# OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 9 March 1994 *

*Mr President,*
*Members of the Court,*

1. In this action against a Member State for failure to fulfil its obligations, brought before the Court by application lodged at the Court Registry on 10 June 1993, the Commission asks the Court to:

(i) declare that by failing to adopt and/or communicate to the Commission within the prescribed period all the measures necessary to comply 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 Grand Duchy of Luxembourg has failed to fulfil its obligations under the directive, in particular Article 12 thereof, as well as under Articles 5 and 189 of the EEC Treaty;

(ii) order the Grand Duchy of Luxembourg to pay the costs.

2. Article 12 of the directive in question provides that the Member States are to take the measures necessary to comply with the directive within three years of its notification and communicate to the Commission the provisions of national law which they adopt in the field covered by the directive.

The directive was notified to the Member States on 3 July 1985. The period allowed for transposition therefore expired on 3 July 1988.

Since the Luxembourg Government communicated no information concerning the transposition of the directive, the Commission gave the Grand Duchy of Luxembourg formal notice by letter of 9 March 1990 to submit its observations in that connection. By letter of 19 July 1990, the Permanent Representative of the Grand Duchy of Luxembourg replied to the Commission that legislation to transpose the directive was in the process of being adopted. As it had still received no information, on 8 April 1991 the Commission sent the reasoned opinion provided for by the first paragraph of Article 169 of the EEC Treaty to the Grand Duchy of Luxembourg. By letter of 3 May 1991, the Permanent Representative of the Grand Duchy of Luxembourg again replied to the Commission that implementing legislation was being adopted.

* Original language: French.
1 — OJ 1985 L 175, p. 40.

3. In its defence, the Grand Duchy of Luxembourg considers that the Court would not be justified in ruling against it since the main provisions of the directive have already been transposed into national law by the Law of 9 May 1990 concerning premises that are dangerous or insanitary or used for carrying on noisy or noxious trades [2] and by the implementing Grand-Ducal Regulation of 18 May 1990 fixing the list and classification of premises that are dangerous or insanitary or used for carrying on noisy or noxious trades. [3] The provisions which have not been transposed are of a technical kind, and even of an ancillary nature, and their formal transposition would in no way alter the practice of the public authorities, which consists of systematically requiring assessments of environmental effects in accordance with the directive and taking account of environmental interests. In its rejoinder, however, the Grand Duchy of Luxembourg impliedly acknowledges that legal certainty will be ensured only when a draft law and draft Grand-Ducal implementing regulation transposing the directive in full have been adopted.

4. It is apparent from the information in the documents before the Court that, in reality, the existing Luxembourg legislation does not transpose all the provisions of Directive 85/337/EEC. Moreover, the Court has consistently held [4] that mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of the obligations imposed under Article 189 of the Treaty on the Member States to which directives are addressed.

At the hearing, the representative of the Luxembourg Government announced that the draft Grand-Ducal regulation would be approved two days later by the Government, and then published in the Luxembourg official journal, 'Le Mémorial'. The failure by Luxembourg to fulfil its obligations would thus be remedied before the judgment.

It should be noted, however, that the actual position of the Luxembourg authorities has no bearing on the question whether Luxembourg is in default. The Court has consistently held that a Member State may not rely on provisions, practices or situations in its internal legal system in order to justify non-compliance with the obligations and time-limits prescribed by Community directives. [5]

Moreover, the fact that Directive 85/337/EEC is to be transposed forthwith into Luxembourg law in no way lessens the value of holding that there has been a failure to do so. The Court has also consistently held that even when a default has been remedied after the expiry of the time-limit

2 — Mémorial A 1990, p. 310.

3 — Mémorial A 1990, p. 316.

4 — Judgment in Case 102/79 *Commission* v *Belgium* [1980] ECR 1473, and more recently the judgment in Case C-381/92 *Commission* v *Ireland* [1994] ECR I-215, at paragraph 7.

5 — Consistent case-law and, most recently, the judgment in Case C-303/92 *Commission* v *Netherlands* [1993] ECR I-4793, at paragraph 9.

fixed by the Commission's reasoned opinion, 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. [6]

5. For those reasons, I propose that the Court grant the Commission's application and uphold its claims.

6 — Consistent case-law and, most recently, the judgment in Case C-280/89 *Commission* v *Ireland* [1992] ECR I-6185, at paragraph 7.