OPINION OF ADVOCATE GENERAL DÁMASO RUIZ-JARABO COLOMER
delivered on 14 September 2000 *

1. By the action it brought on 12 November 1999, the Commission seeks an order from the Court of Justice declaring that the Portuguese Republic has failed to fulfil certain obligations arising under Community law. The obligations in question are found in the following provisions, as worded pursuant to amendment by Article 2(1) of Directive 91/692/EEC [1] (hereinafter 'Directive 91/692'): Article 13(1) of Directive 76/464/EEC; [2] Article 14 of Directive 78/176/EEC, [3] as amended by Directive 83/29/EEC; [4] Article 16 of Directive 78/659/EEC; [5] Article 16(1) of Directive 80/68/EEC; [6] Article 5(1) and the first subparagraph of Article 5(2) of Directive 82/176/EEC; [7] Article 5(1) and (2) of Directive 83/513/EEC; [8] Article 6(1) of Directive 84/156/EEC; [9] Article 5(1) and (2) of Directive 84/491/EEC; [10] and Article 6(1) and (2) of Directive 86/280/EEC, [11] as amended by Directive 90/415/EEC. [12]

2. Under the provisions cited above, as worded pursuant to amendment by Article 2(1) of Directive 91/692:

'At intervals of three years the Member States shall send information to the Commission on the implementation of this Directive, in the form of a sectoral report which shall also cover other pertinent Community Directives. This report shall be drawn up on the basis of a questionnaire or outline drafted by the Commission in

* Original language: Spanish.

1 — Council Directive 91/692/EEC of 23 December 1991 standardising and rationalising reports on the implementation of certain Directives relating to the environment (OJ 1991 L 377, p. 48).

2 — Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23).

3 — Council Directive 78/176/EEC of 20 February 1978 on waste from the titanium dioxide industry (OJ 1978 L 54, p. 19).

4 — Council Directive 83/29/EEC of 24 January 1983 amending Directive 78/176/EEC on waste from the titanium dioxide industry (OJ 1983 L 32, p. 28).

5 — Council Directive 78/659/EEC of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life (OJ 1978 L 222, p. 1).

6 — Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (OJ 1980 L 20, p. 43).

7 — Council Directive 82/176/EEC of 22 March 1982 on limit values and quality objectives for mercury discharges by the chlor-alkali electrolysis industry (OJ 1982 L 81, p. 29).

8 — Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges (OJ 1983 L 291, p. 1).

9 — 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 (OJ 1984 L 74, p. 49).

10 — Council Directive 84/491/EEC of 9 October 1984 on limit values and quality objectives for discharges of hexachlorocyclohexane (OJ 1984 L 274, p. 11).

11 — Council Directive 86/280/EEC of 12 June 1986 on limit values and quality objectives for discharges of certain dangerous substances included in List I of the Annex to Directive 76/464/EEC (OJ 1986 L 181, p. 16).

12 — Council Directive 90/415/EEC of 27 July 1990 amending Annex II to Directive 86/280/EEC (OJ 1990 L 219, p. 49).

accordance with the procedure laid down in Article 6 of Directive 91/692/EEC. The questionnaire or outline shall be sent to the Member States six months before the start of the period covered by the report. The report shall be sent to the Commission within nine months of the end of the three-year period covered by it.

The first report shall cover the period from 1993 to 1995 inclusive.

The Commission shall publish a Community report on the implementation of the Directive within nine months of receiving the reports from the Member States.'

3. In accordance with Article 2(2) of Directive 91/692, the text set out in paragraph 2 above was also inserted in Directive 75/440/EEC [13] ('Directive 75/440') as Article 9a and in Directive 80/778/EEC [14] as Article 17a.

4. The Commission considers that the Portuguese Republic has also failed to fulfil its obligations under the first paragraph of Article 10 EC and the third paragraph of Article 249 EC.

I. The pre-litigation procedure

5. The Portuguese Republic should have sent its first report to the Commission by 30 September 1996. When it failed to do so, the Commission initiated the procedure laid down in Article 169 of the EC Treaty (now Article 226 EC), sending Portugal a letter of formal notice on 30 June 1998 which invited it to submit its observations within two months.

6. The Portuguese Government sent the Commission the reports on the implementation of Directives 75/440, 79/869 [15] and 79/923. [16] In the letters accompanying the reports the Government stated that it would send the other reports as soon as they were available. The Commission's application does not cover those directives.

