OPINION OF ADVOCATE GENERAL MISCHO

delivered on 13 October 1998 *

1. By the present application, the Commission asks the Court to declare that, by failing to adopt the laws, regulations or administrative provisions necessary to comply fully and properly with Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1] ('the Directive'), the Portuguese Republic has failed to fulfil its obligations under the third paragraph of Article 189 of the EC Treaty and Article 12 of the Directive.

2. Article 12 requires the Member States to take the measures necessary to comply with the Directive within three years of its notification. Notification took place on 3 July 1985.

3. Although the Portuguese Republic acceded to the European Communities with effect only from 1 January 1986, it was required, by virtue of Articles 392 and 395 of the Act of Accession, [2] to bring into force the measures necessary to implement the Directive by 3 July 1988 at the latest.

4. By various letters, the Portuguese Government communicated to the Commission provisions intended to transpose the Directive into national law and, in particular, Decree-Law No 186/90 of 6 June 1990.

5. On 25 January 1993, taking the view that those provisions did not constitute complete transposition of the Directive, the Commission informed the Portuguese Government of the grounds on which it considered that transposition was incomplete and requested the Portuguese Government to submit its observations within two months, in accordance with Article 169 of the EC Treaty.

6. The Portuguese Government forwarded its observations to the Commission in various letters and, in particular, mentioned that it had adopted new legislation.

* Original language: French.

1 — OJ 1985 L 175, p. 40.

2 — Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23).

7. Considering that the new legislation constituted a satisfactory response to one of its claims, the Commission withdrew that claim but, on the other hand, on 6 August 1996 it sent the Portuguese Republic a reasoned opinion concerning the claims which it maintained.

8. The Portuguese Republic replied by letter of 17 December 1996 in which it made it known that a working party had been set up for the purpose of drafting the legislative provisions necessary in order to resolve the matters raised by the Commission.

9. Since it never received the promised legislative provisions, the Commission brought the present action by application of 15 April 1997.

10. In its application the Commission set out nine challenges to the Portuguese legislation.

11. On 23 October 1997 the Portuguese Republic communicated to the Court the text of Decree-Law No 278/97 of 8 October 1997, and Implementing Decree No 42/97 of 10 October 1997, both amending some of the provisions previously adopted in order to transpose the Directive.

12. After considering those documents, the Commission informed the Court that it was withdrawing part of its action, maintaining only one of the heads of claims set out in the application, namely, the claim in part II, paragraph 17(i). By that claim, the Commission criticises the Portuguese Republic for the fact that, according to Article 11(2) of Decree-Law No 186/90, that Law does not apply to projects in respect of which the approval procedure was already underway on the date on which it came into force, namely 7 June 1990.

13. In its letter of part withdrawal, the Commission states 'that that Decree-Law and that Implementing Decree do not put an end to the infringement of Community law, as it is pointed out in paragraph II.17(i) of its application, since both the amended national legislation and the amending national legislation expressly exempt, pursuant to Article 11(2) of Decree-Law No 186/90 and Article 3 of Decree-Law No 278/97, from the obligations imposed by the Directive, projects in respect of which applications for approval had already been submitted before that national legislation came into force but after 3 July 1988 (the date on which the provisions of the Directive became applicable pursuant to Articles 2 and 12 thereof). The Commission therefore maintains its application for a declaration that the Portuguese Republic has failed to fulfil its obligations so far as concerns that claim, *in the terms in which it presented that claim in its application*, and having regard to the case-law of the Court in this area ...'.

14. Despite its somewhat ambiguous nature, in my opinion that letter is not to be interpreted as formulating a new complaint as

regards Article 3(2) of Decree-Law No 278/97, which also provides that some of the amendments it makes to Decree-Law No 186/90 are to apply only to projects in respect of which an application for authorisation was submitted after the entry into force of Decree-Law No 278/97. Plainly the Commission would not have been entitled to do so, since that would have been a new request, not covered by the pre-litigation procedure and the application.

15. The claim therefore concerns only projects in respect of which the authorisation procedure was already under way on 7 June 1990. It is not disputed that the contested provision, namely Article 11 of Decree-Law No 186/90, was not amended by the provisions adopted in 1997.

