JUDGMENT OF THE COURT (Sixth Chamber)

9 September 1999 *

In Case C-217/97,

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

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agent, and Dieter Sellner, Rechtsanwalt, Bonn,

defendant,

APPLICATION for a declaration that the Federal Republic of Germany has failed to fulfil its obligations under Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (OJ 1990 L 158, p. 56), in particular Article 2(b), Article 3(2), third indent of the first subparagraph and second subparagraph, and Article 5 thereof,

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, G. Hirsch and R. Schintgen (Rapporteur), Judges,

Advocate General: N. Fennelly,

Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 December 1998,

after hearing the Opinion of the Advocate General at the sitting on 28 January 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 9 June 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that the Federal Republic of Germany had failed to fulfil its obligations under Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (OJ 1990 L 158,

p. 56, 'the directive'), in particular Article 2(b), Article 3(2), third indent of the first subparagraph and second subparagraph, and Article 5 thereof.

The directive

2 Article 1 of the directive provides that 'the object of this directive is to ensure freedom of access to, and dissemination of, information on the environment held by public authorities and to set out the basic terms and conditions on which such information should be made available'.

3 Article 2 provides:

'For the purposes of this directive:

(a) "information relating to the environment" shall mean any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes;

(b) "public authorities" shall mean any public administration at national, regional or local level with responsibilities, and possessing information, relating to the environment with the exception of bodies acting in a judicial or legislative capacity.'

4 Article 3 provides:

'1. Save as provided in this article, Member States shall ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest.

Member States shall define the practical arrangements under which such information is effectively made available.

2. Member States may provide for a request for such information to be refused where it affects:

— the confidentiality of the proceedings of public authorities, international relations and national defence,

— public security,

— matters which are, or have been, *sub judice*, or under enquiry (including disciplinary enquiries), or which are the subject of preliminary investigation proceedings,

— commercial and industrial confidentiality, including intellectual property,

— the confidentiality of personal data and/or files,

— material supplied by a third party without that party being under a legal obligation to do so,

— material, the disclosure of which would make it more likely that the environment to which such material related would be damaged.

Information held by public authorities shall be supplied in part where it is possible to separate out information on items concerning the interests referred to above.

...'

5 Article 5 provides:

'Member States may make a charge for supplying the information, but such charge may not exceed a reasonable cost.'

6 Under Article 9(1) of the directive Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 31 December 1992 at the latest, and were forthwith to inform the Commission thereof.

The German legislation

7 The directive was transposed into German law by the Umweltinformationsgesetz (Law on information relating to the environment, BGBl. I 1994, p. 1490, 'the UIG'), which was adopted on 8 July 1994 and came into force on 16 July 1994.

8 The object of the UIG, according to Paragraph 1 thereof, is to ensure freedom of access to, and dissemination of, information on the environment held by public authorities and to set out the basic terms and conditions on which such information should be made available.

9 Paragraph 3(1)(3) of the UIG provides that 'public authorities' is not to include 'courts, criminal prosecution authorities and disciplinary authorities'.

10 Paragraph 4(1) of the UIG provides that 'there shall be freedom of access for all to information on the environment available from administrative authorities or private persons... The administrative authorities may supply information on request, allow consultation of the file or make the source of information available in some other fashion'.

11 The exercise of that right of access to information on the environment is subject to certain conditions which are laid down in Paragraphs 7 and 8 of the UIG.

12 Paragraph 7(1)(2) of the UIG, in particular, provides that there is no right to information 'during judicial, criminal or administrative proceedings in respect of information obtained by the public authorities in the course of such proceedings...'.

13 Paragraph 10(1) of the UIG, the Umweltinformationsgebührenverordnung (Regulation on charges for communicating information on the environment, hereinafter 'the Regulation') and the Gebührenverzeichnis (Tariff) annexed thereto provide for fees and expenses to be charged to cover foreseeable administrative costs incurred in connection with that Law. The Regulation also authorises the charging of a fee where a request for access to information on the environment is refused.

Procedure prior to the action

14 The Commission decided that certain provisions of the UIG and the Regulation were not compatible with the directive and therefore initiated against the Federal Republic of Germany the procedure for failure to fulfil obligations provided for in Article 169 of the Treaty.

