OPINION OF ADVOCATE GENERAL LENZ

delivered on 1 June 1994 *

Mr President,
Members of the Court,

A — Introduction

1. The instant case is concerned with whether France has fulfilled its obligations under Article 3(1) and (2) of Council Directive 85/339/EEC of 27 June 1985 on containers of liquids for human consumption. [1]

2. According to Article 1 of the directive, its purpose is to provide for 'a series of measures relating to the production, marketing, use, recycling and refilling of containers of liquids for human consumption and to the disposal of used containers, in order to reduce the impact of the latter on the environment and to encourage a reduction in the consumption of energy and raw materials in this field'.

3. The first two paragraphs of Article 3 provide as follows:

'1. In pursuance of the objectives referred to in Article 1, Member States shall draw up programmes for reducing the tonnage and/or volume of containers of liquids for human consumption in household waste to be finally disposed of.

2. Programmes shall be drawn up for the first time for a period commencing on 1 January 1987 and shall be communicated to the Commission before that date.'

Those programmes have to be regularly revised and updated — at least every four years (Article 3(3)). They are to 'take account of the repercussions of the measures envisaged on energy consumption, with a view to achieving as far as possible a reduction in overall energy consumption' (Article 3(4)).

* Original language: German.
1 — OJ 1985 L 176, p. 18.

4. 'Within the framework of the programmes referred to in Article 3', Article 4 requires Member States to take measures designed *inter alia* to develop consumer education, to facilitate the recycling of containers, to ensure the rational use of non-refillable containers, to promote the use of refillable containers and to develop new types of container. Member States may take those measures either by legislative or administrative means or by voluntary agreements. Article 7(1) provides that the Member States are to notify the Commission of such measures.

Every four years Member States are to send reports to the Commission on the measures taken under the programmes referred to in Article 3 and the results achieved (Article 6).

5. On 22 July 1987, the Commission pointed out to the French Government that it had not yet communicated the programmes referred to in Article 3 and that France had therefore failed to fulfil its obligations under Article 3(1) and (2) of the directive and likewise under the third paragraph of Article 189 and the first paragraph of Article 5 of the EC Treaty.

6. In its answer to that letter, the French Government informed the Commission on 22 September 1987 that it had decided to rely on voluntary agreements in order to implement the directive. At the same time, it stated that 'programmes' had been drawn up in liaison with the economic circles concerned, and that the programmes provided for measures for each of the types of container concerned. The letter briefly summarized the measures. The French Government further stated that the programmes would be 'given concrete form' by voluntary agreements with industry, and that those agreements were still at the negotiation stage. It added that the French authorities would communicate 'those programmes' to the Commission once they had been finalized.

7. On 16 March 1988, the French Government communicated to the Commission the draft agreements which it was minded to conclude with the industrial circles concerned. The agreements were signed on 9 May 1988 and forwarded by the French Government to the Commission by letter of 12 August 1988. There were six agreements, each relating to a specific type of container (glass, plastic, steel, aluminium, board, and returnable glass containers).

8. On 4 November 1988, the Commission asked the French Government whether the

draft agreements communicated on 16 March 1988 pursuant to Article 7 of the directive had since been signed. [2] On the same time, it asked whether the programmes mentioned in the letter of 22 September 1987 had become definitive. It also requested the French Government to send it the text of those programmes.

9. On 2 October 1989, the Commission sent the French Government a reasoned opinion pursuant to Article 169 of the EC Treaty. In that opinion, it stated that the French Government's letter of 22 September 1987 and the measures set out therein could not be regarded as being 'programmes' within the meaning of Article 3 of the directive. It added that that comment also applied to the draft agreements which had been communicated concurrently with the aforementioned letter. The Commission considered as a result that the programmes had not yet been drawn up, and that the French Republic had therefore infringed Community law by failing to communicate to it the programmes referred to in Article 3 of the directive.

10. In its answer of 26 October 1989 to that letter, the French Government contested the Commission's view that the agreements concluded with industry could not be regarded as being programmes within the meaning of Article 3 of the directive.

11. On 13 March 1991, the Commission informed the French Government that the voluntary agreements which it had concluded could not be regarded as programmes. [3] In addition, it specified the requirements which, in its view, a programme within the meaning of the directive had to satisfy.

12. By the application which it brought in this case on 21 April 1993 (which was received at the Court Registry on 26 April 1993), the Commission asks the Court to declare that by failing to draw up and communicate to the Commission the programmes provided for in Article 3 of the directive, the French Republic has failed to fulfil its obligations under the directive and the EC Treaty. It also asks that the French Republic should be ordered to pay the costs.

