

JUDGMENT OF THE COURT  
30 May 1991 \*

In Case C-59/89,

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

applicant,

v

**Federal Republic of Germany**, represented originally by Martin Seidel, acting as Agent, and Dietmar Sellner, Rechtsanwalt, Cologne, then by Mr Sellner alone, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22, Avenue Émile 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 82/884/EEC of 3 December 1982 on a limit value for lead in the air, 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: French.

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 28 February 1989, 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 82/884/EEC of 3 December 1982 on a limit value for lead in the air (Official Journal 1982 L 378, p. 15, hereinafter referred to as 'the directive'), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.
- 2 That directive, which is intended protect human beings against the risks of lead poisoning, has as its objective the laying down, by means of a limit value, the concentration of lead contained in the air which must not be exceeded in certain conditions.
- 3 Article 2(2) of the directive provides that that limit value is to be 2 micrograms Pb/m<sup>3</sup> expressed as an annual mean concentration.

- 4 Article 3(1) provides that Member States are to take the necessary measures to ensure that five years after notification of the directive, concentration of lead in the air, measured in accordance with Article 4, is not greater than the limit value given in Article 2.
  
- 5 Under Article 12(1) of the directive, 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 9 December 1982, it should therefore have been transposed into German law by no later than 9 December 1984.
  
- 6 The Commission accuses the Federal Republic of Germany of not fulfilling the obligation, arising from Article 2 of the directive, to adopt a mandatory rule, accompanied by effective sanctions, with a view to prohibiting expressly, throughout the national territory, the exceeding of the maximum value of 2 micrograms Pb/m<sup>3</sup>. It also charges the Federal Republic of Germany with not taking the appropriate measures to ensure the observance of that limit value, as required by Article 3(1) of the directive.
  
- 7 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, noises, vibrations and other types of nuisances on the environment (BGBl. I, p. 721, hereinafter referred to as the 'Law on protection against pollution') also and from the measures implementing it. It adds that the concrete results which it has achieved in the matter of lead contamination amply satisfy the requirements of the directive.
  
- 8 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**

- 9 Paragraph 3 of the Law on protection against pollution defines effects harmful to the atmosphere 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 to adopt, after hearing the sectors concerned and receiving the consent of the Bundesrat, 'the general administrative provisions necessary in order to implement' the law.
- 10 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 (GMBI, p. 95). It is common ground that paragraph 2.5.1 of that circular fixes, for lead, a maximum value of 2 micrograms Pb/m<sup>3</sup>, which appears in Article 2(2) of the directive.
- 11 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.
- 12 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 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. Moreover, it is admitted, in both case-law and 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.

- 13 Furthermore, according to the Commission, the requirements of the circular do not apply to sources of pollution other than the plant referred to therein and they consist solely of rules concerning the protection of the air which must be applied certain administrative measures relating to plant are taken.
  
- 14 In that respect, the Federal Republic of Germany contends that the framework of rules intended to ensure that the limit value contained in the directive is observed covers all sources of lead discharges.
  
- 15 That framework covers, in the first place, plant for which a licence is required, within the meaning, in particular, of Paragraph 4 of the Law on protection against pollution, that is, plant which, because of its specific nature or of the use to which it is put is likely to give rise to effects particularly harmful to the environment, or to danger, substantial damage or particular inconvenience to the community or the neighbourhood. The nuisance thresholds which may not be exceeded by that plant are referred to in paragraph 2.5.1 of the technical circular 'air', which, in respect of lead, reproduces the limit value fixed by the directive. Those thresholds are minimum standards which must be observed, even in the case of atypical situations.
  
- 16 Secondly, that framework also covers other plant. Under Paragraph 22 of the Law on protection against pollution, such plant must be constructed and operated in such a way as to prevent effects harmful to the environment which are avoidable in the present state of technology. The concept of effects harmful to the environment was given concrete expression in paragraph 2.5.1 of the technical circular 'air'. Under Paragraph 25(2), when such harmful effects endanger life or human health, the competent authorities may prohibit, in whole or in part, the construction or the operation of such plant, if it is not possible otherwise to protect the community or the neighbourhood.
  
