

JUDGMENT OF THE COURT (Fourth Chamber)
26 September 1996 *

In Case C-168/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Pretura Circondariale di Vicenza (Italy) for a preliminary ruling in the criminal proceedings before that court against

Luciano Arcaro

on the interpretation of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23) and Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges (OJ 1983 L 291 p. 1),

THE COURT (Fourth Chamber),

composed of: C. N. Kakouris (Rapporteur), President of the Chamber,
P. J. G. Kapteyn and H. Ragnemalm, Judges,

Advocate General: M. B. Elmer,
Registrar: H. von Holstein, Deputy Registrar

* Language of the case: Italian.

after considering the written observations submitted on behalf of the Commission of the European Communities by Laura Pignataro and Dominique Maidani, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 14 March 1996,

gives the following

Judgment

- 1 By order of 22 April 1995, received at the Court on 30 May 1995, the Pretura Circondariale (District Magistrate's Court), Vicenza, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 179, p. 23) and Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges (OJ 1983 L 291, p. 1).

- 2 Those questions have been raised in criminal proceedings brought against Luciano Arcaro pursuant to Articles 5, 7 and 18 of Legislative Decree No 133 of 27 January 1992 on industrial discharge of dangerous substances into the aquatic environment (Ordinary Supplement No 34 of GURI No 41 of 19 February 1992, and corrigendum published in GURI No 124 of 28 May 1992, hereinafter 'the Decree').

- 3 Article 3 of Directive 76/464 provides that all discharges of substances in List I of its Annex 'shall require prior authorization by the competent authority of the Member State concerned'. That list includes substances particularly dangerous for the aquatic environment, including cadmium.

- 4 For that category of substances, discharge authorizations must be issued in accordance with Articles 3 and 5 of the same directive. According to those provisions, discharge authorizations must lay down in particular emission standards, namely the maximum concentration and maximum permissible quantity of a substance in a discharge, the conditions on which the discharge is authorized and the period in which it may be made.

- 5 According to Article 6(1) of Directive 76/464, emission standards must not exceed the value limits laid down by the Council.

- 6 In the case of cadmium, the national authorities are to observe the limit values, time-limits and monitoring procedures laid down in the Annexes to Directive 83/513.

- 7 However, Annex I (footnotes 1 and 7) to that directive provides that, as regards sectors not mentioned in that annex, limit values for cadmium discharges are to be fixed by the Council at a later stage. In the meantime, the Member States are to fix emission standards autonomously, in accordance with Directive 76/464, and those standards must not be less stringent than the most nearly comparable limit value in that annex.

- 8 In Italy, the Decree was adopted in order to implement a number of Community directives on discharges containing dangerous substances, including Directives 76/464 and 83/513.

- 9 It applies to discharges of dangerous substances included in the groups of substances as mentioned in List I and II in its annex A (Article 1). Annex B lays down the 'limit values for emission standards' for certain of the dangerous substances referred to in List I of Annex A.
- 10 The Decree lays down the rules for authorization by local authorities of discharges of the substances in List I of Annex A. Those rules are based on a distinction between discharges from new industrial plant and discharges from industrial plant existing on 6 March 1992 or brought into operation before 6 March 1993.
- 11 All industrial plants, whether new or already existing, must, in order to be able to carry out discharge operations, obtain authorization (Article 5 of the Decree). In the case of both categories, local authorities, when issuing discharge authorizations, prescribe emission standards in conformity with the limit values laid down in Annex B. However, if the discharge concerns substances for which no limit value has yet been laid down in Annex B, the following rules apply.
- 12 In the case of new plant, prior authorization for discharge is compulsory and is issued in accordance with the tolerance limits laid down by Law No 319 of 10 May 1976 (GURI No 141 of 29 May 1976), as amended (Article 6(3) of the Decree). On the other hand, in the case of existing plant, Article 7(7) of the Decree provides that the Decree, and therefore the obligation to obtain authorization, is to be applicable only after adoption of the ministerial decrees provided for in Article 2(3)(b).
- 13 According to the case file, Annex B does not indicate the limit values for the cadmium discharges with which the main proceedings are concerned. Consequently, according to the Decree, the obligation to obtain authorization applies to such discharges only if they come from new plant.

