OPINION OF ADVOCATE GENERAL COSMAS
delivered on 25 March 1999 *

I — Introduction

1. By the application it has made in the present case under Article 169 of the EC Treaty, the Commission seeks a declaration from the Court that, by failing to adopt and/or communicate all the measures necessary to comply with Article 6 of Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances [1] (hereinafter 'the Directive'), the French Republic has failed to fulfil its obligations under the Directive.

II — Relevant provisions

2. Article 1 of the Directive provides:

'The aim of this Directive is to approximate the laws of the Member States on the recovery and controlled disposal of those spent batteries and accumulators containing dangerous substances in accordance with Annex I.'

3. Article 6 of the Directive provides:

'Member States shall draw up programmes in order to achieve the following objectives:

— reduction of the heavy-metal content of batteries and accumulators,

— promotion of marketing of batteries and accumulators containing smaller quantities of dangerous substances and/or less polluting substances,

— gradual reduction, in household waste, of spent batteries and accumulators covered by Annex I,

* Original language: Greek.
1 — OJ 1991 L 78, p. 38.

— promotion of research aimed at reducing the dangerous-substance content and favouring the use of less polluting substances in batteries and accumulators, and research into methods of recycling,

— separate disposal of spent batteries and accumulators covered by Annex I.

The first programmes shall cover a four-year period starting on 18 March 1993. They shall be communicated to the Commission by 17 September 1992 at the latest.

The programmes shall be reviewed and updated regularly, at least every four years, in the light in particular of technical progress and of the economic and environmental situation. Amended programmes shall be communicated to the Commission in good time.'

III — Facts

4. On 22 December 1992, the Commission sent a letter to the French Government reminding it of its obligations under Article 6 of the Directive and requesting a copy of the relevant programmes. The letter remained unanswered.

5. Accordingly, the Commission sent the French Government a letter of formal notice [2] on 3 July 1995 under the procedure provided for in Article 169 of the EC Treaty, in which it stated that, according to the information available to it, the French Republic had failed to fulfil its obligations under Article 6 of the Directive and requested the French Government to submit its observations on the infringement within two months.

6. The French authorities replied to the letter of formal notice by letter of 19 September 1995 addressed to the Commission, in which they stated that a decree transposing the Directive into national law was about to be adopted. Specifically, they stated that the decree was before the Conseil d'État (Council of State).

7. In addition, by letter of 9 April 1996 the French authorities sent the text of a draft decree to the Commission and stated that programmes under Article 6 of the Directive had been drawn up and would be signed within a month or two.

2 — Letter SG(95) D/8446 of 3 July 1995.

8. In the absence of further information from the French Republic, on 5 May 1997 the Commission sent it a reasoned opinion [3] in which it complained that, by failing to inform it of the programmes referred to in Article 6 of the Directive, the French Republic had failed to fulfil its obligations under that article. At the same time it called upon the French Republic to comply with the reasoned opinion within two months from its notification.

9. By letter of 12 June 1997, the French Republic informed the Commission that the draft decree transposing the Directive into national law had been put before the Prime Minister and that the draft envisaged that the necessary arrangements would be in place by 1 January 1998.

10. As stated by the French Government in its defence and acknowledged by the Commission in its reply, the French Republic finally adopted measures transposing the Directive into national law. Specifically, Decree No 97-1328 of 30 December 1997 was adopted and, according to the Commission, communicated to it on 20 January 1998.

11. Taking the view that that transposition of the Directive into national law as such had no bearing on the present procedure, that the French Government had failed to adopt all the measures necessary to comply with Article 6 of the Directive and that, in any event, it had not informed the Commission of any measures adopted for the implementation of Article 6, the Commission brought the present action before the Court on 14 May 1998.

IV — The views of the parties

12. The Commission bases its action on the third paragraph of Article 189 of the EC Treaty and on the first paragraph of Article 5 of the same Treaty according to which the Member States to which a directive is addressed are required to achieve the result provided for therein within the time-limit laid down. It also observes that the Court has consistently held that a Member State cannot rely on provisions, practices or circumstances existing in its internal legal order in order to justify its failure to comply with the obligations and time-limits laid down by a Community directive. Finally, the Commission points out in support of its action that, according to the case-law of the Court, a Member State cannot rely on the fact that the laws, regulations and administrative provisions necessary for the general transposition of a directive into national law have not yet been adopted in order to justify another failure to fulfil obligations relating to a specific obligation under the same directive.

