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

In Case C-207/97,

Commission of the European Communities, represented initially by Richard B. Wainwright, Principal Legal Adviser, and Jean-Francis Pasquier, a national civil servant on secondment to the Legal Service, and subsequently by Richard B. Wainwright and Olivier Couvert-Castéra, a national civil servant on secondment to the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by Jan Devadder, General Adviser at the Ministry of Foreign Affairs, External Trade and Cooperation with Developing Countries, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

defendant,

APPLICATION for a declaration that, by not adopting pollution reduction programmes including quality objectives for water — at least in respect of 99 substances listed in an annex to the application — or by not communicating to the Commission summaries of such programmes and the results of their implementation, in infringement of Article 7 of Council Directive 76/464/EEC of 4 May 1976 on pol-

* Language of the case: French.

lution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23), the Kingdom of Belgium has failed to fulfil its obligations under the EC Treaty,

THE COURT (Sixth Chamber),

composed of: P. J. G. Kapteyn, President of the Chamber, G. F. Mancini, H. Ragnemalm, R. Schintgen and K. M. Ioannou (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 14 May 1998,

after hearing the Opinion of the Advocate General at the sitting on 18 June 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 30 May 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by not adopting pollution reduction programmes including quality objectives for water — at least in respect of 99 substances listed in an annex to the application — or by not communicating to the Commission summaries of such programmes and the results of their implementation, in infringement of Article

7 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; hereinafter 'the Directive'), the Kingdom of Belgium has failed to fulfil its obligations under the EC Treaty.

Legislative background

2 The first recital in the preamble to the Directive, which was adopted on the basis of Articles 100 and 235 of the Treaty, states that 'there is an urgent need for general and simultaneous action by the Member States to protect the aquatic environment of the Community from pollution, particularly that caused by certain persistent, toxic and bioaccumulable substances'.

3 In order to ensure such protection, the Directive draws a distinction between two categories of dangerous substances, described respectively in List I and List II of the Annex to the Directive.

4 As is clear from the sixth and seventh recitals in the preamble to the Directive, and from Articles 2 and 3 thereof, List I contains particularly dangerous substances selected mainly on the basis of their toxicity, persistence and bioaccumulation. The Member States are required to take the appropriate steps to eliminate pollution of the waters by those substances and to ensure that current discharges of such substances are subject to prior authorisation by the competent authority of the Member State concerned.

5 Article 6 of the Directive provides:

'1. The Council, acting on a proposal from the Commission, shall lay down the limit values which the emission standards must not exceed for the various dangerous substances included in the families and groups of substances within List I.

...

The limit values applicable to the substances within List I shall be laid down mainly on the basis of:

— toxicity,

— persistence,

— bioaccumulation,

taking into account the best technical means available.

2. The Council, acting on a proposal from the Commission, shall lay down quality objectives for the substances within List I.

...'

6 In accordance with the sixth and ninth recitals in the preamble to the Directive and Article 2 thereof, List II comprises substances which have a deleterious effect on the aquatic environment, which can, however, be confined to a given area and which depends on the characteristics and location of the water into which the substances are discharged. The pollution thus caused must be reduced and current discharges of those substances must be subject to prior authorisation specifying emission standards.

7 Article 7 of the Directive provides:

'1. In order to reduce pollution of the waters referred to in Article 1 by the substances within List II, Member States shall establish programmes in the implementation of which they shall apply in particular the methods referred to in paragraphs 2 and 3.

2. All discharges into the waters referred to in Article 1 which are liable to contain any of the substances within List II shall require prior authorisation by the competent authority in the Member State concerned, in which emission standards shall be laid down. Such standards shall be based on the quality objectives, which shall be fixed as provided for in paragraph 3.

3. The programmes referred to in paragraph 1 shall include quality objectives for water; these shall be laid down in accordance with Council Directives, where they exist.

...

5. The programmes shall set deadlines for their implementation.

6. Summaries of the programmes and the results of their implementation shall be communicated to the Commission.

7. The Commission, together with the Member States, shall arrange for regular comparisons of the programmes in order to ensure sufficient coordination in their implementation. ...'

8 Article 12 of the Directive provides:

'1. The Council, acting unanimously, shall take a decision within nine months on any Commission proposal made pursuant to Article 6 and on the proposals concerning the methods of measurement applicable.

...

2. The Commission shall, where possible within 27 months following notification of this Directive, forward the first proposals made pursuant to Article 7(7). The Council, acting unanimously, shall take a decision within nine months.'

9 The Annex to the Directive provides:

'...

List II contains:

— substances belonging to the families and groups of substances in List I for which the limit values referred to in Article 6 of the Directive have not been determined,

— certain individual substances and categories of substances belonging to the families and groups of substances listed below,

...'

