JUDGMENT OF THE COURT (Sixth Chamber)

3 December 2009 *

In Case C-475/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 5 November 2008,

European Commission, represented by M. Patakia and B. Schima, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by C. Pochet, acting as Agent, and J. Scalais and O. Vanhulst, avocats,

defendant,

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of J.-C. Bonichot, President of the Fourth Chamber, acting for the President of the Sixth Chamber, C. Toader (Rapporteur) and P. Kūris, Judges,

Advocate General: V. Trstenjak,
Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities claims that the Court should declare that:

— by failing to designate the system operators as required under Article 7 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June

2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57; 'the Directive'); and

— by providing not only for the regulated access, but also for the negotiated access, of third parties to the system, contrary to Article 18 of the Directive, read in conjunction with Article 25(2) thereof; and

— by failing to transpose Article 22(3)(d) and (e) and (4) of the Directive,

the Kingdom of Belgium has failed to fulfil its obligations under the Directive.

2 By letter lodged at the Court Registry on 31 March 2009, the Commission abandoned the claim referred to in the second indent of paragraph 1 above, since the Kingdom of Belgium stated, in its defence, that it had repealed the provision of national law under which third parties could have negotiated access to transmission systems and to storage and liquefied natural gas ('LNG') facilities.

Legal framework

The Directive

3 Article 7 of the Directive provides:

'Member States shall designate or shall require natural gas undertakings which own transmission, storage or LNG facilities to designate, for a period of time to be determined by Member States having regard to considerations of efficiency and economic balance, one or more system operators. Member States shall take the measures necessary to ensure that transmission, storage and LNG system operators act in accordance with Articles 8 to 10.'

4 Article 11 of the Directive states:

'Member States shall designate, or shall require undertakings which own or are responsible for distribution systems to designate, for a period of time to be determined by Member States, having regard to considerations of efficiency and economic balance, one or more distribution system operators and shall ensure that those operators act in accordance with Articles 12 to 14.'

5 Article 22 of the Directive is worded as follows:

‘1. Major new gas infrastructures, i.e. interconnectors between Member States, LNG and storage facilities, may, upon request, be exempted from the provisions of Articles 18, 19, 20 [concerning, respectively, access to systems, access to storage facilities and access to upstream pipeline networks], and 25(2), (3) and (4) [concerning regulatory authorities] under the following conditions:

…

3. …

…

(d) The exemption decision … shall be duly reasoned and published.

(e) In the case of an interconnector any exemption decision shall be taken after consultation with the other Member States or regulatory authorities concerned.

4. The exemption decision shall be notified, without delay, by the competent authority to the Commission, together with all the relevant information with respect to the decision. This information may be submitted to the Commission in aggregate form, enabling the Commission to reach a well-founded decision.

…'

6 Article 33 of the Directive lays down the general rule in accordance with which Member States were to bring into force the provisions necessary to comply with the Directive not later than 1 July 2004.

The Belgian law transposing the Directive

7 The Directive was transposed into Belgian Law by the Law of 1 June 2005 amending the Law of 12 April 1965 on the transmission of gas and other products by pipeline (loi du 1 juin 2005 portant modification de la loi du 12 avril 1965 relative au transport de produits gazeux et autres par canalisation, *Moniteur belge* of 14 June 2005, p. 27164).

8 Article 8(4) of the Law of 12 April 1965 as amended by the Law of 1 June 2005 ('the Gas Law') provides:

'Further to an opinion from the Commission for Banking, Finance and Insurance concerning the criteria referred to in paragraph 3, and to an opinion from the [Energy and Gas Regulatory] Commission concerning the remaining criteria, and after discussion in the Council of Ministers, the [Federal] Minister [whose portfolio includes Energy] shall, within nine months of the date of publication of the opinion referred to in

paragraph 2, following a proposal from one or more holders of a natural gas transmission authorisation, designate:

1 the operator responsible for the management of the natural gas transmission system;

2 the natural gas storage facility operator and the LNG facility operator, for a renewable term of twenty years.

…'

9 Article 8/1(1) of the Gas Law states:

'Notwithstanding Article 8, from the date on which this Article enters into force, the natural gas undertaking which on 1 July 2004 held one or more natural gas transmission authorisations pursuant to this Law and its implementing decrees or natural gas storage authorisations, including authorisations issued under the Law of 18 July 1975 (loi du 18 juillet 1975) and its implementing decrees, shall be designated, as appropriate:

1. natural gas transmission system operator;

2. natural gas storage facility operator;

3. LNG facility operator.

All three designations shall remain in force until the operator concerned has been designated definitively, in accordance with Article 8, or until the designation is rejected as unacceptable by the [Federal] Minister [whose portfolio includes Energy].'