13. The Commission submits that it is not, and cannot, be disputed that the French

3 — Letter C(97) 640 final of 5 May 1997.

Republic did not adopt all the measures necessary to draw up the programmes provided for by Article 6 of the Directive and/or communicate those measures to the Commission within the prescribed time-limit.

14. Nor did the French Republic inform it in the course of the pre-litigation procedure of any measures which could be considered to be a programme within the meaning of Article 6 of the Directive, but merely referred to measures which were at a preparatory stage. Furthermore, certain measures which the French Government cited in its defence had until then never been communicated to it.

15. The Commission points out, moreover, that, apart from the fact that the information provided by the defendant at that stage of the proceedings is of a brief and general nature, it is evident that the actions and legislation described by the French Republic in no way fulfil the obligation to draw up programmes within the meaning of Article 6, as that obligation has been defined by the case-law of the Court. The Commission maintains that it is not necessary or appropriate to examine the abovementioned measures in detail in order to reach that conclusion, as their description makes it clear that they are isolated, incomplete measures of a 'partial' and 'fragmentary' nature.[4] According to the Commission those measures, first, vary from one part of France to another because they are the result not of coordinated action taken by that Member State but of initiatives taken by individuals and local authorities and, secondly, are not expressed in quantitative terms and lack a timetable

4 — The Commission none the less analytically examines, as a subsidiary point, the measures which the French Government relies upon in its defence, where it contends that they meet the objectives of Article 6.
As regards the measures relating to the first objective established by Article 6 of the Directive, the Commission points out: (i) that it is not in a position to verify the existence of a 'programme' set up by French manufacturers as no measure of such a nature, adopted or coordinated by the Member State, was communicated to it; (ii) that the first objective of Article 6 of the Directive does not concern only 'general purpose batteries' but all batteries and accumulators; (iii)-that a simple request by producers to ban the sale of certain batteries does not constitute a programme within the abovementioned meaning; and (iv) that the project referred to to extend the life of lead batteries, whose terms and timetable remain unknown, appears to aim to reduce the flow of spent batteries, which is not the same as reducing their heavy-metal content.
As to the measures cited as implementing the second objective referred to in Article 6 of the Directive, the Commission points out that it is in no position to verify the existence of a 'campaign' and that the defendant makes no reference to any measures which it has adopted itself. At the same time, it states that indicating heavy-metal content is a separate obligation deriving from Article 4(2) of the Directive and that the objective established by Article 6 is not limited to batteries but also applies to accumulators.
As regards the measures pertaining to the third objective laid down by Article 6, the Commission repeats its criticism concerning the absence of initiatives and coordination by the French Government itself with regard to many of the measures adopted and observes that these measures too do not fulfil the requirements of a programme in that they lack quantitative planning and a timetable. As for the action taken by local authorities, the Commission points out that the organisation of separate collection is a specific obligation under Article 7 of the Directive. Nor do the isolated results achieved by some waste disposal sites with regard to the collection of batteries — no figures are provided for accumulators — in any event constitute 'programmes' within the meaning of Article 6.
Regarding the promotion of research, the Commission observes that the discussion groups which the French Government refers to are only indirectly and partially occupied with attainment of the objectives of the Directive, are not concerned with batteries or methods of recycling and do not clearly form part of a programme coordinated by the Member State. Finally, no specific results from the work carried out by the two discussion groups are provided, whilst the second discussion group began its work in 1996, that is to say four years after expiry of the period prescribed by the Directive for drawing up the first programme.
So far as concerns the fifth objective laid down by Article 6, the Commission takes the view that the facts cited by the French Government relate, first, to the collection and treatment figures for certain accumulators and, secondly, to three measures for the provision of financial support, matters which do not support the conclusion that programmes are involved. Furthermore, this information relates only to isolated measures and there is no guarantee that they apply to all batteries and accumulators.

for their implementation, elements which the Court has held are essential if particular measures are to be regarded as programmes.

16. As regards the measures being drafted and the agreements which are to be concluded for the organisation of disposal networks, the Commission states that it is evident that those measures have not yet been adopted and points out that the drafts of measures to be adopted are of no relevance when finding a past failure to fulfil obligations.

17. The Commission also states that the reference made by the French Government to the general nature of directives is of no relevance to the present case. The Directive does not simply establish the five objectives referred to in Article 6, but expressly obliges the Member States to adopt consecutive programmes covering a number of years in order to achieve those objectives. That specific obligation cannot be equated with the general obligation to attain the objectives of the Directive.

