OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 7 April 1987 *

Mr President,
Members of the Court,

1. The Federal Republic of Germany is accused by the Commission of failing to implement Directive 79/831/EEC of 18 September 1979 amending for the sixth time Directive 67/548/EEC on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances, [1] the provisions of which have not been completely and correctly transposed into national law within the period prescribed by the directive (that is, by 18 September 1981 at the latest).

2. The Commission considered that the German law applicable (namely the Chemikaliengesetz (Law on Chemical Products) of 16 September 1980 hereinafter referred to as 'the 1980 Law', and the Verordnung über gefährliche Arbeitsstoffe (Regulation on dangerous industrial substances) of 11 February 1982, hereinafter referred to as 'the 1982 Regulation'), did not adequately ensure the correct implementation of the directive; by letter of 22 December 1983, it therefore informed the Federal German Government that it had failed to implement the directive.

3. As a result of observations submitted by the Federal German Government, the Commission withdrew some of the original complaints but maintained several others in the reasoned opinion delivered on 6 November 1984.

4. In reply to that opinion, the Federal German Government informed the Commission that it intended to enact a further regulation (Verordnung über gefährliche Stoffe (Regulation on dangerous substances)), a draft of which was forwarded to the Commission and which was enacted on 18 December 1985.

5. The Commission nevertheless brought the present action against the Federal Republic of Germany for failure to fulfil its obligations under the Treaty on 5 July 1985.

6. In the course of the procedure, as a result of arguments put forward by the Federal German Government in its defence, the Commission withdrew, in its reply, some of the remaining complaints, thus restricting the subject-matter of the action even further.

7. After the hearing, in the course of which it had, moreover, appeared to be satisfied as regards various other complaints, the Commission informed the Court in writing, pursuant to Article 78 of the Rules of Procedure, that it wished to discontinue the proceedings with regard to two of the complaints (concerning the fourth indent of Article 8 (1) and the third subparagraph of Article 11 (1) of the directive).

8. I shall therefore now consider the complaints which the Commission has not expressly withdrawn.

Article 11 (3) of the directive

9. Article 11 (3) provides that for three years the name of a substance covered by the directive may be included in encoded form in the list provided for in Article 13 (2) — drawn up by the Commission on the basis of information provided by the

* Translated from the Portuguese.

1 — Official Journal 15.10.1979, L 259, p. 10.

Member States — where the competent authority to which the notification has been submitted in accordance with Articles 6 and 11 (1) so requests because of the confidentiality problems to which publication of the name of the substance would give rise.

10. In the application, the Commission claimed that the failure to implement Article 11 (3) in national law meant that the protection of secrecy provided for in the directive was not assured. In the reply, however, it stated that in this respect the protection of secrecy provided was too wide, inasmuch as the period for which the name of the substance was to be in encoded form was unlimited.

11. On that point the Federal German Government considers that, by changing its arguments, the Commission was in effect putting forward a fresh complaint which was not raised in the application or in the pre-litigation procedure. Consequently, the complaint is in its view inadmissible.

12. I am inclined to think that the Federal German Government is right, since the new formulation of the complaint does not merely amplify the scope of the original complaint but refers to a different aspect — and even a different part — of the same provision.

13. However, it must be recognized that it is not wholly clear that this complaint is inadmissible.

14. The Commission has always claimed that the Federal Republic of Germany has not implemented, or has not fully implemented, the provision of the directive in question. The complaint was reformulated in the light of the arguments put forward by the parties and — it may be thought — in reply to those arguments.

15. In any event, it seems to me that the complaint is clearly unfounded.

16. The Federal German Government has in my view explained this well; I shall therefore merely set out the relevant passage of the rejoinder.

17. 'German law provides for the possibility of including in encoded form, that is to say solely under its commercial name, the substances in the list drawn up by the Commission — that is not disputed by the applicant. The question as to how long the *Commission* will continue to include a substance in encoded form in the list drawn up by the Commission pursuant to *Community law* is a question governed not by German national law but solely by Community law. The three-year period fixed by Article 11 (3) of the directive cannot be abolished, reduced or extended by rules of national law. National law can merely provide, in connection with the *national* notification procedure, for a chemical substance to be included in encoded form in the list, which for its part is governed by *Community* law. There is no doubt that German law satisfies this requirement of the directive'.

