OPINION OF ADVOCATE GENERAL LÉGER

delivered on 21 February 2002 [1]

1. The Commission of the European Communities has, in accordance with Article 226 EC, applied to the Court for a declaration that the Kingdom of Spain has failed to fulfil its obligations under Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants [2] by failing to take the measures necessary in order to ensure, with regard to the three incineration furnaces located at Mazo and Barlovento on the island of La Palma (Spain), the application of:

— Article 2 of Directive 89/369, inasmuch as the three furnaces are operating without authorisation having been issued for that purpose;

— Article 6 of Directive 89/369, inasmuch as, with regard to the said furnaces, the competent authorities:

  — have not taken periodic measurements in respect of the parameters prescribed by that article,

  — have not given prior authorisation for the sampling and measurement procedures or determined the location of the measurement points concerned,

  — have not laid down any measurement programme;

— Article 7 of Directive 89/369, inasmuch as the three furnaces are not equipped with auxiliary burners enabling a minimum combustion temperature of 850 °C to be guaranteed, particularly during start-up and shut-down operations.

2. The Commission has also asked the Court to order the Kingdom of Spain to pay the costs.

1 — Original language: French.

2 — OJ 1989 L 163, p. 32; hereinafter also referred to as 'the Directive'.

I — Legal framework

3. Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants [3] lays down measures and procedures aimed at preventing and/or reducing air pollution caused by industrial plants within the European Community.

4. Directive 89/369 sets out the obligations arising out of Directive 84/360 with regard to new municipal waste incineration plants, establishing rules governing the authorisation, equipping and operation of such plants.

5. Under Article 1(5) of Directive 89/369, '"new municipal waste incineration plant" means a municipal waste incineration plant for which authorisation to operate is granted as from the date specified in Article 12(1)'.

Article 12(1) states that 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 December 1990'.

6. Article 2 of Directive 89/369 provides:

'Without prejudice to Article 4 of Directive 84/360/EEC, Member States shall take the necessary measures to ensure that the conditions laid down in Articles 3 to 10 of this Directive are attached to the prior authorisation required to operate all new municipal waste incineration plants under Article 3 of Directive 84/360/EEC and under Article 8 of Directive 75/442/EEC.' [4]

7. Article 6 of Directive 89/369 states:

'1. The following measurements shall be taken at new municipal waste incineration plants:

(a) concentrations of certain substances in the combustion gases:

(i) concentrations of total dust, CO, oxygen and HCl shall be continu-

3 — OJ 1984 L 188, p. 20.

4 — Council directive of 15 July 1975 on waste (OJ 1975 L 194, p. 39).

ously measured, and recorded in the case of plants of a nominal capacity equal to, or greater than, 1 tonne/h;

(ii) the following shall be measured periodically:

— concentrations of the heavy metals referred to in Article 3(1), of HF, and of SO_2, in the case of plants of a nominal capacity equal to, or greater than, 1 tonne/h,

— concentrations of total dust, of HCl, of CO and of oxygen in the case of plants of a nominal capacity of less than 1 tonne/h,

— concentrations of organic compounds (expressed as total carbon) in general;

(b) operating parameters:

(i) the temperatures of the gases in the area where the conditions imposed by Article 4(1) are satisfied and the water vapour content of the combustion gases shall be continuously measured and recorded. Continuous measurement of the water vapour content shall not be necessary provided that the combustion gas is dried before the emissions are analysed;

(ii) the residence time of the combustion gases at the minimum temperature of 850 °C specified in Article 4(1) must be the subject of appropriate verifications at least once when the incineration plant is first brought into service and under the most unfavourable operating conditions envisaged.

...

3. All the measurement results shall be recorded, processed and presented in an appropriate fashion so that the competent authorities can verify compliance with the conditions laid down, in accordance with procedures to be decided upon by those authorities.

4. The sampling and measurement procedures used to satisfy the obligations imposed by paragraph 1 and the location of the sampling or measurement points shall require the prior approval of the competent authorities.

