Article 11(1) of the Directive to take place before measures affecting border areas are taken, and that such legislation should provide expressly for the consultation required by Article 11(2) to take place, in cases of significant pollution originating in a neighbouring Member State.

A transposition into national law of Article 4 of the Directive therefore constitutes an incomplete implementation of the Directive if it is not accompanied by transposition of Article 11, which imposes an obligation relating to the exercise of the discretion conferred by Article 4.

REPORT FOR THE HEARING
in Case C-186/91 *

I — The Directive

Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide (OJ 1985 L 87, p. 1, hereinafter 'the Directive'), as amended by Council Directive 85/580/EEC of 20 December 1985 (OJ 1985 L 372, p. 36), fixes a limit value which the concentration of nitrogen dioxide in the atmosphere must not exceed, and also lays down guide values for fixing nitrogen dioxide concentration levels in zones which are to be afforded special protection.

Article 1(1) of the Directive defines the object pursued in the following terms:

'The purpose of this Directive is to:

— fix a limit value (Annex I) for nitrogen dioxide in the atmosphere specifically to help protect human beings against the effects of nitrogen dioxide in the environment,

— lay down guide values (Annex II) for nitrogen dioxide in the atmosphere in order to improve the protection of human health and contribute to the long-term protection of the environment.'

Article 2 of the Directive gives the following definitions:

'For the purposes of this Directive:

* Language of the case: French.

— "limit value" means the concentration of nitrogen dioxide as defined in the table in Annex I which must not be exceeded throughout the territory of the Member States during specified periods and under the conditions laid down in the following Articles,

— "guide values" means the concentrations of nitrogen dioxide as given in Annex II considered over specified periods and intended, in particular, to serve as reference points for the establishment of specific schemes within zones determined by the Member States.'

Article 3(2) of the Directive imposes the following obligation on Member States:

'... when in particular circumstances the nitrogen dioxide concentrations in the atmosphere in certain zones are likely, despite the measures taken, to exceed the limit value in Annex I after 1 July 1987, the Member State concerned shall inform the Commission thereof before 1 July 1987.

It shall forward plans for the gradual improvement of the quality of the air in these zones to the Commission as soon as possible. These plans, drawn up on the basis of relevant information on the nature, origin and development of this pollution, shall describe, in particular, the measures taken or to be taken and the procedures implemented or to be implemented by the Member State concerned. These measures and procedures must aim at reducing the nitrogen dioxide concentrations in the atmosphere within these zones to values not exceeding the limit value given in Annex I as rapidly as possible and by 1 January 1994 at the latest.'

Article 4 states:

'1. In the zones in which the Member State concerned considers it necessary to limit or prevent a foreseeable increase in pollution by nitrogen dioxide in the wake of urban or industrial development in particular, it may fix values lower than the limit value in Annex I.

2. In zones which the Member State concerned considers should be afforded special environmental protection, it may fix values which are generally lower than the guide values in Annex II.'

Article 7 of the Directive provides:

'1. From 1 July 1987 Member States shall inform the Commission, not later than six months after the end (31 December) of the annual reference period, of instances in which the limit value laid down in Annex I has been exceeded and of the concentrations recorded.

2. Member States shall also notify the Commission, not later than one year after the end of the annual reference period, of the reasons

for such instances and of the measures they have taken to deal with them.

3. In addition, Member States shall inform the Commission, at its request, of:

— the concentrations they have measured,

— the limit values, deadlines and timetables they have laid down,

— any appropriate measures they have taken,

concerning the zones referred to in Article 4(1) and (2).

This information must also be made available to the public.'

Finally, *Article 11* of the Directive provides:

'1. Where a Member State intends to fix, in a region near the border with one or more other Member States, values for concentrations of nitrogen dioxide in the atmosphere in accordance with Article 4(1) and (2), it shall hold prior consultations with the Member States concerned. The Commission shall be informed and may attend such consultations.

2. Where the limit value given in Annex I or the values referred to in Article 4(1) and (2) — provided that the latter values have been the subject of consultations in accordance with paragraph 1 — are or are likely to be exceeded following significant pollution which originates or may originate in another Member State, the Member States concerned shall hold consultations with a view to remedying the situation. The Commission shall be informed and may attend such consultations.'

Under *Article 15* of the Directive, Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 1 January 1987 at the latest.

II — The Belgian legislation

To comply with Directive 85/203 as amended, the Kingdom of Belgium adopted the Royal Decree of 1 July 1986, fixing air quality standards for nitrogen dioxide (published in the *Moniteur Belge* on 23 September 1986 at page 12867, hereinafter 'the Royal Decree'), and communicated it to the Commission on 28 November 1986.

