OPINION OF ADVOCATE GENERAL TESAURO

delivered on 26 June 1997 *

1. By application under Article 169 of the EC Treaty, lodged on 18 June 1996, the Commission is asking the Court to declare that the Grand Duchy of Luxembourg has failed to fulfil its obligations under the Treaty and under Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community [1] (hereinafter 'the Directive').

In particular, the Commission charges the Grand Duchy of Luxembourg with having failed to establish programmes to reduce pollution or to communicate summaries of the programmes and also to communicate the results of their implementation in breach of Article 7 of the Directive.

The relevant legislation

2. The Directive is one of the first instruments adopted by the Community to implement a policy on the environment pursuant to the first programme of action of the European Communities on the environment. [2] With the aim of ensuring effective protection of the aquatic environment, the Directive singles out two categories of dangerous substances, reproduced in the lists annexed to it. The first category includes substances, referred to in List I, which are particularly harmful because of their toxicity, persistence, and bioaccumulation; pollution caused by those substances must be eliminated. Under Article 6 of the Directive, the Council is to lay down the limit values which the emission standards must not exceed for the substances within List I. The second category includes substances, referred to in List II, whose harmful effects on the aquatic environment can be confined to a given area and which depend on the characteristics and location of the water into which they are discharged. The substances within List II are, on the one hand, expressly indicated by reference to individual substances and to families and groups of substances; included within them, on the other hand, are substances 'belonging to the families and groups of substances in List I for which the limit values referred to in Article 6 of the Directive have not been determined'. For the substances within List II, the aim of the Directive is to reduce pollution. To attain this objective, the Member States should therefore have 'establish[ed] programmes which incorporate quality

* Original language: Italian.

1 — OJ 1976 L 129, p. 23.

2 — OJ 1973 C 112, p. 1, where the programme is annexed to the declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting in the Council of 22 November 1973.

objectives for water' and laid down emission standards 'calculated in terms of these quality objectives'. [3]

3. The content of the programmes is laid down in Article 7 of the Directive. That article provides that the programmes are to include 'quality objectives for water; these shall be laid down in accordance with Council Directives, where they exist'. [4] The programmes must take into account the latest economically feasible technical developments and must set deadlines for their implementation. [5] Moreover, Article 7(6) provides that summaries of the programmes and the results of their implementation are to be communicated to the Commission. The purpose of the obligation to communicate seems to be connected with the Commission's duty, together with the Member States, to arrange for regular comparisons of the programmes in order to ensure sufficient coordination in their implementation. [6]

4. The Directive was notified to the Member States on 5 May 1976. No deadline had been expressly provided for its implementation by the Member States; however, according to Article 12(2), the Member States should have communicated the programmes by 5 August 1978 at the latest. [7]

In the absence of such a communication within that time-limit, the Commission, by letter of 3 November 1976, proposed to the Member States the adoption of 15 September 1981 as a final date for the communication of the programmes to reduce pollution caused by the substances within List II. That deadline was not challenged by the Member States.

Procedure

5. The Commission first reminded the Luxembourg Government of the obligation to comply with the provisions of Article 7 of the Directive by a letter dated 21 August 1985. By letter of 26 September 1989, the Commission then requested it to forward the programmes to reduce pollution relating to 99 substances in List II which were regarded as having priority. This request was repeated in a letter of 4 April 1990.

3 — See the preamble to the Directive, particularly the ninth recital, and also Article 7 which constitutes the legislative 'transposition' thereof.

4 — See Article 7(3) of the Directive.

5 — See Articles 7(4) and (5) of the Directive.

6 — See Article 7(7) of the Directive.

7 — The article referred to provides that the Commission is, within 27 months following notification of the Directive, to forward the first proposals for the harmonisation of programmes to the Council. From this it is to be inferred that the Member States should have sent their programmes to the Commission prior to that date. The deadline indicated by the article does not however appear to be mandatory, but seems instead to be merely of indicative value, in that transmission is dependent upon a vague 'possibility', which is obviously contingent upon the availability of the programmes communicated by the Member States.

The Commission reports that the Luxembourg Government has replied to none of the letters mentioned above. [8]

6. The letter of formal notice subsequently sent by the Commission has also remained unanswered.

In the reasoned opinion of 25 May 1993 the Commission considered that, by failing to establish the programmes to reduce pollution comprising quality objectives for the 99 substances listed in the annex to that document, or to communicate those programmes and the results of their implementation to the Commission, in breach of Article 7 of the Directive, and by neglecting to provide the information requested on this matter, in breach of Article 5 of the Treaty, the Grand Duchy of Luxembourg had failed to fulfil its obligations under the Treaty.