5. For the periodic measurements, the competent authorities shall lay down appropriate measurement programmes to ensure that the results are representative of the normal level of emissions of the substances concerned. The results obtained must be suitable for verifying that the limit values applicable have been observed.'

8. Article 7 of Directive 89/369 provides:

'All new municipal waste incineration plants shall be equipped with auxiliary burners. These burners must be switched on automatically when the temperature of the combustion gases falls below 850 °C. They shall also be used during plant start-up and shut-down operations in order to ensure that the abovementioned minimum temperature is maintained at all times during these operations and as long as the waste is in the combustion chamber.'

II — The facts and pre-litigation procedure

9. In 1993, a complaint was lodged with the Commission criticising a decision whereby the Island Council of La Palma authorised the installation of five incinerator furnaces at a number of localities on the island (two at El Paso, two at Mazo and one at Barlovento), citing irregularities affecting the granting of the authorisation and the operation of the furnaces.

10. By letter of 4 February 1994 and in a reminder dated 3 August 1994, the Commission invited the Spanish authorities to let it have their comments on the allegations within a period of two months and one month respectively.

11. By letter of 19 December 1994, the Spanish authorities acknowledged that the furnaces did not meet the requirements of Community rules as they were equipped neither with auxiliary systems for injecting fuel nor with combustion chambers. It was for this reason that they were not authorised to operate beyond 1 December

1995. It is apparent from the documents in the case that on 26 June 1995 the Commission addressed a letter of formal notice to the Kingdom of Spain without taking account of the Spanish authorities' reply of 19 December 1994.

12. On 20 November 1995, at a meeting held in Madrid (Spain), the Commission examined the issues with the Spanish authorities. In the course of that meeting, the Spanish authorities indicated that, with the entry into service of the new incineration plant at Mendo on the island of La Palma, it had been possible to close four of the five furnaces which were the subject of the complaint. They indicated further that, in the absence of alternative solutions, the incineration plant at Barlovento was still in operation, while pointing out that the Canary Islands authorities had given a commitment to resolve the problem in the course of 1996.

13. The information communicated to the Commission by the Spanish authorities was conveyed to the complainants. The latter disputed the assertion that four of the five furnaces concerned had been closed and affirmed that the two furnaces at Mazo and the furnace at Barlovento were continuing to operate.

14. By letter of 18 December 1996 and in a reminder dated 11 February 1997, the Commission asked the Spanish authorities to let it have their observations on the complainants' statements.

15. On 20 February 1997, the Spanish authorities sent the Commission a letter, which failed however to respond to the complainants' assertions. They provided the Commission with the integrated waste management plan for the Canary Islands. Consequently, by letter of 4 April 1997, the Commission again asked the Spanish authorities to submit their observations.

16. By letter of 16 June 1997, the Spanish authorities informed the Commission that the integrated waste management plan had been approved by the Island Council of La Palma on 4 April 1997.

17. On 23 September 1997, the Commission sent the Kingdom of Spain a complementary letter of formal notice inviting the Spanish authorities to submit their observations concerning the incineration plants at Mazo and Barlovento.

18. In their replies of 24 November 1997 and 28 November 1998, the Spanish authorities gave an account of the various measures they had taken to improve the management of waste on the island of La Palma.

19. Taking the view that the Kingdom of Spain had failed to fulfil certain obligations under Directives 89/369 and 84/360, the Commission, acting in accordance with Article 169 of the EC Treaty (now Article 226 EC), sent the Kingdom of Spain a reasoned opinion on 24 July 1998.

20. By letter of 6 August 1998, the Spanish authorities asked for the time-limit for replying to the reasoned opinion to be extended by one month. The extension was granted by the Commission, the new time-limit for replying to the reasoned opinion thus becoming 24 October 1998. The first reply to the reasoned opinion is to be found in a letter of 20 November 1998, to which is attached a note from the Island Council of La Palma supplying information on the progress of work on the integrated waste management plan for the island and on the various measures taken concerning waste collection and treatment.