The pre-litigation procedure

10 The Directive does not set a deadline for its transposition into national law. Nevertheless, Article 12(2) provides that the Commission should, within 27 months following notification of the Directive, forward to the Council the first proposals made on the basis of the comparison of the programmes drawn up by the Member States. Surmising that the Member States would be unable to provide the relevant information in good time, the Commission suggested to them, by letter of 3 November 1976, that the programmes should be established by 15 September 1981 and implemented by 15 September 1986.

11 Since List I largely comprises families and groups of substances, the Commission considered it necessary to identify individual substances within those families and groups. The research undertaken for that purpose by the Commission with the help of the Member States led to the establishment of a list of 129 substances annexed to the Communication from the Commission to the Council of 22 June 1982 on dangerous substances which might be included in List I of the Directive (OJ 1982 C 176, p. 3).

12 In its Resolution of 7 February 1983 concerning the combating of water pollution (OJ 1983 C 46, p. 17), the Council took note of the Commission's communication. The Council stated that the list of 129 substances contained in that communication would serve the Community as a basis for further work on the implementation of

the Directive, and noted that the Member States recognised the list of 129 substances as a provisional basis for any national measures to combat pollution of water by those substances when applying the measures provided for in the Directive.

13 Following that resolution, three other substances were added to the list in question, bringing the total number of substances listed to 132. Of those, 18 have been the subject of Council directives laying down emission limit values and quality objectives and 15 others gave rise to the Proposal for a Council Directive amending Directive 76/464, submitted by the Commission on 14 February 1990 (OJ 1990 C 55, p. 7). The Commission has consistently maintained that the remaining 99 substances properly belonged to List I but, pending legislation to that effect, they must be treated in the same way as the priority substances referred to in List II, in accordance with the Annex to the Directive.

14 By letter of 26 September 1989, the Commission reminded the Belgian Government that the meeting of national experts on 31 January and 1 February 1989 concerning the Directive's implementation had enabled a priority list of List II substances to be drawn up, and requested sight of the pollution reduction programmes covering those substances. Under cover of a letter of 14 December 1989, the Belgian Government sent the Commission a series of emission limit values laid down by sectoral decree for some of the substances in question. However, the Commission still wished to receive information on the setting of quality objectives for those substances and the related pollution reduction programmes.

15 On 4 April 1990 the Commission contacted the Belgian Government again, this time concerning the 99 priority substances referred to above. It asked the Belgian Government to send it an up-to-date list indicating which of the 99 substances had been discharged into Belgium's aquatic environment. It also asked to receive the quality objectives applicable at the time when the discharge authorisations had been

granted, or the reasons for the failure to establish such objectives and a timetable indicating the date on which the Kingdom of Belgium would establish them. The Belgian Government did not reply to that letter.

16 By letter of 26 February 1991, the Commission initiated the procedure under Article 169 of the Treaty, giving the Belgian Government notice to submit within two months its comments on the infringement of Article 7 of the Directive brought about by its failure to draw up programmes for the reduction of pollution caused by the substances referred to in the letters of 26 September 1989 and 4 April 1990.

17 By letter of 28 February 1991 in response to the letter of formal notice, the Belgian Government referred to its reply of 15 June 1990 regarding a complaint concerning the operation of a cellulose production undertaking in the Ardennes, maintaining that it '... indicates the approach underlying the Belgian authorities' view that they fulfil the obligations relating to the reduction programmes'.

18 On 3 April 1996 the Commission received delivery from the Belgian authorities of the document entitled 'Flow to the North Sea: Belgian emissions of dangerous substances into the air and waters during the period 1985-1995'. This was drawn up as part of the Belgian commitment under the final declaration of the Third International Conference on the Protection of the North Sea (The Hague, 1990), and consists of charts collating the data available on the discharge into the air and waters of certain dangerous substances likely to affect the North Sea.

19 The Commission decided that neither the reply to the letter of formal notice nor the document forwarded on 3 April 1996 could provide justification for finding that the Belgian authorities had adopted the programmes for reducing pollution of the waters for the purposes of Article 7 of the Directive. Accordingly, on 6 August 1996, it delivered a reasoned opinion to the Belgian Government, expressing its view that by failing, contrary to Article 7 of the Directive, to adopt pollution reduc-

tion programmes including quality objectives in respect of the 99 dangerous substances listed in the Annex or to communicate summaries of such programmes and the results of their implementation, and by failing, contrary to Article 5 of the EC Treaty, to provide the related information requested, the Kingdom of Belgium had failed to fulfil its obligations under that Treaty.

20 By letter of 20 January 1997, the Belgian authorities replied to the reasoned opinion that the list of 99 substances did not have binding force and, in the alternative, that the Kingdom of Belgium had drawn up the programmes and measures required by the Commission.