10 Article 8/2 of the Gas Law provides:

'The following conditions shall apply to each of the three operators referred to in Articles 8 and 8/1, whether a listed company or otherwise:

1. the operator must be constituted in the form of a public limited company, with its seat and central administration in a Member State of the European Economic Area,

2. the operator must fulfil all the conditions laid down by the Law of 2 August 2002 amending the Belgian Companies Code (loi du 2 août 2002 modifiant le Code des sociétés) and the Law of 2 March 1989 on the disclosure of significant shareholdings in listed companies and on the regulation of takeover bids (loi du 2 mars 1989 relative à la publicité des participations importantes dans les sociétés cotées en bourse et réglementant les offres publiques d'acquisition).'

11 Article 15/5k of the Gas Law, as amended by the Law of 27 December 2006 laying down miscellaneous provisions (loi du 27 décembre 2006 portant des dispositions diverses, *Moniteur belge* of 28 December 2006, p. 75266), provides:

'1. Major new natural gas infrastructures, that is to say, interconnectors between neighbouring States, LNG facilities and storage facilities may be exempted from the provisions of this Chapter and those relating to the tariff methodology, with the exception of Articles 15/7, 15/8 and 15/9. That exemption shall be granted by the King, further to an opinion from the [Energy and Gas Regulatory] Commission...

…

4. Any request for an exemption shall be notified, without delay, to the Commission [of the European Communities], together with all the relevant information with respect to the request.'

Pre-litigation procedure

12 On 10 April 2006, the Commission sent the Kingdom of Belgium a letter of formal notice alleging that it had failed to fulfil its obligations under certain provisions of the Directive.

13 The Belgian authorities submitted their observations under cover of a letter to the Commission dated 13 June 2006.

14 Since the Commission was not convinced by those observations, it sent a reasoned opinion to the Kingdom of Belgium on 15 December 2006, calling on it to adopt the measures necessary to bring an end to the alleged infringement within two months of the date of receipt.

15 The Belgian authorities replied to the Commission by letter sent on 27 February 2007.

16 On the view that the situation remained unsatisfactory, the Commission brought the present proceedings.

The action

The first complaint, alleging failure to transpose Article 7 of the Directive

Admissibility

— Arguments of the parties

17 The Kingdom of Belgium contends that, in its application, the Commission has alleged failure to transpose Article 7 of the Directive, whereas in the letter of formal notice the Commission had based its complaint on Article 11 of the Directive and, in the reasoned opinion, it had alleged infringement of Articles 7 and 11 of the Directive. The Commission has thus created confusion as to its criticisms of the Kingdom of Belgium in that regard.

18 The Commission submits, first of all, that, regardless of the provisions of the Directive relied on, the complaint in question has always been defined as the failure to designate the various system operators. Although the Commission did refer to Articles 7 and 11 of the Directive in its reasoned opinion, the reference to Article 11 was not retained in the application since the Kingdom of Belgium had designated the distribution system operators, in accordance with that provision. The Kingdom of Belgium was therefore in a position to understand the complaint and to put forward its arguments.

19 The Commission also states — referring in that regard to Case 274/83 *Commission* v *Italy* [1985] ECR 1077, paragraphs 19 to 21 — that, according to the case-law of the Court, there is nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in its letter of formal notice.

— Findings of the Court

20 First of all, it should be recalled that since the letter of formal notice is intended, inter alia, to define the subject-matter of the dispute in order to enable the Member State concerned to prepare its defence, it is not subject to the same requirements of precision as the reasoned opinion (see, inter alia, *Commission* v *Italy*, paragraphs 19 and 21).

21 In the present case, the Commission alleged in its letter of formal notice that the Kingdom of Belgium had failed to transpose Article 11 of the Directive, stating that that Member State had not designated the transmission, distribution, storage and LNG system operators on a definitive basis. In the reasoned opinion, the Commission referred in addition to Article 7 of the Directive in order to substantiate its complaint. Lastly, in its application, it withdrew the reference to Article 11, on the view that that provision had in the meantime been transposed correctly into Belgian law as a result of the designation by the Kingdom of Belgium of the distribution system operators.

22 Accordingly, the first complaint raised by the Commission in the present proceedings is obviously related to the first complaint raised in the context of the letter of formal notice and the reasoned opinion, both of which were concerned with the definitive designation of the system operators. As a consequence, the change made as regards the relevant provision of the Directive has not undermined the rights of defence of the defendant Member State.

23 The complaint alleging infringement of Article 7 of the Directive must therefore be considered admissible.

Substance

— Arguments of the parties

24 The Commission alleges that the Kingdom of Belgium has failed to designate the various transmission, storage and LNG system operators on a definitive basis as required under Article 7 of the Directive.