21. By letter of 3 February 1999, the Spanish authorities sent the Commission additional information, that information being, according to the Commission, as follows. Firstly, the incineration plants at Mazo and Barlovento had started to operate although they had not received the authorisation required for them to be brought into service. Secondly, the Dinoze furnaces used in these two incineration plants had not been designed in accordance with Community rules concerning new municipal waste incineration plants and could not, in practice, have been equipped with auxiliary burners or combustion chambers. Thirdly, emission measurements had not been taken.

22. By letter of 28 May 1999, the Commission asked the Spanish authorities to supply it with a copy of the integrated waste management plan for the island of La Palma, to confirm the timetable for closure of the incineration furnaces and to provide it with information on the measures taken to comply with a decision of the Ministerial Department of Trade and Industry.

23. In reply to that letter, the Spanish authorities dispatched to the Commission, on 21 June 1999, a copy of the integrated waste management plan for the island of La Palma, approved on 2 October 1998, together with a preliminary study by the University of La Laguna, dated 10 June 1999, setting out a proposed work plan for implementing measures to monitor emissions and immissions from the incineration furnaces.

24. Concluding from the information furnished by the Kingdom of Spain that the infringements referred to in the reasoned opinion had not been made good, the Commission decided to bring the present action.

25. The Spanish Government disputes the admissibility of the action for failure to fulfil obligations and considers further that the action is unfounded.

III — Admissibility of the action

Arguments of the parties

26. The Spanish Government maintains that throughout the pre-litigation phase the Commission recognised that an authorisation had been granted, stating in this connection that 'the authorisation granted for the installation of the furnaces did not lay down the operating conditions required by the Directive'. [5] Now, however, the Commission is asserting before the Court that no authorisation had been given for the furnaces installed at Mazo and Barlovento to be brought into service.

27. The Spanish Government contends that that assertion is contrary to the position taken by the Commission during the pre-litigation phase and represents, moreover, a misinterpretation of the report of 30 November 1998 drawn up by the Ministerial Department of Trade and Industry of the Government of the Canary Islands and sent to the Commission on 3 February 1999. [6] According to the Spanish Government, the report confined itself to indicating that no authorisation was required from that department but did not state that no other authorisation was required. The Mazo and Barlovento plants had in fact been granted two authorisations.

28. The plants had first of all been granted, on 24 April 1990, a 'land-use authorisation' by the General Directorate of Urban Planning of the Ministerial Department of Land-Use Planning of the Government of the Canary Islands. The facilities were declared in that authorisation to be in the public interest and it was also stated that the final plans would have to conform with the technical descriptions to be attached to the authorisation. Secondly, the plants had undergone the compulsory formality of definition of the activity and assessment of any corrective measures that might be required, performed by the Island Council of La Palma on 9 January 1992.

29. The Spanish Government maintains therefore that the Commission has amended its complaint concerning Article 2 of Directive 89/369, contrary to the Court's settled case-law to the effect that the Commission's reasoned opinion and its application must be based on the same complaints as those stated in the letter of formal notice initiating the pre-litigation procedure. Since the complaint as formulated in the pre-litigation phase and the

5 — Defence, paragraph 16.

6 — Hereinafter the 'report'.

complaint set out in the application do not correspond, the present action is thus inadmissible.

30. According to the Commission, the requirement that its reasoned opinion and its application to the Court be based on the same complaints cannot be carried so far as to mean that in every case the statement of the subject-matter of the dispute in the reasoned opinion and the forms of order sought in the application must be exactly the same.

31. The Commission maintains that the case-law in question, concerning cases where the subject-matter has been stated more narrowly in the application than in the preceding phase, has been extended to cover cases where, at the application or reply stage, the forms of order sought are reformulated to take account of the arguments submitted by the Member State in the reply to the reasoned opinion or in the defence.

32. It maintains that the said case-law applies here, since account has been taken in the application of the arguments submitted by the Spanish authorities in their reply of 3 February 1999 to the reasoned opinion. According to the Commission, it can be seen from the report that although an authorisation to operate should have been granted, this had not been done.

33. The Commission adds that, under settled case-law, the requirement that the subject-matter of the action and that of the pre-litigation procedure should tally is justified on the ground that the possibility given to the State concerned to submit its observations constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure under Article 226 EC.