- 17 Thirdly, discharges of lead arising from the use of motor vehicles have been controlled by the Law on lead in petrol.

- 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 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.
- 19 In that respect, it should be pointed out that the obligation imposed on the Member States to prescribe a limit value which must not be exceeded in specified circumstances, laid down in Article 2 of the directive, is imposed, according to Article 1, 'specifically in order to help protect human beings against the effects of lead in the environment'. It does not apply, however, to occupational exposure. Except in that case the obligation 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 a limit value in a provision the mandatory nature of which 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.
- 20 It should first be observed, however, that the limit value of 2 micrograms/m<sup>3</sup> is to be found only in the technical circular 'air' and that the latter has only a limited area of application.
- 21 Contrary to the contention 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 likely to give rise to effects which are particularly harmful to the environment, or to cause danger, substantial damage or particular inconvenience to the community or the neighbourhood. The same paragraph imposes obligations on the administrative authorities only, essen-

tially, 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.

- 22 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. The general nature of the directive cannot, therefore, be satisfied by a transposition which is expressly confined to certain sources of the exceeding of the limit value which it lays down and to certain measures to be adopted by the administrative authorities.
- 23 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 decision 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 likely to give rise to nuisances are adequately informed of the extent of their obligations.
- 24 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 value**

- 25 The Commission charges the Federal Republic of Germany with having failed to adopt the appropriate measures for ensuring that the limit value prescribed by the directive is actually observed, as required by Article 3 of the directive. It stresses that the plans for the protection of the air which, under Paragraph 44 to 47 of the Law on protection against pollution, must be drawn up and implemented when air pollution is likely to produce effects harmful to the environment, do not make it possible to ensure that the limit value fixed in the directive is actually observed. The reason for this, it claims, is firstly that those measures concern only specified zones and do not ensure observance of the limit value throughout the entire territory. 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, the procedures to be followed take so much time that the observance of the limit value cannot be effectively and swiftly ensured.
- 26 The Federal Republic of Germany contends firstly that the nuisance values recorded in Germany are well below the value of 2 micrograms Pb/m<sup>3</sup> fixed by the directive.
- 27 It states that it is, moreover, in a position to ensure that that limit value is actually observed. In that respect, it relies in particular on Paragraphs 44 to 47 of the Law on protection against pollution which require the competent authorities of the Länder to define exposed zones and draw up for them plans for the protection of the air. With regard to the criticism that such plans were drawn up only for a part of the Federal territory, it maintains that it would be quite pointless to draw up those plans for regions in which there is no danger that the limit value will be exceeded. It adds that the administrative authorities have no margin of discretion as to the decision to implement plans for the protection of the air when specific threats occur. Finally, it states that since 1 September 1990 those plans must observe the limit values contained in the directive.
- 28 It should be pointed out in that respect that the fact that a practice is in conformity with the requirements of a directive may not constitute a reason for not trans-

posing 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 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.

- 29 It follows 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.
- 30 It is necessary, therefore, to consider whether the provisions referred to by the Federal Republic of Germany guarantee a proper implementation of the directive.
- 31 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 air 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 air 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.
- 32 Article 3(1) of the directive requires the Member States to take the necessary measures to ensure that the concentration of lead in the air is not greater than the limit value of 2 micrograms/m<sup>3</sup>.
- 33 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 specific plant. There are, therefore, no general and mandatory rules under which the administrative authorities are required to adopt measures in all cases where the limit values of the directive are likely to be exceeded.

- 34 It follows that Article 3 of the directive has not been transposed into the internal 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.
- 35 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 determined by the Commission's reasoned opinion and that, even where the default has been remedied after the time-limit prescribed in 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.
- 36 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 82/884/EEC of 3 December 1982 on a limit value for lead in the air, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

### Costs

- 37 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 been unsuccessful 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 ordered to comply with Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air, 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 do 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