OPINION OF ADVOCATE GENERAL ALBER

delivered on 18 April 2002 [1]

I — Introduction

1. By this action for failure to fulfil obligations, the Commission claims that the Hellenic Republic has failed, within the prescribed period, to adopt the laws, regulations and administrative provisions necessary to transpose Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC [2] on the assessment of the effects of certain public and private projects on the environment ('Directive 97/11'). [3] It bases this claim above all on the fact that the Greek Government did not notify the Commission of any measures for transposing the directive by the end of the period prescribed.

II — Legal background

2. Reproduction of the text of the provisions may be dispensed with at this point in this case, as the Commission's complaint effectively relates simply to the failure generally to transpose the directive. Where the content of the provisions is significant, it will be reproduced in the context of the parties' submissions and the legal assessment.

III — Preliminary proceedings and applications

3. Since Greece had failed to notify the Commission of the measures taken to transpose the directive by the time the period for transposition expired on 14 March 1999, the Commission called upon the Hellenic Republic, by letter of formal notice of 5 August 1999, to inform it within two months of how the directive had been transposed. The Greek authorities did not react to that letter.

4. Thereupon, the Commission sent a reasoned opinion to the Hellenic Republic on 26 January 2000, in which it repeated the points contained in the letter of formal notice, and called upon Greece to respond

1 — Original language: German.
2 — OJ 1985 L 175, p. 40.
3 — OJ 1997 L 73, p. 5.

to these within two months. The Greek authorities did not reply to that letter either.

5. The Commission, therefore, brought the present action for failure to fulfil obligations on 11 October 2000, in which it claims that the Court should

— declare that, by failing to adopt or, in the alternative, to notify to the Commission, within the prescribed period, the laws, regulations and administrative provisions necessary to comply fully with Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, the Hellenic Republic has failed to fulfil its obligations under the Treaty;

— order the Hellenic Republic to bear the costs of the proceedings.

6. The Hellenic Republic contends that the Court should

— dismiss the action;

— order the Commission to bear the costs of the proceedings.

IV — Submissions of the parties

1. *The Commission*

7. The Commission concludes from the fact that Greece has failed to notify it of any transposing measures that Greece has failed to transpose the directive into national law within the period prescribed.

8. Given the extensive amendments introduced by Directive 97/11 and which it lists individually in its reply, the Commission considers that the national legislation adopted to transpose Directive 85/337 is not sufficient to satisfy the obligation to transpose Directive 97/11. As confirmation of its view, the Commission referred in the oral procedure to a press release of 31 January 2002 from the Greek Minister for the Environment in which notice was given of an amending law intended to transpose Directive 97/11.

9. In addition, in relation to the transposition of amended Article 5(3) — which specifies the information to be provided by the developer — the Commission submitted in the oral procedure that the Greek authorities merely require a questionnaire

to be completed by the project applicant. On the basis of the information given by the applicant, the project is then approved, provided no objections to the project are raised within 20 days. The information in the questionnaire does not, however, satisfy the minimum requirements of Article 5(3). Overall, this procedure does not satisfy the obligation to assess the environmental impact of the project.

2. *Hellenic Republic*

10. In its defence, the Hellenic Republic contends that it has already comprehensively transposed the earlier Directive 85/337, so that the amendments subsequently introduced by Directive 97/11 have already been incorporated into Greek law. Its reasoning in relation to the individual provisions is as follows.

11. The new version of Article 2(1) requires all projects likely to have significant effects on the environment to be made subject to a requirement for development consent. This is already the case under Greek Law No 1650/86 on the protection of the environment, pursuant to which all projects are subject to development consent.

12. The new version of Article 2(2a) leaves it to Member States to decide whether or not they wish to combine the procedures pursuant to Directives 97/11 and 96/61/EC.[4] A defective transposition of Directive 97/11 could not, in any event, follow from this.

13. According to the new version of the first subparagraph of Article 2(3), Member States must have regard to the provisions of Article 7 if they choose to exempt a project from the provisions of Directive 85/337. (Article 7 provides for the notification of another Member State if a project has significant effects on the environment in that Member State.) Greece, however, does not border on another Member State of the European Union, so Article 7 is not applicable to Greece. There has not, to date, been a single case in which Article 7 of the directive would have had to be applied with regard to Italy, the only Member State of the European Union with which Greece shares a maritime border. There is, therefore, no need for Article 2(3), first subparagraph, and Article 7 to be transposed.