21 Finding that response unsatisfactory, the Commission brought the present proceedings.

22 On being asked by the Court to specify the scope of the dispute in the present case, the Commission replied that its application relates solely to the 99 substances listed in the annex thereto.

Admissibility

23 The Belgian Government contends that the fact that more than five years elapsed between 28 February 1991, the date of its reply to the Commission's letter of formal notice, and 6 August 1996, the date of the reasoned opinion, was capable of creating uncertainty and of leading the Member State concerned to believe with good reason that the Commission had acknowledged that its position was unfounded. Clearly, therefore, the Commission's inaction over such a long period affected the preparation of a defence.

24 In so far as the defending Government's purpose in making that assertion may be to raise doubts as to the admissibility of the action, it should first be recalled that the Court has consistently held that, given the Commission's role as guardian of the treaties, that institution alone is competent to decide whether it is appropriate to initiate the procedure under Article 169 (Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 22). The Commission also enjoys sole competence to decide whether the pre-litigation procedure should be taken further by delivering a reasoned opinion and, on completion of that procedure, it has the right, but not the duty, to commence proceedings before the Court for a declaration that the Member State concerned is in breach of its obligations as alleged (see, to that effect, Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 12, and Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 46).

25 Secondly, as has been held in the case-law of the Court, the rules of Article 169 of the Treaty must be applied with no attendant obligation on the Commission to act within a specific period, save where the excessive duration of the pre-litigation procedure laid down by Article 169 is capable of making it more difficult for the Member State concerned to refute the Commission's arguments and of thus infringing the rights of defence (Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraphs 15 and 16). Consequently, it is for the Member State concerned to provide evidence that it has been so affected.

26 In the present case, the defending Government does no more than assert that the pre-litigation procedure was excessively long and that, clearly, the Commission's inaction affected the preparation of the defence.

27 Thus, without there being any need to determine whether the length of time which elapsed between the date of the letter of formal notice and the date of the reasoned opinion may be regarded as excessive in the circumstances of this case, it must be held that the Belgian Government has failed to put forward any specific argument to demonstrate that the duration of the pre-litigation procedure made it more difficult for Belgium to refute the Commission's arguments and that the rights of defence were thus infringed. The allegations made by the defending Government must therefore be rejected.

Substance

The plea that the list of 99 substances has no binding force

28 The Belgian Government contends, first of all, that the list of 99 substances is not of a legally binding nature. It maintains that this is clear, not only from the fact that the Council Resolution of 7 February 1983 has no legal force, but also from the content of that resolution, according to which the list in question was to serve simply as a basis for continuing work on a Community definition and as a provisional basis for any national measures. Thus the Commission was making an incorrect association between a brief and vague annex to the Directive and a Council policy resolution.

29 Furthermore, according to the Belgian Government, the Directive constitutes a framework directive which, for effect to be given to it, requires implementing directives such as those adopted by the Council to establish emission limit values and quality objectives in respect of particular substances. Lastly, the fact that the list is not legally binding is borne out by the adoption of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), which replaces a number of articles of the Directive.

30 The Commission points out that it has never regarded the Council Resolution of 7 February 1983 as being of a legally binding nature. It merely viewed the 99 substances at issue as legally relevant simply by virtue of their inclusion in List II of the Annex to the Directive.

31 Furthermore, according to the Commission, the argument that the Directive is only a framework directive is at odds with the system which was set up by the Directive and which defines two levels of protection. The first level aims to reduce water pollution (caused by substances on List II) through programmes adopted in accordance with Article 7 of the Directive. The second aims to eliminate water pollution (caused by substances on List I) by means of the measures prescribed in Article 6 of the Directive.

32 It should be noted that the point at issue in the present case is not the legal nature, binding or not, of the resolution in question, but the question whether the 99 substances belong to the families and groups of substances in List I of the Annex to the Directive and whether more specific legislative provision is required before they can be treated as List II substances.

33 It is not in dispute that the 99 substances belong scientifically to the families and groups of substances in List I and were identified in the course of the research undertaken by the Commission with the help of representatives of the Member States. That research culminated in the Communication of the Commission of 22 June 1982 and the Council Resolution of 7 February 1983 which recognised that those particular substances belonged to the families and groups of substances in List I and that they were a proper subject for Council measures establishing emission limit values and quality objectives, in accordance with Article 6 of the Directive.

34 Consequently, the substances in question belong to List I but they stand in need of more specific legislative provision, such as specific directives adopted by the Council, with a view to fixing their emission limit values and eliminating the pollution which they cause.