Articles 1, 1(2), 2(1), 3(1), 3(2), 4, 5 and 6 of the Royal Decree, and Annexes I to IV thereto, correspond respectively to Articles 2, 1(2), 3(1), 4(1), 4(2), 6, 9 and 10 of the Directive and Annexes I to IV thereto.

However, Article 2(2) of the Royal Decree, which appears to correspond to Article 3(2) of the Directive, does not mention the obligation to communicate the required information to the Commission. It reads as follows:

'2. In zones where there is found to be a risk that nitrogen dioxide concentrations will exceed the limit value in Annex I to this Decree after 1 July 1987, and in respect of which plans have been drawn up for the gradual improvement of air quality, the limit value specified in Annex I to this Decree shall, in derogation from paragraph 1, be complied with not later than 1 January 1994.'

The obligations contained in Articles 7 and 11 of the Directive are not mentioned anywhere in the Royal Decree.

III — Facts and administrative procedure

By letter of 25 January 1988, the Commission reminded the Kingdom of Belgium of its obligations under the Directive, and under Article 11 thereof in particular.

The Belgian Permanent Representative replied to the Commission in a letter of 13 April 1988, arguing that:

— the Commission had never required that provisions like those in Article 11 of the Directive, regarding cooperation with neighbouring countries, be transposed literally into national law;

— Article 11 of the Directive was concerned with procedural or instrumental obligations, and not with obligations of substance;

— in the context, there was no point in transposing Article 11 of the Directive, since it was concerned with situations in which a Member State wanted to designate a zone with *more stringent air quality requirements* than the limit or guide values. Whether or not it was possible to satisfy such quality requirements depended to a large extent on the pollution of air crossing borders. In other words, such a zone *could not usefully* be designated without examining foreign pollution coming in across the border, or entering into co-operation in respect of such pollution. To impose a legal obligation on a Member State wishing to designate such a zone would be superfluous. It would be different if, under Article 3, Belgium intended to designate a border zone in which excesses, or in other words a lower air quality, were to be permitted.

Following that reply, the Commission delivered a reasoned opinion on 30 January 1990, under Article 169 of the EEC Treaty, explaining why it considered the measures necessary to bring Belgian law into line with the Directive had not yet been taken, and calling upon the Kingdom of Belgium to comply within two months from the date of service of the reasoned opinion.

In a letter of 11 September 1990, the Belgian Permanent Representative maintained the position taken in the reply of 13 April 1988, to the effect that Article 11 of the Directive did not need to be implemented into national legislation.

Following that latter reply from the Kingdom of Belgium, the Commission brought the present action.

IV — Written procedure and forms of order sought

The Commission's application was lodged at the Court Registry on 23 July 1991. The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, on 17 June 1992, to open the oral procedure without any preparatory inquiry.

The applicant, the *Commission of the European Communities*, pleads that the Court should:

— declare that, by not bringing into force the laws, regulations and administrative provisions necessary to implement in its national law the obligation set out in Article 11 of Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide, the Kingdom of Belgium has failed to fulfil its obligations under that article and under Article 189 of the EEC Treaty;

— order the Kingdom of Belgium to pay the costs.

The Kingdom of Belgium pleads that the Court should declare the Commission's application unfounded.

V — Pleas in law and arguments of the parties

The *Commission* begins by emphasizing that the criteria for transposing a Directive must be strict and rigorous. The Court has held that provisions of a Directive that are primarily concerned with procedure, like those of Article 11 which lay down precise and detailed rules for consultation between Member States and the participation of the Commission, and which are intended to create rights and obligations for individuals, must therefore be incorporated into national legislation (see Case C-131/88 *Commission* v *Germany* [1991] ECR I-825, paragraph 61).

The *Kingdom of Belgium* considers the Commission's application unfounded because, hitherto, the Commission has never required that provisions like those of the Directive in question here be transposed literally. It refers to Directives 76/160/EEC (OJ 1976 L 31, p. 1), 78/659/EEC (OJ 1978 L 222, p. 1) and 79/923/EEC (OJ 1979 L 281, p. 47) on water quality, which provide, in Articles 4(4), 10 and 10 respectively, that Member States are to consult each other if bathing, freshwater fish, or shellfish areas are designated near a border. In the same way, Directives 82/176/EEC (OJ 1982 L 81, p. 29), 83/513/EEC (OJ 1983 L 291, p. 1), 84/156/EEC (OJ 1984 L 74, p. 49) and 84/491/EEC (OJ 1984 L 274, p. 11) provide that Member States shall consult each other in order to coordinate their controls

on discharges of mercury, cadmium and hexachlorocyclohexane into cross-border waters. Directive 80/779/EEC regarding air quality in relation to sulphur dioxide (OJ 1980 L 229, p. 30) contains a provision similar to Article 11 of Directive 85/203.

