JUDGMENT OF THE COURT (Fifth Chamber)
21 January 1999 *

In Case C-150/97,

Commission of the European Communities, represented by Francisco de Sousa Fialho, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Portuguese Republic, represented by Luís Fernandes, Director of the Legal Service of the Directorate-General for European Community Affairs, and Pedro Portugal, Adviser to the Environment Directorate, acting as Agents, 1 Rua da Cova da Moura, Lisbon,

defendant,

APPLICATION for a declaration that, by failing to adopt the laws, regulations or administrative provisions necessary to comply fully and properly with Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), the Portuguese Republic has failed to fulfil its obligations under the third paragraph of Article 189 of the EC Treaty and Article 12 of that directive,

* Language of the case: Portuguese.

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J. C. Moitinho de Almeida, C. Gulmann, L. Sevón (Rapporteur) and M. Wathelet, Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 13 October 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 17 April 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to adopt the laws, regulations or administrative provisions necessary to comply fully and properly with Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40, 'the directive'), the Portuguese Republic has failed to fulfil its obligations under the third paragraph of Article 189 of the EC Treaty and Article 12 of the directive.

2 Article 12(1) of the directive required the Member States to take the measures necessary to comply with the directive within three years of its notification, which took place on 3 July 1985.

3 Although the Portuguese Republic acceded to the European Communities with effect only from 1 January 1986, it was required, by virtue of Articles 392 and 395 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23), to bring into force the measures necessary to implement the directive by 3 July 1988 at the latest.

4 The Portuguese Government communicated to the Commission the provisions which, in its view, were sufficient to transpose the directive into national law, namely:

— Law No 11/87 of 7 April 1987 (the basic environment law);

— Decree-Law No 186/90 of 6 June 1990;

— Implementing Decree No 38/90 of 27 November 1990, and

— Regional Implementing Decree No 14/91/M of 16 August 1991, approving the necessary amendments for the implementation of Decree-Law No 186/90 and Implementing Decree No 38/90 in the Madeira Region.

5 The Commission, however, took the view that those provisions did not constitute complete transposition of the directive and accordingly informed the Portuguese Government of the grounds on which it considered that transposition was incomplete and, by letter of 25 January 1993, gave that Government notice to submit its observations within two months.

6 The Portuguese Government forwarded its observations to the Commission and mentioned in particular that it had adopted new legislation.

7 Considering that the new legislation amounted to partial transposition of the directive, the Commission withdrew some of its claims but, on the other hand, on 6 August 1996 it sent the Portuguese Government a reasoned opinion concerning the claims which it maintained.

8 By letter of 17 December 1996, the Portuguese Republic informed the Commission that a working party had been set up for the purpose of drafting the legislative provisions necessary to resolve the matters raised by the Commission.

9 Since it never received the promised legislative provisions, the Commission brought the present action.

10 In its application the Commission set out nine claims against the Portuguese legislation.

11 On 23 October 1997, the Portuguese Government communicated to the Court Decree-Law No 278/97, amending Decree-Law No 186/90 of 6 June 1990 (*Diário da Republica* No 233/97, I Series A, of 8 October 1997), and Implementing Decree No 42/97, amending Implementing Decree No 38/90 of 27 November 1990 (*Diário da Republica* No 235/97, I Series B, of 10 October 1997).

12 After considering the national implementing measures, the Commission informed the Court by letter of 30 June 1998 that it was withdrawing part of its action and would now pursue only one head of claim.

13 By that claim, the Commission contends that, according to Article 11(2) of Decree-Law No 186/90, that Law does not apply to projects in respect of which the approval procedure was already under way on the date on which it came into force, namely 7 June 1990, whereas the provisions of the directive must, pursuant to Articles 2(1) and 12(1) thereof, apply whenever it is necessary to take a decision concerning a consent application as from 3 July 1988. In the Commission's view, the Portuguese Republic cannot plead the principle of legal certainty in order to justify the fact that the new legislation does not apply to applications currently under consideration since, so long as no administrative decision has been taken concerning the projects submitted, developers acquire no vested interest.

14 In its letter of withdrawal, the Commission states that Decree-Law No 278/97 has not altered that state of affairs. It therefore asks the Court to find that the Portuguese Republic has failed to fulfil its obligations in the terms used in its application.

