

OPINION OF ADVOCATE GENERAL

GEELHOED

delivered on 24 November 2005 <sup>1</sup>

I — Background

1. By its judgment in Case C-52/00 *Commission v France*,<sup>2</sup> the Court of Justice declared that the French Republic had failed to fulfil its obligations under Article 9(b), Article 3(3) and Article 7 respectively of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products<sup>3</sup> ('the Directive' or 'Directive 85/374');

— by including damage of less than EUR 500 in Article 1386-2 of the French Civil Code;

— by providing in the first paragraph of Article 1386-7 of that code that the supplier of a defective product is liable in all cases and on the same basis as the producer;

— by providing in the second paragraph of Article 1386-12 of the code that the producer must show that he has taken appropriate steps to avert the consequences of a defective product in order to be able to rely on the grounds of exemption from liability provided for in Articles 7(d) and (e) of the Directive.

2. Being of the view that the French Republic had failed to take the necessary measures to comply with the judgment in Case C-52/00 *Commission v France*, the Commission sent it a letter of formal notice under the procedure laid down in Article 228 EC.

3. By letter of 27 June 2003, the French authorities responded to the letter of formal notice. That response contained the amendments to the Civil Code envisaged in order to put an end to the infringement alleged, and added that those amendments still had to undergo the parliamentary procedure.

1 — Original language: French.

2 — Case C-52/00 [2002] ECR I-3827.

3 — OJ 1985 L 210, p. 29.

4. On 11 July 2003, the Commission sent the French Republic a reasoned opinion inviting it, within two months, to comply with the judgment in Case C-52/00 *Commission v France*.

5. The French authorities replied to that reasoned opinion by a letter of 9 September 2003 in which they informed the Commission that a draft law was in preparation but that unfortunately they could not at that stage give any commitment as to the dates of the parliamentary calendar.

6. Taking the view that the French Republic was still failing to comply with the judgment in Case C-52/00 *Commission v France*, on 14 April 2004 the Commission brought the present action.

## II — The proceedings

7. According to its original wording, the Commission's action sought, first, a declaration that, by failing to take the necessary measures to comply with the judgment in Case C-52/00 *Commission v France*, on the incorrect transposition of the Directive, the French Republic had failed to fulfil its obligations under Article 228(1) EC and, second, an order that the French Republic pay the Commission (into the 'European

Community own resources' account) a penalty payment of EUR 137 150 for each day of delay in complying with that judgment, from the date on which judgment is delivered in this case until that on which the judgment in Case C-52/00 *Commission v France* is complied with. The Commission also applied for an order against the French Republic for costs in the proceedings.

8. In its defence, the French Government conceded that it had not yet complied with the judgment in Case C-52/00 *Commission v France*. It confined itself to disputing the amount of the penalty payment proposed by the Commission, which it considered excessive.

9. In its rejoinder, the French Government asserted that it had commenced the process of complying with the judgment in Case C-52/00 *Commission v France* from the very year in which it was delivered and that it had kept the Commission informed of the difficulties it had encountered, associated principally with its initial intention to transpose in a single text Directive 85/374 and Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.<sup>4</sup> In contrast, once it had been decided to transpose each directive separately, compliance with the judgment in Case C-52/00 *Commission v France* had taken place swiftly.

<sup>4</sup> — OJ 1999 L 171, p. 12.

10. In an annex to its rejoinder, the French Government produced Article 29 of Law No 2004-1343 of 9 December 2004 on the simplification of the law<sup>5</sup> ('the 2004 Law'), which provides:

I — The Civil Code is amended as follows:

1. Article 1386-2 shall read as follows:

"Article 1386-2. — The provisions of this title shall apply to compensation for damage resulting from personal injury.

They shall also apply to compensation for damage exceeding an amount defined by decree resulting from damage to property other than the defective product itself."