18. Finally, the French Republic did not in any event inform it of the content of any programme covering the objectives listed in Article 6 of the Directive within the period prescribed by that article (that is to say by 17 September 1992), within the period prescribed by the reasoned opinion or before the Commission lodged its reply. Furthermore, that omission is of a substantive rather than purely formal nature.

19. On those grounds, the Commission requests the Court, first, to declare that, by failing to adopt and/or communicate all the necessary measures, the French Republic has failed to comply with Article 6 of the Directive and, secondly, to order that State to pay the costs.

20. The French Republic points out that the five objectives listed in Article 6 of the Directive have been achieved or are being achieved through the various measures adopted by the national authorities. It submits, first of all, that the Directive was transposed into national law by Decree No 97-1328 of 30 December 1997, whose adoption enabled the Commission to end the pre-litigation procedure initiated by it under Article 171 of the EC Treaty for failure by the French Republic to comply with the Court's judgment of 29 May 1997 in *Commission* v *France*.[5] Next, whilst

5 — Joined Cases C-282/96 and C-283/96 *Commission* v *France* [1997] ECR I-2929. In that judgment the Court held, *inter alia*, that, by failing to adopt within the periods prescribed the laws, regulations and administrative measures necessary to comply with the Directive, the French Republic had failed to comply with its obligations under Article 11 thereof. Article 11 provides: '1. Member States shall take the measures necessary to comply with this Directive before 18 September 1992. They shall forthwith inform the Commission thereof. 2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive. The Commission shall inform the other Member States thereof.'

acknowledging that the various measures which it has adopted in order to attain the objectives of Article 6 of the Directive are not in the form of a programme, it counters that since those objectives are covered by the measures, its failure to comply with Article 6 is purely a matter of form. Moreover, so long as the objectives of a directive are achieved, the Member States have a discretion as to the transposition of its provisions. According to the French Government, what matters is that the public authorities, as well as the trade bodies, have adopted numerous measures applying to both businesses and individuals in order to achieve the five objectives listed in Article 6. In addition, further important measures are in the process of being drawn up.

21. The French Government thus states that, as regards the first objective laid down by that article, namely the reduction of the heavy-metal content of batteries and accumulators, the measures adopted were aimed at reducing pollutants and altering the composition of those products. Specifically, it points out:

— first, that a programme to reduce mercury content set up by French manufacturers has resulted, since 1993, in the elimination of mercury from cylindrical and prismatic general purpose batteries. In this way, the use of mercury is now limited to certain special purpose batteries, whose marketing has, moreover, significantly decreased as they have gradually been replaced by substitute products;

— second, that the producers requested a ban as from 1 January 1999 on the sale of mercuric oxide batteries and saline and alkaline batteries containing additional mercury;

— third, that there is a project to extend the life of lead batteries and diminish their lead content through a non-polluting additive (the 'Métaleurop' project, supported by the Agency for the Environment and Energy Management (Agence de l'Environnement et de la Maîtrise de l'Énergie, hereinafter 'ADEME')). That project aims to decrease the flow of spent batteries by 15% to 20%.

22. As to the second objective laid down, the French Government points out that battery producers have initiated a campaign to have mercury and cadmium content indicated on batteries.

23. So far as concerns the third objective, the French Government maintains that industry, producers, local authorities and businesses have taken measures concerning the collection of batteries and accumulators. The French Government specifically

refers to the return of lead batteries to car dealers participating in the 'Relais Vert Auto' scheme (ADEME supports and participates in this scheme); the provision of sealed containers in car parks for the collection of lead batteries by Métaleurop; the establishment of a return system (Écovolt association) for nickel-cadmium, nickel-metal hydride and lithium accumulators; a study carried out by France Logistique Systèmes (FLS) on the collection of emergency lighting systems; the collection of disposable cameras by the French Federation of Film and Photography Industries (collection started in 1994 and already 90% to 95% of cameras are collected, whilst the weight of batteries collected increased from 19 tonnes in 1994 to 91 tonnes in 1997); the separate collection and transfer to waste disposal sites of batteries and accumulators; the return of certain batteries and accumulators to businesses, particularly large retailers; and the contribution made by smaller businesses in the collection of button batteries.

