

JUDGMENT OF THE COURT

18 June 2002 *

In Case C-60/01,

Commission of the European Communities, represented by H. Støvlbaek and J. Adda, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented initially by G. de Bergues and D. Colas, and subsequently by R. Abraham and D. Colas, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by failing to adopt all the necessary and appropriate measures to ensure that all incinerators currently operating in France are operated in accordance with the combustion conditions laid down by Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new

* Language of the case: French.

municipal waste incineration plants (OJ 1989 L 163, p. 32) and Council Directive 89/429/EEC of 21 June 1989 on the reduction of air pollution from existing municipal waste incineration plants (OJ 1989 L 203, p. 50) or that they ceased to operate by the due date, namely 1 December 1990 as regards new plants and 1 December 1996 as regards existing plants, the French Republic has failed to fulfil its obligations under Article 4(1) of Directive 89/369, Articles 2(a) and 4 of Directive 89/429 and the third paragraph of Article 249 EC,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken, N. Colneric and S. von Bahr (Presidents of Chambers), A. La Pergola, J.-P. Puissochet, M. Wathelet, V. Skouris, J.N. Cunha Rodrigues and C.W.A. Timmermans (Rapporteur), Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2002,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 12 February 2001, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to adopt all the necessary and appropriate measures to ensure that all incinerators currently operating in France are operated in accordance with the combustion conditions laid down by Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants (OJ 1989 L 163, p. 32) and Council Directive 89/429/EEC of 21 June 1989 on the reduction of air pollution from existing municipal waste incineration plants (OJ 1989 L 203, p. 50) or that they ceased to operate by the due date, namely 1 December 1990 as regards new plants and 1 December 1996 as regards existing plants, the French Republic has failed to fulfil its obligations under Article 4(1) of Directive 89/369, Articles 2(a) and 4 of Directive 89/429 and the third paragraph of Article 249 EC.

Community legislation

- 2 Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants (OJ 1984 L 188, p. 20) provides for measures and procedures designed to prevent and/or reduce air pollution from industrial plants within the Community. The obligations resulting from that directive have been defined more precisely in Directives 89/369 and 89/429.

- 3 By virtue of Articles 1(5) and 12(1) of Directive 89/369, a municipal waste incineration plant is to be regarded as new if authorisation to operate it has been granted on or after 1 December 1990. Under Article 1(5) of Directive 89/429, a municipal waste incineration plant is to be regarded as existing if the first authorisation to operate it was granted before 1 December 1990.
- 4 Article 4(1) of Directive 89/369 provides:

‘All new municipal waste incineration plants must be designed, equipped and operated in such a way that the gas resulting from the combustion of the waste is raised, after the last injection of combustion air, in a controlled and homogeneous fashion and even in the most unfavourable conditions, to a temperature of at least 850 °C [for] at least two seconds in the presence of at least 6% oxygen.’

- 5 Article 2(a) of Directive 89/429 states:

‘In accordance with Article 13 of Directive 84/360/EEC, Member States shall take appropriate measures to ensure that the operation of existing municipal waste incineration plants [is] subject:

- (a) in the case of plants with a nominal capacity equal to or more than six tonnes of waste per hour: by 1 December 1996, to the same conditions as those imposed on new incineration plants of the same capacity under the terms of Council Directive 89/369/EEC of 8 June 1989 on the prevention of air

pollution from new municipal waste incineration plants ... , except with regard to the provisions of Article 4, which shall be replaced by those of Article 4 of this Directive’.

6 Article 4(1)(a) of Directive 89/429 states:

‘By 1 December 1996, existing municipal waste incineration plants with a capacity of a least six tonnes per hour must comply with the following combustion conditions: the gases resulting from the combustion of the waste must be raised, after the last injection of combustion air and even under the most unfavourable conditions, to a temperature of [at] least 850 °C for at least two seconds in the presence of at least 6% oxygen. However, in the event of major technical difficulties, the provisions concerning the two-second period shall be implemented at the latest when the furnaces are replaced.’

Pre-litigation procedure

7 The Commission received a complaint stating that the incinerator at Maubeuge (France) did not comply with the combustion conditions laid down by Directives 89/369 and 89/429.

8 As a result of that complaint, the Commission became aware of a survey of 1 December 1996 compiled by the Ministry of Regional Planning and the Environment. The survey revealed that, as at that date, 40 incinerators handling more than six tonnes of waste per hour were not complying with the operating conditions imposed by Directives 89/369 and 89/429 and were discharging dust and heavy metals exceeding the maximum permitted values.