35 However, it is clear from the system set up by the Directive and from the wording of the first indent of List II of the Annex thereto that, so long as the Council has not determined emission limit values, there is absolutely no need for more specific legislative provision before the substances in question, which have been identified, are to be treated as List II substances by the Member States. The latter are under an obligation to establish the programmes referred to in Article 7 of the Directive in order to reduce pollution, at least in the case of pollution caused by any of the substances at issue which is likely to be present in waste discharged in their territory (see Case C-206/96 *Commission* v *Luxembourg* [1998] ECR I-3401). Thus the Directive cannot be regarded as a framework-directive so far as that obligation is concerned.

36 Lastly, it must be pointed out that a directive remains in force and continues to produce its full effects in respect of the obligations on Member States until the date of its repeal or replacement. That being so, and since the period prescribed for the transposition of Directive 96/61 has not yet expired, there is no need to consider whether, as the Belgian Government maintains, Directive 96/61 is capable of affecting the Member States' obligations under the Directive.

37 The Belgian Government's submission must therefore be rejected.

The plea that the national measures adopted constitute programmes for the purposes of the Directive

38 The Belgian Government contends that programmes within the meaning of Article 7 of the Directive have in fact been drawn up. It refers on that point to the document entitled 'Flow To the North Sea', a copy of which was forwarded to the Com-

mission on 3 April 1996, and submits that the existing national legislation in this field — consisting of some 50 sectoral decrees, the Royal Decree of 21 November 1987 concerning the Walloon Region and the Decree of the Flemish Government of 21 October 1987 — satisfies the requirements laid down by Article 7 of the Directive. Furthermore, the codes of good agricultural practice also cover many List II substances. The Belgian authorities have therefore acted in the spirit of Article 7 of the Directive.

39 On that point it should be noted that, according to established case-law, the programmes to be established under Article 7 of the Directive must be specific. Thus, the objective of reducing pollution pursued by general purification programmes does not necessarily correspond to the more specific objective of the Directive (Joined Cases C-232/95 and C-233/95 *Commission* v *Greece* [1998] ECR I-3343, paragraph 35).

40 What is specific to the programmes in question is the fact that they must embody a comprehensive and coherent approach, covering the entire national territory of each Member State and providing practical and coordinated arrangements for the reduction of pollution caused by any of the substances in List II which is relevant in the particular context of the Member State concerned, in accordance with the quality objectives fixed by those programmes for the waters affected. They differ, therefore, both from general purification programmes and from bundles of *ad hoc* measures designed to reduce water pollution.

41 It should be added that the quality objectives fixed by those programmes on the basis of analyses of the waters affected serve as the point of reference for calculating the emission standards specified in the prior authorisations. Moreover, those programmes must be communicated to the Commission in a form which facilitates comparative appraisal and their harmonised implementation in all the Member States.

42 However, the national measures at issue do not meet those criteria.

43 In the first place, they do not cover all the substances to which the Commission's application relates. In any event, the Belgian Government has not specified which substances are relevant in the national context.

44 Secondly, and more specifically, it is clear from the documents before the Court that the document entitled 'Flow to the North Sea', drawn up as part of the Belgian commitment under the final declaration of the Third International Conference on the Protection of the North Sea, presents a collation of the data available on the discharge into the air and waters — between 1985 and 1995 — of certain dangerous substances likely to affect the North Sea, on the basis of which a percentage reduction was inferred. It does not embody, therefore, comprehensive arrangements for the reduction of pollution in accordance with the quality objectives set for the waters affected.

45 Similarly, although the various sectoral decrees and the codes of good agricultural practice may assist in reducing water pollution, they are merely *ad hoc* measures, not comprehensive and coherent programmes for pollution reduction, based on studies of the waters affected and setting quality objectives. Although it might be possible to take the view that those measures reflect implied programming, as the Belgian Government maintains, that is not sufficient to characterise them as programmes for the purposes of Article 7 of the Directive.

46 Consequently, it is necessary to reject the plea in law alleging that the national measures at issue constitute programmes for the purposes of Article 7 of the Directive.

47 It must therefore be held that, by not adopting pollution reduction programmes including quality objectives for water in respect of the 99 substances listed in the annex to the application, the Kingdom of Belgium has failed to fulfil its obligations under Article 7 of the Directive.

Costs

48 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 Kingdom of Belgium has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that, by not adopting pollution reduction programmes including quality objectives for water in respect of the 99 substances listed in the annex

to the application, the Kingdom of Belgium has failed to fulfil its obligations under Article 7 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;

2. Orders the Kingdom of Belgium to pay the costs.

Kapteyn Mancini Ragnemalm

Schintgen Ioannou

Delivered in open court in Luxembourg on 21 January 1999.

R. Grass P. J. G. Kapteyn

Registrar President of the Sixth Chamber