OPINION OF ADVOCATE GENERAL ALBER

delivered on 29 March 2001 [1]

1. In these infringement proceedings brought by it, the Commission claims that the Italian Republic has not yet transposed into national law all the provisions of Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. [2] Under Article 2 of Directive 97/36, the time-limit for its implementation expired on 30 December 1998. In particular, the Commission alleges failure to transpose the following provisions:

— Article 1(1), in so far as Article 1(c) of Directive 89/552 is amended;

— Article 1(2) which replaces Article 2 of Directive 89/552 (with the exception of Article 2(3), (4), (5) and (6) which, the Commission states, has already been transposed into Italian law);

— Article 1(3) which inserts Article 2a into Directive 89/552;

— Article 1(4) which inserts Article 3a(3) into Directive 89/552;

— Article 1(12) which replaces Article 10 of Directive 89/552 (with the exception of Article 10(2) which, the Commission states, has already been transposed into Italian law);

— Article 1(14) which amends the first sentence of Article 12 of Directive 89/552;

— Article 1(15) which replaces Article 13 of Directive 89/552, and

1 — Original language: German.
2 — OJ 1997 L 202, p. 60.

— Article 1(18) which adds a new paragraph 2 to Article 16 of Directive 89/552.

2. On 29 March 1999 the Italian Republic responded to the Commission's letter of formal notice of 12 March 1999 by communicating the Government's applications for amendment of Draft Law d.d.l. A.S. No 1138. [3]

3. By letter of 14 June 1999 the Italian Government also submitted to the Commission the Ministerial Decree (Decreto ministeriale) of 8 March 1999, stating that that decree had transposed Directive 97/36. The decree concerns the issue of licences for private television broadcasters. However, this is not the subject of Article 1(1), (2), (3), (4), (12), (14), (15) and (18) of Directive 97/36 which the Commission claims has not been transposed.

4. In response to the reasoned opinion of 4 August 1999 the Italian Minister for Telecommunications submitted a summary concerning the transposition of the provisions of Directive 97/36 into Italian law on 22 November 1999. This list confirms the letter of 29 March 1999, according to which Draft Law d.d.l. A.S. No 1138 is intended to transpose certain provisions of the directive including the proposed amendments formulated by the Government. Even after the lodging of the defence on 14 September 1999, that transposition has yet to take place. Accordingly, the Italian Republic does not contest the charge, made in the application, that it has not transposed the directive within the prescribed period.

5. The Court has consistently held that any remedying of the failure to fulfil obligations after the action is brought does not affect the merits of the action. The subject-matter of the action is determined by the Commission's reasoned opinion. Even where the default has been remedied after the time-limit prescribed by the second paragraph of Article 226 EC has expired, there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur, as a result of its default, towards other Member States, the Community or private parties. [4] Therefore, the fact that Draft Law d.d.l. A.S. No 1138 has since been enacted does not affect the merits of the present action. Consequently, judgment must be given in the terms sought by the Commission.

3 — D.d.l. A.S. = disegno di legge Atto Senato, draft law — act of the Senate.

4 — Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 45; Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 31.

6. The Commission also claims that the Court should order the Italian Republic to pay the costs. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for.

Conclusion

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

(1) declare that, by failing to transpose, within the prescribed period, Article 1(1), (2), (3), (4), (12), (14), (15) and (18) of Council Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, the Italian Republic has failed to fulfil its obligations under Article 10 EC, read in conjunction with Article 2 of the said directive.

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