The *Commission* replies that it always has a discretion when deciding whether to bring proceedings under Article 169 of the EEC Treaty (see Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 11). In any event, and contrary to what the Kingdom of Belgium supposes, the provisions do not have to be transposed 'literally' (see Case C-59/89 *Commission* v *Germany* [1991] ECR I-2607, paragraph 18), provided they are incorporated 'with the precision and clarity necessary in order to satisfy fully the requirement of legal certainty' (see Case C-131/88 *Commission* v *Germany*, cited above, paragraph 61; see also Case C-59/89 *Commission* v *Germany*, cited above, paragraph 18).

The Commission argues that in the circumstances, having regard to the context and purpose of Article 11 of the Directive, the introduction of a consultation mechanism between Member States is essential in order to avoid too great a disparity between the values fixed by national authorities under Article 4(1) and Article 4(2) in areas close to a border. Without such consultation (given that air pollution is cross-border by nature, and given also that each Member State may fix values under the Directive that vary from one region to another or from one Member State to another), a region where stricter limit values were applied than those laid down by the Directive could suffer nuisance from the pollution of another Member State, which applied higher, and less stringent, limit values.

Moreover, the Directive would not be able to attain its environmental objective in regions close to borders with one or more other Member States without establishing consultation systems between the Member States and the Commission, as provided for in Articles 11(1) and 11(2), in cases where the limit values were exceeded or there was a risk that they might be exceeded.

In the present case, the Belgian legislation had expressly provided, in Article 3 of the Royal Decree, that the national, or even regional, authorities might fix values in border regions lower than those laid down in Annex I or Annex II. But by failing to provide a general legal context that would effectively ensure the full application of Article 11, and by not imposing any legal obligation to consult with neighbouring Member States, the Kingdom of Belgium was leaving open the possibility that values might be fixed unilaterally by the relevant authorities when the Directive required concerted action between Member States. In that respect, the Commission draws attention to the Court's case-law (see Joined Cases 227 to 230/85 *Commission* v *Belgium* [1988] ECR 1, paragraphs 9 and 10). Moreover, the Environment Minister charged with enforcing the Royal Decree, under the terms of Article 7 thereof, was not

obliged to carry out the consultations required by Article 11 of the Directive, nor did he have the legal authority to put it into effect.

The Commission concludes that the Kingdom of Belgium has failed to lay down precise rules to fix either the detailed procedure for such consultations, or the legal authority of the various national authorities concerned to carry them out.

The *Kingdom of Belgium* disagrees with the Commission's argument, and maintains that the purpose of the consultation required by Article 11 is not to allow neighbouring Member States to object to more stringent standards adopted by Belgium, but rather to convince such neighbours to adopt similar standards themselves. In any event, the Kingdom of Belgium has no intention at present to use the possibility, envisaged in Article 11 of the Directive, of designating zones with stricter, and lower, limit values than in other zones. If, *quod non*, Belgium were to designate zones under Article 11 of the Directive, consultation with neighbouring countries would of necessity take place.

The *Commission* argues that the transposition of the provisions of Article 11 is especially important, because the fixing of limit values for nitrogen dioxide emissions (Articles 3 and 4 of the Directive) creates rights and obligations for individuals. Individuals affected by the fixing of limit values are thus entitled to expect national authorities to comply with the provisions of Article 11 of the Directive where it applies, and, where appropriate, to rely on those provisions before the national courts (see Case C-59/89 *Commission* v *Germany*, cited above, paragraph 18). In the present case, there is no general legal context effectively ensuring the full application of Article 11 of the Directive, which is something entirely lacking in the Royal Decree.

The *Kingdom of Belgium* takes the view that the facts of Case C-59/89 are not comparable with those in the present case. That case was about standards regarding a limit value for lead in the atmosphere. In paragraph 19 of its judgment, the Court held that Directive 82/884/EEC implied that 'whenever the exceeding of the limit values could endanger human health the persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights'. The case now before the Court is about compulsory consultation between States prior to the adoption of stricter measures than those laid down by the Directive. Even when consultation with other Member States has taken place, however, an individual Member State is neither prevented from adopting stricter measures and lower values, nor obliged to do so. Stricter measures are therefore pointless unless the neighbouring State lays down similar standards. The Kingdom of Belgium concludes, therefore, that the procedure is issue is one without which use of the possibility envisaged in Article 4(2) has no *raison d'être*.

On those grounds, the Kingdom of Belgium believes that such obligation to consult does not confer rights on individuals.

D. A. O. Edward

Judge-Rapporteur