JUDGMENT OF THE COURT (Sixth Chamber)

13 June 2002 *

In Case C-474/99,

Commission of the European Communities, represented by G. Valero Jordana, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by failing to adopt the measures necessary to transpose correctly the obligation arising from Articles 2(1) and 4(2) of 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), in

* Language of the case: Spanish.

conjunction with Annex II thereto, and by maintaining in force legislation which, in breach of those provisions, does not enable an assessment of the environmental effects to be carried out in the whole of the national territory in respect of certain classes of project listed in Annex II to that directive and, in a considerable part of that territory, in respect of many other classes of project listed in the same annex, the Kingdom of Spain has failed to fulfil its obligations under that directive,

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, J.-P. Puissochet (Rapporteur) and V. Skouris, Judges,

Advocate General: L.A. Geelhoed,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 10 January 2002,

after hearing the Opinion of the Advocate General at the sitting on 7 March 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 14 December 1999, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to adopt the measures necessary to transpose correctly the obligation arising from Articles 2(1) and 4(2) of 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, hereinafter 'the Directive'), in conjunction with Annex II thereto, and by maintaining in force legislation which, in breach of those provisions, does not enable an assessment of the environmental effects to be carried out in the whole of the national territory in respect of certain classes of project listed in Annex II to that directive and, in a considerable part of that territory, in respect of many other classes of project listed in the same annex, the Kingdom of Spain has failed to fulfil its obligations under that directive.

The legal context

2 The purpose of the Directive is to prevent pollution and other damage to the environment by making certain public or private projects subject to a prior assessment of their effects on the environment.

3 The main provisions of the Directive relevant to the present case, in the version prior to Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337 (OJ 1997 L 73, p. 5), are the following.

4 Article 2(1) of the Directive states:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

5 Article 3 of the Directive provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— the interaction between the factors mentioned in the first and second indents,

— material assets and the cultural heritage.'

6 Article 4 of the Directive provides:

'1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

7 Article 12 of the Directive states:

'1. Member States shall take the measures necessary to comply with this directive within three years of its notification.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this directive.'

8 Since the Directive was notified to the Member States on 3 July 1985, the period prescribed for its transposition expired, pursuant to Article 12(1), on 4 July 1988.

9 In Spanish constitutional law, competence in the field of the environment is shared between the State and the autonomous communities, at both the legislative and executive levels.

10 The State has competence to adopt basic legislation and the autonomous communities adopt secondary legislation, with the possibility of adopting additional measures of protection.

11 Implementing measures generally fall within the competence of the autonomous communities. However, the Tribunal Constitucional (Spanish Constitutional Court) has recognised that in exceptional cases the State, which is competent to

adopt basic legislation, may take the implementing measures needed to avoid irreparable damage and to ensure that the objective requirements of that legislation are satisfied.

12 The status of the autonomous cities of Ceuta and Melilla does not confer on them legislative competence, but merely competence to implement national legislation.

13 At national level, Legislative Royal Decree No 1302/1986 of 28 June 1986 on the assessment of environmental impact (BOE No 155 of 30 June 1986, p. 2195), which applies to the projects covered by Annex I and the projects in the four classes listed in Annex II to the Directive, and Royal Decree No 1131/1988 of 30 September 1988 approving the regulation implementing Legislative Royal Decree No 1302/1986 (BOE No 239 of 5 October 1988, p. 28911) constitute the first measures transposing the Directive.

14 In addition, pursuant to Article 6(3) of Royal Decree No 1997/1995 of 7 December 1995 laying down measures contributing to ensuring biodiversity through the conservation of natural habitats and of woodland fauna and flora (BOE No 310 of 28 December 1995, p. 37310), any project listed in Annex II to the Directive which affects a special area of conservation must be made subject to an environmental impact assessment. This covers the special areas of conservation provided for in Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, hereinafter 'the Habitats Directive').

15 Moreover, for many sectors of activity there are specific national laws which contain provisions relating to the assessment of the impact of projects on the environment. These include Law No 54/1997 of 27 November 1997 on the electricity sector (BOE No 285 of 28 November 1997, p. 35097).