24. As regards the fourth objective, the French Government refers to a discussion group set up in 1992 to examine the use of cadmium, with reference, *inter alia*, to nickel-cadmium accumulators. It also refers to a discussion group set up in 1996 to examine the use of lead, with reference, *inter alia*, to lead accumulators.

25. As for the fifth objective, the French Government states that, in addition to the measures relating to the third objective, the following initiatives have been taken:

— of a total of 6 000 000 lead batteries, 5 400 000 are collected and recovered in the six recovery facilities in France;

— approximately 1 000 tonnes of batteries and portable nickel-cadmium and nickel metal hydride accumulators were treated in 1997, that is to say a recycling rate of approximately 4% to 5%;

— ADEME has provided financial support for the recycling of nickel metal hydride accumulators, the recovery of 10% to 15% of the lead from battery waste and the recycling of unpolluted polymers derived from this (industrial investment should occur in the near future), and the creation of a recycling network for lithium batteries and accumulators (this network is starting to operate);

— ADEME has published an article on all the French sites for the recovery of batteries and accumulators;

— the Ministry of the Environment has researched the impact of batteries and accumulators that are not subject to the

Directive and come into contact with the treatment processes for household waste through the collection of the latter.

26. As regards the measures in the course of preparation, the French Government points out that, under the abovementioned Decree No 97-1328 of 30 December 1997 transposing the Directive into national law, agreements designed to create disposal networks, define the details of their operation and contribute in this manner to the achievement of the objectives established by Article 6 of the Directive are being drafted.

27. In response to the Commission's assertion that there is no coordination of the above measures by the French Government, the latter points out the significant part played by ADEME [6] in the adoption of a large number of those measures, particularly, as already mentioned, through financial support for the various schemes intended to attain the Directive's objectives. The French Government claims that, through the help provided by ADEME, it has participated in the implementation of most of the measures adopted to attain the five objectives established by Article 6.

6 — As the French Government points out, ADEME is a public industrial and commercial establishment under the supervision of the Ministry of the Environment, which encompasses the agency for air quality, the French agency for energy management and the national agency for the recovery and disposal of waste. ADEME has wide-ranging powers enabling it to promote research, awareness and the provision of services, whilst at the same time it can conclude agreements with undertakings.

28. As regards the Commission's assertion that the information regarding the measures taken is general and brief, the French Government states in its rejoinder that following in-depth research it has gathered, for two of the five objectives mentioned in the Directive, additional numerical data covering the whole of France.

29. So far as concerns the reduction of the heavy-metal content of batteries and accumulators, the French Government thus submits a table showing the changes in mercury weight and content for batteries marketed in France since 1990. According to the French Government, that table demonstrates the effectiveness of the measures taken, since the quantity of mercury contained in batteries sold in France has been continuously decreasing since 1990 to the extent that almost all batteries sold there today contain no mercury.

30. With regard to the promotion of research, the reduction of dangerous-substance content, the substitution of dangerous substances in batteries and accumulators by less polluting substances and methods of recycling, the French Government states that the discussion group set up in 1992 with the participation of representatives from various government departments, thus ensuring a wide examination of the issues at inter-ministerial level, led to the creation of a body to manage the collection and disposal of portable accumulators.

31. As regards the separate disposal of spent batteries and accumulators covered by Annex I to the Directive, the French Government points out that France now has sufficient facilities to treat all spent batteries and accumulators. Drawing a distinction between the categories established by the Directive, the French Government cites data according to which:

— a significant (five-fold) increase in the quantity of nickel-cadmium accumulators treated was recorded over a six-year period. The improvement in collection and in treatment capacities, which is due to more efficient organisation, accounts for the continuous increase in the quantities recycled;

— new legislation requiring the collection and disposal of all batteries and accumulators will be enacted. This legislation goes beyond the minimum obligations enacted by the first decree transposing the Directive into national law;

— the annual quantities of batteries containing mercury which are recycled are continuously increasing. The French Government also provides estimates concerning disposal prospects for the coming years;

— finally, approximately 85% of non-portable lead accumulators are recycled, a percentage that has remained constant since 1993.

32. In conclusion, the French Republic requests the Court to find that, although it may not have adopted programmes within the strict sense of that term in order to attain the objectives set out in Article 6 of the Directive, it has none the less adopted many measures to that end, in collaboration with economic operators, consumers and other public bodies, some of which have proved particularly effective. In view of the foregoing, it asks the Court to find that its failure to fulfil its obligations under Article 6 is solely a failure to publish programmes and as such purely a matter of form, given that the objectives of the Directive have been or are being met, and then to dismiss the action brought by the Commission.