2. The first paragraph of Article 1386-7 shall read as follows:

"The vendor, hirer, except a lessor under a hire purchase agreement or a hirer assimilable thereto, or any other supplier in the course of business shall be liable for safety

defects in his products on the same basis as the producer only if the latter is unknown.";

3. The second paragraph of Article 1386-12 is repealed.

II — The provisions of subparagraph I shall apply to products placed in circulation after the date on which Law No 98-389 of 19 May 1998 on liability for defective products came into force, even if the products were the subject-matter of an earlier contract. However, those provisions shall not apply to disputes in which a final judicial decision has been delivered by the date of publication of the present law.

...

11. Subsequently to filing its rejoinder, the French Government also sent a note to the Commission annexing a copy of Decree No 2015-113 of 11 February 2005 implementing Article 1386-2 of the Civil Code<sup>6</sup> ('the 2005 Decree'), Article 1 of which provides that 'the amount referred to in Article 1386-2 of the Civil Code is fixed at EUR 500'.

<sup>5</sup> — JORF of 10 December 2004, p. 20857.

<sup>6</sup> — JORF of 12 February 2005.

12. Invited by the French Government to consider the possibility of withdrawing its action in the light of the amendments enacted by the 2004 Law and the 2005 Decree, the Commission informed the government and, by letter of 15 April 2005, the Court that it would partially withdraw its action at the hearing to take place in the present case.

13. Since it considered that the 2004 Law and the 2005 Decree still did not afford full compliance with the judgment in Case C-52/00 *Commission v France*, the Commission intended to continue its action, whilst reducing both the extent of the declaration it had sought in its application and the amount of the penalty payment it was proposing. In the view of the Commission, with respect to the three complaints upheld in the judgment in Case C-52/00 *Commission v France*, two of the infringements complained of had ceased and the third now persisted only partially, in so far as there were substantially fewer cases in which the supplier of the defective product was liable instead of the producer.

14. In those circumstances, the Commission reduced the extent of the declaration it was seeking in point I of its application, which it now worded as follows: 'By failing to take certain of the measures necessary to comply with the judgment of the Court of Justice of the European Communities of 25 April 2002 in Case C-52/00 concerning the incorrect transposition of Directive 85/374, more particularly by continuing to regard the

supplier of a defective product as liable on the same basis as the producer where the producer cannot be identified, even though the supplier has informed the injured person within a reasonable time of the identity of the person who supplied him with the product, the French Republic has failed to fulfil its obligations under Article 228(1) EC.'

15. As regards the amount of the penalty payment payable by the French Republic, the Commission stated that, in the light of the new circumstances, it considered it appropriate to reduce the seriousness coefficient from 10 (on a scale of 1 to 20), as initially suggested, to 1 (on a scale of 1 to 20). The resulting figure is EUR 13 715.

16. The Commission has maintained its claim for an order against the French Republic for the costs of the proceedings.

### III — Legal framework

17. In what remains of the action, the only issue is whether the first paragraph of Article 1386-7 of the Civil Code, as amended by Article 29 of the 2004 Law, is compliant with Article 3(3) of the Directive.

18. The first paragraph of Article 1386-7 of the Civil Code now reads as follows:

‘The vendor, hirer, except a lessor under a hire purchase agreement or a hirer assimilable thereto, or any other supplier in the course of business shall be liable for safety defects in his products on the same basis as the producer only if the latter is unknown.’

19. Article 3(3) of the Directive provides as follows:

‘Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.’

#### IV — Arguments of the parties

20. During the written procedure up to and including the reply, the debate between the parties centred on the method of calculating the amount of the penalty payment sought

by the Commission. The French Government acknowledged in principle that it had not yet complied with the judgment in Case C-52/00 *Commission v France*.