16 Directive 97/11 was transposed into Spanish law by Royal Decree-Law No 9/2000 of 6 October 2000 amending Legislative Royal Decree No 1302/1986 (BOE No 241 of 7 October 2000, p. 34606). That royal decree-law entered into force on 8 October 2000.

The pre-litigation procedure

17 Considering that the Spanish legislation did not comply with the Directive, in particular Article 4(2) thereof, on the ground that it exempted most of the projects covered by Annex II to the Directive from the obligation to assess their environmental effects, by letter of 28 February 1990, the Commission requested the Spanish Government to send it its observations on that subject.

18 By letter of 2 May 1990, the Spanish authorities challenged the Commission's analysis, pointing out that Article 4(2) of the Directive grants Member States considerable latitude to decide whether the classes of projects listed in Annex II must be made subject to an assessment. The Spanish authorities also informed the Commission of the national laws and regulations which, according to them, transposed the Directive.

19 Considering that that response did not permit the conclusion that the Directive had been fully transposed, by letter of 23 December 1992, the Commission sent the Kingdom of Spain a reasoned opinion in which, first, it maintained its interpretation of Article 4(2) of the Directive and, second, it stated that it was not

able to determine whether the national provisions mentioned by the Spanish authorities complied with the Directive, since they had not been communicated to it, and that, in any event, those provisions did not cover all the projects listed in Annex II to the Directive.

20 By letter of 3 March 1993, the Spanish authorities responded to the reasoned opinion by repeating their interpretation of Article 4(2) of the Directive and adding that Legislative Royal Decree No 1302/1986 covered various classes of projects listed in Annex II to the Directive, that the legislation adopted by the autonomous communities reproduced most of the list of projects in that annex and that, in respect of certain projects to be carried out, an informal analysis of environmental impact was undertaken, according to the simplified procedure applicable to the projects covered by Annex I to the Directive.

21 On 18 December 1998, the Commission sent the Kingdom of Spain a supplementary reasoned opinion in which it concluded that the Spanish legislation still did not enable an assessment of the environmental effects of certain classes of projects listed in Annex II to the Directive to be carried out in the whole of the national territory. It requested the Kingdom of Spain to comply with its Community obligations within two months of the notification of that opinion.

22 By letters of 25 February, 9 April and 22 April 1999, the Permanent Representation of Spain to the European Union sent the Commission a copy of the preliminary draft law on environmental impact assessment drawn up by the Ministry of Environment, as well as several texts adopted by various autonomous communities.

23 Since examination of the legislation communicated in 1999 had led it to conclude that only a very small part of the infringement had ceased to exist, the Commission brought the present action before the Court.

Admissibility

24 The Spanish Government maintains that the entry into force on 8 October 2000 of Royal Decree-Law No 9/2000, which transposes the Directive as amended by Directive 97/11, deprives the Commission of a legal interest in bringing proceedings in the present case, so that it should withdraw and its action should be declared inadmissible.

25 However, it is settled case-law that an action against a Member State for failure to fulfil its obligations is objective in nature and that the bringing and continuation of such an action before the Court, in application of the second paragraph of Article 226 EC, is a matter for the Commission in its entire discretion and the Court must consider whether or not there has been a failure to fulfil obligations as alleged, without its being part of its role to take a view on the Commission's exercise of its discretion (see, *inter alia*, Case 415/85 *Commission* v *Ireland* [1988] ECR 3097, paragraph 9, and Case C-209/89 *Commission* v *Italy* [1991] ECR I-1575, paragraph 6).

26 In these circumstances, the plea of inadmissibility raised by the Spanish Government must be rejected.

Substance

27 As a preliminary point, it must be stated, first, that the Commission did not refer in its action to the failure by the Kingdom of Spain to comply with Article 12(2) of the Directive, under which Member States must communicate to the Commission the provisions of national law which they adopt in the field covered by the Directive. The alleged infringement can thus exist, as submitted by the Spanish Government at the hearing, only if, on 18 February 1999 — the date on which the period prescribed in the supplementary reasoned opinion expired — the provisions of national law necessary to transpose the Directive had not entered into force, whatever the circumstances in which those provisions were communicated to the Commission.