- 14 Article 18 of the Decree lays down the penalties applicable in the event of infringements of its provisions.
- 15 It appears from the case file forwarded to the Court that Mr Arcaro, the legal representative of an undertaking whose main activity is the working of precious metals, is being prosecuted under Articles 5, 7 and 18 of the Decree for discharging cadmium into surface waters (the River Bacchiglione) without having submitted an application for the relevant authorization.
- 16 In proceedings before Pretura Circondariale di Vicenza, brought by the Public Prosecutor, Mr Arcaro submits, first, that his undertaking is an existing plant within the meaning of the Decree and that, having regard to the production of his undertaking, the system of authorization laid down in Article 7 of the Decree would be applicable to it only if emission limit values, corresponding to that production, had been adopted by ministerial decree.
- 17 The Pretore finds that the provisions of Article 7(1) and (7) of the Decree exclude the majority of existing plant from the system of authorization which it introduces.
- 18 However, in point 8 of its order for reference, the Pretore expresses doubts concerning the conformity of those provisions with the Community directives which they implement and which, according to the Pretore, require authorization for all discharges which are subject to them, without any distinction between new plant and existing plant. In this regard, the Pretore refers, by way of example, to Article 1(2)(d) and Article 3 of Directive 76/464, and to Article 3 of Directive 83/513.

19 In view of those considerations, the Pretore has decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- (1) Does point 8 of this order for reference put forward a correct interpretation of the Community directives which Legislative Decree No 133/1992 is intended to implement?
- (2) If Question 1 is answered in the affirmative, is it possible for direct effect to be given to the Community provisions, in the light of a correct interpretation of Community law, and at the same time for the national provisions which are incompatible therewith to be left unapplied even though the citizen's legal position may as a result be impaired?
- (3) If Question 2 is answered in the negative, what other method of procedure may be adopted under a correct interpretation of Community law to achieve the elimination from national legislation of provisions which are incompatible with those of Community law, where the direct application of the latter would result in impairment of the citizen's legal position?

The first question

20 This question is vaguely formulated since it concerns an interpretation of all the Community directives which the Decree is intended to implement and the provisions of Directives 76/464 and 83/513, mentioned more particularly in point 8 of the order for reference, are mentioned only by way of example.

21 However, according to settled case-law, where questions are formulated imprecisely, the Court may extract from all the information provided by the national

court and from the documents concerning the main proceedings the points of Community law needing to be interpreted, having regard to the subject matter of the dispute (judgment in Case 251/83 *Haug-Adrion* [1984] ECR 4277, paragraph 9).

22 In the present case, as explained in paragraphs 15 and 16 of this judgment, the documents concerning the main proceedings show that those proceedings concern cadmium discharges made without authorization by an existing plant within the meaning of the Decree.

23 Since, as far as cadmium discharges are concerned, the relative provisions of Community law are contained in Directives 76/464 and 83/513, the first preliminary question must be understood as seeking to ascertain whether the relevant provisions of those directives are to be interpreted as making any discharge of cadmium, irrespective of the date on which the plant from which it comes commenced operation, subject to the issue of prior authorization.

24 In this regard, it should be observed that Article 3 of Directive 76/464 provides that:

‘With regard to the substances belonging to the families and groups of substances in List I ...:

1. all discharges into the waters ... which are liable to contain any such substance shall require prior authorization by the competent authority of the Member State concerned;

...’

List I, contained in the Annex to the directive, mentions, in point 6, cadmium.

25 It follows that any discharge of cadmium is subject to the issue of prior authorization, without there being any exception for discharges coming from plant existing before a certain date.

26 That interpretation is not contradicted by Article 3, point 3, nor by Article 6(4) of Directive 76/464.

27 The first of those provisions provides:

‘With regard to the substances belonging to the families and groups of substances in List I ...:

3. in the case of existing discharges of any such substance into the waters referred to in Article 1, the dischargers must comply with the conditions laid down in the authorization within the periods stipulated therein. This period may not exceed the limits laid down in accordance with Article 6(4).’

28 Article 6(4) provides:

‘For those substances included in the families and groups of substances referred to in paragraph 1, the deadlines referred to in point 3 of Article 3 shall be laid down by the Council in accordance with Article 12, taking into account the features of the industrial sectors concerned and, where appropriate, the types of products.’

- 29 Consequently, although those provisions concern 'existing discharges' of the substances in List I, they make no exception, in favour of a plant existing before a certain date, to the obligation to obtain prior authorization; they simply refer to the time-limits which are to be laid down in the authorization for this type of discharge.
- 30 Moreover, that interpretation is not undermined by Directive 83/513, which, in Article 2(f) and (g), defines 'existing plant' and 'new plant'. Thus, Article 2 provides:

'For the purposes of this Directive:

...