34. If the Spanish Government itself recognised in its reply to the reasoned opinion that the three incinerator furnaces on the island of La Palma were brought into service without authorisation to operate having previously been granted, it can hardly accuse the Commission of infringing the rights of the defence.

35. The Commission maintains, therefore, that as its application simply reformulates its complaints concerning failure to fulfil obligations to take account of the arguments put forward by the Spanish Government in its reply to the reasoned opinion, that application did not widen the subject-matter of the dispute.

36. The Spanish Government submits in its rejoinder that to accept the Commission's argument would amount to infringing the rights of the defence. The Commission has not, in its view, simply reformulated the subject-matter of the dispute but rather has submitted a different complaint, based on a misinterpretation by the Commission of the report.

Assessment

37. The Court has consistently held that the subject-matter of an application made under Article 226 EC is circumscribed by the pre-litigation procedure provided for by that article. The Commission's reasoned opinion and the application must therefore be based on the same complaints. [7]

38. According to the same case-law however, that requirement cannot be carried so far as to mean that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered but simply limited. [8]

39. I take the view that while, in the present case, the subject-matter of the dispute has not been limited, it has not been extended or altered either.

40. It is true that, during the pre-litigation procedure, the infringement with which the Commission charges the Kingdom of Spain focused on the fact that the authorisation granted to install the furnaces failed to impose the operating conditions prescribed by the Directive, whereas, in the application, the Commission considers the infringement to consist purely and simply of the absence of authorisation, within the meaning of Article 2 of the Directive.

41. This change in the way the complaint is presented should not be taken as an extension or alteration of the subject-matter of the dispute but as a reformulation designed to adjust the Commission's response in the light of the information given in the reply to the reasoned opinion.

42. It should be stressed in this connection that the complaint formulated by the Commission in the letters of formal notice, the reasoned opinion and the application concerns the Kingdom of Spain's failure to fulfil its obligations under Article 2 of the Directive.

43. While the Commission may have interpreted information subsequently received, and in particular the Spanish Government's reply of 3 February 1999 to the reasoned opinion, as constituting an acknowledgement by that government that no authorisation had been granted, the fact remains that the aim pursued through its complaints, namely compliance with the obligations under Article 2 of the Directive, remains essentially unchanged.

7 — See, in particular, Case C-11/95 *Commission* v *Belgium* [1996] ECR I-4115, paragraph 73.

8 — See, in particular, Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 56.

44. It should be remembered that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations under Community law or to avail itself of its right to defend itself against the complaints made by the Commission. [9]

45. I consider, with regard to that purpose, that the rights of the Kingdom of Spain have not been infringed.

46. The changes made by the Commission to the terms in which the application is couched are not such as to deprive the Kingdom of Spain of its ability to defend itself. In setting out its reasons for considering that the authorisation in question is free of the irregularities initially alleged by the Commission, the Kingdom of Spain necessarily maintains that the authorisation exists. The arguments it develops in its reply to the complaint as initially formulated by the Commission thus apply, *a fortiori*, in respect of the same complaint as finally presented in the application.

47. Nor has the Kingdom of Spain been deprived of the ability to comply with its obligations. Whether the infringement at issue is an absence of authorisation or the existence of improper authorisation, the measure that is required to make good the failure to fulfil obligations under Article 2 of the Directive is the same, namely that the Member State in question grant proper authorisation.

48. The plea of inadmissibility entered by the Spanish Government cannot therefore be accepted.

IV — The merits

49. The action for failure to fulfil obligations brought by the Commission is divided into three separate complaints: the absence of prior authorisation to operate, irregularities in respect of periodic measurements and failure to equip the three furnaces with auxiliary burners.

50. These will be taken in turn.

Prior authorisation to operate

51. The Commission recalls that, under Article 2 of the Directive, new incineration

9 — See, in particular, the order in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraph 16.

plants require 'prior authorisation... to operate', which is subject to the conditions laid down in Articles 3 to 10 of that directive.

