OPINION OF ADVOCATE GENERAL LENZ
delivered on 10 November 1992 *

Mr President,
Members of the Court,

A — Introduction

1. In this action for failure to fulfil an obligation, the Commission accuses the Government of the Kingdom of Belgium of failing to transpose Article 11 of Directive 85/203/EEC on air quality standards for nitrogen dioxide [1] into national law, and thereby failing to fulfil its obligations under Community law.

2. Member States have a discretionary power to fix more stringent values than those laid down in the Directive (Articles 4 and 5 of the Directive).

3. Directive 85/203 was transposed into Belgian law by the Royal Decree of 1 July 1986. [2] Article 11 of Directive 85/203, which was not reproduced in the Royal Decree either expressly or in substance, provides for consultation with other Member States in which the Commission may also participate. It makes such provision in Article 11(1), in cases where a Member State intends to fix more stringent values in areas close to a border, and in Article 11(2), in cases where there is a risk that values may be exceeded following pollution which originates, or may originate, in another Member State.

4. The Belgian Government defends its position by maintaining that those provisions are instrumental only, and do not need to be expressly implemented. It adds, moreover, that the Belgian State has no intention of using the possibility, contained in Articles 4 and 5 of the Directive, of fixing more stringent values, and that, even if border areas were to become subject to more stringent values, any neighbouring State would inevitably be consulted first, because it is impossible to improve air quality unilaterally.

5. For a fuller account of the factual and legal background, and the parties' pleas in law and supporting arguments, I refer to the Report for the Hearing.

B — Legal assessment

6. There is no dispute that Article 11 of Directive 85/203 has found no expression in the implementing measure of the Member State. The only question is whether the obligation to consult imposed upon the Member State requires transposition, since there can

* Original language: German.

1 — Council Directive 85/203/EEC of 7 March 1985 (OJ 1985 L 87, p. 1), as amended by Council Directive 85/580/EEC of 20 December 1985 (OJ 1985 L 372, p. 36).

2 — Moniteur Belge of 23 September 1986, p. 12867.

be no doubt that an obligation imposed on a Member State in the form of a Directive is legally binding (third paragraph of Article 189 of the EEC Treaty).

7. The answer to that question depends on which body, in accordance with the allocation of powers within the Member State, is empowered to fix more stringent limit or guide values than those laid down in the Directive. If that task were entrusted exclusively to the Government of the Member State, express transposition might be unnecessary in some cases, because Article 11 of the Directive already imposes a legal obligation that directly binds the Member State.

8. However, the application refers to the fact that, in the way in which powers are allocated in Belgium, regional authorities can be entrusted with the fixing of more stringent values. That idea was discussed in greater detail at the hearing, in which it was mentioned that, in this very area of environmental matters, a number of powers have been transferred to the regions.

9. The obligation to consult is, however, placed upon the Governments of the Member States to which the Directive is addressed (Article 16), and not upon the regions. To ensure that the obligation to consult is complied with, such obligation must be placed on those wielding legislative power. As the Belgian State has not met those requirements when transposing Directive 85/203, I propose that the Court should allow the Commission's application.

C — Conclusion

10. I propose that the Court should rule as follows:

(1) By not bringing into force the laws, regulations and administrative provisions necessary to implement into national law the obligations laid down by Article 11 of Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide, the Kingdom of Belgium has failed to fulfil its obligations under that Directive and under Article 189 of the EEC Treaty.

(2) The Kingdom of Belgium is ordered to pay the costs.