21. The Commission’s partial withdrawal of its application, which it had already announced in its letter of 15 April 2005 and confirmed at the hearing of 11 October 2005, fundamentally altered the substance of the dispute. That substance now consists solely of whether the first paragraph of Article 1386-7 of the French Civil Code, as amended by the 2004 Law,<sup>7</sup> is compliant with Article 3(3) of the Directive and, if the answer is in the negative, whether the penalty payment which the Commission is now seeking is appropriate.

22. The Commission asserted that, by the expiry date of the period set in the reasoned opinion, 11 September 2003, the French Republic had not adopted any measure to comply with the judgment in Case C-52/00 *Commission v France*. On the basis of the case-law of the Court, the Commission could have obtained a declaration of infringement on the grounds of total failure to implement the ruling. However, in the interests of reasonableness and efficacy, it opted to reduce the matters covered by the action in response to the legislative measures taken by the French Republic. According to the settled case-law on the application of Article 226 EC, such a reduction in the substance of infringement proceedings is lawful provided the subject-matter of the action is neither extended nor altered.

<sup>7</sup> — Cited in point 10.

23. Basing itself on a thorough analysis of the amendments which the French legislature had made to national law, the Commission reached the conclusion that the first and third limbs of its action had become devoid of purpose. Only the transposition of Article 3(3) of the Directive remained deficient. Accordingly, it chose to pursue its action in so far as the French Republic had not yet fully complied with the Court's judgment on the second complaint in Case C-52/00 *Commission v France*. In that regard, the Commission further pointed out that, in the present case, no new complaint was being raised, but what was left of one of the original limbs of the present action.

24. In essence, the Commission's complaint against the French Republic is that Article 1386-7 of the French Civil Code, as amended by the 2004 Law, by maintaining the supplier's liability where he informs the injured person, within a reasonable time, of the identity of his own supplier, does not bring the law fully into conformity with Article 3(3) of the Directive. The Commission points out that that provision of the Directive implies that the supplier can relieve himself of his liability if he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product.

25. As regards the penalty payment it had proposed, the Commission notes that, taking into account the recent considerable efforts by the French authorities resulting in most of

the original complaints ceasing to exist, the coefficient for seriousness should be reduced from 10 to 1 (on a scale of 1 to 20), which, since the other factors in the calculation remain unchanged, gives a sum of EUR 13 715 for each day of delay from the time the Court gives judgment.

26. At the hearing, the French Government reiterated its view, which it had already expressed in its letter to the Court of 17 May 2005, that the complaint maintained by the Commission was in fact a new complaint which that government has not yet been in a position to discuss.

27. In the proceedings in Case C-52/00 *Commission v France*, the Commission levelled against the French Government only the complaint of incorrect transposition of Article 3(3) of the Directive to the extent that Article 1386-7 of the Civil Code failed to provide that the supplier is liable only on a secondary basis where the producer is unknown. On that point, the French Government refers to paragraph 36 of that judgment, to paragraphs 37 to 39 of the application in that case, and to paragraphs 34 to 36 of the Commission's reply in the present case.

28. Accordingly, the Commission did not at any time, until its letter of 15 April 2005, allege against the French Government what it is now alleging, namely that it should have provided in Article 1386-7 of the Civil Code

that the supplier of a defective product can be relieved of liability, not only if he has informed the injured party, within a reasonable period of time, of the identity of the producer, but also where he has indicated the identity of his own supplier.

29. So, had the Commission considered that the transposition of Article 3(3) of the Directive was still incorrect because it left the supplier liable where he has informed the injured party of the identity of his own supplier, it should have brought proceedings against the French Republic under Article 226 EC. In the present proceedings, according to the French Government, the new plea is inadmissible.

30. As regards the merits of the case, the French Government also claimed, in the alternative, that the transposition effected by the 2004 Law was correct. The legal nature of a directive does not require its terms to be reproduced literally in national law. Furthermore, the option under Article 3(3) of the Directive for a supplier to inform the injured person of the identity of his own supplier can only operate on a secondary basis, that is to say, when the producer is unknown, a rather rare occurrence. Finally, the injured person's direct remedy against the supplier's supplier does not necessarily preclude him from bringing multiple actions, in order, for example, to avert possible delaying tactics. It follows that, as regards the result sought by the Directive, French law does fulfil the Directive on that point.

