OPINION OF ADVOCATE GENERAL ALBER

delivered on 24 January 2002 [1]

1. The Commission has applied for a declaration that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with Council Directive 97/70/EC of 11 December 1997 setting up a harmonised safety regime for fishing vessels of 24 metres in length and over, [2] the Kingdom of the Netherlands has failed to fulfil its obligations under the Treaty.

2. Article 12 of the directive provides:

'1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1999. They shall forthwith inform the Commission thereof.

...'

3. Since the Commission had still not received any notification regarding the transposition of the directive, it wrote to the Netherlands Government on 12 March 1999. It gave the Netherlands Government the opportunity to submit its observations on the Treaty infringement within two months.

4. The Netherlands Government replied by letter of 21 May 1999, stating that measures transposing the directive were currently being prepared. The remaining difficulties were due to the fact that the Torremolinos Protocol, [3] to which the directive refers, was not yet available in Dutch.

5. On 10 August 1999, the Commission sent the Netherlands Government a rea-

1 — Original language: German.

2 — OJ 1998 L 34, p. 1.

3 — The Torremolinos Protocol of 2 April 1993, adopted within the framework of the International Maritime Organisation, supplements and replaces the 1977 International Convention for the Safety of Fishing Vessels.

soned opinion in which it stated that the provisions of Directive 97/70 had not been transposed into Netherlands law within the prescribed period. It set the Netherlands a time-limit of two months in which to remedy the Treaty infringement.

6. On 3 October 2000, after the Netherlands Government had informed it by letter of 6 October 1999 that the measures necessary to transpose the directive were still being prepared, the Commission brought this action. It claims that, by failing to transpose into national law the measures required under the directive by 1 January 1999, the Netherlands has infringed Article 249 EC and Article 10 EC.

7. The Netherlands Government does not dispute that claim. As an explanation for the delay it submits that the directive makes reference to the Torremolinos Protocol despite the fact that that protocol has not been published in all the official languages in the *Official Journal of the European Communities*. In addition, the national provisions which must be amended in order to transpose the directive also apply in the territories of the Netherlands Antilles and Aruba. It was therefore first necessary to obtain the approval of the governments of those territories. The draft of the new version of the regulation on fishing vessels has now been submitted to the Netherlands Council of Ministers and it is anticipated that the regulation will be adopted in October 2001.

8. It is settled case-law that the merits of an action are not affected by the fact that the default concerned may have been remedied after the expiry of the period prescribed in the reasoned opinion.[4] Therefore, even if the provisions in question had, in the meantime, been adopted, that would not militate against a declaration that the Member State in question had failed to fulfil its obligations under the Treaty. Since the Netherlands Government does not dispute the Commission's allegation, the Commission's application must, accordingly, be granted.

9. The Commission has also sought an order requiring the Kingdom of the Netherlands to pay the costs. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

4 — Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 45, and Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 31.

Conclusion

10. For the reasons set out above, I propose that the Court should:

(1) declare that, by failing to adopt the laws, regulations and administrative provisions necessary to transpose Council Directive 97/70/EC of 11 December 1997 setting up a harmonised safety regime for fishing vessels of 24 metres in length and over, the Kingdom of the Netherlands has failed to fulfil its obligations under the Treaty and that directive;

(2) order the Kingdom of the Netherlands to pay the costs.