The reasoned opinion also failed to produce a response, which justified the application to the Court under Article 169 of the Treaty in the terms I have mentioned earlier.

8 — In fact, it would appear from the letter of formal notice that the Grand Duchy of Luxembourg replied to the first letter by a communication of 31 January 1986. It would, however, have been a partial response, containing information concerning the programmes to reduce pollution caused by lead, zinc, copper and nickel. The defendant Member State, however, has not raised the point.

Partial inadmissibility of the action

7. In the interests of a rigorous approach, as is required in the context of infringement proceedings against a Member State, a possibility that the action may be partially inadmissible should be dealt with before the substance of the Commission's application is examined.

In the letter of formal notice, as in the reasoned opinion, the Commission charged the Grand Duchy of Luxembourg with having failed to establish, or to communicate, the programmes to reduce pollution for just 99 substances, to be regarded as having priority in the context of List II and which were listed in an annex to the reasoned opinion ('list of 99 substances which are the subject of the infringement procedure'). [9] On the other hand, in its application to the Court, the Commission is asking the Court to declare the defendant Member State's failure to fulfil its obligations to consist in its failure, in breach of Article 7 of the Directive, to establish (or to communicate) the programmes to reduce pollution, with no further specification, so that the breach of obligations which is alleged must be taken to refer to all the substances in List II annexed to the Directive and not merely to the 99 substances which are the subject of the reasoned opinion and of the letter of formal notice.

9 — In particular, the substances are those for which, whilst belonging to the families and groups of substances within List I, the Council has not yet determined the limit values to be complied with by the Member States in laying down the emission standards. Consequently, as provided in the Annex to the Directive, those substances should be regarded as contained in List II and are therefore subject to the system referred to in Article 7 of the Directive.

8. As the Court has consistently held, an action for failure to fulfil obligations is inadmissible to the extent to which it includes complaints which were not the subject of the pre-litigation procedure and in respect of which there has, as a result, been no exchange of argument between the Commission and the Member State concerned, in breach of that State's right to be heard. [10] It follows that, in so far as the action seeks a declaration that the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 7 of the Directive in relation to the substances which, whilst set out in List II, are not amongst the 99 priority substances, [11] it must be declared inadmissible.

9. On the other hand, the complaint made in the letter of formal notice and in the reasoned opinion, alleging a separate infringement of Article 5 of the Treaty and based on the fact that the Grand Duchy of Luxembourg had not provided the information requested by the Commission on the implementation of the Directive, cannot be raised in these proceedings. [12] That complaint was not pursued in the application and should, therefore, be regarded as having been withdrawn.

Substance

10. Within the limits I have just specified, the Commission's action is not only admissible, but also well founded. Firstly, as regards the failure to communicate, in summary form, the programmes and the results of their implementation, and hence the infringement of Article 7(6) of the Directive, the defendant itself acknowledges its failure to fulfil its obligations and omits, moreover, to provide any justification whatever on this point.

11. On the other hand, as regards the failure to establish programmes, and hence the infringement of Articles 2 and 7(1) of the Directive, the Grand Duchy of Luxembourg denies that it was in breach of its obligations. More specifically, according to the defendant, the absence of programmes to reduce

10 — See the Court's judgments in Case 298/86 *Commission* v *Belgium* [1988] ECR 4343 and Case 51/83 *Commission* v *Italy* [1984] ECR 2793, at paragraphs 2 to 10. In the latter case, in particular, the Court held that the action was inadmissible to the extent to which, in the letter of formal notice, the alleged failure to fulfil obligations concerned only the restriction on the use of gelatin in sweets, whilst the reasoned opinion and the application to the Court also related to confectionery products, preserved meat products and ice cream.

11 — It is irrelevant that the Grand Duchy of Luxembourg has not raised any plea of inadmissibility on this point and that it has even put forward a defence on the merits during the litigation. The harm caused to its rights to be heard occurred, however, in its entirety during the pre-litigation procedure, the proper conduct of which is an indispensable prerequisite for the formal legality of the proceedings for a declaration of infringement by a Member State: see *Commission* v *Italy*, cited in the previous footnote, at paragraph 7 in particular.

12 — The Directive itself did not require information to be forwarded about the methods adopted for its implementation, but simply the communication of summaries of the programmes established and the results of their implementation. Consequently, the obligation to provide the information requested by the Commission on several occasions prior to the letter of formal notice finds its own basis in the duty of Member States to cooperate with the Community institutions. For a different situation, where the obligation to provide details on the implementation of the Directive derives directly from the Directive itself, see Case C-69/90 *Commission* v *Italy* [1991] ECR I-6011, paragraphs 11 to 13.

pollution and of determination of quality objectives is justified by the fact that there are no industrial or commercial sectors dealing with the polluting substances in question or, as regards the existing sources of pollution, by the adoption by the Luxembourg authorities of emission standards on a case-by-case basis, which, in certain instances, are rendered even more stringent by the managers of industrial plant in a spirit of voluntary cooperation. The Commission replied that the existence of emission standards, even if particularly stringent, and the absence of industries using the polluting substances in question are irrelevant. These factors are not such as to absolve the Member States from the obligation to establish programmes comprising quality objectives.