52. It considers that as, in the present case, the incineration furnaces at Mazo and Barlovento have not received authorisation to operate, the Kingdom of Spain has failed to fulfil the obligations arising out of Article 2 of Directive 89/369.

53. The Spanish Government maintains that the Directive is not applicable to the furnaces in issue, going on to assert, in the alternative, that the authorisation to operate that was granted for them complies with the Directive.

The applicability of the Directive

54. According to the Spanish Government, the description 'new municipal waste incineration plant' applies only to plants in respect of which authorisation to operate was issued as from 1 December 1990. Installation of the incineration furnaces was however authorised by virtue of a 'land-use authorisation' granted on 24 April 1990, so that they should be regarded as 'plants already in existence'.

55. The Commission considers that the authorisation of 24 April 1990 is not a prior authorisation to operate, within the meaning of Article 2 of the Directive, but rather an authorisation associated with land-use planning, the purpose of which is to grant the right, not to operate, but to build furnaces.

56. It should be remembered that, in accordance with Articles 1(5) and 12(1) of the Directive, the latter is applicable only to municipal waste incineration plants granted authorisation to operate as from 1 December 1990.

57. Since the authorisations referred to by the Spanish authorities [10] were granted on 24 April 1990, that is prior to the date specified in the Directive, the latter is inapplicable if it can be shown that the authorisations of 24 April 1990 are indeed authorisations to operate.

58. To qualify as such from the legal point of view, the authorisations must satisfy the conditions established by the Community rules as they existed prior to the Directive. Under the terms of Article 2 of the Direc-

10 — There are in fact two authorisations, granted on the same date, one concerning the furnace at Mazo, the other the furnace at Barlovento (Annex 4 to the defence).

tive, prior authorisation to operate was already required under Article 3 of Directive 84/360 and Article 8 of Directive 75/442. The new feature introduced by Article 2 is that henceforth the Member States are required to ensure that the conditions laid down in the Directive are attached to that authorisation.

59. To comply with the provisions of Directives 84/360 and 75/442 the prior authorisation to operate must, essentially, be granted by a competent authority responsible for ensuring, in particular, that measures have been taken to counter the risk of air pollution.

60. It would seem that the authorisations of 24 April 1990, granted pursuant to Ley 5/1987 sobre ordenación urbanística del suelo rústica de la Comunidad Autónoma de Canarias (law of the Autonomous Community of the Canary Islands on urban planning in rural areas), [11] constitute measures authorising construction of the furnaces and declaring that they serve the public interest, as is borne out by their wording. It is not however apparent from the documents concerned that the authorisation they accord is sufficient for the furnaces to be brought into operation nor that the purpose of the technical requirements to which adoption of the measures is subject is in fact to counter the risk of air pollution.

11 — BOC No 48 of 17 April 1987.

61. On the contrary, it is stated there that the authorisation granted does not relieve the beneficiary of the obligation to obtain a municipal licence. According to the Spanish Government's statements at the hearing, the municipal licence is the measure corresponding, in Spanish law, to the authorisation required under Directives 84/360 and 75/442. It maintains that the only basic authorisation that is genuinely compulsory for the installation of pollution-causing industrial facilities is the municipal authorisation to install, open and operate facilities granted under Reglamento 2414/1961 de Actividades Molestas, Insalubres, Nocivas y Peligrosas (regulation on activities that constitute a nuisance or are health-endangering, harmful or dangerous) of 30 November 1961. [12]

62. The Spanish Government does however indicate that, in accordance with the 1961 Regulation, the compulsory formality of defining the activity and assessing any corrective measures required was carried out by the Island Council of La Palma on 9 January 1992. [13] The decree to which the Spanish Government refers, and which it described at the hearing as a municipal licence, was adopted after the date, 1 December 1990, provided for in Articles 1(5) and 12(1) of the Directive.

12 — BOE No 292 of 7 December 1961; hereinafter the '1961 Regulation' (Annex 6 to the defence).

13 — Paragraph 11 of the defence. The document does in fact refer to the date of 9 January 1991 (Annex 5 to the defence) but it would seem that the correct year is indeed 1992, as evidenced by the preamble to the decree, where reference is made to another decree bearing a date in November 1991. In any event, this uncertainty as to the date of the decree does nothing to modify my line of argument since both dates are later than the date which determines the Directive's applicability.

