OPINION OF ADVOCATE GENERAL MISCHO

delivered on 22 February 2000 *

1. The Commission of the European Communities seeks from the Court a declaration that, by adopting Articles 1(5) and 2 of the consolidated text of Decree Law No 332 of 31 May 1994, converted, after amendment, into Law No 474 of 30 July 1994, and the decrees concerning the 'special powers' laid down in the case of the privatisation of ENI SpA and Telecom Italia SpA, the Italian Republic has failed to fulfil its obligations.

2. The defendant admits the failure to fulfil its obligations.

3. It submits, however, that account should be taken of the decree of the President of the Council of Ministers of 4 May 1999, laying down instructions for the exercise of special powers as provided for in Article 2 of Decree Law No 332 of 31 May 1994.

4. According to the defendant, the new decree fully satisfies the requirements which the Commission regards as arising from Community law. The decree requires the 'special powers' to be exercised in conditions consistent with those requirements, that is to say, in particular, where there are overriding reasons in the general interest, and in compliance with the principles of non-discrimination and proportionality.

5. Its failure to fulfil its obligations should therefore be regarded as having ceased since the adoption of the decree.

6. However, it is to be remembered, as the Italian Government indeed acknowledges, that, in accordance with the settled case-law of the Court, [1] the question whether there is a failure to fulfil obligations should be assessed as at the date on which the deadline set in the reasoned opinion expires.

7. In the present case, that deadline was two months and the reasoned opinion was notified by letter of 10 August 1998. The deadline therefore expired long before the decree of the President of the Council of Ministers of 4 May 1999 was adopted. The Court is therefore unable to take account of the above argument and it is not even

* Original language: French.

1 — See, for example, Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299.

necessary to consider the Commission's response that the content of that decree is not such as to ensure sufficient legal certainty.

8. The same case-law means that it is fruitless for the Italian Government to state that the content of the decree was included in the Finance Law of 23 December 1999 and that, as a result, legal certainty is fully guaranteed and the failure to fulfil obligations has been eliminated beyond all doubt.

9. That argument comes up against the same obstacle as the preceding one.

10. Accordingly, it is irrelevant whether or not the relevant provisions of the Finance Law must be supplemented by an implementing regulation, which indeed has not yet entered into force, if the failure to fulfil obligations is to be eliminated, and the fact that that question is in dispute between the parties is of no consequence.

Conclusion

11. In those circumstances, I propose that the Court should grant the Commission's application for a declaration that, by adopting Articles 1(5) and 2 of the consolidated text of Decree Law No 332 of 31 May 1994, converted, after amendment, into Law No 474 of 30 July 1994, and the decrees concerning the 'special powers' laid down in the case of the privatisation of ENI SpA and Telecom Italia SpA, the Italian Republic has failed to fulfil its obligations under:

— Article 52 of the EC Treaty (now, after amendment, Article 43 EC);

— Article 59 of the EC Treaty (now, after amendment, Article 49 EC); and

— Article 73b of the EC Treaty (now Article 56 EC).

12. Consequently, I also propose that the Italian Republic should be ordered to pay the costs.