OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 11 July 2000 *

1. By application of 20 August 1999, entered in the register of the Court Registry on 26 August 1999, the Commission brought proceedings against the French Republic for failure to implement Directive 97/68/EC of the European Parliament and of the Council of 16 December 1997 on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery [1] (hereinafter, the 'directive').

The relevant Community legislation

2. The purpose of the directive, as stated in Article 1 thereof, is to approximate the laws of the Member States relating to emission standards and type-approval procedures for engines to be installed in non-road mobile machinery, with the intention of contributing to the smooth functioning of the single market, while protecting human health and the environment.

3. Article 17 of the directive requires the Member States to bring into force the necessary national implementing measures not later than 30 June 1998 and to notify the Commission thereof forthwith. In particular, the Member States are required to communicate to the Commission the text of the provisions of national law which they adopt in the field governed by the directive.

Procedure

4. On 25 August 1998, not having received within the prescribed time-limit any communication regarding implementing measures and having no information from which it might be inferred that the French Republic had adopted such measures, the Commission sent the French Government a letter of formal notice in accordance with the first paragraph of Article 169 of the EC Treaty (now Article 226 EC) in which, *inter alia*, it requested that Government to submit its observations within a period of two months.

There was no reply to this letter. As a consequence, the Commission could only

* Original language: Italian.

1 — OJ 1998 L 59, p. 1.

note that the French Republic had not fulfilled the obligations incumbent upon it under the directive within the time prescribed. Accordingly, by letter of 17 December 1998, it delivered a reasoned opinion stating that, by not adopting the national measures to implement the directive within the period prescribed, or in any case by not communicating such measures to the Commission, France had failed to fulfil its obligations under the directive. In the same letter, the Commission called upon the French Republic to adopt the measures necessary to comply with the reasoned opinion, within a period of two months of notification. This second letter from the Commission also remained unanswered.

5. In its defence, lodged at the Registry on 8 November 1999, the French Government set out a number of facts to indicate that it had taken steps to ensure the adoption of national measures to implement the directive.

6. In this connection, the French Government stated that, by letter of 3 September 1999, it had sent the Commission the text of two pieces of draft legislation to transpose the directive into French law. [2] In that letter, it had pointed out in particular that on 10 March 1999, being indeed aware of the need to introduce the provisions necessary to comply with the directive, it had adopted an instrument concerning the appointment of the administrative and technical bodies responsible for examining applications from constructors, carrying out controls on the levels of pollutant residues and issuing EC type-approvals, as provided for in Article 16 of the directive. The French Government added that these two pieces of draft legislation had been approved by all the ministries concerned and would be sent to the Council of State for its opinion in November 1999; it would therefore be possible to notify the implementing measures to the Commission during the first three months of 2000.

7. However, the French Republic explicitly acknowledged that, upon expiry of the period specified by the Commission for the purpose, it had not transposed the directive into national law.

8. The Commission, in its reply lodged at the Registry on 9 December 1999, noted that the French authorities had explicitly acknowledged failure to transpose the directive into national law. It also emphasised that even the instrument of 10 March 1999 concerning the appointment of administrative and technical bodies had been adopted after the period for implementing the directive had expired, that is to

2 — The text of these drafts is annexed to the defence.

say, after 30 June 1998, and in any event after the expiry of the two-month period prescribed in the reasoned opinion, that is to say, after 17 February 1999.

9. On the basis of all those observations, the Commission claimed that the Court should:

(1) declare that, by failing to adopt within the prescribed time-limit the laws, regulations and administrative measures necessary in order to comply with Directive 97/68/EC of the European Parliament and of the Council of 16 December 1997 on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road machinery, alternatively by failing in any event to communicate those measures to the Commission, the French Republic had failed to fulfil its obligations under that directive;

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

10. In its rejoinder, lodged at the Registry on 10 January 2000, the French Government merely repeated the points already made regarding the facts and again gave assurances that national measures giving effect to the directive would be adopted within the first three months of 2000 and that the text of those provisions would be communicated to the Commission immediately upon adoption.

Whether there has been a failure to fulfil obligations

11. In my view, this action is well founded. There can be no question but that France has failed to comply with its obligations under the directive and the EC Treaty. As the French Government itself acknowledges, the transposition procedure has not yet been completed; thus, even now France has not yet implemented the directive. The fact that the procedure for adoption of the national implementing measures necessary is in hand and that the French authorities are taking action to bring it to completion cannot cure the failure to fulfil the obligation. It should be recalled that, in accordance with established case-law, 'the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion, and subsequent changes cannot be taken into account'. [3]

12. Moreover, the fact that, on 10 March 1999, the French Government adopted a

3 — See Joined Cases C-232/95 and C-233/95 *Commission* v *Greece* [1998] ECR I-3343, paragraph 38. See also Case C-60/96 *Commission* v *France* [1997] ECR I-3827, paragraph 15 and Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405, paragraph 20.

measure concerning the appointment of administrative and technical bodies responsible for monitoring the pollution produced by engines cannot remedy the French Government's failure to fulfil its obligations. While those measures are in line with the aims of the directive, they are none the less marginal as regards its material content and the many substantive obligations which it places on the Member States. It should also be added — and this point is conclusive — that in any case this measure was issued out of time, that is to say, after the deadlines specified first in the directive and then in the reasoned opinion for adoption of the national implementing measures.

Costs

13. Under Article 69(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs, if this has been requested. Since the Commission has applied for costs in this case, I propose that the French Republic — which, in my view, has been unsuccessful — be ordered to pay the costs.

Conclusion

14. In the light of all the foregoing considerations, I propose that the Court should rule as follows:

(1) The French Republic, by failing to adopt the laws, regulations and administrative measures necessary in order to comply with Directive 97/68/EC of the European Parliament and of the Council of 16 December 1997 on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road machinery and, in any event, by failing to communicate those measures and the content thereof to the Commission, has failed to fulfil its obligations under that directive.

(2) The French Republic is ordered to pay the costs.