14. Under the new version of Article 3, the environmental impact assessment must now also take into account the interaction

4 — Council Directive of 24 September 1996 on integrated pollution prevention and control (OJ 1996 L 257, p. 26).

of all the factors mentioned in that article. (These are, in addition to human beings, fauna and flora, soil, water, air and so on.) Greek Law No 1650/86 defines 'environment' as the totality of all factors which interact to affect the ecological equilibrium, quality of life, human health, historical and cultural traditions and aesthetic values. The requirements of the amended version of Article 3 of the directive have thereby been transposed into Greek law.

15. The changes (with regard to the assessment) introduced by the new version of Article 4 have also already been transposed into Greek law. In particular, all the criteria listed in the new Annex III are already taken into account in case-by-case examinations, or rather in setting thresholds.

16. According to the new version of Article 5, the competent authority must give an opinion on the information to be supplied by the developer within the consent procedure, if so requested by the developer or the Member State. These changes have already been incorporated into Greek law by Interministerial Resolution 69269/5387/90, as well as by Circulars 17/94 and 9/96.

17. As regards the complaint that the information in the questionnaire is insufficient to assess environmental impact, the Greek Government explained in the oral procedure that the questionnaire related to the initial choice of location, which is made in advance of the environmental impact assessment. The questionnaire does not, therefore, replace the compulsory environmental impact assessment. If queries arose in the examination of the information given in the questionnaire, a review would be required. The questionnaire relates only to the preliminary approval of location.

18. The amendments to Article 6(1) concerning the participation of the relevant authorities have already been transposed by Interministerial Resolution 69269/5387/90.

19. The requirements of Article 6(2) concerning public consultation have also already been met. Interministerial Resolution 75308/5512/90 provides that the Prefectorial Councils, which are responsible for giving public notice, must within 15 days invite the public to raise any objections to the project. No more than 30 days may elapse between public notice and submission of representations. In practice, however, the process takes an average of 2.6 months. The public thus has a 'reasonable time' to express an opinion

within the meaning of Article 6(2). Furthermore, the Greek authorities are presently drawing up draft legislation to, inter alia, extend time-limits for public consultation.

20. The amendments introduced by the new version of Article 8 have, again, already been transposed into Greek law. (Article 8 relates to the results of the consultation procedure and the information gathered.)

21. The new version of Article 9 governs notification to the public of the grant or refusal of development consent. In practice, the competent Greek authorities regularly provide the Prefectorial Councils with this information. In this respect, Greek law thus also complies with the requirements of Directive 97/11.

22. The amendments to Article 10 merely relate to matters of form, or rather, the wording of that article. (Article 10 governs the respect of commercial confidentiality and of intellectual property.)

23. According to the new version of Article 11(2), Member States are to inform the Commission of the criteria or thresholds adopted in accordance with Article 4(2). This amendment is taken into account in the proposed 'formal transposition' of Directive 97/11.

24. Article 13 of Directive 85/337 has been deleted, as it goes without saying that Member States are entitled to adopt stricter rules in respect of the scope of application of and procedure for the environmental impact assessment than those laid down in the directive.

25. Greek law also complies with the requirements of the amended Annexes to the directive. In particular, the criteria listed in Annex III are already incorporated into national law. The Greek Government refers in this respect to Article 4 of Interministerial Resolution 69269/5387/90 and Circulars 17/94 and 9/96. (Annex III lists the selection criteria, which include, for example, characteristics, location and impact of projects.)

26. Furthermore, the announcement of a new law in no way signifies that Directive 97/11 has not already been transposed by legislation currently in force.

V — Assessment

1. *Compliance without transposing measures*

27. The Greek Government denies the infringement, claiming essentially that Greek legislation which had already been adopted in order to transpose Directive 85/337 satisfies the requirements of Directive 97/11, and that no further transposing measures are necessary.

28. According to the case-law, this defence cannot be dismissed out of hand. The Court has in fact acknowledged that there are cases in which the transposition of a directive does not necessarily require the legislator to act in every Member State. But even in these cases, the relevant national law must indeed guarantee that the directive is fully applied by the national authorities, that the legal position arising from such law is sufficiently determined and clear, and that the beneficiaries are in a position to know all their rights, and, if necessary, to enforce them in the national courts. [5] The question whether Greek law does in fact satisfy the requirements of Community law must therefore be examined with respect to each provision of Directive 97/11.

5 — Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23; Case C-365/93 *Commission* v *Greece* [1995] ECR I-499, paragraph 9.