18. I would merely add that in various passages of its defence the Federal German Government explained, with regard to various connected complaints (Article 11 (1), (2) and (3) of the directive), the provisions of national law which could be regarded as satisfying the obligation for notified substances to be included in encoded form in order to respect secrecy. It was in the light of those considerations that the Commission withdrew its complaints

concerning Article 11 (1) and (2) and reformulated the complaint concerning Article 11 (3).

19. On the other hand, since Article 13 (2) and 13 (3) of the directive provide that the Commission is to draw up, manage and keep up to date the list of all notified substances, Commission Decision 85/71/EEC of 21 December 1984[2] fixed the procedure for organizing and publishing that list. There is nothing in that decision to show that the protection of secrecy during the period laid down in the directive is not the Commission's responsibility, and that it is not for the Member States to amend the list of substances to lift the secrecy at the end of the three-year period.

20. That is not altered by the fact that the Commission acknowledged at the hearing that it did not yet know how to proceed to terminate confidentiality at the end of that period.

21. I must therefore conclude that that complaint is unfounded.

Articles 15 and 16 of the directive

22. Articles 15 and 16 of the directive provide that any dangerous substance within the meaning of Article 2 of the directive cannot be placed on the market unless its packaging and labelling satisfies the requirements laid down.

23. According to the Commission, the national law of the Federal Republic of Germany only provides for such obligations with regard to substances intended for industrial purposes and not for those intended for domestic use, even though Article 1 is so broadly worded that the directive applies to them as well. Secondly, the Commission claims that the German legislation does not fully reproduce the various specific requirements laid down in certain provisions in Articles 15 and 16.

24. Even as regards the national legislation in force at the time when the application was brought, the Federal German Government contended that the provisions of Articles 15 and 16 of the directive had been fully implemented.

25. In that regard it referred first to Paragraph 13 (1) of the 1980 Law, which extended the obligations on packaging and labelling to dangerous substances not covered by the 1982 Regulation but included in the definitions laid down in Paragraph 3 (3) of the Law.

26. Secondly, the Federal German Government considered that Paragraph 14 of the 1980 Law made that provision sufficiently effective, without the need for any additional implementing measure.

27. The Federal German Government also referred to the 'Technical Rules' concerning the 1982 Regulation which were adopted and published in the official bulletin by the Federal Minister for Labour and Social Security and to which the 1982 Regulation attributed binding force. Points 3.6.4 and 3.4.5 of those rules provided for the requirements laid down by Article 16 (2) (f) and (4) of the directive.

28. I consider that the Federal German Government has provided adequate justifi-

2 — Official Journal 2.2.1985, L 30, p. 33.

cation for its view that the obligations concerning labelling and packaging are applicable, having regard to the provisions of the 1980 Law, to all dangerous substances, whether or not they are industrial substances.

29. I am, however, in some doubt as to whether the specific points covered by Article 16 (2) (f) and (4) of the directive have been fully implemented. On the one hand, the 'Technical Rules' are referred to solely by the 1982 Regulation, on *industrial* substances; furthermore, the explanation furnished by the Federal Republic concerning the scope of the term 'advertising' in connection with the first of the provisions in question does not seem to be entirely convincing.

30. With regard to the rules laid down in the third indent of Article 16 (2) and Article 16 (2) (d) of the directive for carcinogenic substances covered by Article 2 (2) (1), it again does not seem that the German legislation fully implements that provision, in view of the exception provided for in Paragraph 5 (1) *in fine* of the 1982 Regulation. The explanations provided by the Federal German Government cannot refute the Commission's complaint.

31. However, the Federal German Government has submitted to the Court and the Commission the text of the Verordnung über gefährliche Stoffe (Regulation on dangerous substances) of 26 August 1986, which in its view should satisfy all the Commission's requirements.

32. At the hearing, the Commission's agent stated that that regulation contained provisions which took account of the Commission's requirements.

33. In particular, with regard to the complaints based on the implementation of Article 16 (2) (f), 16 (2) (d) (in conjunction with Article 2 (2) (l) and the third indent of Article 16 (2)) and Article 16 (4) of the directive, the Commission's agent stated that, in the light of the provisions of the new regulation and having regard to the 'Technical Rules' referred to by the Federal German Government in its written observations, the Commission wished to withdraw its complaints.

34. However, none of those complaints was included in the statement of withdrawal which the Commission subsequently sent to the Court.

35. I take the view that with the publication, on 5 September 1986, of the new regulation, the Commission's complaints are now clearly satisfied, in particular by Paragraphs 1 and 2 (1) (field of application), 3 (4) (indications which must appear on the label or packaging), 5 (carcinogenic substances) and 7 (5) (optional symbols).