(f) "existing plant" means an industrial plant which is operational on the date of notification of this Directive;

(g) "new plant" means:

— an industrial plant which has become operational after the date of notification of this Directive,

— an existing industrial plant whose cadmium-processing capacity has been substantially increased after the date of notification of this Directive.'

Nevertheless, that distinction is relevant only in relation to the first subparagraph of Article 3(4) of that directive, according to which 'Member States may grant authorization for new plants only if those plants apply the standards corresponding to the best technical means available when'.

31 It accordingly follows that that provision does not exempt the plants concerned from the obligation to obtain an authorization. On the contrary, it reinforces it.

32 The answer to the first question must therefore be that Article 3 of Directive 76/464 is to be interpreted as making any discharge of cadmium, irrespective of the date on which the plant from which it comes commenced operation, subject to the issue of a prior authorization.

The second question

33 By this question the national court wishes to ascertain in substance whether, in the absence of full transposition by a Member State within the time allowed of Directive 76/464, and therefore of Article 3 thereof, and of Directive 83/513, a public authority of that State may rely on that Article 3 against an individual, although this may impair that individual's position.

34 The Commission observes that the system for authorizing discharges provided for by Directives 76/464 and 85/513 entails the designation of competent national authorities for this purpose, having a real power of assessment. It concludes that the provisions of these directives cannot be regarded as unconditional, within the meaning of the case-law of the Court, and that they therefore have no direct effect.

It also submits that, in any event, a directive cannot by itself create obligations for an individual nor be relied upon as such against an individual before a national court.

- 35 Having regard to a situation such as that with which the main proceedings are concerned, it is not necessary to examine whether Article 3 of the Directive is unconditional and sufficiently precise.
- 36 The Court has made it clear that the possibility of relying, before a national court, on an unconditional and sufficiently precise provision of a directive which has not been transposed exists only for individuals and only in relation to 'each Member State to which it is addressed'. It follows that a directive may not by itself create obligations for an individual and that a provision of a directive may not therefore be relied upon as such against such a person (judgments in Case 152/84 *Marshall* [1986] ECR 723, paragraph 48, and in Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 9). The Court has stated that this case-law seeks to prevent a Member State from taking advantage of its own failure to comply with Community law (judgments in Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 22, and Case C-192/94 *El Corte Inglés* [1996] ECR I-1281, paragraph 16).
- 37 In that same line of authority the Court has also ruled that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (judgment in Case 14/86 *Pretore di Salò* [1987] ECR 2545).
- 38 The answer to the second question must therefore be that, in the absence of full transposition by a Member State within the time allowed of Directive 76/464, and therefore of Article 3 thereof, and of Directive 83/513, a public authority of that State may not rely on that Article 3 against an individual.

The third question

- 39 By this question the national court essentially seeks to ascertain whether, upon a correct interpretation of Community law, there is a method of procedure allowing the national court to eliminate from national legislation provisions which are contrary to a provision of a directive which has not been transposed, where the latter provision may not be relied on before the national court.
- 40 It should be observed first of all that there is no such method of procedure in Community law.
- 41 It should be added that the Member States' obligation, arising under a directive, to achieve the result envisaged by the directive and their duty, under Article 5 of the Treaty, to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation, are binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, the national court called upon to interpret that law is required to do so, as far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 189 of the Treaty (see the judgments in Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, and Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20).
- 42 However, that obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions (see the judgment in *Kolpinghuis Nijmegen*, cited above, paragraphs 13 and 14).

- 43 The reply to the third question must therefore be that there is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to a provision of a directive which has not been transposed where that provision may not be relied upon before the national court.

Costs

- 44 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, so far as the parties to the main proceedings are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to questions referred to it by the Pretura Circondariale di Vicenza, by order of 22 April 1995, hereby rules:

1. Article 3 of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community is to be interpreted as making any discharge of cadmium, irrespective of the date on which the plant from which it comes commenced operation, subject to the issue of a prior authorization.

2. In the absence of full transposition by a Member State within the time allowed of Directive 76/464, and therefore of Article 3 thereof, and of Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges, a public authority of that State may not rely on that Article 3 against an individual.

3. There is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to a provision of a directive which has not been transposed where that provision may not be relied upon before the national court.

Kakouris

Kapteyn

Ragnemalm

Delivered in open court in Luxembourg on 26 September 1996.

R. Grass

C. N. Kakouris

Registrar

President of the Fourth Chamber