The French Government claims that the application should be dismissed as inadmissible or, in the alternative, as unfounded, and asks that the Commission should be ordered to pay the costs.

2 — Why the Commission failed to take account of the French Government's letter of 12 August 1988 when it drew up this letter remains unclear.

3 — That letter can probably be explained by the fact that, in the meantime, the Commission had become aware of the definitive agreements which the French Government had forwarded to it on 12 August 1988.

B — Assessment

Admissibility

13. The French Government submits that the application is inadmissible on two counts. First, the failure to fulfil obligations alleged by the Commission was brought to an end even before the reasoned opinion was adopted. Secondly, the Commission bases its application on the complaint that the agreements concluded with industry do not constitute programmes within the meaning of the directive. That complaint, however, is different from the one formulated in its letter of 22 July 1987 and in the reasoned opinion of 2 October 1989.

14. I am unable to agree with those arguments. As regards in the first place the objection that the alleged failure to fulfil obligations was brought to an end, the French Government claims that the agreements which it concluded constitute programmes within the meaning of Article 3 of the directive. Yet it is precisely this that the Commission is contesting. This therefore relates to the question as to whether the application is *well-founded*, a subject which I shall be investigating later. The second argument against the admissibility of the application, relating to the failure to fulfil obligations alleged by the Commission, stands up to scrutiny no better. In its application, the Commission accuses the French Government of not having drawn up and communicated the programmes laid down by Article 3 of the directive. That charge corresponds to the complaint which was already set out in the letter of 22 July 1987 and in the reasoned opinion of 2 October 1989. That the Commission discusses in detail in its application the agreements concluded by the French Government is explained by the fact — which I have already mentioned — that the defendant considered that, by concluding those agreements, it fulfilled its obligations under Article 3 of the directive. However, this cannot be regarded as constituting a change in the subject-matter of the proceedings as compared with the complaint raised in the pre-litigation phase.

Substance

15. Under Article 3(2) of the directive, the Member States were under a duty to communicate to the Commission before 1 January 1987 the programmes which they had to draw up pursuant to Article 3(1). It is clear that France failed to fulfil that obligation within the prescribed period. The French Government admits moreover that the programmes which it was under a duty to communicate were not set out in its letter of 22 September 1987 to the Commission. However, we are not concerned with that delay in this case, but with the question as to whether the French Republic has fulfilled its obligations under Article 3(1) and (2) of the directive *at all.* The French Republic maintains that this is in fact the case owing to the conclusion (and the communication) of the agreements concluded with industry concerned. Consequently, the question arises as to whether those agreements may be considered to be 'programmes'.

16. The Commission takes the view that the agreements cannot be considered to be 'programmes' on the basis of the wording of the directive. The directive does in fact clearly distinguish between the programmes to be drawn up by the Member States (Article 3) and the measures designed to implement those programmes (Article 4). That distinction is further underscored by the fact that those measures — legislative or administrative provisions or voluntary agreements — must be taken, according to the wording of the relevant provision, *within the framework* of the programmes referred to in Article 3. [4] It should also be observed that both the programmes and the measures have to be communicated to the Commission, the former under Article 3(2) and the latter under Article 7(1). This also shows that the directive draws a clear distinction between programmes within the meaning of Article 3 and measures within the meaning of Article 4.

17. The French Government argues that these are purely formal considerations and I take that point. However, it must be stressed that that formal distinction is laid down by the directive. Since the directive requires the Member States first to draw up programmes and then to implement them by specific means, the Member States are bound to comply with that procedure. I would observe that that procedure seems to be familiar to the defendant, too. As I have mentioned, in its letter of 22 September 1987, the French Government referred to the 'programmes' which it had drawn up and which had been given concrete form by voluntary agreements.

18. The French Republic would therefore not have failed to fulfil its obligations under Article 3(1) and (2) of the directive only if the agreements which it concluded with the industry could (at the same time) be regarded as being 'programmes' within the meaning of Article 3. To my mind, they could not be so regarded, even if the formal aspects described above were to be disregarded.

19. To this end, it should first be considered what the content of a 'programme' within the meaning of Article 3 should be. The Court has already had occasion to consider that provision, yet did not discuss the question of interest in this case in detail. [5] The directive itself contains only a small number of concrete indications. According to Article 3(1), the programmes should aim at reducing the tonnage and/or volume of containers of liquids for human consumption in household waste to be finally disposed of. In that context, the aim is to achieve as far as possible a reduction in energy consumption (Article 3(4)). What is involved, therefore, is a very general obligation which leaves a broad discretion to the Member States with regard to its implementation. Consequently, it is for

4 — See Article 4(1) and Article 6.