- 9 The Commission also became aware of a press release dated 18 February 1999 issued by the same ministry showing that seven incineration plants had discharged into the atmosphere quantities of dioxins and furans exceeding 10 ng I-TEQ/m³, a fact which, according to the Commission, means that those furnaces did not comply with the combustion conditions prescribed in Article 4(1) of Directive 89/369 and Articles 2(a) and 4 of Directive 89/429.
- 10 It was also apparent from that press release that, as at 15 January 1999, 12 of the 75 incineration plants in France did not yet comply with the ministerial order of 25 January 1991 concerning urban waste incineration plants (JORF of 28 March 1991, p. 3330; 'the order of 25 January 1991'), which transposed Directives 89/369 and 89/429. The plants concerned were those at Maubeuge and La Rochelle, Blois, Angers, Mulhouse, Le Mans, Rouen, Le Havre, Belfort, Rungis, Douchy and Noyelles-sous-Lens (France).
- 11 Since the Commission took the view in those circumstances that the French Republic had not adopted all the necessary and appropriate measures to ensure that all incinerators then functioning in France were operated in accordance with the combustion conditions laid down by Directives 89/369 and 89/429, it sent the French Republic a letter of formal notice on 28 April 1999 in order to enable it to submit its observations.
- 12 The French Government replied by letter of 22 September 1999, stating that Directives 89/369 and 89/429 had been transposed into French law by the order of 25 January 1991. In addition, it acknowledged that, at the beginning of 1998, 27 incinerators had been operating without complying with provisions of that order. It also conceded that, notwithstanding the measures adopted by it to secure compliance with the applicable mandatory rules, at the beginning of 1999 12

incinerators did not yet comply with those rules and there remained nine plants whose discharges exceeded 10 ng I-TEQ/m³.

- 13 The Commission considered that, by that reply, the French Government had not denied the existence of the infringements set out in its letter of formal notice. Accordingly, it issued a reasoned opinion on 21 October 1999 calling on the French Republic to adopt the measures necessary to comply with the opinion within two months from notification thereof.

- 14 The French Government replied to the reasoned opinion by letter of 22 December 1999, stating that, as a result of incinerators' shutting down or being modified so as to comply with the rules, the number of incinerators not meeting the conditions prescribed by the order of 25 January 1991 and by Directives 89/369 and 89/429 had gone down from 27 in 1998 to seven at the end of 1999, namely those at Angers, Douchy, La Rochelle, Le Havre, Le Mans, Maubeuge and Rouen. It contended that this significant improvement in the position proved that the measures adopted by it were neither ineffective nor insufficient.

- 15 The French Government also maintained that no limit on dioxin discharges then existed in European legislation for household refuse incinerators. Nevertheless, it had imposed upon itself the obligation to ensure that incineration plants did not discharge quantities of dioxins of more than 10 ng I-TEQ/m³ and the most recent assessment carried out revealed only four cases where this was exceeded.

- 16 Since the Commission considered that the French Government had not adopted the measures required in order to comply with the reasoned opinion, it brought the present action.

Substance

- 17 First of all, the subject-matter of the action should be made clear. The Commission asks the Court, in the form of order set out in its application, to find a failure to fulfil obligations in relation to incinerators currently operating in France. That wording could be understood as referring to incinerators operating on the date of delivery of the judgment. However, it is evident from the action as a whole and from the pre-litigation procedure that the form of order sought by the Commission in the present case in fact refers to incinerators operating on the date on which the period laid down in the reasoned opinion expired.
- 18 The Commission submits that it is clear beyond question from the information made public by the French Government and its replies to the letter of formal notice and to the reasoned opinion that numerous incinerators have operated, and seven of them continue to operate, without complying with the combustion conditions laid down by Article 4(1) of Directive 89/369 and Articles 2(a) and 4 of Directive 89/429.
- 19 The French Government contends that, in its application, the Commission included among the number of deficient incinerators those which did not meet the limit of 10 ng I-TEQ/m³ for the discharge of dioxins but did comply with the obligations under Directives 89/369 and 89/429. The French Government states that those directives do not prescribe a maximum value for the discharge of dioxins. Moreover, the Commission acknowledged in its reply that the exceeding of that limit does not constitute legal or scientific proof that Directives 89/369 and 89/429 have been infringed. This admission amounts to a partial withdrawal of the Commission's complaint which should be taken into account in the decision on costs.