7. The Commission subsequently delivered a reasoned opinion in which it highlighted the fact that the Portuguese Republic had still not supplied the reports required by the remaining directives, namely: Directives 76/464, 78/176, 78/659, 80/68, 82/176, 83/513, 84/156, 84/491, 86/280 and 80/778. It allowed Portugal a two-month period in which to comply with the obligations that the Commission complained it had failed to fulfil. On 26 April 1999, in response to that opinion, the Portuguese

13 — Council Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States (OJ 1975 L 194, p. 26).

14 — Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (OJ 1980 L 229, p. 11).

15 — Council Directive 79/869/EEC of 9 October 1979 concerning the methods of measurement and frequencies of sampling and analysis of surface water intended for the abstraction of drinking water in the Member States (OJ 1979 L 271, p. 44).

16 — Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters (OJ 1979 L 281, p. 47).

Government sent the report required by Directive 80/778 for the years 1993, 1994 and 1995. Consequently, that Directive is not referred to in the Commission's application.

II. Examination of the action

8. The Commission received no further reports and claims that when Member States behave in such a way, it is prevented from complying with the obligation imposed on it by the third subparagraph of Article 2(1) of Directive 91/692 to publish a Community report on the implementation of each directive within nine months of receiving the reports from the Member States. That is why the Commission has applied for an order declaring that the Portuguese Republic has failed to fulfil its obligations.

9. In its defence, the Portuguese Government cites the efforts which it has made in this field, in that it has already sent the Commission all the available data relating to the substances referred to in Directives 76/464, 82/176, 83/513, 84/156, 84/491 and 86/280 and collected for the period 1993 to 1998 by the authorities responsible for monitoring the aquatic environment. It adds that a programme has been set in motion which will enable Directive 76/464 to be fully implemented in Portugal within a short time. It is confident that the data collected, although not exhaustive, will enable reports to be drawn up in respect of each of the directives.

The report relating to Directive 80/68 is under way and will be forwarded to the Commission as soon as it is completed. Directive 78/176 on waste from the titanium dioxide industry, as amended by Directive 83/29, defines pollution as 'the discharge by man, directly or indirectly, of any residue from the titanium dioxide manufacturing process into the environment, the results of which are such as to cause hazards to human health, harm to living resources and to ecosystems, damage to amenities or interference with other legitimate uses of the environment concerned'. Since there are no commercial organisations in Portugal which produce titanium, it is not possible to establish that that type of waste is discharged or dumped at sea. Nor has it been established that waste of that kind has been discharged into surface water, or that it has been stored, tipped or injected. For those reasons the Portuguese Government submits that it is not necessary for it to respond to the questionnaire dealing with Directive 78/176. However, the reply to that questionnaire was enclosed with its defence.

Lastly, as regards Directive 78/659, the Portuguese Government states that data has been collected which will be used to draw up the report on the implementation of that directive, and that the Government is waiting for the designation of salmonoid and cyprinid waters to be approved at national level. Approval should be obtained during the first quarter of 2000. It asks the

Court to wait until 30 May when the reports will be presented and the Court may declare that the application has become devoid of any practical purpose.

10. In its reply, the Commission objects to that request, stating that when the action was brought Portugal had not sent the reports on the implementation of Directives 76/464, 78/176, 78/659, 80/68, 82/176, 83/513, 84/156, 84/491 and 86/280 for the period 1993 to 1995. For that reason it seeks from the Court a declaration that the Portuguese Republic has failed to fulfil its obligations.

11. In its rejoinder the Portuguese Republic states that, as a result of its efforts to collect data, Portugal is now able to deliver to the Commission the reports required by the provisions of the Directives that it is alleged to have infringed and it encloses the reports as Annexes I, II, III and IV. The Portuguese Republic submits that by doing this it has fully complied with the Directives, the delay being due to differences of opinion with the Commission as to the interpretation of the legislation in one instance and, in general, to a lack of human, material and technical resources. For those reasons, it asks the Court to declare that the dispute has become devoid of purpose and to order the Commission pay the costs.

12. The rejoinder, together with the four annexes referred to above, was lodged at the Registry of the Court of Justice on 30 March 2000. Taking account of the fact that the Commission has not withdrawn its application, I must conclude that it continues to seek a declaration from the Court of Justice that the Portuguese Republic has failed to fulfil its obligations.

