JUDGMENT OF THE COURT
30 May 1991 *

In Case C-361/88,

Commission of the European Communities, represented by Ingolf Pernice, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Mr Guido Berardis, a member of its Legal Department, Centre Wagner, Kirchberg,

applicant,

v

Federal Republic of Germany, represented originally by Martin Seidel, acting as Agent, and Dietmar Knopp, Rechtsanwalt of Cologne, then by Mr Knopp alone, with an address for service at the Embassy of the Federal Republic of Germany, 20-22, avenue Emile Reuter,

defendant,

APPLICATION for a declaration that, by not adopting all the laws, regulations and administrative provisions necessary to ensure the complete transposition into national law of Council Directive 80/779/EEC of 15 July 1980 on air quality limit values for sulphur dioxide and suspended particulates, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty,

THE COURT,

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Díez de Velasco (Presidents of

* Language of the case: German.

Chambers) Sir Gordon Slynn, C. N. Kakouris, R. Joliet, F. A. Schockweiler, F. Grévisse, M. Zuleeg and P. J. G. Kapteyn, Judges,

Advocate General: J. Mischo
Registrar: D. Louterman, Principal Administrator

having regard to the Report for the Hearing,

after hearing the oral argument of the parties at the hearing on 6 December 1990,

after hearing the Opinion of the Advocate General at the sitting on 6 February 1991,

gives the following

Judgment

1 By application lodged at the Court Registry on 13 December 1988, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by not adopting all the laws, regulations and administrative provisions necessary to ensure the complete transposition into national law of Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates (Official Journal 1980 No L 229, p. 30), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

2 That directive is intended, on the one hand, to eliminate or prevent unequal conditions of competition capable of arising from the existence of discrepancies between the various national laws concerning the presence of sulphur dioxide and suspended particulates which can be tolerated in the air and, on the other hand, to protect human health and the quality of the environment. For those purposes it prescribes the approximation of national laws.

3 Article 2 of that directive provides that the limit values, that is the concentrations of sulphur dioxide and of suspended particulates 'which, in order to protect human health in particular, must not be exceeded throughout the territory of the Member States during specified periods and under the conditions laid down in the following Articles', are those fixed in Annex I to the directive.

4 Article 3(1) provides that, without prejudice to certain exceptions specified in paragraph (2), the Member States are to take appropriate measures to ensure that as from 1 April 1983 the concentrations of sulphur dioxide and suspended particulates in the air are not greater than the limit values given in Annex I.

5 Article 10(2), however, authorizes the Member States, on a temporary basis and provided they use certain sampling and analysis methods, to use limit values other than those in Annex I, namely those defined in Annex IV.

6 Under Article 15(1) the Member States were required to bring into force the laws, regulations and administrative provisions necessary in order to comply with the directive within 24 months of its notification. Since the directive was notified to the Federal Republic of Germany on 18 July 1980, it should therefore have been transposed into German law by no later than 18 July 1982.

7 The Commission accuses the Federal Republic of Germany of not fulfilling the obligation, arising from Article 2(1) of the directive, to adopt a mandatory rule, accompanied by effective sanctions, with a view to expressly prohibiting, throughout the national territory, the exceeding of the limit values fixed in Annex I to the directive. It also charges the Federal Republic of Germany with not taking the appropriate measures to ensure that the limit values are actually observed, as required by Article 3(1) of the directive.

8 The Federal Republic of Germany replies that the protection sought by the directive is in line with that resulting from the Federal Law of 15 March 1974 on protection against the harmful effects of air pollution, noise, vibrations and other types of nuisance on the environment (BGBl., I, p. 721, hereinafter referred to as the 'Law on protection against pollution'), and also from the measures implementing it. It adds that the concrete results which it has achieved regarding pollution by sulphur dioxide and suspended particulates amply satisfy the requirements of the directive.

9 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The absence of a general mandatory rule

10 Paragraph 3 of the Law on protection against pollution defines effects harmful to the environment as being 'nuisances which, because of their magnitude or their duration, are likely to give rise to dangers, substantial disadvantages or substantial nuisances for the environment or the neighbourhood'. However, that law does not specify the threshold beyond which those nuisances must be regarded as harmful to the environment. Under Paragraph 48 it is for the Federal Government, after hearing the sectors concerned and receiving the consent of the Bundesrat, must adopt 'the general administrative provisions necessary in order to implement' the law.

11 On the basis of Paragraph 48, the Federal Government adopted, in 1974, the first general administrative provision to implement the Law on protection against pollution (hereinafter referred to as the 'technical circular "air"'). That circular was amended on various occasions, in particular on 27 February 1986 (GMBl., p. 95). It is common ground that paragraph 2.5.1 of that circular fixes, for sulphur dioxide and suspended particulates, nuisance values which correspond to those appearing in Annex IV to the directive.