2. *Transposition of the amended versions of Articles 2(1), 3, 4, 6(1), 8, 10 and Annexes*

29. The Greek Government's basic objection is that it has already transposed Directive 97/11 into national law through the comprehensive transposition of Directive 85/337, especially in relation to the amendments to Articles 2(1) and 4 (selection of projects requiring development consent), Article 3 (scope of the environmental impact assessment), Article 6(1) (authorities to be consulted), Article 8 (consideration of the results of consultations and information gathered), and Article 10 (respect of industrial rights), and Annexes I and II (list of projects affected), and in relation to the insertion of a new Annex III (selection criteria for projects). The Greek Government refers in this respect to Law No 1650/86 as well as to Interministerial Resolutions 69269/5387/90 and 75308/5512/90. The Commission does not discuss to what extent these provisions satisfy the requirements of the provisions of Directive 85/337 as amended by Directive 97/11. Instead, it highlights only the differences between the two directives.

30. According to settled case-law, in infringement proceedings it is incumbent upon the Commission to prove the existence of the alleged infringement and to

deliver to the Court the necessary evidence, on the basis of which it can decide whether there has been any such infringement. [6] In this, the Commission may not rely on mere suppositions, but must present concrete facts as proof of its contentions. [7]

31. As regards the provisions of the directive at issue here, the Commission has not succeeded in providing this proof. In its submission, the Commission merely lists all the amended provisions of Directive 85/337, and concludes from the non-communication of any transposing measures, that these provisions have not been transposed into Greek law. That is not sufficient proof in these proceedings, because Greece has disputed any infringement of its transposing obligation in respect of every single one of these provisions and provided evidence in each case. It was, therefore, incumbent upon the Commission to respond to the Greek submissions and to explain why the abovementioned national provisions of Law No 1650/86, and Interministerial Resolutions 69269/5387/90 and 75308/5512/90, do not satisfy the requirements of Community law. Those provisions had evidently already been notified by the Greek Government in November 1990 in Appendix I of its reply to the Commission's reasoned opinion of 9 August 2000 in Infringement Procedure No 1991/2036.

6 — Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 102; Case C-96/98 *Commission* v *France* [1999] ECR I-8531, paragraph 36; Case C-337/98 *Commission* v *France* [2000] ECR I-8396, paragraph 45.

7 — Case C-62/89 *Commission* v *France* [1990] ECR I-925, paragraph 37; Case C-244/89 *Commission* v *France* [1991] ECR I-163, paragraph 35.

32. Accordingly, it is not established that Greece failed to fulfil its obligation to transpose Articles 2(1), 3, 4, 6(1), 8, 10, the amended versions of Annexes I and II, and the newly inserted Annex III.

3. *Transposition of the amended version of Article 2(2a) (administrative procedure)*

33. Greece denies that it has an obligation to transpose Article 2(2a). Indeed, this provision merely states: 'Member States may provide for a single procedure in order to fulfil the requirements of [Directive 97/11 and of] Council Directive 96/61/EC of 24 September 1996 on integrated pollution prevention and control.' The provision does not, therefore, establish any obligation in this respect.

34. In the oral procedure, the Commission also conceded that that provision does not impose any obligation on Member States to establish a common administrative procedure. Therefore, in that regard no infringement can be established.

4. *Transposition of the amended version of Article 2(3), first subparagraph, and Article 7 (participation of other Member States)*

35. The first subparagraph of Article 2(3) of Directive 85/337 in the version of Directive 97/11 states: 'Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.' Under Article 7, a Member State must involve another Member State in the environmental impact assessment procedure if it is aware 'that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected... requests [participation]'.

36. Greece's defence against the allegation of infringement is that those articles do not apply to Greece. It does not have a land border with other Member States of the European Union. Only with Italy does it have a common maritime border. However, there has not, to date, been a single case in which Article 7 of the directive has applied as between Greece and Italy.

37. On this point, reference must be made to the settled case-law of the Court, according to which it is essentially irrelevant, as far as the transposing obligation of a Member State is concerned, whether a specific area of applicability exists for the provision laid down in a directive or not. Rather, the aim of transposition is to create a common legal position in all Member States of the European Union. [8]

38. The only exception to this rule is where, for geographical reasons, there would be no purpose in transposing the directive. [9] This is what the Greek submission seems to be addressing. However, such an evident exception cannot be inferred in this case. The wording of Article 7 is not predicated on the existence of a common border, but on the issue of whether a project could have an effect on another Member State. In practice, the spatial proximity of other Member States may well be relevant in this respect. But the provision is not predicated on whether or not there is a common (land) border with other Member States. This is consistent with the fact that the possible effects of environmental pollution can spread over wide areas. Thus the Greek Government's objection does not support the argument that there are no projects within the meaning of Articles 2(3) and 7 in Greece.