The Commission's analysis should be upheld.

12. Purely on the basis of a literal interpretation of the provisions it may be seen that a Member State which has not established programmes has failed to fulfil its obligations. The preparation of the programmes is required by Article 7 in order to attain the objective referred to in Article 2, namely to reduce pollution caused by the dangerous substances set out in List II of the Annex. As a result, the mere presence of polluting substances itself requires programmes to be established. I would add that the defendant does not deny the presence of polluting substances in Luxembourg; in fact it asserts that the competent authorities have laid down emission standards for different types of waste.

13. The undeniable absence of programmes can only be offset, and the Directive thereby complied with, by the existence of emission standards laid down by the competent authorities for each and every source of pollution on a case-by-case basis. The Directive prescribes for the programmes a structural content including quality objectives, deadlines and specific provisions governing the use of substances and products, determined by taking into account the latest economically feasible technical developments. It is solely on the basis of the quality objectives, and in terms of those objectives, that the competent authorities are required to lay down the emission standards. That interpretation seems to be entirely consistent with the *ratio* of the Directive, the function of which is not only to satisfy the need to protect the environment, but also to harmonise the laws on the discharge of dangerous substances into the aquatic environment, so as to prevent disparities in the conditions of competition from affecting the functioning of the common market. That emerges clearly not only from the preamble, [13] but also from

13 — See in particular the third recital of the preamble to the Directive. This dual requirement also explains why the Directive was founded on a dual legal basis, Articles 100 and 235, at a time when the environmental policy did not expressly fall within Community competence.

the *principles of an environmental policy in the Community* as defined in the programme of action on the environment mentioned above, of which the Directive constitutes one of the means of implementation. [14] Such a need for harmonisation can only be satisfied by coordinating programmes which incorporate quality objectives since the mere imposition of emission standards at the time when prior authorisation is granted for each discharge of polluting substances is shown to be unsuitable for this purpose. It is precisely for that purpose that Article 7(7) provides, as I have already mentioned, for a comparison by the Commission of the various national programmes 'to ensure sufficient coordination in their implementation'.

14. The reference by the Grand Duchy of Luxembourg to the national measures for the implementation of Council Directive 78/659/EEC of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life [15] does not justify a different conclusion. In particular, it should be pointed out that the areas of application and objectives of the two diretives do not coincide. Whereas the directive which is the subject of these proceedings concerns, in practice, all the waters situated in the territory of a Member State up to the limit of the territorial waters, [16] including underground waters, Directive 78/659 only applies to the fresh waters designated by the Member States as needing protection or improvement in order to support fish life. Furthermore, and it is this that carries greater importance, the qualitative criteria laid down by Directive 78/659 for both salmonid and cyprinid waters respond to different requirements and, in any event, they do not coincide with the quality objectives which the Member States must establish in the programmes required by Directive 76/464 to reduce pollution by dangerous substances.

Costs

15. The failure to comply with the Directive so far as the 99 priority substances are concerned constitutes the most serious aspect of the breach of obligations complained of before the Court and is also the main reason which prompted the Commission to initiate the proceedings. For the rest, the Grand Duchy of Luxembourg not having raised any plea of inadmissibility, it has failed in all its arguments, so that there is no reason for not ordering it to pay all the costs.

14 — In particular, the programme stresses the need to coordinate and to harmonise at Community level the national policies on the environment, based on a common long-term perspective.

15 — OJ 1978 L 222, p. 1.

16 — Moreover, by a declaration annexed to the Directive the Member States have undertaken to lay down requirements which are to be not less stringent with regard to the discharge of waste water into the open sea by means of pipelines.

Conclusion

16. In the light of the foregoing observations, I propose that the Court should:

— declare that, by failing to establish and to communicate in summary form the programmes to reduce pollution with respect to the 99 dangerous substances indicated in the annex to the reasoned opinion and the result of their implementation, in breach of Article 7 of Council Directive 76/464/EEC of 4 May 1976 on the pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Articles 2 and 7 of that directive;

— declare the application inadmissible in so far as it seeks a declaration of failure to fulfil obligations in respect of the failure to establish and to communicate in summary form the programmes and the results of their implementation with respect to the dangerous substances other than the 99 substances mentioned above;

— order the Grand Duchy of Luxembourg to pay the costs.