36. In general, the Commission retains the right to bring an action against a State for failure to fulfil its obligations even when the State in question terminates the infringement of which it is accused after the end of the period fixed in the reasoned opinion. Indeed, the Commission may have an interest in the Court's deciding whether or not the State in question has failed to fulfil its obligations. [3]

3 — Judgment of 19 December 1961 in Case 7/61 *Commission* v *Italy* [1961] ECR 317 at pp. 325 and 326, and Opinion of Mr Advocate General Lagrange at pp. 330-338.

37. However, although it is certain that the Commission is in principle assumed to have a legal interest whenever the failure by a State to fulfil its obligations is not terminated within the prescribed period,[4] the Court has already acknowledged in a case in which the application was brought when the defendant's alleged infringement had virtually ceased that although the Court was not in a position to determine how far it was expedient for the Commission to bring the action, it had to consider whether the Commission still had a sufficient legal interest.[5]

38. I consider that the circumstances surrounding the present application justify further reflection as to the use made by the Commission of the powers conferred upon it by the second paragraph of Article 169 of the Treaty.

39. May I draw the Court's attention to the following facts:

(a) The new regulation was published on 5 September 1986 after the end of the written procedure in the action but several months before the hearing; the Federal German Government informed the Commission that a draft had been drawn up during the pre-litigation procedure and forwarded to the Commission in 1985, apparently in April, before the application was even lodged.

(b) At the hearing the Commission's agent mentioned the possibility that it would withdraw the complaint concerning Articles 15 and 16 of the directive in terms which caused the agent for the Federal Republic of Germany to believe that all the complaints had been withdrawn apart from that concerning Article 11 (3) of the directive;

(c) After the hearing the Commission expressly withdrew two of the remaining complaints, in the light of the amendment made to the 1980 Law by the Gesetz zum Schutz der Kulturpflanzen (Law on the protection of cultivated plants) of 19 September 1986. However, it made no comment as regards the complaints affected by the new regulation, even though it was requested by the Court to 'revise its position' in that regard;

(d) The Commission's agent admitted that he had not become aware of the new law on cultivated plants until 4 February 1987, owing to problems connected with the internal organization of the institution and the procedure had raised no ground on which the new decree merited attention; however, no request was made for the hearing to be adjourned to permit further consideration of the question;

(e) The questions arising from the present application do not raise questions of principle on Community law, but only technical questions concerning the implementation of a harmonizing directive.

40. Under those circumstances, there is good reason to consider that although the Commission has an interest in bringing the action, this is a borderline case.

41. However, although it is clear that the Commission did not consider it useful to put forward formal arguments to justify its interest in having the infringement of the

4 — Judgment of 4 April 1974 in Case 167/73 *Commission* v *French Republic* [1974] ECR 359, at p. 369.

5 — Judgment of 9 July 1970 in Case 26/69 *Commission* v *France* [1970] ECR 565, at pp. 576-577.

Treaty established by the Court, in spite of the fact that it had been terminated by the new regulation, it is equally impossible to say that the general presumption that the Commission has such an interest has been indisputably rebutted by formal evidence or that it has been indisputably proved that it is *only* by reason of its negligence, lack of care or internal office problems that the Commission maintained its application, in spite of amendments to the laws and regulations.

42. Thus the fact remains that the 1980 Law and the 1982 Decree did not, in my opinion, properly implement the provisions of Directive 79/831/EEC as regards the indication of carcinogenic substances on the labels of packages and there is still some doubt as to whether the provisions of Article 16 (2) (f) and (4) of the directive were fully implemented through the 'Technical Rules', so that the requirements of clarity and legal certainty have not been satisfied.

43. It is in these terms that I propose that the Court should declare that the Federal Republic of Germany has failed to fulfil its obligations.

44. As regards the Commission's reservation on Paragraph 2 (3), Point 1, of the 1982 Regulation, which excludes from the scope of its second part 'substances, preparations or products . . . intended to be transported outside the geographical field of application of the present regulation', this need not be taken into account since it was not put forward until the hearing.

45. The circumstances in which the Commission prepared and conducted this application — to which I have referred in points (a) to (e) above — merit unequivocal criticism and lead me to propose that the Court should avail itself of the possibility conferred upon it by the second subparagraph of Article 69 (3) of the Rules of Procedure and order the Commission to bear the whole of the costs.