31. Next, the French Government asserted that, as early as in its letter of 27 June 2003, responding to the letter of formal notice, it had conveyed to the Commission the text of the amendment it envisaged to Article 1386-7 of the Civil Code, designed to comply with the judgment in Case C-52/00 *Commission v France*. According to the duty of loyal cooperation between the Community institutions and the Member States, enshrined in Article 10 EC, the Commission should have contacted the French Government if it had any objections to the text which the latter had communicated to it, rather than waiting for the text to be adopted by the French Parliament.

32. In that context, the French Government refers to the case-law of the Court, according to which one of the objectives of the pre-litigation procedure is to enable the Member State concerned to bring itself as quickly and fully as possible into line with Community law. By implication, therefore, the Commission should inform the Member State at as early a stage as possible of any objections arising from a piece of draft legislation seeking to transpose a directive.

33. In the absence of any objection to its draft legislation by the Commission, the French Government was entitled to infer that the latter found the draft to be acceptable. In consequence, it was submitted to the French Parliament with a view to its adoption.

34. Lastly, the French Government referred to the Commission's written reply of 5 July 2005 to the questions raised by the Court, in particular in relation to the method for setting the coefficient for the duration of the infringement. According to that government, the method in question, set by the College of Commissioners on 2 April 2001, should have been published or in any event communicated to the Member States.

36. The French Republic contested the admissibility of the residual plea, employing two arguments:

- the partial complaint in question is in fact a new plea, because the Commission had not explicitly asked the Court, in Case C-52/00 *Commission v France*, to declare that the French Republic should expressly have exempted the supplier from liability where the latter could inform the injured person only of the name of his own supplier;

## V — Analysis

35. It emerges from the foregoing that, as the proceedings currently stand, there are still three matters on which the parties are in disagreement:

- the admissibility of the remaining part of the Commission's complaint that the French Government has not yet correctly transposed Article 3(3) of the Directive into its national law;

- in the alternative, the Commission should immediately have indicated to the French authorities that the wording of Article 1386-7 as apparent from the draft amending legislation at the time it was communicated to the Commission — by letter of 27 June 2003 — was still unsatisfactory for the purposes of correctly transposing the Directive.

- the merits of that complaint;

37. Neither of those arguments is, in my view, convincing.

- lastly, whether the Commission used the correct method to calculate the coefficient relating to the duration of the infringement.

38. The subject-matter of the present action lies in the failure to comply in due time with the judgment in Case C-52/00 *Commission v France*. It is that judgment which defined and circumscribed the substantive obliga-

tions of the French Republic, as is clearly apparent, moreover, from the case-file of the pre-litigation procedure and from the pleadings exchanged between the parties in the present case.

39. Following the note of 23 February 2005 in which the French Government argued that Article 29 of the 2004 Law, in conjunction with the 2005 Decree, afforded full compliance with the judgment in Case C-52/00 *Commission v France*, the Commission had to react by analysing and assessing that information. Those processes culminated in the observation that the government in question had indeed complied with the greater part of the judgment, but not all of it. In so far as the residual part where there had not been compliance was concerned, the Commission opted to continue the present action.

40. It is common ground that the part of Article 3(3) of the Directive full implementation of which remains in dispute falls entirely within the framework of the present proceedings, as defined in the Commission's formal notice and reasoned opinion. Its subject-matter has merely become less. Instead of the three elements to which the operative provisions of the judgment in Case C-52/00 *Commission v France* refer, only one part of the second element of those provisions is now at issue.