15 On 14 March 1995 the Commission addressed a letter of formal notice to the German Government, inviting it to submit within two months its observations on the compatibility of the German rules with Article 2(b), 3(2), third indent of the first subparagraph and second subparagraph, and Article 5 of the directive.

16 The German Government replied on 2 October 1995, denying that it had failed to fulfil its obligations as alleged by the Commission.

17 On 26 September 1996 the Commission addressed a reasoned opinion to the German Government and invited it to comply therewith within two months of its notification.

18 Since the German Government did not reply to the reasoned opinion, the Commission brought this action.

The action brought by the Commission

19 In support of its action, the Commission relies on four grounds: incorrect transposition of Article 2(b) of the directive owing to the general exclusion of courts, criminal prosecution authorities and disciplinary authorities from the scope of the UIG; incorrect transposition of Article 3(2), third indent of the first subparagraph, of the directive owing to the exclusion of the right to obtain information during 'administrative proceedings'; failure to transpose Article 3(2), second subparagraph, of the directive inasmuch as the UIG contains no provision for information to be supplied in part; and lastly incorrect transposition of Article 5 of the directive inasmuch as the German rules provide for a charge to be made even if a request for information is refused and does not provide that the charge must be limited to a reasonable sum.

Incorrect transposition of Article 2(b) of the directive

20 The Commission claims that the UIG is not compatible with Article 2(b) of the directive inasmuch as it removes as a matter of principle from the duty to provide access to information on the environment courts, criminal prosecution authorities and disciplinary authorities, not only in the exercise of their judicial functions, but also in the exercise of their administrative activities. The Commission submits that a court or criminal prosecution authority may have information on the environment, in particular in the form of statistics, not necessarily obtained in the context of judicial activities.

21 The German Government contends that it has correctly transposed Article 2(b) of the directive by means of Paragraph 3(1)(3) of the UIG, inasmuch as in Germany courts, criminal prosecution authorities and disciplinary authorities cannot have responsibilities relating to the environment otherwise than in the context of their judicial activities, and according to the directive information gathered in the course of such activities does not have to be transmitted to the public.

22 In order to determine whether that ground is well founded, reference may be made to the consistent case-law to the effect that in the context of proceedings under Article 169 of the Treaty it is for the Commission to prove the existence of the alleged failure to fulfil obligations, and it may not rely on any presumption for that purpose (see *inter alia* Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6).

23 As the Advocate General noted in paragraph 7 of his Opinion, the Commission has failed to show in this case that in Germany authorities acting normally in the exercise of their judicial powers and therefore not in principle covered by the directive may also have responsibilities relating to the environment or be in possession of information on the environment within the meaning of Article 2(b) of the directive when they act outside their strictly judicial functions, or that such authorities have information of that kind not covered by the exception contained in the third indent of the first subparagraph of Article 3(2) of the directive.

24 Since the Commission cannot rely on the presumption that in Germany all courts and other bodies acting normally in the exercise of their judicial functions must be regarded as public authorities for the purposes of the directive, and no detailed evidence has been adduced to establish that such authorities have information on the environment obtained outside their judicial activities and falling therefore within the scope of the directive, the first ground of the Commission's action must be rejected.

Incorrect transposition of the third indent of the first subparagraph of Article 3(2) of the directive

25 The Commission submits that excluding access to information during 'administrative proceedings' as provided for in Paragraph 7(1)(2) of the UIG goes beyond the scope of the derogation allowed for in the third indent of the first subparagraph of Article 3(2) of the directive, which merely refers to 'preliminary investigation proceedings'.

26 The German Government contends that in Germany 'preliminary investigation proceedings' is understood to cover all administrative proceedings which take place prior to judicial proceedings and the outcome of which is capable of forming the subject-matter of judicial review by the administrative courts.

27 In that connection it is sufficient to refer to Case C-321/96 *Mecklenburg* v *Kreis Pinneberg-Der Landrat* [1998] ECR I-3809, in which the Court held that the term 'preliminary investigation proceedings' in the third indent of Article 3(2) of the directive was to be interpreted as including an administrative procedure such as that referred to in Paragraph 7(1)(2) of the UIG, which merely prepares the way for an administrative measure, only if it immediately precedes a contentious or quasi-contentious procedure and arises from the need to obtain proof or to investigate a matter prior to the opening of the actual procedure.