25 The Commission points out that Article 8(4) of the Gas Law provides for the definitive designation of the system operators for a renewable term of 20 years. That term is regarded as sufficient under Belgian law with regard to considerations of efficiency and economic balance. Accordingly, until such time as the operators are designated for that period, the Kingdom of Belgium will not have complied fully with its obligations under Article 7 of the Directive. What is more, an interim designation for an indefinite period cannot give operators the security with which they should be provided, under the Directive, by being designated for a period known in advance.

26 The Kingdom of Belgium replies that Article 7 of the Directive does not prevent Member States from designating system operators on an interim basis. It contends that, under Belgian law, Articles 8/1 and 8/2 of the Gas Law provide that the interim operators are to be responsible for carrying out the tasks of the system operators as set out under the Directive. The conditions and obligations imposed on the interim operators are identical to those imposed on operators which have been designated definitively, the only difference in the rules governing the two categories lying in the designation procedure and the duration of their contracts. In addition, the designation of the interim operators is tantamount to designating them on a definitive basis, since the undertakings concerned are the only ones that satisfy the requirements necessary for definitive designation. In any event, a procedure is under way for the purposes of designating operators on a definitive basis.

— Findings of the Court

27 Article 7 of the Directive provides that the Member States are to designate transmission, storage and LNG system operators 'for a period of time to be determined by Member States having regard to considerations of efficiency and economic balance'. The measures for the implementation of that provision had to be adopted by 1 July 2004 at the latest, in accordance with Article 33 of the Directive.

28 Even though Article 8 of the Gas Law establishes a procedure for designating the operators for a period of 20 years, Article 8/1 thereof provides for the interim designation — 'until the operator concerned has been designated definitively' — of the undertakings already holding an authorisation before the amendments made by the Law of 1 June 2005 came into force. Thus, it extends the authorisations of those operators until the designation procedure established in accordance with the requirements laid down by the Directive has been completed.

29 The Kingdom of Belgium accepts that it has not yet designated the system operators definitively, but states that that procedure is under way.

30 It should be pointed out that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-456/05 *Commission* v *Germany* [2007] ECR I-10517, paragraph 15). Accordingly, since the system operators have not been definitively designated within that period, it must be found that the complaint raised by the Commission is well founded.

31 The fact relied upon by the Kingdom of Belgium that the interim operators are subject to the same conditions and obligations as the operators to be designated on a definitive basis and that they are the only operators which can meet the requirements necessary for a definitive designation does not preclude the finding that that Member State has failed to fulfil its obligations under Article 7 of the Directive.

32 The interim designation of the operators delays transposition of Article 7 of the Directive which, as the Kingdom of Belgium has accepted, required those operators to be designated for a period of 20 years.

33 It must therefore be held that, by failing to designate transmission, storage and LNG system operators on a definitive basis as required under Article 7 of the Directive, the Kingdom of Belgium has failed to fulfil its obligations under that provision.

The third complaint, alleging failure to transpose Article 22(3)(d) and (e) and (4) of the Directive

Arguments of the parties

34 As regards major new gas infrastructures, the Commission submits that Article 15/5k of the Gas Law enables the King to adopt exemptions such as those provided for in Article 22(1) of the Directive, but without laying down all the requirements specified in that connection in Article 22(3)(d) and (e) and (4) thereof. Under those provisions, the national legislation must, inter alia, provide expressly for all exemption decisions to be published and notified to the Commission and, in the case of interconnectors, for the obligation to consult with the other Member States before any exemption decision is taken.

35 In that connection, the Commission submits that the general principles laid down in the national legislation in relation to the administrative measures and the direct application of the above provisions of the Directive by the administrative authorities do not ensure that those provisions are fully transposed.

36 As regards the rule that an exemption decision must be published, the Kingdom of Belgium contends that, as a measure adopted by the King under Articles 105 and 108 of the Belgian Constitution, an exemption decision must be published in accordance with the general principles governing the publication of federal measures. Under those principles, a measure which affects a large number of persons must be published in the *Moniteur belge*. Consequently, to require an obligation of that kind to be included in the Gas Law would be contrary both to the principle of subsidiarity and to the principle of proportionality.

37 As regards the transposition of Article 22(3)(e) and (4) of the Directive, concerning the consultation with the other Member States in the case of interconnectors, and the notification of exemption decisions to the Commission, the Kingdom of Belgium states

that, in the light of the direct effect of the Directive and the primacy of Community law, the same obligations are automatically imposed on the Belgian authorities, so that it is not necessary to transpose them into national law. It refers in that connection to the case-law of the Court, according to which the incompatibility of national legislation with Community provisions — even provisions which are directly applicable — can be finally remedied only by means of national provisions of a binding nature in the case of a directive intended to confer rights on individuals (in particular, Case C-354/98 *Commission* v *France* [1999] ECR I-4927, paragraph 11). In the present case, the Kingdom of Belgium contends that, since the Directive does not confer rights on individuals, a provision of that kind need not necessarily be transposed into national law.

