OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 10 May 2001 [1]

I — Facts, relevant legislation and pre-litigation procedure

1. By its application under Article 226 EC for a declaration of failure to fulfil obligations under the Treaty, lodged at the Court on 3 August 2000, the European Commission complains that the Grand-Duchy of Luxembourg has failed to adopt within the prescribed period the laws, regulations and administrative provisions necessary to transpose Council Directive 98/35/EC of 25 May 1998 amending Directive 94/58/EC on the minimum level of training of seafarers into national law (hereinafter 'the Directive').

2. In accordance with Article 2(1) of the Directive, Member States are obliged to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive, at the latest by 1 July 1999 or within one year of the adoption of the Directive, whichever is the earlier. The Directive was adopted on 25 May 1998, so that the period prescribed for its transposition expired on 25 May 1999.

3. Having received no communication from the Luxembourg Government by that date concerning the measures taken to transpose the Directive into national law, and since, furthermore, it had no information on the matter, the Commission requested the defendant by letter of 20 August 1999 to state its position within two months.

4. As that letter remained unanswered, the Commission sent a reasoned opinion within the meaning of Article 226 EC to the Grand-Duchy of Luxembourg on 24 January 2000 in which it demanded that the necessary measures be taken within a period of two months.

5. The Luxembourg Government, under cover of its letter in response of 13 April 2000, enclosed the text of a law dated 9 November 1990 on the setting up of a public sea register as well as two Grand-Ducal decrees of 29 January 1997 and 13 September 1999, from which it emerges that the international Convention on Stan-

1 — Original language: German.

dards of Training, Certification and Watchkeeping for Seafarers (STCW Convention), the STCW Code and the technical annexes were transposed into Luxembourg law, and as a result of this the substantive provisions of the Directive were already largely complied with.

6. As that legislation did not fulfil the requirements of the Directive in the opinion of the Commission and as the Luxembourg Government did not communicate any further measures, the Commission brought an action before the Court.

7. The Commission claims that the Court of Justice should:

— declare that, by failing to adopt the laws, regulations and administrative provisions necessary to transpose the Directive within the period prescribed for that purpose, the Grand-Duchy of Luxembourg has failed to fulfil its obligations under Council Directive 98/35/EC of 25 May 1998 amending Directive 94/58/EC on the minimum level of training for seafarers, as well as Article 249 EC;

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

8. The Grand-Duchy of Luxembourg contends that the Court should:

— stay proceedings until such time as the Commission withdraws its application

or

— dismiss the application.

II — Infringement of Treaty

Submission of the parties

9. The Commission's essential submission is that the Grand-Duchy of Luxembourg

has failed to fulfil its obligation under the third paragraph of Article 249 EC, Article 10 EC and Article 2 of the Directive to adopt within the period prescribed all necessary measures to transpose the Directive into national law and to communicate those measures immediately to the Commission. In regard to the Luxembourg Government's argument it concedes that, although, a directive may also be transposed into national law by the incorporation of an international treaty, such as the STCW Convention, it is of the opinion that the Community-law requirements of unambiguity and certainty in the legal situation are not complied with in the present case. The fact that the Luxembourg Government is working on the transposition of the Directive is itself evidence of this.

10. The Grand-Duchy of Luxembourg claims that the obligations under the Directive have already been largely fulfilled by the transposition of the STCW Convention, the STCW Codes and the technical annexes and points out that the legislative procedure for the required complete transposition of the Directive is in progress. With reference to the draft, attached as an annex to the rejoinder, of a 'Grand-Ducal regulation for the transposition of Council Directive 94/58/EC of 22 November 1994 on the minimum level of training for seafarers, as amended by Council Directive 98/35/EC of 25 May 1998', the Luxembourg Government refers, finally, to the fact that this draft will shortly be approved in accordance with national procedure and requests the Commission not to proceed with the case.

Assessment

11. Whilst the Luxembourg Government does not dispute that a specific transposition of the Directive is required through the enactment of corresponding legislation is still necessary, it also does not ultimately dispute that the obligations under the Directive were not completed in good time.

12. Whether and to what extent a 'parallel transposition' of the Directive has taken place through the transposition of the STCW Convention does not in that respect require further discussion.

13. In so far as the Luxembourg Government refers to the draft prepared in the meantime for the transposition of the directive at issue and the promise of its early adoption in accordance with national procedure, it must be observed that, according to actual case-law of the Court, first, the existence of an infringement of the

Treaty is to be determined [2] solely on the basis of the situation at the time of expiry of the period prescribed in the reasoned opinion and second a Member State may not plead on any provisions, practices or circumstances of its internal legislation to justify the non-observance of obligations and time-limits laid down in a directive. [3]

14. Furthermore an action based on Article 226 EC is directed solely to obtaining an objective finding of infringement of the treaty and requires no proof of continuing failure to act or of an adverse attitude on the part of the Member State concerned. [4] Submissions like the reference to progress in the legislative procedure concerned by means of which the Luxembourg Government is attempting to demonstrate genuine and continuous endeavours in the present case to transpose the Directive are therefore of no consequence, where a Treaty infringement objectively exists at the procedurally relevant time, for the purposes of the outcome of the proceeding for infringement of the Treaty.

15. As regards the application by the Luxembourg Government for the proceedings to be stayed until the case is withdrawn by the Commission, it is to be noted that although the Commission has signalled its willingness in its letter to the Court of 21 December 2000 in respect to the abovementioned request in the rejoinder, to withdraw the action as soon as the draft in question has been finally adopted and published, however, this has clearly not yet happened.

16. It is therefore to be found that the Grand-Duchy of Luxembourg has not adopted the laws, regulations and administrative provisions within the prescribed time-limit in order to fulfil its obligations under the Directive. There is therefore an infringement of the Treaty and the Commission's application is well founded.

III — Costs

17. Under Article 69(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for by the successful party. As the Commission has applied for costs and the Grand-Duchy of Luxembourg has been unsuccessful, the latter must pay the costs.

2 — See Case C-147/00 *Commission* v *France* [2001] ECR I-2387, paragraph 26, and Case C-384/99 *Commission* v *Belgium* [2000] ECR I-10633, paragraph 16.

3 — See Case C-374/98 *Commission* v *France* [2000] ECR I-10799, paragraph 13, and C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 13.

4 — Case 301/81 *Commission* v *Belgium* [1983] ECR 467, paragraph 8.

IV — Conclusion

18. In the light of those considerations, it is proposed that the Court should:

— declare that by not adopting within the prescribed period the necessary laws, regulations and administrative provisions in order to transpose Council Directive 98/35/EC of 25 May 1998 amending Directive 94/58/EC on the minimum level of training for seafarers the Grand-Duchy of Luxembourg has failed to fulfil its obligations under that directive and Article 249 EC;

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