41. According to the settled case-law of the Court on the interpretation of Article 226 EC, the pre-litigation procedure pursues three objectives:

- to place the Member State concerned in a position to rectify any infringement by it;
- to enable the Member State to exercise its rights of defence;
- to define the subject-matter of the dispute with a view to an action before the Court.<sup>8</sup>

It follows that, once the pre-litigation procedure is closed, the Commission can no longer extend or alter the subject-matter of the dispute. Conversely, it is perfectly entitled to reduce the subject-matter, since such a reduction cannot detract from the fundamental procedural safeguards for Member States.

42. In the context of applying Article 228(2) EC, the pre-litigation procedure serves similar purposes to those of the procedure established in Article 226 EC. Accordingly, the Commission is entitled to reduce the subject-matter of the dispute during the procedure before the Court, provided that the subject-matter remains unaltered as regards the matters covered.

<sup>8</sup> — Case C-362/01 *Commission v Ireland* [2002] ECR I-11433, paragraphs 16 to 18.

43. In the present case, the Commission has reduced the subject-matter of the dispute, whilst its content has stayed the same, that is to say, full and correct compliance with the judgment in Case C-52/00 *Commission v France*. The fact that the French Government and the Commission now disagree as to the exact extent of the obligations deriving from Article 3(3) of the Directive in no way detracts from that observation. Any obligation to comply with a ruling of the Court may involve questions as to the precise content of that ruling. Where necessary, they must be resolved in the course of the procedure under Article 228 EC. On that point, I would also mention the recent ruling in a different *Commission v France* case,<sup>9</sup> in which the Court had to begin by establishing the exact obligations of the French Republic as discernible from the relevant Community rules before it could determine whether the French Republic had failed fully and correctly to comply with the earlier judgment of the Court of 11 June 1991.<sup>10</sup>

44. Moreover, the French Government's argument would lead to the unsatisfactory, indeed paradoxical, outcome that partial compliance with a judgment of the Court under Article 226 EC would entail the Commission having to bring fresh proceedings under the same article. In my view, such a consequence would be highly undesirable from the point of view of procedural economy.

45. That being so, I would call to mind the history of the present case. Already in its judgment of 13 January 1993,<sup>11</sup> the Court was obliged to find that the French Republic had failed to fulfil its obligations by not transposing the Directive within the period laid down in Article 19. Then, in its judgment of 25 April 2002,<sup>12</sup> the Court held that the French Republic had not correctly implemented the Directive. To entertain the French thesis, which, moreover, I believe to be intrinsically unfounded, would potentially give rise to a fourth and even a fifth set of proceedings relating to the transposition of the Directive by the French Republic.

46. It is in the light of the foregoing that I must appraise the argument that the obligations of the Member States, when bound to comply with a judgment against them by the Court under Article 226 EC, are delimited by the terms of the pleas submitted by the Commission in those earlier proceedings.

47. In advancing that argument, the French Government is overlooking the fact that the subject-matter of the Article 228 EC procedure always was determined by the Court's earlier judgment. The present proceedings cannot have any subject-matter other than the failure to comply with that judgment or the incorrect or incomplete nature of that compliance.

9 – C-304/02 [2005] ECR I-6263, judgment of 12 July 2005.

10 – Case C-64/88 *Commission v France* [1991] ECR I-2727.

11 – Case C-293-91 *Commission v France* [1993] ECR I-1.

12 – Case C-52/00 *Commission v France*.

48. It is admittedly within the bounds of possibility that issues as to the scope of the earlier judgment may arise in the course of the Article 228 EC procedure. However, such issues do not go to the admissibility of the action but to its merits. That is why I shall return at a later stage to that argument of the French Government.

49. Nor does that government's argument in the alternative seem tenable.

50. Whether the Commission should have informed the French authorities of its view that the proposed wording of Article 1386-7 of the Civil Code amounted to an incomplete transposition of Article 3(3) of the Directive, or whether it was for the French Republic explicitly to invite the Commission to convey its comments on the text, is irrelevant as regards assessing the admissibility of the present action.