V — My views on the application

33. The Commission complains that the French Republic has failed to fulfil its

obligations under Article 6 of the Directive. It is therefore necessary to determine very precisely what those obligations are, given that the parties put forward different approaches for their interpretation.

34. The Court has to a considerable extent defined these obligations already, in its recent judgments in Case C-298/97 *Commission* v *Spain* [7] and Case C-347/97 *Commission* v *Belgium*. [8] I will rely mainly on those judgments in examining whether in the present case the French Republic has failed to fulfil its two obligations under Article 6 of the Directive, namely (a) the obligation to draw up programmes in order to attain the objectives referred to in the first paragraph of Article 6 and (b) the obligation to communicate those programmes to the Commission pursuant to the second and third paragraphs of that article.

(a) *The obligation to draw up programmes*

35. The first paragraph of Article 6 of the Directive provides that the Member States are to draw up programmes in order to achieve the five objectives listed in that paragraph.

36. The Court has held that 'it follows from the wording of Article 6 and the general scheme of the Directive that the various problems posed by specific waste such as batteries and accumulators are to be resolved according to a precise timetable. In this respect, it must be pointed out that, even if certain results relating to the objectives of the Directive have been achieved before the expiry of the period prescribed thereby for the implementation of programmes, that does not excuse a Member State from drawing up the programmes required'. [9]

37. Characteristically, the Court has stated that the measures adopted by the Member States must not constitute 'a series of

7 — Case C-298/97 *Commission* v *Spain* [1998] ECR I-3301.

8 — Case C-347/97 *Commission* v *Belgium* [1999] ECR I-309. In relation to the Directive, see also Case C-303/95 *Commission* v *Italy* [1996] ECR I-3859 (Article 11 of the Directive — failure of the Member State to fulfil its obligations not contested), Case C-236/96 *Commission* v *Germany* [1997] ECR I-6397 and Joined Cases C-282/96 and C-283/96 *Commission* v *France* (cited above in footnote 5).

9 — See Case C-347/97 *Commission* v *Belgium*, cited above in footnote 8, paragraph 18. As I had observed in my Opinion in that case (point 30), the Directive sets the objective, among others, of protecting the environment, as is expressly stated in its preamble. Attainment of that objective necessarily involves the adoption, at the same time, both of regulatory measures and of practical measures; it therefore depends to a considerable extent on the planning of comprehensive action by the national and Community public institutions in those areas in which the environment is important. In other words, the need for adequate planning, through the drawing up of complete programmes, which is the aim pursued by Article 6 of the Directive, cannot be satisfied by piecemeal activity on the part of the national authorities in the sectors which such planning ought to cover. See also the judgment in Case C-298/97 *Commission* v *Spain* (paragraphs 15 and 16), cited above in footnote 7, and my Opinion in that case (point 11).

legislative provisions or ad hoc measures which do not possess the characteristics of an organised and coordinated system of objectives such as to make it possible to regard them as programmes within the meaning of Article 6'. [10]

38. Moreover, the Court has held that national programmes must contain the specific elements of the 'programme' envisaged by Article 6 of the Directive. Thus, those programmes must provide that they 'be reviewed and updated regularly, at least every four years', that is to say they must contain 'a precise timetable for [their] review... in step with technical progress and the economic and environmental situation'. [11]

39. In that regard, as I also observed in my Opinion in *Commission* v *Belgium*, cited above in footnote 8, it follows from the use of the terms 'reduction' and 'promotion' in the first paragraph of Article 6 and from the fact that that article provides for a succession of programmes covering four-year periods that no quantitative limit has been set for the definitive attainment of the Directive's specific objectives. On the contrary, the Directive lays down a dynamic process for the continued reduction of dangerous substances, namely mercury and heavy metals, pending their definitive ban. [12]

40. In the present case, it is clear that the French Government did not draw up the programmes envisaged by Article 6 of the Directive. The measures which the French Government states it has drawn up could not be considered programmes within the meaning of Article 6. Moreover, the French Government itself expressly acknowledges that those measures are not in the form of programmes.

The truth is that most of the measures are not expressed in quantitative terms, nor are they accompanied by a specific timetable, which is necessary if they are to be regarded

10 — See Case C-347/97 *Commission* v *Belgium*, paragraph 23, cited above in footnote 8.