8 — Case C-214/98 *Commission* v *Greece* [2000] ECR I-9601, paragraph 22; Case C-372/00 *Commission* v *Ireland* [2001] ECR I-10303, paragraphs 11 and 12.

9 — Case 420/85 *Commission* v *Italy* [1987] ECR 2983, paragraph 5; Case C-372/00, cited in footnote 8 above, paragraph 13.

39. For that reason, the argument as to the absence, to date, of any relevant cases involving Italy is of no relevance. The shortest distance between the Greek and Italian coasts is about 140 km. Environmental effects may, therefore, depending on the direction of the wind and currents, reach Italy from Greece by air as well as by water, and have a significant impact on the environment there.

40. In the light of the foregoing considerations, it must be concluded that Greece has failed to fulfil its obligation to transpose Article 7, and the first subparagraph of Article 2(3) of Directive 85/337 as amended by Directive 97/11.

5. Transposition of the amended version of Article 5 (information to be supplied by the developer)

41. In the oral procedure, the Commission complained that the information to be supplied in the questionnaire which a developer must complete does not satisfy the requirements of Article 5 and, furthermore, that the authorities simply issue development consent if, or, in so far as, no objections are put forward. The Greek Government responded by pointing out that the questionnaire is relevant only in the context of preliminary approval of the location. It is not a substitute for the environmental impact assessment, but is only the first stage of the environmental impact assessment, which is compulsory for all projects.

42. As already pointed out above, it is for the Commission to prove the infringement. As this point was not discussed in the written procedure, and the Commission has not refuted Greece's arguments as to the significance of the questionnaire as merely the first stage of a comprehensive environmental impact assessment, no infringement can be found in relation to the transposition of Article 5, as amended.

6. Transposition of the amended versions of Article 6(2) (participation of the public) and Article 9 (notice of consent decisions)

43. With regard to the transposition of Articles 6(2) and 9, the Greek Government refers not only to existing laws, but also to current administrative practice.

(a) Transposition of the amended version of Article 6(2)

44. According to Article 6(2), 'Member States shall ensure that any request for development consent and any information gathered pursuant to Article 5 are made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted'. Greece argues that Greek law currently provides a time-limit of 15 to a maximum of 30 days for such public participation, but that, in practice, the process takes, on average, approximately 2.6 months. [10] The public, therefore, has a reasonable time to express its opinions. Furthermore, legislation is currently underway to transpose Directive 97/11, which will extend the time-limits for public participation.

45. First of all, it must be noted that, according to the settled case-law of the Court, Member States are bound, in the interests of those affected, to transpose directives in such a way that they are indisputably binding, and sufficiently precise, certain and clear. [11] A purely administrative practice, of which the public is given only inadequate notice, which has no, or only indirect, external effect, and which can by its very nature be altered by the administration at any time, cannot, therefore, be considered a legally effective fulfilment of the transposing obligation of Member States. [12] The reference to the administrative practice, according to which the average length of the process is 2.6 months, is thus not sufficient to establish that Article 6(2) of the Directive has been transposed into Greek law and that an appropriate period for raising objections has been laid down.

46. The Commission concludes from the planned legislative amendments, and the extension of the period for objection from 15 to 30 days proposed in that context, that the Hellenic Republic has acknowledged that it has not so far provided for a reasonable period. It relies, above all, on the letter from the Greek Government of 8 November 1999, in which it responded to the allegation of failure to fulfil its obligation to transpose the corresponding provision in Directive 85/337.

47. However, it is questionable whether an acknowledgement of inadequate transposition can in fact be inferred from the proposed legislative amendments. The Greek Government also vehemently disputes such an inference. The fact that the period for objection is to be extended may well indicate that the Greek legislature considers that a longer period for objection would be useful. But this does not, of itself, reveal anything about whether the period for objection which currently applies is 'reasonable' within the meaning of the directive. It follows that no conclusion about the inadequacy of the current period for objection can be drawn simply from its proposed extension.

10 — The Reply talks of time periods of over 3 months (p. 4).

11 — Case C-207/96 *Commission* v *Italy* [1997] ECR I-6869, paragraph 26; Case C-354/99 *Commission* v *Ireland* [2001] ECR I-7657, paragraph 27.

12 — Case 102/79 *Commission* v *Belgium* [1980] ECR 1473, paragraph 11; Case C-207/96 *Commission* v *Italy*, cited in note 11, paragraph 28.

48. The Commission, for its part, has not argued that the time-limit of 15 days is unreasonable. It has neither presented comparisons with other Member States, nor illustrated its objection with examples in which objections could not be raised because of the short period of time allowed or were rejected as being inadmissible.