- 20 That argument cannot be upheld. Although the Commission stated in its application that exceeding the limit of 10 ng I-TEQ/m³ means, in its view, that the combustion conditions laid down by Directives 89/369 and 89/429 have not been complied with, it did not take that as demonstrating any failure to fulfil the obligations under those directives. On the contrary, in its application the Commission founded its complaint solely on the fact that at least seven incinerators did not satisfy the combustion conditions laid down by those directives, as the French Government itself conceded in its response to the reasoned opinion.
- 21 The French Government also argues that the provisions of Directives 89/369 and 89/429 have been correctly transposed into national law by the order of 25 January 1991 and that there are measures to ensure the effective application of those provisions. In accordance with the case-law, it has laid down, for breach of the obligations arising under those provisions, effective, proportionate and dissuasive penalties conferring no less protection than that under national law alone.
- 22 As to that argument, suffice it to state that the Commission does not allege that the French Republic has not transposed, or has incorrectly transposed, Directives 89/369 and 89/429 into national law or that it has failed to put in place laws, regulations and administrative provisions ensuring their application. The Commission's complaint relates to the fact that the measures adopted by the French authorities to comply with their obligations under those directives were too late, as they were adopted only from April 1998, that is to say nearly a year and a half after the time-limit of 1 December 1996. Moreover, those measures are insufficient for the Commission since, four years after the time-limit, they still had not enabled the result required by Directives 89/369 and 89/429 for all incinerators in France to be achieved.
- 23 The French Government contends, however, that, in accordance with the wording of Directives 89/369 and 89/429, the Member States are required only to

make incinerator operators subject to certain obligations. It submits that, in accordance with settled case-law, such an obligation is binding on the Member States as to the objective to be achieved, whilst leaving a margin of discretion in assessing the need for the measures which are to be adopted. From the fact that a situation is not in conformity with the objectives laid down by a provision of a directive, the direct inference may not in principle be drawn that the Member State concerned has necessarily failed to fulfil its obligation under that provision. Furthermore, breach of a rule contained in a directive by a legal person independent of a Member State cannot constitute a failure by that State to fulfil its obligations.

- 24 As to those arguments, first of all, the third paragraph of Article 249 EC provides that 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. It follows that one of the principal characteristics of directives is precisely that they are intended to achieve a specified result.
- 25 However, Community legislative practice shows that there may be great differences in the types of obligations which directives impose on the Member States and therefore in the results which must be achieved.
- 26 Some directives require legislative measures to be adopted at national level and compliance with those measures to be the subject of judicial or administrative review (see, for example, Article 4, in conjunction with Article 8, of Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17); see, in this regard, Case C-360/88 *Commission v Belgium* [1989] ECR 3803 and Case C-329/88 *Commission v Greece* [1989] ECR 4159).

- 27 Other directives lay down that the Member States are to take the necessary measures to ensure that certain objectives formulated in general and unquantifiable terms are attained, whilst leaving them some discretion as to the nature of the measures to be taken (see, for example, Article 4 of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32); see, in this regard, Case C-365/97 *Commission v Italy* (the ‘*San Rocco*’ case) [1999] ECR I-7773, paragraphs 67 and 68).
- 28 Yet other directives require the Member States to obtain very precise and specific results after a certain period (see, for example, Article 4(1) of Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ 1976 L 31, p. 1); see, in this regard, Case C-56/90 *Commission v United Kingdom* [1993] ECR I-4109, paragraphs 42, 43 and 44, Case C-198/97 *Commission v Germany* [1999] ECR I-3257, paragraph 35, Case C-307/98 *Commission v Belgium* [2000] ECR I-3933, paragraph 51, and Case C-268/00 *Commission v Netherlands* [2002] ECR I-2995, paragraphs 12, 13 and 14).
- 29 Accordingly, given that a failure to fulfil obligations can be found only if there is, on expiry of the period laid down in the reasoned opinion, a situation contrary to Community law which is objectively attributable to the Member State concerned, a finding that the failure at issue has occurred depends on the type of obligations imposed by the provisions of Directives 89/369 and 89/429.
- 30 In this regard, it is to be remembered that Directives 89/369 and 89/429 form part of an overall Community strategy to protect the environment and reduce air pollution. Incineration plants were already covered by Directive 84/360, under which the Member States were obliged to prescribe prior authorisation procedures and regular checks for their operation and gradually to adapt existing

plants to the best available technology. Directives 89/369 and 89/429 supplemented that legislation by introducing detailed and precise requirements applicable to both new and existing municipal waste incineration plants.

