the Community legislature sought to set the Member States a specific objective which they have to ensure is achieved (obligation as to the result to be achieved). Furthermore, the fact that a six-year period was nevertheless laid down for existing plants to be refitted supports this view. In that respect the situation regarding the requirements contained in the Bathing Water Directive is comparable.

However, whilst the quality of bathing water depends on a multitude of factors which it may in certain circumstances be difficult to influence, it is comparatively easy to ensure that specified combustion conditions in a waste incineration plant are met by means of technical measures, for instance by fitting auxiliary burners.

78. Account should also be taken of the fact that the number of plants concerned is limited, in the present case some 70 plants of such capacity in France. Under the relevant Community legislation and the national implementing provisions, authorisation is required for the construction and operation of those plants. They are subject to regular inspection by the authorities of the Member States. It is open to the authorities in particular to shut down plants if the statutory conditions governing their operation are not met.

79. Herein lies the difference between the facts in this case and the circumstances underlying the judgments in *Commission* v *France*[35] and *Commission* v *Italy*.[36] In those cases the authorities had to deal with a large number of unknown operators who were unlawfully obstructing the free movement of goods or were unlawfully disposing of waste. It was therefore impossible on practical grounds alone for the national authorities to put a stop to every infringement of Community law.

35 — Cited in ECR I-5694, footnote 21.

36 — Cited in ECR I-5688, footnote 11.

80. Finally, it must be added that the combustion conditions laid down in the directives are intended to limit dioxin emissions. On account of the considerable risks to human health and the environment posed by these substances, strict compliance with the requirements of the directive is of the utmost importance.[37]

81. On those grounds Directives 89/369 and 89/429 are to be interpreted as requiring Member States in all circumstances to ensure compliance with the combustion conditions in plants which are overseen by their authorities. In the event of non-compliance with those conditions, they cannot as a rule plead as a defence that they have adopted the measures necessary to prompt the operators of the plant to comply with the conditions.

(d) No failure to fulfil obligations where it is objectively impossible to achieve the specified objectives

82. It is at most necessary to consider whether, by way of exception, a failure to fulfil obligations attributable to the Member State is precluded if it demon-

37 — In Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste (OJ 2000 L 332, p. 91), by which Directives 89/369 and 89/429 will be repealed as from 28 December 2005, an emission limit value for dioxins and furans of 0.1 ng I-TEQ/m^3 has in the meantime been set (see Article 7 in conjunction with Annex V(d)). Emissions from the plants at issue in these proceedings came in some instances to between 100 and 1 000 times that value.

strates that it was objectively impossible to meet the objectives laid down in the directive within the specified period. The Court did not in any event entirely rule out such a possibility in the judgments on the Directive concerning the quality of bathing water. [38] It has also examined in a different context the extent to which *force majeure* may constitute an absolute obstacle to the fulfilment of obligations under a directive. [39]

83. The French Government has listed a series of measures which it has taken since 1996 for rendering the waste incineration plants compliant. In some cases the authorities, as the ultimate measure, ordered that deposits be made of the sums required for modernisation ('*consignation*'). However, that submission is by no means sufficient to demonstrate that it was objectively impossible to refit within the prescribed period, or shut down, plants operating in breach of the directives.

84. From adoption of the directive in 1989, the plant operators and the competent authorities were aware of the standards that had to be met at existing plants by 1 December 1996. Even if account is taken of the periods necessary for the planning, authorisation and execution of extensive modernisation measures, it is thus impossible to comprehend what insurmountable difficulties are actually supposed to have prevented the refitting of existing plants within the specified period. New plants which did not meet the conditions of the directives should not have been allowed to begin operating in the first place.

85. The authorities did not order that the plants at issue in this case be shut down. On that issue the French Government has submitted that such a measure was impossible on account of the volume of waste generated. However, it has not explained why it would not have been possible, in the event of individual plants being shut down and until such time as they could be refitted, temporarily to transport the waste to neighbouring plants or to dispose of it by landfill.

(e) In the alternative, examination of the measures adopted by the French authorities

86. Should the Court, contrary to the view put forward in this Opinion, not infer from Directives 89/369 and 89/429 an obligation as to the result to be achieved by the Member States in complying with the conditions laid down in those directives, it is then relevant whether the French authorities properly exercised their discretion as regards the measures which were necessary to achieve the objectives of the directives.

87. In that connection, if human health was put at significant risk or there was a significant deterioration in the environment over a protracted period, this could in

38 — See above, ECR I-5696, footnote 34.

39 — Case 101/84 *Commission* v *Italy* [1985] ECR 2629, paragraph 16.

particular be an indication that the discretion was exceeded. [40]

88. The French Republic cannot counter that argument by relying on the fact that only few plants were still failing to meet the requirements of the directives on expiry of the period specified in the reasoned opinion. In view of the risks to human health arising as a result of dioxins being released from each individual emitting plant into the environment and therefore into the food chain, the total number of plants operating in breach of the directives is immaterial to determining whether there has been a failure to fulfil obligations. [41]

89. On 1 December 1996, 40 out of a total of some 70 plants did not meet the requirements of the directives. When the period prescribed in the reasoned opinion expired, the breach by the seven plants at issue in this case had already been continuing for three years if they were existing plants. New plants should already have been complying with the requirements of Directive 89/369 for nine years. In the rejoinder of 20 August 2001, the French Government still indicated that the plants at Le Havre and Maubeuge, as before, had not been fully refitted. Also, the dioxin emissions released by those two plants in some instances were eight to ten times higher than the value of 10 ng I-TEQ/m^3 which is not usually exceeded if the prescribed combustion conditions are complied with.

90. Furthermore, the fact that the competent authorities, in spite of their knowing that the plants were in breach of the directives, for no apparent reason took specific action against the plant operators only after considerable delay signifies that they exercised their discretion improperly. It is apparent from the French Government's communication of 11 February 2000 that the operators of the plants at La Rochelle, Douchy, Maubeuge, Rouen and Le Havre were not given deadlines for carrying out the refitting until the decisions of the respective prefects in May and July 1998, that is to say not until one-and-a-half years after the date by which existing plants should have been refitted. In part, use was made of an order requiring the deposit of a sum ('*consignation*') only after further delay, in the case of Le Havre in July 2001. No plant was ever ordered to be shut down and alternative methods of disposal were never adopted.

91. In the alternative it must therefore be found that the French authorities in any event failed to take effective action in due time to deal with the condition, which did not comply with the directives, of the incineration plants at issue in this case and have therefore failed to fulfil their obligations under Directives 89/369 and 89/429.

40 — See *Commission* v *Italy*, cited in footnote 11, ECR I-5688, paragraph 68.

41 — *Commission* v *Italy*, cited in footnote 11, ECR I-5688, paragraph 70.

VII — Costs

92. The decision as to costs is based on Article 69 of the Rules of Procedure. Under Article 69(2) the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has not withdrawn part of its action Article 69(5) is not applicable.

VIII — Conclusion

93. In the light of the foregoing considerations, I propose that the Court should:

(1) declare that, by failing to adopt all the necessary and appropriate measures to ensure either that all incineration plants were operated in accordance with the combustion conditions laid down by Directives 89/369 and 89/429 or that they ceased to operate by the due date, namely 1 December 1990 as regards new plants and 1 December 1996 as regards existing plants, the French Republic has failed to fulfil its obligations under Article 4(1) of Directive 89/369, Articles 2(a) and 4 of Directive 89/429 and the third paragraph of Article 249 EC;

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