12 The Commission takes the view, however, that that circular is not mandatory in nature. It further considers that the scope of its application is more limited than that of the directive.

13 The Commission considers that, under the German legal system, administrative circulars are not generally recognized as rules of law. The Basic Law, and in particular Article 80(1) thereof, make the adoption of regulations by the administration subject to certain conditions, in particular regarding procedure, which are not satisfied in the present case. Furthermore, it is admitted, both in case-law and in academic legal writing, that administrative circulars need not necessarily be observed when an atypical situation arises, that is to say a situation which the author of the administrative provisions could not, or did not wish to, resolve by reason of the fact that he had to settle the problem in a general way. Moreover, the provisions of the circular do not apply to sources of pollution other than the industrial plant referred to therein.

14 The Federal Republic of Germany contends that the technical circular 'air' is not an ordinary administrative provision. First, it was adopted according to a special procedure, calling for the cooperation of representatives from science, interested parties, the economic sectors affected, transport services and the higher administrative authorities of the Länder, and was submitted for the approval of the Bundesrat. Moreover, since its purpose is to give detailed content to a rule having binding force, it, like that rule, is binding in nature. In that respect it leaves no discretion to the administration. National case-law confirms this. Finally, the general concept 'effect harmful to the environment' contained in the Law on protection against pollution was put into concrete form by the limit values laid down in the circular and, accordingly, those limit values apply to all cases where sulphur dioxide and suspended particulates are present in the atmosphere.

15 It should be borne in mind in that respect that, according to the case-law of the Court (see, in particular, the judgment in Case C-131/88 *Commission* v *Germany* [1991] ECR I-825), the transposition of a directive into domestic law does not

necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose, provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.

16 In that respect, it should be pointed out that the obligation imposed on the Member States to prescribe limit values not to be exceeded within specified periods and in specified circumstances, laid down in Article 2 of the directive, is imposed 'in order to protect human health in particular'. It implies, therefore, that whenever the exceeding of the limit values could endanger human health, the persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights. Furthermore, the fixing of limit values in a provision whose binding nature is undeniable is also necessary in order that all those whose activities are liable to give rise to nuisances may ascertain precisely the obligations to which they are subject.

17 It should first be observed, however, that the limit values prescribed by the directive are to be found only in the technical circular 'air' and that the latter has only a limited area of application.

18 Contrary to the contentions of the Federal Republic of Germany, that circular does not apply to all plant. Paragraph 1 confines the scope of its application to plant for which a licence is required, within the meaning, in particular, of Paragraph 4 of the Law on protection against pollution, that is to say, to plant which, because of its specific nature or of the use to which it is put, is liable to give rise to effects particularly harmful to the environment, or to cause danger, substantial damage or particular disadvantage to the community or the neighbourhood. The same paragraph imposes obligations on the administrative authorities only, essentially, when applications for a licence to construct, operate or

alter such plant are examined, or when obligations are subsequently imposed on that plant, or, again, in the case of an inquiry into the nature and the magnitude of the discharges from that plant, or into the nuisances emanating from the area in which it is operated.

19 The area of application of the circular is therefore the immediate neighbourhood of well-defined buildings or plant, while the directive has a wider scope of application, which concerns the entire territory of the Member States. As the Commission rightly points out, the nuisances created by sulphur dioxide and suspended particulates may originate elsewhere than in the plant subject to a requirement of authorization, for example in a high density of road traffic, private heating systems or pollution from another State. The general nature of the directive cannot be satisfied by a transposition confined to certain sources of the exceeding of the limit values which it lays down and to certain measures to be adopted by the administrative authorities.

20 Nor, secondly, is the concern to enable individuals to assert their rights satisfied in the sphere of application of the circular itself, namely plant for which a licence is required. The Federal Republic of Germany and the Commission differ on the question of the extent to which, in German academic legal writing and case-law, technical circulars are recognized as being binding in nature. The Commission was able to refer to judicial decisions denying the binding nature of such circulars, in particular in the sphere of tax law. The Federal Republic of Germany, for its part, referred to a line of decisions recognizing that binding nature in the field of nuclear energy. It must be stated that, in the particular case of the technical circular 'air', the Federal Republic of Germany has not pointed to any national judicial decision explicitly recognizing that that circular, apart from being binding on the administration, has direct effect vis-à-vis third parties. It cannot be claimed, therefore, that individuals are in a position to know with certainty the full extent of their rights in order to rely on them, where appropriate, before the national courts or that those whose activities are liable to give rise to nuisances are adequately informed of the extent of their obligations.