11 — See Case C-347/97 *Commission* v *Belgium*, paragraph 20, cited above in footnote 8.

12 — See my Opinion in Case C-347/97 *Commission* v *Belgium*, cited above in footnote 8 (point 34).

as programmes.[13] Moreover, the French Government itself states in its rejoinder that it carried out in-depth research to gather additional numerical data, ultimately for only two of the Directive's five objectives. That statement shows that the measures were not, as a general rule, based on quantified actions whose results were monitored, checked, reviewed and updated on the basis of a timetable, as the concept of a programme would require. In any event, it is evident that the measures as a whole ignore the specific provisions of the Directive and do not follow the particular timetable established by Article 6, that is to say, successive four-year programmes starting on 18 March 1993.

41. Furthermore, the French Government's reference to measures which are to be adopted in the future or are in the process of being worked out not only constitutes an acknowledgment of the present absence of such measures and need for their adoption but also cannot be considered relevant to this case. The Court has consistently held that the question whether a Member State has failed to fulfil its obligations must in every case be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion, and subsequent changes may not be taken into account.[14]

42. The French Republic counters, in spite of the above, that since the objectives at issue are covered by those measures, the failure to comply with Article 6 of the Directive is purely a matter of form. However, this is not a valid argument. First, as I have already mentioned, the Court has held that the objectives of Article 6 can be achieved only through the programmes specifically provided for by that article.[15] Secondly, as far as content is concerned, the measures that the French Government states have been adopted to attain the five specific objectives listed in the Directive do not appear to establish a systematic and dynamic process for the reduction of dangerous substances, namely mercury and heavy metals, leading to their definitive elimination; in any event, the measures have failed to eliminate those substances, a failure also made apparent by the French Government's reference to measures being drawn up, evidently because it is still necessary to adopt measures. Moreover, the failure as yet to achieve all the specific objectives set out by Article 6 is also apparent from the fact that, in its observations, the French Government sometimes refers to the objectives as having been achieved and at other points asks that it be acknowledged that the aims of that article are covered by measures of a different nature, some of which have proven particularly effective.

13 — With regard to the importance of specific figures and timetables in assessing whether an appropriate programme has been drawn up, see also Case C-255/93 *Commission* v *France* [1994] ECR I-4949, paragraphs 20 to 27.

14 — See, by way of example, Joined Cases C-232/95 and C-233/95 *Commission* v *Greece* [1998] ECR I-3343, paragraph 38.

15 — See points 36, 37 and 38 above.

43. It should also be noted that some of the measures which the French Government has relied on to contend that it achieved the objectives laid down by Article 6 [16] were adopted, as it states itself, [17] by trade bodies. Thus, despite the actions taken by Ademe — whose participation, as is also stated by the French Government, was limited to the implementation of only a certain number of those measures — it is clear that the French Government did not adopt the necessary programmes on the basis of coordinating, and legally binding, provisions of national law, as required by the Court's case-law. [18] That absence of central regulation which could ensure in a legally binding way that measures were planned in accordance with specific requirements set by Article 6 of the Directive is not in any way compatible with the aims of the Directive, which, moreover, expressly obliges the Member States to draw up programmes. Furthermore, in view of the mention in the preamble to the Directive of the need to approximate the laws of the Member States by setting up programmes and communicating them to the Commission, division of the specific national programmes into initiatives and measures to be taken by non-government agencies with a different breadth of powers is *a fortiori* excluded. Moreover, as the Court has held, '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'. [19]

44. Generally, the impression is given that, rather than contesting the substance of the complaints which the Commission has made against it, the French Government in reality attempts to emphasise the various initiatives taken and efforts made in France with regard to the specific objectives of Article 6 of the Directive, whilst being fully aware that the obligations deriving from that article have not been fulfilled within the time-limit or in an appropriate manner.

45. In my view, the above general observations suffice for it to be found that the French Republic has failed to fulfil its obligation under Article 6 of the Directive to set up programmes, and a detailed

16 — See point 20 et seq. above.

17 — See, for example, point 6 of its defence.

18 — See, by way of example, Case 239/85 *Commission* v *Belgium* [1986] ECR 3645, paragraph 7.