16. The Portuguese Government acknowledges that there was 'a clear failure to comply with the time-limit for transposing' the Directive. None the less, in order to challenge the merits of the action, the Portuguese Republic argues that it had to comply with the principle of legal certainty and the principle that legislative provisions should not have retrospective effect. According to the defendant government, a general principle established by the Portuguese legal order and set forth in Article 12 of its Civil Code requires laws to take effect for the future only. Any exception to that principle must be carefully examined in the light of those principles and the legally protected interests of individuals or their legitimate expectations cannot in any circumstances be compromised.

17. It adds that the projects covered by Article 11 of Decree-Law No 186/90, that is to say those in respect of which consent applications were submitted after 3 July 1988 but before the date on which the national legislation entered into force, were very few in number and all of them were the subject of an environmental impact report.

18. With regard to Decree-Law No 278/97, the Portuguese Republic points out that it was careful to exclude from retrospective effect only those revisions which entailed serious infringement of the rights and legitimate expectations of the individuals subject to the obligations arising from the legislation in question.

19. The Portuguese Republic therefore considers that it would be meaningless for the Court to declare that it had failed to fulfil its obligations with regard to that claim since it is the Portuguese legal order itself which prohibits the retrospective application of the law where that would entail infringement of the right of legitimate expectations of individuals.

20. That argument cannot be accepted. It is clear from the judgment in Case C-396/92 *Bund Naturschutz in Bayern and Others* v *Fraystat Bayern* [3] that nothing in the Direc-

3 — Case C-396/92 *Bund Naturschutz in Bayern and Others* v *Fraystat Bayern* [1994] ECR I-3717, paragraph 18; to the same effect see Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 33, and Case C-81/96 *Burgemeester en Wethouders van Haarlemmerliede en Spaarnwoude and Others* v *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 22.

tive makes it possible to interpret it as authorising the Member States to exempt from the obligation to carry out an environmental impact report projects in respect of which the approval procedures were begun after the deadline of 3 July 1988.

21. Moreover, if that line of argument means that the Portuguese Government intends to rely on the requirements of its national law to evade the obligations imposed on it by Community law, the reply for which it calls is that supplied by the settled case-law of the Court, that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify failure to comply with the obligations and time-limits laid down in the Directive.

22. I will add that, even if the Portuguese Government had intended to rely on the principles of legal certainty and of the protection of legitimate expectations enshrined in Community law itself, its line of argument would still not have been relevant. While it is true that a Member State, in implementing provisions of Community law, must act in compliance with the general principles of that law, that requirement is limited by the actual scope of those principles. On the one hand, those principles have effects in the area of the relations between public authorities and individuals which are no way an issue in the present case where the only question is whether or not the Commission is entitled to seek a declaration that the Portuguese Republic has failed to meet the requirements imposed on it by the Directive. On the other hand, it is difficult to see how the submission of applications for approval already under way to the newly-introduced requirements could conflict with the principles of legal certainty and of the protection of legitimate expectations, as defined in their application by the Court's case-law. As the Commission has observed in its reply, 'so long as no administrative decision has been taken on authorisation of the projects submitted, the developers have acquired no vested interest'.

23. In an action seeking a declaration that a Member State has failed to fulfil its obligations, which is objective in character, a Member State which has not acted within the time-limits prescribed cannot be allowed, in the light of a situation which it has itself created, to take refuge behind the principles for the protection of individuals in order to evade the declaration which is the conveyance to which the objective facts put forward by the Commission give rise.

24. I therefore consider that the Commission's action is well founded and that it must be allowed.

25. Similarly, as the Commission requests, the Court must order the Portuguese Republic to pay the costs, in accordance with Article 69(5) of the Court's Rules of Procedure.

Conclusion

26. I therefore propose that the Court:

— declare that, by failing to adopt the laws, regulations or administrative provisions necessary to comply fully and correctly with Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, the Portuguese Republic has failed to fulfil its obligations under Article 12(1) of the Directive;

— order the Portuguese Republic to pay the costs.