51. It is not my intention to rule out that deficiencies in the cooperation between the Commission and the Member States in relation to compliance with judgments of the Court may have consequences at the time of assessing the merits of an action under Article 228 EC or the severity of any penalties, but circumstantial factors of that nature are not such as to affect the

admissibility of an action which would otherwise be perfectly admissible.

52. As regards the merits of the present case, it is necessary to determine whether Article 1386-7 of the Civil Code, in its current wording, satisfies the requirements of Article 3(3) of the Directive.

53. In its judgment in Case C-52/00 *Commission v France*, the Court explicitly held that the Directive sought to achieve, in the matters regulated by it, complete harmonisation of the laws, regulations and administrative provisions of the Member States.<sup>13</sup> It follows that the Member States are no longer entitled to maintain a general system of defective product liability different from that established by the Directive. Accordingly, in order to ascertain the exact obligations of the Member States, one must refer to the literal wording and to the scheme of the Directive itself.

54. The wording of Article 3(3) leaves little room for doubt. According to the first sentence, '... each supplier [of a defective product] shall be treated as its producer

<sup>13</sup> — Paragraph 24.

unless he informs the injured person, within a reasonable time, of the identity of the producer or *of the person*<sup>14</sup> who supplied him with the product'. The first paragraph of Article 1386-7 of the Civil Code now reads: '[t]he vendor ... or any other supplier in the course of business shall be liable for safety defects in his products on the same basis as the *producer*<sup>15</sup> only if the latter is unknown.'

55. Comparing the two texts, it is clear, straight away, that the French legislature neglected to include 'the supplier's supplier' in the new wording of Article 1386-7 of the Civil Code. As a result, the transposition of Article 3(3) of the Directive into French law is not yet complete.

56. Of itself, that observation is sufficient to conclude that the present action is well founded.

57. However, for the sake of completeness, I shall comment briefly on the French Government's argument regarding the residual subject-matter of the dispute.

58. As I pointed out in point 53 above, in paragraph 24 of the judgment in Case C-52/00 *Commission v France*, the Court had already held that the Directive sought to achieve total harmonisation of the provisions of the Member States on defective product liability. The French Republic therefore cannot claim that it is only bound to amend Article 1386-7 of the Civil Code to the extent that the Court has explicitly held that the article does not comply with the Directive.

59. The argument which the French Republic put forward in response to a question raised by the Court, that a Member State always has a certain margin of discretion in transposing a directive, given the special legal character of that instrument, is likewise unfounded.

60. According to abundant case-law, the obligations of Member States as regards transposing directives depend on the nature, subject-matter and wording of the directive. Given the nature of the directive at issue in the present case, which, as explained, aims at the total harmonisation of the rules relating to specific subject-matter, its text provides no support whatsoever for the argument that the French authorities were entitled to omit the reference to 'the supplier's supplier' in Article 1386-7 of the Civil Code, as amended.

14 – Emphasis added.

15 – *Idem*.

61. On the basis of the foregoing, I accordingly come to the conclusion that the present action is admissible and well founded.

62. It remains to ascertain whether the lesser penal payment which the Commission is still asking the Court to impose is reasonable. More particularly, the question arises as to whether the method used to calculate the coefficient for the duration of the infringement is permissible.

63. On 8 January 1997, the Commission published a communication on the method of calculating penalty payments pursuant to Article 171 of the EEC Treaty (now Article 228 EC).<sup>16</sup> That communication stipulated that '[d]epending on the duration of the infringement, the flat-rate amount will be multiplied by a coefficient of at least 1 and no more than 3'.

64. Unsurprisingly, the application in practice of such a concise formula has not been easy, since it provides no exact criteria for assessing the duration of the infringement. Nor is it in any way unexpected that the Commission has taken the initiative of establishing more precise and objective criteria. On the other hand, it does seem

strange that it has so far omitted to inform the Member States of its decision of 2 April 2001 on the matter.