19 — See Case C-131/88 *Commission* v *Germany* [1991] ECR I-825, paragraph 71.

analysis of the individual measures referred to is not necessary.[20] Even if measures which positively contributed to the achievement of the general objectives of the Directive were adopted, those measures are not 'programmes' within the meaning of Article 6. Therefore, the adoption of those measures could not fulfil the obligation to set up programmes complying with the specific requirements of Article 6 before the expiry of the time-limit laid down.

46. Moreover, contrary to the assertions of the French Government, the discretion of a Member State to choose the legal means for transposing a directive does not relieve that State from the obligation to transpose the directive fully and cannot lead to a failure to comply with certain specific obligations, such as the obligation to set up the programmes specified in Article 6.

47. The reference made by the French Government to the decree transposing the Directive into national law (Decree No 97-1328 of 30 December 1997), which was adopted after the expiry of the time-limits laid down by the Directive and the reasoned opinion, is of no relevance to the present case, which concerns the specific obligation deriving from Article 6 and not the general obligation under Article 11 to

20 — The following, entirely subsidiary, observations could be made on each group of measures individually:

1. With regard to the measures relating to the first objective referred to in Article 6 of the Directive, as the Commission correctly points out, first, even after taking account of the matters relied on by the French Government in its rejoinder, the measures do not appear to be programmes within the meaning of Article 6 or programmes which accord with the timetable laid down by that article. Second, those measures apply only to a specific category of batteries, whereas the Directive also requires that measures be taken with regard to accumulators. Third, a simple request by manufacturers to ban the marketing of certain batteries does not constitute a programme within the abovementioned meaning. Finally, the project to extend the life of lead batteries referred to by the French Government, whose terms and timetable have not been specified, appears to be aimed primarily at reducing the flow of spent batteries, an aim that does not accord with the first objective under Article 6.

2. So far as concerns the measures mentioned relating to the second objective set out in the Directive, the 'campaign' referred to does not appear to take the form of an appropriate programme, whilst, as the Commission also points out, its objective of having the heavy-metal content indicated indeed appears to fall within the scope of Article 4(2) of the Directive.

3. The measures cited as serving the third objective laid down by Article 6 appear to be a group of isolated initiatives, without the necessary quantified objectives and timetable required by the notion of a programme. Moreover, as the Commission also points out, the separate collection stated to be carried out by local government is an activity falling within the scope of Article 7 of the Directive which states: '1. Member States shall ensure the efficient organisation of separate collection and, where appropriate, the setting up of a deposit system...'.

4. As regards the discussion groups invoked by the French Government in contending that measures have been taken to cover the fourth objective laid down by Article 6 of the Directive, the Commission correctly points out, first, that the activities of those groups relate only indirectly to the objectives of the Directive and, secondly, that the second group began its work approximately four years after the expiry of the period prescribed by the Directive. Moreover, the activities of both discussion groups cover only a limited part of the areas of research under the fourth objective set by Article 6. Finally, I believe that the creation of an agency to manage the collection and disposal of portable accumulators, which was the conclusion reached on completion of the work of the discussion group which began in 1992 and is referred to in the rejoinder, does not reflect the broad scope of the objective in question.

5. As regards the measures relating to achievement of the fifth objective laid down by Article 6, it should be pointed out that, even if it is accepted that they produced or are producing positive results, it cannot be concluded from the matters relied on by the French Government that they are measures which are coordinated within the framework of the specific programmes required by Article 6. For example, the financial support referred to does not necessarily mean that the appropriate programme for separate disposal also exists. Moreover, the French Government refers to measures which are about to be implemented and objectives which will be attained through appropriate legislation, an argument that cannot justify the failure to draw up the requisite programmes in the past.

transpose the Directive into national law. [21] Moreover, the Court has held that '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'. [22] Also, the Court has consistently held that a Member State cannot rely on provisions, practices or circumstances existing in its own internal legal system to justify its failure to comply with the obligations and time-limits laid down in a directive. [23]

48. It is apparent from the foregoing that, by failing to adopt within the period prescribed by the Directive — or, moreover, within the period laid down by the Commission in its reasoned opinion — all the measures necessary to comply with Article 6 of the Directive, the French Government has failed to fulfil its obligations under that article. Consequently, the Commission's application must be considered well-founded in this respect. [24]

(b) *The obligation to communicate the programmes*

49. Under the second paragraph of Article 6 of the Directive, the Member States were required to communicate to the Commission by 17 September 1992 programmes drawn up pursuant to the first paragraph, valid for a four-year period starting on 18 March 1993; all amended programmes were then to be communicated at the appropriate time.