28 Second, the consideration by the Court must, in the framework thus defined, relate to all the Spanish legislation adopted in the field governed by the Directive for the purpose of transposing it, whether that legislation originates from the national authorities or the decentralised authorities. In fact, the constitutional division of powers between those authorities has no effect on the assessment of the infringement. It is for the Member States to ensure that the implementation of their Community obligations by the centralised and decentralised competent authorities is effective (see, to that effect, Case C-237/90 *Commission* v *Germany* [1992] ECR I-5973, paragraph 35).

29 Third, the Court has repeatedly held that internal difficulties, such as those put forward by the Spanish Government in the present case, relating to the circumstances in which laws and regulations are drawn up, cannot exempt Member States from their Community obligations (see, *inter alia*, Case C-374/98 *Commission* v *France* [2000] ECR I-10799, paragraph 13).

30 Lastly, the Court has already held that Article 4(2) of the Directive does not empower the Member States to exclude generally and definitively from the obligation of assessment one or more classes of projects mentioned in Annex II (Case C-133/94 *Commission* v *Belgium* [1996] ECR I-2323, paragraphs 41 to 43), since the concept of 'classes' of projects must be understood to mean not the 12 main categories in Annex II, but the subdivisions of those categories, each preceded by a letter of the alphabet (Case C-301/95 *Commission* v *Germany* [1998] ECR I-6135, paragraphs 39 to 43).

31 By contrast, Member States may establish the criteria and/or thresholds necessary to determine which of the projects covered by Annex II are to be subject to an assessment (Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraphs 49 to 53). When establishing those thresholds and/or criteria, Member States must take account not only of the size of projects, but also their nature and location (Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraphs 65 to 67).

32 More generally, national provisions of a general or sectoral nature which require the assessment of the environmental impact of certain types of projects must satisfy the requirements set out in Article 3 of the Directive, as well as the procedural rules in Articles 5 to 9 of the Directive which concern, *inter alia*, public information.

33 In the present case, it is first necessary to consider whether the provisions adopted at national level are such as to satisfy the requirements of the Directive.

34 Several of those provisions cannot, in any event, be taken into account in that consideration, since they entered into force after the period prescribed in the supplementary reasoned opinion had expired. That is true, in particular, of Law

No 46/1999 of 13 December 1999 amending Law No 29/1985 on water (BOE No 298 of 14 December 1999, p. 43100), Royal Decree No 1836/1999 of 3 December 1999 approving the regulation on nuclear and radioactive installations (BOE No 313 of 31 December 1999, p. 46463) and Royal Decree-Law No 9/2000 transposing Directive 97/11.

35 Legislative Royal Decree No 1302/1986 and Royal Decree No 1131/1988 list only four classes of projects among the 83 set out in Annex II to the Directive and accordingly remove the majority of the projects covered by that annex from the scope of the obligation to assess environmental effects.

36 Royal Decree No 1997/1995, which, according to the Spanish Government, reproduces all the classes of projects listed in Annex II to the Directive, in fact concerns only projects affecting special areas of conservation established under the Habitats Directive. The choice of such a criterion, based on the location of the projects within limited and, moreover, essentially rural areas of the national territory, has the effect of relieving of the obligation of assessment a considerable number of projects situated outside those areas which are likely to have significant effects on the environment. Such a choice, which precludes generally the taking into account of criteria and/or thresholds relating to the size and nature of projects, exceeds the limits of the Member States' discretion under Articles 2(1) and 4(2) of the Directive (see, to that effect, Case C-392/96 *Commission* v *Ireland*, cited above, paragraphs 64 to 68).