65. Although the way in which the Commission acted may be questionable in ethical terms, it is not as such illegal or illegitimate. That issue turns on whether or not application of the new method of calculation gives rise to a positive or a negative result for the Member State in question. In the former hypothesis, use of the new method without prior publication should not be considered inadmissible. In the second, such use would be well and truly unlawful, since it would contravene the principle of the protection of legitimate expectations.<sup>17</sup>

66. In the present case, I am bound to find that what is in issue is a clarification of a previously published method of calculation, which does not extend the scope of application of the method and the use of which in the specific case does not produce a result less favourable to the Member State concerned than use of the original method. If one compares the result of the 'new' method, that is to say, a coefficient of 1.3, and the figure which the original method is likely to have produced, according to the information from the Commission in its reply of 5 July 2005 to the questions raised by the Court,

17 — One can draw a parallel with the Commission communications on the calculation of fines imposed under Article 15(2) of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), such as the guidelines published at OJ 1998 C 9, p. 3.

16 — OJ 1997 C 63, p. 2.

namely a coefficient of 1.5, the inevitable conclusion is that use of the new method was more favourable to the French Republic.

67. Accordingly, given that the French Government has raised no further objections to application of the other two factors in the calculation, the coefficient for the seriousness of the infringement and the fixed element for the French Republic, I reach the conclusion that the amount of the residual penalty payment should not be reduced.

68. However, I do not share the Commission's view in so far as it applies for the penalty payment sought to be imposed 'from delivery of the present judgment'. On that point it is useful to refer back to the lack of transparency prevailing in communications between the French authorities and the Commission staff in relation to the proposed amendments to the Civil Code, as conveyed to the Commission by letter of 27 June 2003.

69. At that juncture, the Commission neglected to alert the French authorities to the evident shortcomings of the proposed wording of Article 1386-7 of the Civil Code — a curious omission, since such notice would not have detracted from the French Government's liability correctly to comply with the judgment in Case C-52/00 *Commis-*

*sion v France*. For their part, the French authorities did not consider it of use explicitly to ask for the Commission's view in order thereby to reduce the risk of needlessly prolonging the already over-lengthy period for the correct transposition of the Directive. Neither of those two stances reflects the requirements of Article 10 EC.

70. In any event, on imposing a penalty payment, the Member State in question must be given a further short period to enable it still to meet its obligations.<sup>18</sup> Especially in situations, such as that of the present case, in which the exact content of those obligations is definitively determined only in the very judgment which imposes the penalty payment, such an additional period should be granted.

71. For those reasons, I am of the view that a penalty payment of EUR 13 715 for each day of delay in complying with the judgment in Case C-52/00 *Commission v France* should be imposed on the French Republic, from three months after the date on which judgment is delivered in the present case.

72. The French Republic should be ordered to bear the costs of the proceedings in accordance with Article 69(2) of the Rules of Procedure.

<sup>18</sup> — Case C-278/01 *Commission v Spain* [2003] ECR I-1441, paragraph 53.

## VI — Conclusion

73. In view of the foregoing considerations, I propose that the Court should:

- (1) declare that, by failing to take all the measures necessary to comply with the second point of the judgment of the Court of 25 April 2002 in Case C-52/00 *Commission v France* concerning the incorrect transposition of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, more particularly by continuing to regard the supplier of a defective product as liable on the same basis as the producer where the producer cannot be identified, even though the supplier has informed the injured person within a reasonable time of the identity of his own supplier, the French Republic has failed to fulfil its obligations under Article 228(1) EC;
- (2) order the French Republic to pay a penalty payment of EUR 13 715 for each day of delay in complying with the judgment in Case C-52/00, from three months after the date on which judgment is delivered in the present case until the date on which the judgment in Case C-52/00 has been complied with;
- (3) order the French Republic to pay the costs of the proceedings.