38 Lastly, the Kingdom of Belgium contends that the establishment of an interconnector system is by definition cross-border in nature and therefore requires cooperation with the authorities of the other Member States concerned, and also that Article 15/5 of the Gas Law expressly provides that requests for an exemption must be notified to the Commission.

Findings of the Court

39 Article 22(1) of the Directive provides that, in the case of major gas infrastructures, the Member States may provide for exemptions, in particular from the rules for accessing the systems. Under Article 22(3)(d) and (e) and (4), any exemption decision must be reasoned, published and notified to the Commission and, in the case of an interconnector, an exemption decision must be taken after consultation with the authorities of the Member States concerned.

40 The Commission alleges that the Kingdom of Belgium has failed to transpose those provisions, since the Gas Law does not lay down all the requirements specified in the Directive with regard to the procedure for taking an exemption decision. The Kingdom of Belgium does not dispute that contention. However, it does not regard itself as under an obligation to transpose those provisions, in the light of both the general national

rules on the publication of measures adopted by the King and the direct applicability of the provisions of the Directive.

41 In that connection, it should be borne in mind that the Court has consistently held that the transposition of a directive does not necessarily require legislative action in each Member State. In particular, the existence of general principles of constitutional or administrative law may render superfluous transposition by specific legislative or regulatory measures, provided, however, that those principles actually ensure the full application of the Directive by the national authorities and that, where the relevant provision of the Directive seeks to create rights for individuals, the legal situation arising from those principles is sufficiently precise and clear and that the persons concerned are put in a position to know the full extent of their rights and, where appropriate, to be able to rely on them before the national courts (see Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23, and Case C-456/03 *Commission* v *Italy* [2005] ECR I-5335, paragraph 51).

42 In the present case, as regards the transposition of Article 22(3)(d) of the Directive, concerning the publication of exemption decisions, it must be pointed out that the general principles of Belgian law concerning the publication of measures, relied on by the Kingdom of Belgium, according to which all measures which affect a large number of persons must be published, cannot be regarded as ensuring the correct and complete transposition of that provision of the Directive. The Directive requires that all decisions concerning exemptions granted to the operator be published. However, the Kingdom of Belgium has not adduced any evidence which proves precisely and with certainty that exemption decisions are always considered to be of general public importance and therefore always published.

43 Accordingly, as the Commission has pointed out, since those general principles do not ensure the correct and complete application of Article 22(3)(d) of the Directive, it must be found that the Kingdom of Belgium has not transposed that provision correctly.

44 As regards the arguments put forward by the Kingdom of Belgium as to the absence of any obligation to transpose the provisions of the Directive concerning the requirement to consult with the Member States concerned beforehand in the case of an interconnector, and the requirement to notify exemption decisions to the Commission, it should be noted that, according to settled case-law, the effect of the third paragraph of Article 249 EC is that Community directives must be implemented by appropriate measures taken by the Member States. The fact that, in specific circumstances, where the implementing measures required have not been adopted or measures have been adopted which are not consistent with a directive, the persons affected thereby are entitled to rely in law on a directive as against a defaulting Member State cannot justify a Member State absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive (see, to that effect, Case 102/79 *Commission* v *Belgium* [1980] ECR 1473, paragraph 12; Case C-433/93 *Commission* v *Germany* [1995] ECR I-2303, paragraph 24; and Case C-253/95 *Commission* v *Germany* [1996] ECR I-2423, paragraph 13). Similarly, and a fortiori, the fact that certain provisions of the Directive in question are directly applicable in the national legal system is not grounds for relieving the Member States of their obligations to transpose Community law.

45 Lastly, Article 15/5(4) of the Gas Law, which provides that requests for an exemption must be communicated to the Commission, cannot be regarded as transposing Article 22(4) of the Directive, since that provision imposes the obligation to notify to the Commission the final decision together with all the relevant information with respect thereto.

46 It must therefore be held that, by failing to transpose Article 22(3)(d) and (e) and (4) of the Directive, the Kingdom of Belgium has failed to fulfil its obligations under those provisions.

Costs

47 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 Belgium has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Sixth Chamber) hereby:

1. **Declares that, by failing to designate transmission, storage and liquefied natural gas system operators on a definitive basis as required under Article 7 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, and by failing to transpose Article 22(3)(d) and (e) and (4) of that directive, the Kingdom of Belgium has failed to fulfil its obligations under those provisions;**

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

[Signatures]