63. There can be no doubt therefore that the authorisations granted in 1990 do not constitute prior authorisations to operate, within the meaning of Directives 84/360 and 75/442, and that the municipal licence on the strength of which the furnaces in question were brought into service in January and May 1992 should have been subject to the body of rules established by the Directive.

Compliance with the Directive of the prior authorisation to operate

64. The Spanish Government maintains that the Kingdom of Spain has not failed to comply with its obligations under Article 2 of the Directive, the Commission having interpreted that provision incorrectly.

65. According to the Spanish Government, Article 2 of the Directive requires Member States to take the necessary measures to ensure that the conditions laid down in Articles 3 to 10 of the Directive are attached to the prior authorisation to operate all waste incineration plants. That requirement has, in its contention, been met by Real Decreto 1088/1992 de normas sobre limitación de emisiones a la atmósfera de determinados agentes contaminentes procedentes de instalaciones de incineración de residuos municipales (royal decree on limiting emissions into the atmosphere of certain polluting agents from municipal waste incineration plants) of 11 September 1992. [14]

66. The Commission does not share that interpretation. In its view it would reduce the content of Article 2 of the Directive to an obligation on the part of the Member States to incorporate the Directive in their legal systems, without entailing that non-application of Article 2 in a specific case such as that at issue in the present proceedings could be regarded as a breach of obligations.

67. The Commission asserts, in response to the Spanish Government's contention that the competent authorities granted not only the land-use authorisations of 24 April 1990 but also the authorisations to carry out scheduled activities of 9 January 1992, that the authorisations concerned do not fulfil the conditions laid down by Article 2 of the Directive and cannot therefore be treated as prior authorisations to operate.

68. The Spanish Government replies that as environmental protection measures have been incorporated in the authorisations to carry out scheduled activities, the purpose pursued by those authorisations can be treated as the objective of effective pro-

14 — BOE No 235 of 30 September 1992; hereinafter 'Decree 1088/1992'. Paragraphs 21 and 22 of the defence.

tection of the environment provided for in the 11th recital in the preamble to the Directive. It adds that incorporation of the Directive in the Spanish legal system took place after the dates of the authorisations concerned.

69. The two series of arguments developed by the Spanish Government need to be examined in turn.

70. On the first point, concerning transposition of the Directive by means of Decree 1088/1992, it should be remembered that, under the third paragraph of Article 249 EC, directives are binding, as to the result to be achieved, upon each Member State to which they are addressed. That obligation involves, for each Member State to which a directive is addressed, the adoption, within the framework of its national legal system, of all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues. [15]

71. In the present case, the Community rule whose obligations the Commission claims the Kingdom of Spain has failed to observe is Article 2 of the Directive. That provision requires Member States to ensure that the conditions laid down in Articles 3 to 10 of the Directive are attached to the prior authorisation required to operate all new municipal waste incineration plants.

72. In maintaining that the obligation arising out of this provision of the Directive has been fulfilled through the adoption of Decree 1088/1992 transposing that provision, the Spanish Government asserts that it has adopted a national legal framework designed to ensure that the Directive is fully effective, without however establishing that the obligation concerned had in fact been fulfilled in the case of the incineration plants at issue.

73. Furthermore, even supposing that the transposition of the Directive by means of Decree 1088/1992 complies with Article 2 of the Directive, it has to be pointed out that that decree was adopted on 11 September 1992, that is to say after the time-limit for transposition of the Directive and after the months of January and May 1992, when the furnaces were brought into service.

74. In those circumstances, for the Spanish Government to be shown to have fulfilled its obligations under Article 2 of the Directive, it must be established that the authorisations of 9 January 1992 comply with the requirements of that article, which is the subject of the second point made by that government.

15 — Case C-97/00 *Commission* v *France* [2001] ECR I-2053, paragraph 9.