37 As regards the specific laws relating to various sectors of activity, other than Law No 54/1997 regulating the electricity sector whose provisions on the assessment of environmental effects fulfil the conditions set by the Directive, they do not include provisions making it possible to satisfy all the requirements of the Directive in terms of the content of the assessment or public information.

38 Consideration of this first series of provisions indicates that the legislation adopted at national level by the Kingdom of Spain is not in itself sufficient to transpose the Directive. The Spanish Government stated in the defence, moreover, that it '[had] worked intensively to attempt correctly to transpose Annex II', by drawing up a 'preliminary draft law on the assessment of environmental impact, delivered to the Commission on 25 February 1999 ... , which incorporates in its annexes all the projects set out in Annex II'. That preliminary draft law had not, however, been adopted when the period prescribed in the supplementary reasoned opinion expired.

39 In those circumstances, it is necessary, as the Spanish Government maintained, in particular at the hearing, and in accordance with the analysis carried out by the Commission at the time of the pre-litigation procedure, to ascertain whether the Directive was the subject of the required implementing measures at the level of the autonomous communities and cities.

40 That consideration indicates that, in the autonomous community of La Rioja and in the autonomous cities of Ceuta and Melilla, no legislation has been adopted in the field governed by the Directive. Consequently, the inadequacies noted at the national level persist in those local authorities.

41 With respect to the legislation adopted by the other autonomous communities, the provisions cited by the Spanish Government have for the most part been communicated to the Commission only as an annex to the rejoinder. They are not accompanied by any direct reference to the classes of project listed in Annex II to the Directive.

42 In order to facilitate consideration of the state of transposition of the Directive, at the hearing the Spanish Government communicated to the Commission and the Court a table which indicates, in respect of each autonomous community and each class of projects listed in Annex II, whether the transposition of the Directive

has already been carried out or remains to be achieved, and it requested the Court to carry out a detailed examination of the national and regional legislation in order systematically to make clear the infringement.

43 However, although that table shows correlations between the legislation of the autonomous communities and the classes of projects listed in Annex II, it does not refer to any of the provisions which, in respect of each autonomous community and each class of projects, transpose the Directive.

44 An inquiry into those provisions, which the Commission was unable to undertake in due time, given the late communication of the relevant document in disregard of the provisions of Article 10 EC, cannot be carried out by the Court within the framework of an action for failure to fulfil obligations.

45 In such a context, characterised by the fact that the Commission was not enabled to carry out its own task in a satisfactory manner, the Court is not required, contrary to what the Spanish Government claimed at the hearing, comprehensively to specify, in respect of each of the autonomous communities and in the light of the specific legislation which they have adopted for a large number of sectors of activity, which classes of projects in Annex II to the Directive have not been the subject of implementing measures.

46 In that regard, suffice it to note that the table communicated by the Spanish Government reveals, for many classes of projects and in the majority of the autonomous communities, gaps in the implementation of the Directive which have not been able to be filled, as stated in paragraph 38 of the present judgment, by the national legislation.

47 It is clear from all those considerations that, by the date on which the period prescribed in the supplementary reasoned opinion expired, the legislation of the autonomous communities was not such as to make good, in the whole of Spanish territory, the deficiencies in the transposition of the Directive found at national level.

48 Accordingly, the Commission's application must be upheld.

49 It must therefore be declared that, by failing to adopt within the prescribed period all the laws, regulations and administrative measures necessary to comply with Articles 2(1) and 4(2) of the Directive, in conjunction with Annex II thereto, the Kingdom of Spain has failed to fulfil its obligations under that directive.

Costs

50 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 Kingdom of Spain has been unsuccessful, the Kingdom of Spain must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, by failing to adopt within the prescribed period all the laws, regulations and administrative measures necessary to comply with Articles 2(1) and 4(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, in conjunction with Annex II thereto, the Kingdom of Spain has failed to fulfil its obligations under that directive;**

2. **Orders the Kingdom of Spain to pay the costs.**

Macken Puissochet Skouris

Delivered in open court in Luxembourg on 13 June 2002.

R. Grass F. Macken

Registrar President of the Sixth Chamber