49. As a result, it must be concluded that the Commission has not established any infringement in relation to Article 6(2) of Directive 85/337, as amended by Directive 97/11.

(b) Transposition of the amended version of Article 9 (notice of consent decisions)

50. As regards the transposition of the amended version of Article 9, pursuant to which the competent authority is to inform the public of decisions to grant or refuse development consent, Greece also refers to its administrative practice. The competent Greek authorities regularly supply the competent Prefectorial Councils with the relevant information. In relation to Article 9(2), according to which 'any Member State which has been consulted pursuant to Article 7' is to be informed, it refers to its submissions on the inapplicability of Article 7 in Greece.

51. As already set out above, a reference to an existing administrative practice is not sufficient to show that a Member State has complied with its obligation to transpose. Nor do the arguments set out above establish that Greece does not have an obligation to transpose Article 7. Accordingly it may be inferred from the Greek Government's submissions that Greece has failed to fulfil its obligation to transpose the amended version of Article 9.

7. *Transposition of the amended version of Article 11(2) (notification of criteria for case-by-case examination)*

52. Under Article 11(2), Member States are to inform the Commission of the criteria and/or thresholds adopted pursuant to Article 4(2) for carrying out a case-by-case examination. Greece argues that this amendment to the directive is taken into account in the proposed legislation for the comprehensive transposition of Directive 97/11. Greece thereby expressly acknowledges that it has not yet transposed Article 11(2) into Greek law. It must therefore be found that Greece has also failed to fulfil its obligations in relation to Article 11(2).

8. *The complaint alleging lack of notification*

53. The Commission has applied, in the alternative, for a declaration that Greece has failed to fulfil its obligations by not informing the Commission of the measures taken to transpose Directive 97/11.

54. The Court has already, on several occasions, decided that the issue of lack of notification should no longer be considered in cases where infringement of specific obligations under a directive has been established. [13] Since an infringement has been established in relation to Articles 2(3), 7, 9 and 11(2), the lack of notification in this respect need not be discussed further.

55. As regards the remaining provisions, it is not disputed that Greece failed to inform the Commission of any transposing measures in relation to Directive 97/11. Greece did not even refer to its communication of 1990 by which it informed the Commission of the legislation adopted to transpose Directive 85/337. It follows, in relation to Articles 2(1) and (2a), 3, 4, 5, 6(1) and (2), 8, 10, 13 and Annexes I, II, III and IV, that, in contravention of Article 3(1) of Directive 97/11, Greece has failed to fulfil its obligations by failing promptly to inform the Commission of the laws, regulations and administrative provisions adopted to transpose the directive.

VI — Costs

56. According to paragraph 2 of Article 69 of the Rules of Procedure, the unsuccessful party is to be ordered to bear the costs if they have been applied for in the successful party's pleadings. Under paragraph 3 of that provision, the Court may, however, order the costs to be shared, or order each party to bear its own costs if the parties partly succeed and partly fail, or in exceptional circumstances.

57. The Commission has not, in this case, been able to prove inadequate transposition in relation to all the provisions. It has, therefore, been unsuccessful as to part of its action. Only in so far as the infringement has been conceded can it be considered to have been established. Nevertheless, it does not seem appropriate to share the costs.

13 — Case C-303/93 *Commission* v *Italy* [1994] ECR I-1901, paragraphs 6 and 7; Case C-65/94 *Commission* v *Belgium* [1994] ECR I-4627, paragraph 5; Case C-365/93 *Commission* v *Greece*, cited in note 5, paragraphs 12 and 13.

The proceedings came about, after all, because of Greece's failure, in contravention of Article 3 of Directive 97/11, to inform the Commission of the measures taken to transpose that directive. The Hellenic Republic must, therefore, bear the costs as requested in the Commission's application.

VII — Conclusion

58. On the basis of the foregoing, it is proposed that the Court should rule as follows:

(1) By failing to adopt, within the prescribed period, the laws, regulations and provisions necessary to transpose fully the first subparagraph of Article 2(3), and Articles 7, 9 and 11(2) of Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment the Hellenic Republic has failed to fulfil its obligations under the Treaty.

(2) By failing, within the period prescribed, to notify the Commission of the provisions adopted to transpose fully Articles 2(1) and (2a), 3, 4, 5, 6(1) and (2), Articles 8, 10, and 13, and of Annexes I, II, III and IV to, Council Directive 97/11 the Hellenic Republic has failed to fulfil its obligations under the Treaty.

(3) The Hellenic Republic is to bear the costs of the proceedings.