OPINION OF ADVOCATE GENERAL ALBER

delivered on 25 October 2001 [1]

1. The action is directed against the failure to transpose, within the prescribed period, Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [2] ('Directive 97/11').

2. Article 10 of Directive 97/11 provides that the directive was to be incorporated into national law by 14 March 1999 at the latest. The Commission has brought an action seeking a declaration that, by failing to transpose Directive 97/11 within the prescribed period or, in the alternative, by failing to inform the Commission that it has done so, the Grand Duchy of Luxembourg has failed to fulfil its obligations under the EC Treaty.

3. Luxembourg does not dispute the claim. On 23 November 1999, it sent the Commission a draft regulation. The Commission found this to be inadequate and therefore, by reasoned opinion dated 26 January 2000, required the Grand Duchy to comply with its obligations within two months. By letter of 17 April 2000, Luxembourg expressed the view that the Grand-Ducal regulation intended to transpose the directive would probably be adopted in the second half of 2000.

4. 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 time-limit prescribed by the reasoned opinion. The subject-matter of the action is the Commission's reasoned opinion. Even when the default is remedied after the time-limit prescribed by Article 226(2) EC has expired, 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 individuals. [3]

5. The Grand Duchy does not dispute the fact that it has failed to transpose Directive 97/11 within the prescribed period. Consequently, it is appropriate to uphold the Commission's application.

1 — Original language: German.

2 — OJ 1997 L 73, p. 5.

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

6. The Commission has also sought an order requiring Luxembourg 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.

Conclusion

7. For the reasons set out above, I propose that the Court declare that:

(1) by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to transpose Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, the Grand Duchy of Luxembourg has failed to fulfil its obligations under the EC Treaty;

(2) the Grand Duchy of Luxembourg is to pay the costs.