- 31 Under Article 4(1) of Directive 89/369 and Articles 2(a) and 4 of Directive 89/429, new and existing incineration plants must be rendered compliant with the precise combustion requirements laid down in those provisions. The provisions state that the gases resulting from the combustion of the waste must be raised, after the last injection of combustion air and even under the most unfavourable conditions, to a temperature of at least 850 °C for at least two seconds in the presence of at least 6% oxygen, save, so far as concerns the two-second period, in the event of major technical difficulties affecting an existing plant.
- 32 Furthermore, Article 5(1) of both Directive 89/369 and Directive 89/429 specifies that the temperature and the oxygen content laid down are minimum values to be observed at all times when the plant is in operation.
- 33 It follows that Directives 89/369 and 89/429 impose on the Member States obligations, formulated in clear and unequivocal terms, to achieve a certain result, in order that their incineration plants meet detailed and precise requirements within the stated time-limits.
- 34 In those circumstances, contrary to the French Government's assertions it is not therefore sufficient for a Member State to take all reasonably practicable measures to achieve the result imposed by Directives 89/369 and 89/249 (see, to that effect, with regard to Directive 76/160, *Commission v United Kingdom*,

cited above, paragraphs 42 and 44, *Commission v Germany*, cited above, paragraph 35, Case C-307/98 *Commission v Belgium*, cited above, paragraph 51, and *Commission v Netherlands*, cited above, paragraphs 12, 13 and 14).

35 Furthermore, even assuming that absolute physical impossibility to perform the obligations at issue imposed by Directives 89/369 and 89/429 may justify failure to fulfil them, the French Government has not been able to establish such impossibility in the present case (see *Commission v United Kingdom*, cited above, paragraph 46).

36 Next, in accordance with settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing at the end of the period laid down in the reasoned opinion, and subsequent changes cannot be taken into account by the Court (see Case C-214/96 *Commission v Spain* [1998] ECR I-7661, paragraph 25, and Case C-384/97 *Commission v Greece* [2000] ECR I-3823, paragraph 35).

37 In that regard, it need only be stated that the French Government itself acknowledged in its reply to the reasoned opinion of 21 October 1999, which laid down a period of two months from its notification, that at the end of 1999 seven incineration plants were still operating without complying with the combustion conditions laid down by Directives 89/369 and 89/429.

38 Nor can the French Government legitimately justify the failure to fulfil obligations by putting forward the argument that the delay in rendering the plants at issue consistent with the rules is due to the fact that more than a few months are required for the compliance works. From 1 December 1990 new plants should have met the requirements under Directive 89/369, so that, from

that date, no new plant not satisfying those requirements should have been put into service. As regards existing plants, Directive 89/429 allowed an additional period of six years after the period laid down for its implementation in order to enable the Member States to fulfil the requirements which it imposes. Accordingly, even if the compliance works were necessarily of considerable duration, Directive 89/429 gave the Member States ample time to carry them out by providing for such an additional six-year period.

- 39 It is likewise not possible to accept the French Government's argument that it embarked upon a vigorous programme to comply with the rules laid down by Directives 89/369 and 89/429, enabling the number of plants not complying with those rules to be reduced from 40 in December 1996 to seven at the end of 1999. It is common ground that the French Government established and then implemented that programme from the end of 1996 only, that is to say six years after the time-limit for implementing Directive 89/429 expired. Accordingly, the measures adopted by the French Government were belated and they cannot be relied on in order to justify the failure to fulfil obligations.
- 40 Nor can the French Government properly argue that shutting down plants which did not comply with the rules was out of the question given the volumes of waste produced. Even assuming that a circumstance of that kind can serve as a valid justification for not complying with the obligations under Directive 89/429, the French Government has not shown that, if certain plants were taken out of service, it would in practice be impossible to transport municipal waste to neighbouring plants as a temporary arrangement.
- 41 Having regard to all the foregoing considerations, it must be found that, by failing to adopt all the necessary and appropriate measures to ensure that all incinerators in France are operated in accordance with the combustion conditions laid down by Directives 89/369 and 89/429 or that they ceased to operate by the

due date, namely 1 December 1990 as regards new plants and 1 December 1996 as regards existing plants, the French Republic has failed to fulfil its obligations under Article 4(1) of Directive 89/369 and Articles 2(a) and 4 of Directive 89/429.

Costs

- ⁴² Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs of the proceedings.

On those grounds,

THE COURT

hereby:

- 1. Declares that, by failing to adopt all the necessary and appropriate measures to ensure that all incinerators in France are operated in accordance with the**

combustion conditions laid down by Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants and Council Directive 89/429/EEC of 21 June 1989 on the reduction of air pollution from existing municipal waste incineration plants or that they ceased to operate by the due date, namely 1 December 1990 as regards new plants and 1 December 1996 as regards existing plants, the French Republic has failed to fulfil its obligations under Article 4(1) of Directive 89/369 and Articles 2(a) and 4 of Directive 89/429;

2. Orders the French Republic to pay the costs.

Rodríguez Iglesias	Jann	Macken
Colneric	von Bahr	La Pergola
Puissochet	Wathelet	Skouris
Cunha Rodrigues	Timmermans	

Delivered in open court in Luxembourg on 18 June 2002.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President