75. For the measure issued by the national authorities to qualify as a prior authorisation to operate, within the meaning of Article 2 of the Directive, the conditions laid down in Articles 3 to 10 of the Directive must have attached thereto. Those conditions include conditions which are specifically the object of the Commission's other two complaints against the Spanish Government, namely the carrying-out of the periodic measurements specified in Article 6 and the equipping of the furnaces with auxiliary burners as required by Article 7.

76. It must therefore be ascertained whether these obligations have been fulfilled.

The periodic measurements

77. It will be remembered that, according to the Commission, the competent authorities did not take periodic measurements, in the new waste incineration plants, in respect of the parameters prescribed by Article 6 of the Directive; nor did they give prior authorisation for the sampling and measurement procedures, determine the location of the measurement points concerned or lay down any measurement programme.

78. Examination of the content of the authorisations of 9 January 1992 has revealed nothing to indicate that they were granted subject to the carrying-out of such measurements. This complaint has not moreover been disputed by the Spanish Government, which has at no time claimed to have taken the periodic measurements prescribed by Article 6 of the Directive.

79. This complaint must therefore be declared well founded.

The auxiliary burners

80. The Commission maintains that the three furnaces should have been equipped with auxiliary burners to enable a minimum combustion temperature of 850 °C to be guaranteed, in accordance with Article 7 of the Directive.

81. There is again no reference in the authorisations of 9 January 1992 to any such requirements on which entry into service of the furnaces would be dependent. The Spanish Government has not moreover disputed that operation of the plants was affected by this shortcoming.

82. This complaint must therefore be upheld.

83. That disregard of the obligations laid down in Articles 6 and 7 of the Directive

leads me to conclude that the authorisations granted on 9 January 1992 lack the essential features which they must, under Article 2 of the Directive, exhibit in order to qualify as 'prior authorisations to operate'. It follows that, in authorising operation of the furnaces in question without ensuring compliance with each of the conditions laid down in Article 2 of the Directive, the Kingdom of Spain has failed to fulfil its obligations under that provision.

84. It should be added that the Spanish Government's arguments concerning the limited environmental impact of the incineration furnaces' operations and their decommissioning as from April 2000 are not such as to justify the Spanish Government's failure to fulfil its obligations.

85. Concerning the effects on the environment of the furnaces' operations, it has to be emphasised that, even assuming the impact of those operations attained an environmentally acceptable level, this result, to which the Spanish authorities lay claim, did not relieve them of the need to comply with their obligations under Articles 2, 6 and 7 of the Directive, which require the Member States to take the measures detailed therein.

86. As to the decommissioning of the incinerators, attention need only be drawn to the Court's settled case-law that the question 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. [16]

87. In the present case, the period laid down in the reasoned opinion came to an end on 28 October 1998. As at that date, the furnaces were still in service, their operations having terminated in September 2000, as the Spanish Government confirmed at the hearing.

88. It can be concluded from the foregoing that the application for a declaration of failure to fulfil obligations should be granted.

89. Under Article 69(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings, which is the case here. I therefore conclude that the Kingdom of Spain should be ordered to pay the costs.

16 — Case C-384/97 *Commission* v *Greece* [2000] ECR I-3823, paragraph 35.

Conclusion

90. In the light of the foregoing considerations, I therefore propose that the Court should declare that:

(1) by failing to take the measures necessary in order to ensure, with regard to the three incineration furnaces located at Mazo and Barlovento on the island of La Palma (Spain), the application of:

— Article 2 of Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants, inasmuch as the three furnaces are operating without authorisation having been issued in accordance with that article;

— Article 6 of Directive 89/369, inasmuch as, with regard to the said furnaces, the competent authorities:

— have not taken periodic measurements in respect of the parameters prescribed by that article,

— have not given prior authorisation for the sampling and measurement procedures or determined the location of the measurement points concerned,

— have not laid down any measurement programme;

— Article 7 of Directive 89/369, inasmuch as the three furnaces are not equipped with auxiliary burners;

the Kingdom of Spain has failed to fulfil its obligations under the said provisions of Council Directive 89/369.

(2) the Spanish Government is ordered to pay the costs.