21 It follows from the foregoing considerations that it is not established that Article 2(1) of the directive has been implemented with unquestionable binding force, or

with the specificity, precision and clarity required by the case-law of the Court in order to satisfy the requirement of legal certainty.

The absence of appropriate measures for securing observance of the limit values

22 The Commission charges the Federal Republic of Germany with having failed to adopt the appropriate measures for ensuring that the limit values prescribed by the directive are actually observed, as required by Article 3 of the directive. It points out first of all that there are no 'anti-smog' regulations in the Länder of Bremen and Schleswig-Holstein. It goes on to stress that the plans for the protection of the air which the Länder must draw up and implement, under Paragraphs 44 to 47 of the Law on protection against pollution, when air pollution is likely to produce effects harmful to the environment, do not make it possible to ensure that the limit values fixed in the directive are actually observed. The reason for this is, it claims, firstly that those measures are not valid for all areas, but only for certain zones specified by the regulations of the Länder. In the second place, the administrative authorities have a discretion with regard to the decision to implement those plans for the protection of the air. In the third place, it does not follow from any provision that those plans must ensure that the limit values of the directive are observed.

23 The Federal Republic of Germany contends that the limit values prescribed by the directive have not in fact been exceeded since 1983. It states that the 'anti-smog' regulations are envisaged only in the zones where atmospheric pollution is likely to appear. It adds that it would be pure formalism to impose preventive measures in the areas where there is no risk that the limit values prescribed by the directive will be exceeded. It maintains further that the administrative authorities have no margin of discretion with regard to the decision to implement the plans for the protection of the air when specific dangers became clearly apparent. Finally, it states that, since 1 September 1990, those plans must observe the limit values of the directive.

24 It must first be pointed out that the fact that a practice is in conformity with the requirements of a directive in the matter of protection may not constitute a reason for not transposing that directive into national law by provisions capable of creating a situation which is sufficiently precise, clear and transparent to enable individuals to ascertain their rights and obligations. As the Court held in its

judgment in Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851, paragraph 25, in order to secure the full implementation of directives in law and not only in fact, Member States must establish a specific legal framework in the area in question.

25 It follows from the foregoing that the argument of the Federal Republic of Germany, according to which no case contrary to the directive has been reported in practice, cannot be upheld.

26 It is necessary, therefore, to consider whether the provisions referred to by the Federal Republic of Germany guarantee a correct implementation of the directive.

27 Under Paragraph 44 of the Law on protection against pollution the competent authorities under the law applicable in the Länder must continuously determine the nature and magnitude of certain atmospheric pollutions capable of creating effects harmful to the environment in certain particularly exposed zones. According to Paragraph 47, in the version in force when the action was brought, if those determinations indicate that the atmospheric pollutions are creating effects harmful to the environment or if such effects are to be expected in the whole of the exposed zone or in a part thereof, those competent authorities must draw up a plan for the protection of the air for that zone.

28 Article 3(1) of the directive requires the Member States to take appropriate measures so that the concentrations of sulphur dioxide and of suspended particulates in the air are not higher than the limit values.

29 In that respect, it must be pointed out that the competent authorities of the Länder have to implement plans for the protection of the air only when they find the

existence of effects which are harmful to the environment. As stated above, the Law on protection against pollution does not specify the threshold beyond which effects on the environment may be found to be harmful. The technical circular 'air' imposes obligations on the administrative authorities only in the event of well-defined acts and in respect of specified plant. There are, therefore, no general and mandatory rules under which the administrative authorities are required to adopt measures in all the cases where the limit values of the directive are likely to be exceeded.

30 It follows that Article 3 of the directive has not been transposed into the national legal system in such a way as to cover all the cases capable of arising and that the national rules do not have the binding nature necessary in order to satisfy the requirement of legal certainty.

31 The fact that, after the action was brought, the German legislation was amended cannot alter that assessment. The Court has consistently held that the subject-matter of an action brought under Article 169 of the Treaty is the Commission's reasoned opinion and that, even when the default has been remedied after the time-limit prescribed by the second paragraph of that article has expired, there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur as a result of its default towards other Member States, the Community or private parties.

32 In the light of all the foregoing considerations, it must be declared that, by not adopting within the prescribed period all the measures necessary in order to comply with Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

Costs

33 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Federal Republic of Germany has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that, by not adopting within the prescribed period all the measures necessary in order to comply with Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty;

(2) Orders the Federal Republic of Germany to pay the costs.

Due Mancini O'Higgins Moitinho de Almeida

Rodríguez Iglesias Díez de Velasco Slynn Kakouris

Joliet Schockweiler Grévisse Zuleeg Kapteyn

Delivered in open court in Luxembourg on 30 May 1991.

J.-G. Giraud — Registrar

O. Due — President