JUDGMENT OF THE COURT (Sixth Chamber)

7 November 2002 *

In Case C-348/01,

Commission of the European Communities, represented by G. zur Hausen and J. Adda, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues, D. Colas and C. Isidoro, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (OJ 1997 L 73, p. 5), alternatively by failing to inform the Commission of those provisions, the French Republic has failed to fulfil its obligations under that directive,

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen, C. Gulmann (Rapporteur), V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,

Registrar: M.-F. Contet, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 13 June 2002,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 17 September 2001, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (OJ 1997 L 73,

p. 5), alternatively by failing to inform the Commission of those provisions, the French Republic has failed to fulfil its obligations under that directive.

Legal framework and background

2 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) is intended to provide the competent authorities with the appropriate information to enable them to take a decision on a given project in full knowledge of the significant effects which the project in question may have on the environment. It has three annexes. Annex I lists, with exceptions, the projects which must be assessed and Annex II lists the projects which Member States may specify as being subject to an assessment.

3 Directive 97/11, which amends Directive 85/337, is intended to clarify, supplement and improve the rules on the assessment procedure, in order to ensure that it is applied in an increasingly harmonised and efficient manner. It amends, *inter alia*, Articles 5(2) and 9 of Directive 85/337 and replaces Annexes I, II and III to that directive with new Annexes I, II, III and IV as set out in its annex. The new Annexes I and II to Directive 85/337 respectively list, with exceptions, the projects which must be assessed and, again with exceptions, those which the Member States decide, on a case-by-case basis or on the basis of thresholds or criteria set by the Member State in question, should be subject to assessment.

4 Article 3(1) of Directive 97/11 provides that the Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 14 March 1999 at the latest, and to inform the Commission thereof forthwith.

5 The Commission took the view that Directive 97/11 had not been transposed into French law within the prescribed period and initiated the procedure for failure to fulfil obligations. The Commission put the French Republic on notice to submit its observations and, on 26 January 2000, issued a reasoned opinion requesting that Member State to adopt the measures necessary to comply with that opinion within two months of the date of its notification.

6 In reply, on 10 April 2000, the French Government sent to the Commission Law No 76-629 of 10 July 1976 on the protection of nature (JORF of 13 July 1976, p. 4203), Decree No 77-1133 of 21 September 1977 applying Law No 76-663 of 19 July 1976 on installations for the protection of the environment (JORF of 8 October 1977, p. 4897) and Decree No 77-1141 of 12 October 1977 applying Article 2 of Law No 76-629 (JORF of 13 October 1977, p. 4948), as amended by Decree No 93-245 of 25 February 1993 on impact studies and the scope of public inquiries (JORF of 26 February 1993, p. 3032). It stated that those texts already transposed most of the provisions of Directive 97/11. It also enclosed a draft decree amending Decree No 77-1133, stating that it had already been examined by the Conseil d'État (Council of State) and was due to be adopted shortly.

7 By letter of 6 December 2000, the French Government sent to the Commission Decree No 2000-258 of 20 March 2000 amending Decree No 77-1133 (JORF of 22 March 2000, p. 4417). It submitted that that decree transposed Directive 97/11 in respect of some of the projects falling within its scope, specifically in respect of about half of the categories of project referred to in Annexes I and II to Directive 85/337 as amended by Directive 97/11. As for the other categories of project covered by those annexes, it informed the Commission that a draft decree amending Decree No 77-1141 was in the final stages of preparation, with the intention of bringing three categories of project within the scope of the domestic legislation which did not yet come within that scope, namely, wind farms, initial afforestation and the use of uncultivated or semi-cultivated land for intensive agricultural purposes.

8 By letter of 22 June 2001, the French Government stated that the draft decree was almost finished and would be published in about October 2001. It added that the decree in question would bring within the scope of domestic law two categories of project which did not yet come within that scope (initial afforestation and the use of uncultivated or semi-cultivated land for intensive agricultural purposes) and would amend the criterion in respect of wind farms.

9 The Commission took the view that the measures adopted were insufficient to transpose the provisions of Directive 97/11 in their entirety and, having no other information in its possession concerning the adoption of the national measures announced, decided to bring the present action.

The scope of the action for failure to fulfil obligations

10 The Commission points out in its application that Decree No 77-1133 transposes Directive 97/11 in respect of the classified installations subject to Law No 76-663, but that, on the French Government's own admission, that decree does not, even after its amendment by Decree No 2000-258, cover all of the projects referred to in Annexes I and II to Directive 85/337 as amended by Directive 97/11.