28 Consequently, as the German Government itself acknowledged at the hearing, to exclude 'administrative proceedings' altogether as does the UIG exceeds the scope of the derogation provided for in the third indent of the first subparagraph of Article 3(2) of the directive, and therefore this ground is well founded.

The failure to transpose Article 3(2), second subparagraph, of the directive

29 The Commission submits that the Federal Republic of Germany has failed to transpose Article 3(2), second subparagraph, of the directive inasmuch as the UIG contains no provision for information to be supplied in part where it is possible to detach such information as may justify refusal to communicate on the part of the Member States. The directive confers rights on individuals, it maintains, and only an express provision in that respect in the law designed to transpose the directive is sufficient to guarantee the binding force, precision and clarity required in order to satisfy the principle of legal certainty.

30 The German Government contends that it is sufficiently clear from Paragraphs 4, 7 and 8 of the UIG read in conjunction that information may be supplied in part, as it is from the practice of the competent national authorities and the case-law of the Bundesverwaltungsgericht (Federal Administrative Court), so that it was not necessary to include an express provision to that effect in the UIG.

31 It is true that the Court has held that transposing a directive into national law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific express legal provision of national law and that the general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see *inter alia* Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23, and Case 247/85 *Commission* v *Belgium* [1987] ECR 3029, paragraph 9).

32 It has also held, however, that it is necessary for the legal situation to be sufficiently precise and clear to enable the persons concerned to know the full extent of their rights and, where appropriate, to be able to rely on them before the national courts (Case 29/84 *Commission* v *Germany*, cited above, paragraph 23).

33 Article 3(2) of the directive permits the Member States to refuse to grant a request for information in the cases there listed exhaustively, but the second subparagraph of that provision requires them to communicate information from which it is possible to detach information which may be covered by the requirements of confidentiality or privilege. The result is that the latter provision imposes on Member States an obligation which is precise as regards the result to be obtained and directly affects the legal situation of individuals, who are thus entitled to obtain information under the conditions laid down in the second subparagraph of Article 3(2) of the directive.

34 As the Advocate General observed in paragraphs 13 and 14 of his Opinion, it is clear that in Germany the duty to supply information on the environment in part is not guaranteed in a manner sufficiently clear and precise to ensure compliance with the principle of legal certainty and to enable persons who may submit a request for information to know the full extent of their rights.

35 That is because in the absence of any express provision in the UIG regarding partial communication, in the first place legal and natural persons seeking information may not be aware of the fact that the existence of the grounds of refusal set out in Article 3(2), first subparagraph, of the directive does not prevent partial communication, and in the second place the public authorities to whom a request for information is addressed may be dissuaded from granting it.

36 In the rejoinder, the German Government maintained that the duty to supply information in part under the second subparagraph of Article 3(2) of the directive was transposed by means of point 3.3 of the Tariff, which provides for a charge of between DEM 2 000 and DEM 10 000 '... where numerous references must be removed from the documents to be communicated in order to protect the interests of public and/or private parties'.

37 However, even if that provision correctly transposes the provisions of the directive, particularly as regards the charges attributable to the need to protect confidentiality or privilege, a matter on which the Court cannot rule in the context of this action in the absence of a plea to that effect raised by the Commission, it is clear that that provision is not sufficient, in any event, to implement clearly the obligations set out in the second subparagraph of Article 3(2) of the directive. The mere fact that partial communication is mentioned in connection with charges, in an annex to the national rules fixing the charges which may be made for supplying information on the environment, and which, moreover, applies only to the federal authorities, is not sufficient to make those seeking information aware of the full extent of their rights and, where appropriate, to enable them to rely on them before the national courts.

38 Accordingly, this ground must likewise be upheld.

Incorrect transposition of Article 5 of the directive

39 The Commission submits that the German legislation is incompatible with Article 5 of the directive because, first, it does not restrict the charge for supplying information on the environment to a reasonable amount and, secondly, it permits a charge to be made even where a request for information is refused.