5 — Judgments in Case C-252/89 *Commission* v *Luxembourg* [1991] ECR I-3973 and in Case C-192/90 *Commission* v *Spain* [1991] ECR I-5933 (summary publication only in both cases).

the Member States themselves to decide to what extent and at what pace they wish to progress along the path traced by the directive.

However, unless the obligation to draw up programmes (and, in the final analysis, the directive itself) is to be completely nugatory, the Member States must comply with certain minimum requirements in this regard. In my view, a programme designed to reduce the tonnage and/or volume of the containers in question will involve the Member State concerned at least in setting itself a specific, quantified target, even though — as the French Government rightly points out — the directive does not stipulate this expressly. That target may be expressed in absolute figures (for example, specific tonnages) or as a percentage (for example, a specific proportion of refillable containers). It should also be clear that it is the *Member State* concerned itself which undertakes to achieve that objective. Moreover, this is doubtless the reason for the distinction which is made by the directive between programmes and measures: the Member State in question must undertake vis-à-vis the Commission to achieve a specific, concrete target. This will allow the Commission to check in each case whether the individual implementing measures do indeed implement the relevant programme. Admittedly, it goes without saying that that a Member State is entitled to consult the industrial circles affected before drawing up the said programmes and to leave it to industry to implement the programmes, through, for instance, voluntary agreements.

Next, the programme should determine the proposed actions — this follows from Article 3(4). Lastly — and this follows from the very nature of the matter — the programme must include a timetable, that is to say, it should fix the period within which the target set is to be achieved. Article 3(2) expressly provides that the programmes must be drawn up for a period commencing on 1 January 1987. The duration of the period is not specified, but Article 3(3) — according to which the programmes are to be revised and updated at least every four years — suggests that the legislator contemplated a fairly long period.

20. To turn to the agreements submitted by the French Government, it can be observed that those minimum requirements are not satisfied in every case.

Admittedly, it appears from the agreements that *both* contracting parties — and hence the French Republic — undertake to ensure that they are implemented. Contrary to the view taken by the Commission, that should be deemed to be sufficient. Article 3 merely requires the Member States to draw up programmes. Since Article 4 authorizes them to implement the programmes by means of voluntary agreements, I do not consider that it is necessary for the Member States themselves to commit themselves in those agreements to playing an active role. If and as

long as industry is in a position to comply with the obligations laid down in the agreements, and hence to further the aims of the directive, there is no need for the State to intervene. However, the agreements in question raise some doubts on matters of detail. For instance, they almost all contain a clause according to which, in the event of unforeseen difficulties, some obligations may be declared by common accord to be no longer applicable. [6] Also, there is no doubt that it must be regarded as very unusual for an agreement to include a clause under which one of the contracting parties may 'call on' the public authorities to carry out a particular measure. [7]

21. However, most of the aforementioned agreements lack a clear definition of the objectives to be attained and a timetable. Only some of the agreements contain concrete objectives, capable of being translated into quantitative terms. The agreement on glass provides for at least 550 000 tonnes from household waste to be recycled in 1990. [8] The agreement of 9 May 1988 on steel containers provides for a 1% reduction in energy consumption each year between 1984 (sic) and 1990. The agreement on returnable glass containers stipulates that 'cafés-hotels-restaurants' [9] should undertake to use solely returnable glass containers [10] in so far as they are available. The other agreements merely set out provisions of a varying degree of generality.

Only the agreement on glass, therefore, includes a concrete provision specifying the decrease in the tonnage of waste for the type of container in question. That individual measure, however, is not sufficient — having regard to the agreements as a whole [11] — in order to satisfy the requirements to which programmes within the meaning of Article 3 are subject. The directive requires the Member States to draw up programmes with a view to reducing the tonnage and/or volume of certain 'containers'. According to Article 2(b), 'containers' include, not only glass containers, but also containers made of metal, plastic, paper or any other material. Consequently, to set a specific target for reducing the volume of waste glass containers is not sufficient in itself.

22. Five of the six agreements are for a limited period of time, barely over two and a half years (from 10 May 1988 — the date on which the agreements were signed — to 31 December 1990). As regards the sixth agreement (on glass) its duration is not

6 — See, for example, Article 8 of the agreement on aluminium.

7 — See Article 3(c) of the agreement on returnable glass containers.

8 — As much as 700 000 tonnes should be recycled in 1990 if industrial waste is included.

9 — The expression is not defined, but apparently refers to the trade associations (and their members) which are parties to the agreement.

10 — Article 3(c) of the agreement.

