# OPINION OF ADVOCATE GENERAL LÉGER

delivered on 2 April 1998 *

1. By application lodged at the Court Registry on 30 May 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty seeking a declaration that, by failing to adopt within the period prescribed the laws, regulations and administrative provisions needed to comply with Council Directive 84/156/EEC of 8 March 1984 on limit values and quality objectives for mercury discharges by sectors other than the chlor-alkali electrolysis industry [1] (hereinafter 'the directive'), the Portuguese Republic has failed to fulfil its obligations under the third paragraph of Article 189 of the EC Treaty and Article 4 of the directive.

2. Under Article 4(1) of the directive, the Member States are to draw up specific programmes for mercury discharges by multiple sources which are not industrial plants and for which the emission standards laid down in Article 3 cannot be applied in practice. Under Article 4(3) of the directive, the specific programmes are to apply as from 1 July 1989 and to be communicated to the Commission.

3. Under Article 7(1) of the directive, Member States are to bring into force the measures necessary to comply with it within two years following its notification. They are forthwith to inform the Commission thereof.

4. On 18 June 1993, in the absence of any response from the Portuguese Government to its request that the programme or programmes referred to in Article 4 of the directive be communicated to it, the Commission gave it formal notice that it should submit its observations on its fulfilment of its obligations under the directive within two months.

5. On 6 January 1994 the Portuguese Government replied to that formal notice explaining that no sources discharging mercury in sectors other than the chlor-alkali electrolysis industry had been found in its territory. Consequently no discharge of mercury or pollution by mercury could be established. The Portuguese Republic therefore argued that the obligation to draw up programmes under Article 4 of the directive could not concern it.

* Original language: French.

1 — OJ 1984 L 74, p. 49.

6. As it was not convinced of the accuracy of those observations, by letter of 25 October 1995, the Commission sent a reasoned opinion to the Portuguese Government calling on it to take the measures necessary to comply with that opinion within two months of its notification.

7. On 18 July 1996 the Portuguese Government responded, pointing out that, whilst it recognised the necessity and urgency of implementing the programmes in question, it would encounter many difficulties in bringing them into operation because of problems relating to the identification of the many different sources. However, it added that it was endeavouring to comply as rapidly as possible with the provisions of the directive and that it would inform the Commission of the outcome of its work.

8. Having received no other information from the Portuguese Government which suggested that it had since fulfilled its obligations under the directive, the Commission decided to bring this action.

9. In its defence the Portuguese Government does not dispute that it has failed to fulfil its obligations, but points out that it is encountering serious practical difficulties in implementing the specific programmes required by Article 4 of the directive. For that reason, it proposes that the Court reserve its decision until such time as the directive has been transposed.

10. The Commission informed the Court that it would not submit a reply to that defence.

11. As regards the request to reserve the decision, it must be observed that the Portuguese Government only provided details of the practical difficulties it has encountered in implementing transposition measures after expiry of the period prescribed for the adoption of measures to transpose the directive, that is to say, at a time when it was already in force. In those circumstances — where a directive has already been adopted and has entered into force —, I take the view that this line of argument cannot be used to suspend proceedings or justify in legal terms the failure to fulfil Treaty obligations which failure to transpose a directive represents, as otherwise a Member State could easily evade its obligation to transpose a directive within the prescribed period by citing such alleged or real difficulties. [2]

12. Moreover it should be noted that the Portuguese Republic does not dispute that the measures necessary to transpose the

2 — For a parallel argument, see Case C-139/96 *Commission* v *Germany* [1997] ECR I-4845 and paragraph 12 of my Opinion delivered on 16 December 1997 in Case C-344/96 *Commission* v *Germany* [1998] ECR I-1165.

directive into national law were not taken within the period prescribed therein.

13. Accordingly, the Commission's application should be granted and it should be declared that, by failing to adopt within the prescribed period the measures necessary to comply with the directive in question, the Portuguese Republic has failed to fulfil its obligations under Article 4 of the directive. Under Article 69(2) of the Rules of Procedure of the Court, the Portuguese Republic should be ordered to pay the costs.

## Conclusion

14. Accordingly, I propose that the Court should:

(1) declare that, by failing to adopt within the period prescribed the laws, regulations and administrative provisions needed to comply with Council Directive 84/156/EEC of 8 March 1984 on limit values and quality objectives for mercury discharges by sectors other than the chlor-alkali electrolysis industry, the Portuguese Republic has failed to fulfil its obligations under Article 4 of the directive;

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