50. In the present case, it is evident that the French Republic did not communicate the necessary programmes to the Commission either within the period prescribed by the Directive or within the period set in the Commission's reasoned opinion.

As the Commission observes and the defendant State acknowledges, all the measures which are considered by the French Government to contribute to the achievement of the objectives established by Article 6 of the Directive were communicated to the Commission in the French Government's defence. Previously, only a decree — originally the draft and later the final text — implementing the Directive (Decree No 97-1328) had been notified. That decree was also adopted (on 30 December 1997) and communicated to the Commission (on 20 January 1998) after the expiry of the abovementioned periods.

Moreover, it should be noted that the failure to communicate programmes is *a fortiori* acknowledged in the very assertion of the French Government that the failure to fulfil obligations under Article 6 is limited to the purely formal matter of a failure to publish programmes.

21 — As regards the latter obligation, see point 28 and footnote 5 above.

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

23 — See, by way of example, Case C-8/97 *Commission* v *Greece* [1998] ECR I-823, paragraph 8, and Case C-298/97 *Commission* v *Spain*, cited in footnote 7 above, paragraph 14.

24 — See, by way of example, Case C-294/96 *Commission* v *Belgium* [1997] ECR I-1781 and Case C-255/93 *Commission* v *France*, cited above in footnote 13, paragraph 29.

51. Finally, in so far as the French Republic has not reviewed programmes at least every four years pursuant to the third paragraph of Article 6 of the Directive or communicated in good time the measures which it claims to have adopted with regard to the requisite programmes, it has not communicated amended and updated programmes under that paragraph, nor could it have done so.

52. It therefore follows that the French Republic has failed to fulfil its obligation to communicate programmes to the Commission which derives from the second and third paragraphs of Article 6 of the Directive.

53. That obligation is a substantive obligation and not a formal one in that, first, it is in itself a specific obligation expressly provided for by the second paragraph of Article 6 of the Directive and, secondly, it allows the Commission to monitor national measures. Moreover, as the Court held in *Commission* v *Belgium*, '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'. [25]

54. It follows from the foregoing that, by communicating belatedly, as it itself admits, the measures which it adopted and, *a fortiori*, by not communicating the programmes required by Article 6 of the Directive, the French Republic has, on that basis alone, failed to fulfil its obligations under Article 6.

55. As I maintained in my Opinion in *Commission* v *Belgium*, cited above in footnote 8, I believe that the general scheme of Article 6 of the Directive requires the drawing up and communication of the requisite programmes as a single and inseparable obligation. [26] In the present case, if that approach is accepted, namely

25 — See Case C-347/97, cited above in footnote 8, paragraph 17. As I pointed out in my Opinion in that case (points 46, 47 and 48), the communication of programmes has direct and important consequences for the effective implementation of the material obligations flowing from Article 6 of the Directive. The Directive was adopted under Article 100a of the EC Treaty and is therefore intended to bring about approximation of provisions laid down by law, regulation or administrative action in Member States which have a direct impact on the establishment and functioning of the internal market. In particular, as stated in the preamble to the Directive, the approximation of laws is necessary because 'any disparity between the laws or administrative measures adopted by the Member States on the disposal of batteries and accumulators could create barriers to trade and distort competition in the Community and may thereby have a direct impact on the establishment and functioning of the internal market'. The monitoring of programmes, national measures and other action by the national authorities in the sphere covered by the Directive is therefore particularly important. For such monitoring to be possible, not only must the programmes required by Article 6 of the Directive be drawn up, but they must also be communicated to the Commission. Accordingly, the specific obligations which flow from Article 6 of the Directive cannot be regarded as satisfied until the action taken at national level is brought to the notice of the Commission.

26 — See points 28 and 46 of my Opinion.

that there is a single obligation to draw up and to communicate the requisite measures, once the Court finds that the French Republic has failed to fulfil its obligation to communicate the measures adopted by it and, *a fortiori*, the programmes required by Article 6 of the Directive, the Court will be able to consider the failure to comply with Article 6 to be proven without needing also to consider whether the measures adopted by the French Republic satisfy the other requirements of Article 6.

VI — Conclusion

56. I therefore propose that the Court should:

(1) declare that the French Republic has failed to fulfil its obligations under Article 6 of Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances;

(2) order the French Republic to pay the costs, pursuant to Article 69(2) of the Rules of Procedure.