11 — As I have mentioned, the agreements relate to six kinds of packaging materials.

expressly limited, although it appears from its content that it, too, was probably intended to apply only for that period. [12] Only one agreement (on returnable glass containers) provides for an extension (until 31 December 1992), unless it is terminated by one of the parties.

The French Government does indeed maintain that the agreements embodied a timetable, in so far as most of them included clauses providing that each year the attainment of the targets should be checked by means of statistical surveys and that 12 the contracting parties should make any necessary adjustments in the light of those figures. However, that point of view could be accepted only if the agreements themselves laid down concrete targets.

23. In the light of the above considerations, I take the view that the agreements concluded by the French Government cannot be regarded as being programmes within the meaning of Article 3 of the directive, and that the Commission's application is therefore well-founded. However, the parties have also set out a series of other arguments, on which, in my view, this case does not turn. Nevertheless, I shall consider them briefly for completeness' sake.

The Commission argues that the agreements cannot be considered to be programmes within the meaning of Article 3, if only because they are confined to individual sectors, whereas in its view such a programme should be comprehensive. For its part, the French Government rightly points out that Article 3 refers, not to a programme, but to programmes. Moreover, it is not clear why a comprehensive programme would be more capable of furthering the attainment of the objectives of the directive than several programmes tailored to the specific features of each of the packaging materials concerned.

Neither do I consider that it is appropriate to go further into the Commission's complaint that, in order to be regarded as programmes, the agreements should have contained at least a list of the main actions provided for with a view to attaining the objectives laid down. The agreements set out a whole series of measures to be carried out by the industry which are conducive to the attainment of the objectives laid down by Article 4(1) of the directive. Rather, the crucial point is that, taken as a whole, the agreements do not lay down to the necessary extent concrete, quantifiable targets and a timetable for achieving those targets.

12 — This view is based on the fact that the agreement mentions a number of quantified objectives which are to be achieved in 1990 (Article 4(3) of the agreement).

Lastly, the Commission argues that the agreements which the French Government considers to be programmes have not been made sufficiently accessible to interested circles and the public. The French Government denies this. For my part, I consider that there is no need to dwell on that question. Although it would doubtless be sensible to publicize the programmes, the Member States are not obliged to do so by the directive. Only communication to the Commission is mandatory (under Article 3(2)).

24. The defendant states — without being contradicted by the Commission — that it has already obtained considerable results in pursuing the objectives laid down by the directive. In response, the Commission argues that there is a failure to fulfil obligations under the directive where a Member State fails to draw up and communicate a programme, even if that Member State meets the substantive objectives of the directive. As I have already observed, that view seems to me to be correct. This is not formalism: only comparison of that which has been achieved and the objectives set enables it to be assessed whether and to what extent those objectives have been attained.

Nevertheless, one is still entitled to ask why the Commission has brought this action. The French Government observed that in 1992 the Commission itself expressed the view that Directive 85/339 had not produced satisfactory results and that the situation envisaged by the directive had been overtaken by events. [13] But what seems to me to be even more surprising is that the Commission should have brought an action relating to a failure to fulfil obligations which is largely formal, even though it appears that the way in which it itself has dealt with this case during the pre-litigation procedure [14] leaves much to desire from the formal point of view. When the Commission adopted its reasoned opinion on 2 October 1989, it had manifestly not yet had cognizance of the French Government's letter of 12 August 1988. In its application, the Commission stated that it had received no response from the French Government to its letter of 13 March 1991. When the French Government stated that it replied to that letter on 14 May 1992, the Commission's representative was obliged to concede this and admitted that the French Government's letter had been wrongly filed. The chronological progress of the procedure also raises a number of questions: indeed, the Commission did not bring its action against France until well after the expiry of the first four-year period, on 1 January 1991. It is to be hoped that such circumstances will remain exceptional.

However, all those considerations have no bearing on the result of my appraisal.

13 — See sections 4.1 and 5.1 of the proposal submitted by the Commission on 15 July 1992 with a view to the adoption of a Council directive on packaging and packaging waste (COM(92) 278 final — SYN 436).

14 — This is not, of course, true of the proceedings before the Court.

C — Conclusion

25. I therefore propose that the Court should:

(1) declare that, by failing to draw up and communicate to the Commission within the prescribed period the programmes laid down by Article 3 of Council Directive 85/339/EEC of 27 June 1985 on containers of liquids for human consumption for the reduction of the tonnage and/or volume of containers of liquids for human consumption in household waste to be finally disposed of, the French Republic has failed to fulfil its obligations under that article and under the EEC Treaty;

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