40 In the first part of this ground, the Commission takes issue with the fact that Paragraph 10(1) of the UIG permits the German public authorities to charge fees and expenses to cover the 'foreseeable costs' of doing a search, and furthermore that under the Regulation and the Tariff the amount of the charge depends on the amount of work entailed for the administration by the search.

41 In its application the Commission submits in this context that acts of the administration connected with requests for information on the environment should not all give rise to a charge, and that only in exceptional cases, where identifying, collating, scrutinising and sorting information which is not accessible is very time-consuming, may a reasonable charge be made. The German rules governing charges, which are based on the principle of covering foreseeable costs, do not meet the requirement that the charge must not be prohibitive because the level of the charges indicated in the Tariff is so high as to have the effect of preventing access to information. The Commission concludes that the German legislation does not comply with the principle that charges must not exceed a reasonable amount. The obligation to make a charge covering costs is therefore incompatible with the requirement that they be of a reasonable amount, as laid down in Article 5 of the directive, at least in cases where the research is time-consuming.

42 In the reply, the Commission adds that the principle that charges may not exceed a reasonable amount is not stated in the UIG and the Regulation. The principle of covering costs referred to in them results in the imposition in individual cases of charges so high as to be tantamount to preventing access to information, flouting directly the purpose of the directive. Freedom of access for the public to information on the environment would cease to exist if citizens were obliged to abandon requests for information on grounds of cost. The Commission concedes that Article 5 of the directive does not exclude charges whose amount may vary according to the circumstances. The Community legislature merely sought to guarantee to those seeking access to information a balance between the service provided by the administration and the charge, which may in no case be prohibitive. However, the Commission considers that if the provisions are applied without restriction, as expressly provided for, the principle of covering costs might in certain cases lead to prohibitive charges.

43 The German Government contends, in essence, that although the disputed legislation makes the amount of the charge dependent on the contribution of the administration in terms of the cost of the work and time expended, the amount of the charge must always be reasonable having regard to the value of the

information for the person seeking it and that, for reasons of equity, the authorities may reduce the amount of the charge or even waive it altogether. A scale of charges is necessary in order to take due account of the wide variety of situations which may arise in practice. That being so, the German legislation correctly transposes Article 5 of the directive.

44 In order to determine whether the Commission's argument is well founded as regards the first part of this ground it should be noted at the outset that Article 5 of the directive expressly permits Member States to impose a charge for supplying information on the environment. Consequently, the Commission's argument that making such a charge is justified only in exceptional cases cannot be accepted.

45 However, under the same provision, such charges may not exceed a reasonable cost.

46 In the absence of more details in the directive itself, what constitutes 'a reasonable cost' must be determined in the light of the purpose of the directive.

47 As the Advocate General observed in paragraph 23 of his Opinion, the purpose of the directive is to confer a right on individuals which assures them freedom of access to information on the environment and to make information effectively available to any natural or legal person at his request, without his or her having to prove an interest. Consequently, any interpretation of what constitutes 'a reasonable cost' for the purposes of Article 5 of the directive which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected.

48 Consequently, the term 'reasonable' for the purposes of Article 5 of the directive must be understood as meaning that it does not authorise Member States to pass on to those seeking information the entire amount of the costs, in particular indirect ones, actually incurred for the State budget in conducting an information search.

49 As regards more particularly the German legislation, it should be remembered that Paragraph 1 of the Regulation provides that a charge shall be made for administrative acts of the federal authorities performed in the implementation of the UIG, such charge being governed by the Tariff annexed to the Regulation. Paragraph 2 of the latter provides that the competent authorities may reduce the charges, in particular for reasons of equity and where the information supplied is of no economic value.

50 The Tariff provides for three cases. First, the provision of oral or written information described as 'simple' is free of charge. Secondly, a fee of between DEM 50 and DEM 1 000 is charged for the supply of detailed written information. Thirdly, a fee of between DEM 20 and DEM 10 000, depending on the complexity of the search, is charged for supplying documents or information in other forms. In the last case, the Tariff distinguishes between three types of case: in the first, described as 'simple' cases, the charges vary from DEM 20 to DEM 200; next, where considerable work is required in order to assemble voluminous documentation, the fee varies from DEM 200 to DEM 2 000; and lastly, the charge varies from DEM 2 000 to DEM 10 000 in isolated cases which entail an unusual amount of work in order to compile a dossier, in particular where numerous references must be deleted from the documents to be supplied in order to protect the interests of public or private parties.

51 The German Government also claimed at the hearing that the Bundesverfassungsgericht (Federal Constitutional Court) and the Bundesverwaltungsgericht have held that any charge made in Germany for an administrative act must comply with the principle of proportionality and be appropriate having regard to the purpose of the service supplied.

52 Having regard to the arguments put forward by the Commission in support of this ground and the content of the German legislation, it is clear that the Commission has failed in this case to establish that the legislation does not comply with the aim of Article 5 of the directive, which is to ensure that the charge made for supplying information on the environment does not exceed a reasonable amount.

53 Since this ground is based solely on the ground that Article 5 of the directive has not been correctly transposed into German national law, it is not concerned with the issue of whether the application of the legislation leads in practice to charges which exceed a reasonable amount for the purposes of Article 5.

54 Consequently, the first part of this ground cannot be upheld.

55 In the second part of the ground concerning the failure to transpose Article 5 of the directive correctly, the Commission submits that making a charge where a request for access to information on the environment is refused is incompatible with that article. Where a request is refused there is no 'supply of information' on the environment within the meaning of the directive. The requirement that a charge be made in the case of a refusal, as provided for by the Regulation, is thus manifestly contrary to the fundamental purpose of the directive, which authorises restriction of the freedom of access to information only in accordance with the criteria and in the cases expressly defined therein.

56 The German Government contends that Article 130s of the EC Treaty (now, after amendment, Article 175 EC), which is the legal basis for the directive, does not confer on the Council the power to prescribe to the Member States rules governing administrative charges. Accordingly, Article 5 of the directive must be understood as merely prohibiting unreasonable charges which hinder effective access to information on the environment, and cannot prohibit the public

authorities from making a charge where a request for information is refused. A prohibition of that kind can also not be inferred from the notion of 'supplying' information. In any event, where a request is refused, the German public authorities may on grounds of equity reduce the charge to a quarter, and even waive it completely.

57 It should be noted, first, that Article 5 of the directive permits Member States to make a charge for 'supplying' information and not for the administrative tasks connected with a request for information.

58 Secondly, the purpose of the directive, which is to guarantee freedom of access to information on the environment and to avoid any obstacles to that freedom, precludes any interpretation which is liable to dissuade those wishing to obtain information from making a request to that effect.

59 Furthermore, the charge made where a request for information is refused cannot be described as reasonable, since in such a case no information has in fact been supplied within the meaning of Article 5 of the directive.

60 Consequently, the second part of this ground must be upheld.

61 In view of all the foregoing considerations it must be held that

— by failing to provide for access to be given to information during administrative proceedings where the public authorities have received information in the course of those proceedings,

— by failing to provide in the UIG for information to be supplied in part where it is possible to separate out information concerning the interests referred to in Article 3(2) of the directive, and

— by failing to provide that a charge is to be made only where information is in fact supplied,

the Federal Republic of Germany has failed to fulfil its obligations under the third indent of the first subparagraph, and the second subparagraph, of Article 3(2) and under Article 5 of the directive.

Costs

62 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 asked that the Federal Republic of Germany be ordered to pay the costs and the latter has been essentially unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby declares that:

1. — By failing to provide for access to be given to information during administrative proceedings where the public authorities have received information in the course of those proceedings,

— by failing to provide in the Umweltinformationsgesetz for information to be supplied in part where it is possible to separate out information concerning the interests referred to in Article 3(2) of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, and

— by failing to provide that a charge is to be made only where information is in fact supplied,

the Federal Republic of Germany has failed to fulfil its obligations under the third indent of the first subparagraph, and the second subparagraph, of Article 3(2) and under Article 5 of Directive 90/313.

2. **The remainder of the application is dismissed.**

3. **The Federal Republic of Germany is ordered to pay the costs.**

Kapteyn Hirsch Schintgen

Delivered in open court in Luxembourg on 9 September 1999.

R. Grass

Registrar

P.J.G. Kapteyn

President of the Sixth Chamber