13. In accordance with settled case-law, if a directive has not been transposed into national law within the prescribed period, an action for failure to fulfil obligations in that respect must be regarded as well founded. [17] In the present case, it has been established that the Portuguese Republic failed, within the period allowed, to comply with the obligations laid down by the directives cited by the Commission in its application.

14. It is also settled case-law that whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing at the end of the period laid down in the reasoned opinion, and subsequent changes cannot be taken into account by the Court. [18] It has already been established that, at the end of the period granted by the reasoned opinion, the Portuguese Republic had not sent the Commission the information requested.

15. As to the difficulties encountered by a Member State in implementing directives,

17 — Case C-268/93 *Commission* v *Spain* [1994] ECR I-947, paragraph 6; and Case C-137/97 *Commission* v *Italy* [1998] ECR I-605, paragraph 11.

18 — Case C-214/96 *Commission* v *Spain* [1998] ECR I-7661, paragraph 25; Joined Cases C-232/95 and C-233/95 *Commission* v *Greece* [1998] ECR I-3343, paragraph 38; and Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405, paragraph 20.

the Court has ruled that practical difficulties which emerge when it comes to implementing a Community measure cannot constitute a ground for a Member State unilaterally to exonerate itself from fulfilling its obligations, [19] and that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive. [20]

16. I disagree with the interpretation that the Portuguese Government gives Article 13(1) of Directive 78/176, whereby it regards itself as exempt, on the grounds that no waste is produced by the titanium dioxide industry in Portuguese territory, from the requirement of sending the Commission any report at all. Article 4 clearly distinguishes between a prior authorisation issued by the authorities of the Member State in whose territory the waste has been produced and a prior authorisation issued by the authorities of the Member State in whose territory the waste has been discharged, stored, dumped or injected or from whose territory it has been discharged or dumped. In my opinion, the disputed provision imposes an equal obligation on all Member States and, if no activities of that kind are carried out in a Member State's territory during the period under consideration, that fact must be indicated to the Commission in the State's report, which may not be dispensed with under any circumstances.

17. Consequently, I take the view that the Commission's application is well founded and that it is appropriate to declare that the Portuguese Republic has failed to fulfil its obligations under Community law by failing to provide the Commission, within the period allowed by the reasoned opinion, with the required information regarding the implementation of Directives 76/464/EEC, 78/176/EEC, 78/659/EEC, 80/68/EEC, 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC and 86/280/EEC.

III. Costs

18. 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. Since I propose that the Commission's application should be upheld and since the Commission has applied for costs against the Portuguese Republic, it is appropriate that the Portuguese Republic should be ordered to pay the costs of the proceedings.

19 — Case C-327/98 *Commission* v *France* [2000] ECR I-1851, paragraph 21; Case C-374/89 *Commission* v *Belgium* [1991] ECR I-367, paragraph 10; and Case 128/78 *Commission* v *United Kingdom* [1979] ECR 419, paragraph 10.

20 — Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 13; Case C-214/96 *Commission* v *Spain* [1998] ECR I-7661, paragraph 18; and Case C-259/94 *Commission* v *Greece* [1995] ECR I-1947, paragraph 5.

IV. Conclusion

19. For the reasons set out above, I propose that the Court of Justice:

(1) declare that the Portuguese Republic has failed to fulfil its obligations under the first paragraph of Article 10 EC; the third paragraph of Article 249 EC; Article 13(1) of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community; Article 14 of Council Directive 78/176/EEC of 20 February 1978 on waste from the titanium dioxide industry, as amended by Directive 83/29/EEC; Article 16 of Council Directive 78/659/EEC of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life; Article 16(1) of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances; Article 5(1) and the first subparagraph of Article 5(2) of Council Directive 82/176/EEC of 22 March 1982 on limit values and quality objectives for mercury discharges by the chlor-alkali electrolysis industry; Article 5(1) and (2) of Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges; Article 6(1) of 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; Article 5(1) and (2) of Council Directive 84/491/EEC of 9 October 1984 on limit values and quality objectives for discharges of hexachlorocyclohexane; and Article 6(1) and (2) of Council Directive 86/280/EEC of 12 June 1986 on limit values and quality objectives for discharges of certain dangerous substances included in List I of the Annex to Directive 76/464/EEC, as amended by Directive 90/415/EEC, as the provisions of those directives are worded pursuant to amendment by Article 2(1) of Council Directive 91/692/EEC of 23 December 1991 standardising and rationalising reports on the implementation of certain Directives relating to the environment.

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