11 The Commission alleges that, in respect of projects other than those concerning classified installations, the French Republic has failed to transpose:

— Article 1(7) of Directive 97/11 in so far as it amends Article 5(2) of Directive 85/337 so as to introduce a framework procedure at the request of developers;

— Article 1(11) of Directive 97/11 amending Article 9 of Directive 85/337 so as to make it compulsory to inform the public of the reasons for a decision;

— Paragraphs 1(b) and (d) and 3(i) of Annex II contained in the annex to Directive 97/11 so as to cover projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes, initial afforestation and wind farms.

12 In its defence, the French Republic put forward a detailed comparison of Directive 97/11 and Decree No 77-1141, concluding therefrom that the latter in fact covered all three categories of project referred to in Paragraphs 1(b) and (d) and 3(i) of Annex II to Directive 85/337 as amended by Directive 97/11.

13 In the light of those observations, the Commission withdrew its third complaint, relating to that annex.

The complaints relating to Article 1(7) and (11) of Directive 97/11

14 According to settled case-law, 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-147/00 *Commission* v *France* [2001] ECR I-2387, paragraph 26) and mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty (see, *inter alia*, Case C-394/00 *Commission* v *Ireland* [2002] ECR I-581, paragraph 11).

15 The French Republic has acknowledged in its statement in defence that, at the end of the period laid down in the reasoned opinion, it had not transposed Article 1(7) and (11) of Directive 97/11 in respect of projects other than those concerning classified installations, since that transposition required an amendment to Decree No 77-1141 and the adoption of a statute. However, it contends that it had in fact always applied the framework procedure in the interests of sound administration.

16 The French Republic stated in its rejoinder that a draft decree amending Decree No 77-1141 was in the process of being adopted for the purpose of transposing Article 1(7) of Directive 97/11 and that it had just transposed Article 1(11) of that directive by adopting a statute.

17 The parties agreed during the oral procedure that the draft decree referred to above was still in the process of being adopted, but that the statute pleaded by the French Republic had in fact been promulgated (Law No 2002-276 of 27 February 2002 on direct democracy (JORF of 28 February 2002, p. 3808)). The Commission pointed out however that it had in its possession only the text of that statute in its draft form annexed to the defendant's rejoinder.

18 It is thus apparent, as regards the issues in dispute, that, at the end of the period laid down in the reasoned opinion, the French Republic had not complied with its obligations under Directive 97/11. In the light of the judgment in *Commission* v *Ireland*, cited above, it must be held, in respect of the framework procedure, that it is not open to the defendant Member State simply to plead a practice followed in its internal legal order.

19 Consequently, the Commission's application, as delimited in the latter stage of the proceedings, must be upheld.

20 It follows that, by failing to adopt within the prescribed time-limit all the laws, regulations and administrative provisions necessary to comply with Article 1(7) and (11) of Directive 97/11, the French Republic has failed to fulfil its obligations under that directive.

Costs

21 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. However, Article 69(5) of the Rules of Procedure provides that, upon application by a party who discontinues or withdraws from proceedings, the costs are to be borne by the other party if this appears justified by the conduct of that party.

22 The French Republic has claimed that, given the partial withdrawal by the Commission, the costs should be shared equally between the two parties.

23 The Commission claimed in its application that the defendant should be ordered to pay the costs. Following its partial withdrawal, it maintained in its reply the form of order sought in the application, that is to say, *inter alia*, its claim for costs. It pointed out during the oral procedure, with reference to Article 69(5) of the Rules of Procedure, that, prior to the institution of the present proceedings, the French Government had stated very clearly that the three categories of project forming the subject of the third complaint had not been brought within the scope of its domestic legislation.

24 The French Republic has been unsuccessful in respect of the two complaints maintained by the Commission following its partial withdrawal. As regards the third complaint, which was withdrawn, the French Government twice acknowledged the validity of that complaint in the course of the pre-litigation procedure, first in the letter of 6 December 2000 and then again in the letter of 22 June 2001. It was not until the stage of lodging its defence that, following a detailed analysis of Decree No 77-1141 — which, contrary to the assertion contained in that defence, did not emerge from a 'simple reading' of that decree — the French Government finally pleaded that the categories of project in question were covered by that decree. Its conduct was therefore such as to necessitate inclusion of the third complaint in the application.

25 In those circumstances, the French Government must be ordered to pay all the costs of the proceedings.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, by failing to adopt within the prescribed time-limit all the laws, regulations and administrative provisions necessary to comply with Article 1(7) and (11) of Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, the French Republic has failed to fulfil its obligations under that directive;**

2. **Orders the French Republic to pay the costs.**

Puissochet Schintgen Gulmann

Skouris Cunha Rodrigues

Delivered in open court in Luxembourg on 7 November 2002.

R. Grass J.-P. Puissochet

Registrar President of the Sixth Chamber