15 In its observations on the Commission's application for partial withdrawal, the Portuguese Republic argues that it is in order to observe the principle of legal certainty, laid down in Article 12 of the Portuguese Civil Code, according to which laws take effect for the future only, that the Decree-Law has not been given retrospective effect. Any exception to that principle would have to be subject to careful examination and the legally protected interests of individuals or their legitimate expectations could not in any circumstances be compromised.

16 It adds that the projects covered by Article 11 of Decree-Law No 186/90, that is to say those in respect of which consent applications were submitted after 3 July 1988 but before the date on which the national legislation entered into force, were very few in number and all of them were the subject of an environmental impact report.

17 With regard to Decree-Law No 278/97, the Portuguese Republic points out that it was careful to exclude from retrospective effect only those provisions which entailed serious infringement of the rights and legitimate expectations of the individuals subject to the obligations arising from the legislation in question.

18 In its judgment in Case C-396/92 *Bund Naturschutz in Bayern and Others* v *Freistaat Bayern* [1994] ECR I-3717, the Court has already ruled that Article 12(1) of the directive must be interpreted as not permitting a Member State which has transposed the directive into national law after 3 July 1988, the deadline for transposition, to waive, by a transitional provision, for projects in respect of which the consent procedure was already initiated before the entry into force of the national law transposing the directive, but after 3 July 1988, the obligations concerning the environmental impact assessment required by the directive (see also, to this effect, Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 28, Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraphs 23 to 28, and Case C-301/95 *Commission* v *Germany* [1998] ECR I-6135, paragraph 29).

19 There is nothing in the directive which could be construed as authorising the Member States to exempt projects in respect of which the consent procedures were initiated after the deadline of 3 July 1988 from the obligation to carry out an environmental impact assessment (*Bund Naturschutz in Bayern,* paragraph 18, and *Gedeputeerde Staten van Noord-Holland,* paragraph 22).

20 As regards the Portuguese Government's argument that it must observe the principle prohibiting retrospective application of laws, the Commission has limited its application for a declaration to the fact that the Portuguese Republic had not provided for the law implementing the directive to apply with immediate effect to applications made to the competent national authority after 3 July 1988 and still pending at the time when the national legislation entered into force.

21 Furthermore, it is settled case-law that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive (see, in particular, Case 275/83 *Commission* v *Belgium* [1985] ECR 1097, paragraph 10, Case C-298/97 *Commission* v *Spain* [1998] ECR I-3301, paragraph 14, and Case C-326/97 *Commission* v *Belgium* [1998] ECR I-6107, paragraph 7).

22 With regard, finally, to the argument that the applications for consent submitted after 3 July 1988 but before the date on which the national legislation entered into force were few in number and had all been the subject of an environmental impact report, it is important to remember that, even assuming that fact to have been established, failure by a Member State to fulfil an obligation imposed by a rule of Community law is sufficient to constitute a breach of Treaty obligations and the fact that the failure had no adverse effects is irrelevant (Case C-209/88 *Commission* v *Italy* [1990] ECR I-4313, paragraph 14).

23 In those circumstances, it must be held that, by adopting a transitional provision by virtue of which national legislation transposing the directive adopted after 3 July 1988, the deadline for transposition, is not applicable to projects in respect of which

the consent procedure had been initiated before the entry into force of the national law transposing the directive but after 3 July 1988, the Portuguese Republic has failed to fulfil its obligations under the directive.

Costs

24 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. Article 69(5) provides, however, that where a party discontinues or withdraws from proceedings, upon application by that party, the costs shall be borne by the other party if this appears justified by the conduct of that party.

25 Despite the partial withdrawal of its action, the Commission requests the Court to order the Portuguese Republic to pay the costs, since its partial withdrawal is justified by the latter's conduct.

26 In light of the fact that the Commission's partial withdrawal was justified by the conduct of the Portuguese Republic, which adopted legislation implementing the directive after the action had been initiated, and of the fact that that Member State has been unsuccessful in defending the claim still remaining following that withdrawal, the Portuguese Republic must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by adopting a transitional provision by virtue of which national legislation transposing Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, adopted after 3 July 1988, the deadline for transposition, is not applicable to projects in respect of which the consent procedure had been initiated before the entry into force of the national law transposing that directive but after 3 July 1988, the Portuguese Republic has failed to fulfil its obligations under that directive;**

2. **Orders the Portuguese Republic to pay the costs.**

Puissochet Moitinho de Almeida Gulmann

Sevón Wathelet

Delivered in open court in Luxembourg on 21 January 1999.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber