JUDGMENT OF THE COURT (Sixth Chamber)

11 November 1999 *

In Case C-184/97,

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

applicant,

v

Federal Republic of Germany, represented by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and C-D. Quassowski, Regierungsdirektor in that Ministry, acting as Agents, Postfach 13 08, D-53003 Bonn,

defendant,

APPLICATION for a declaration that by not adopting, under Article 7 of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous

* Language of the case: German.

substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23), programmes including quality objectives to reduce pollution by the substances in List II of the annex to that directive, the Federal Republic of Germany has failed to fulfil its obligations under the EC Treaty,

THE COURT (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting for the President of the Sixth Chamber (Rapporteur), G. Hirsch and H. Ragnemalm, Judges,

Advocate General: J. Mischo,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 6 May 1999,

after hearing the Opinion of the Advocate General at the sitting on 10 June 1999,

gives the following

Judgment

1 By an application lodged at the Court Registry on 9 May 1997, the Commission of the European Communities brought an application under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that by not adopting, under Article 7 of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23, 'the directive'), programmes including quality objectives to reduce pollution by the substances on List II of the annex to the directive, the Federal Republic of Germany has failed to fulfil its obligations under the EC Treaty.

The directive

2 According to the first recital in the preamble, the directive seeks to protect the aquatic environment of the Community from pollution, particularly that caused by certain persistent, toxic and bioaccumulable substances, the families and groups of which are listed in the annex thereto.

3 The directive distinguishes between two categories of dangerous substances, which are described in Lists I and II respectively of the abovementioned annex.

4 List I comprises certain individual substances selected mainly on the basis of their toxicity, persistence and bioaccumulation and forming part of the families and groups of substances set out in that list.

5 Under Articles 2 and 3 of the directive, the rules governing the substances in List I seek to eliminate water pollution by those substances, all discharges of which require prior authorisation by the competent authority of the Member State concerned, laying down emission standards if necessary.

6 In regard to those substances, Article 6(1) and (2) provide that the Council, acting on a proposal from the Commission, is to lay down the limit values which the emission standards may not exceed, as well as quality objectives set principally on the basis of the toxicity, persistence and accumulation of the said substances in living organisms and in sediment.

7 According to the first indent thereof, List II includes substances belonging to the families and groups of substances in List I for which the limit values referred to in Article 6 of the directive have not yet been determined by the Council. Currently, 99 substances in List I are included in the first indent of List II.

8 According to the second indent, List II also includes certain substances whose harmful effect on the aquatic environment can be confined to a given area and depends on the characteristics and location of the water into which they are discharged.

9 The rules governing substances in List II seek to reduce water pollution by those substances by means of appropriate measures to be taken by the Member States, as required by Article 2 of the directive.

10 Those measures are described in Article 7 of the directive, which provides as follows:

'1. In order to reduce pollution of the waters referred to in Article 1 by the substances within List II, Member States shall establish programmes in the implementation of which they shall apply in particular the methods referred to in paragraphs 2 and 3.

2. All discharges into the waters referred to in Article 1 which are liable to contain any of the substances within List II shall require prior authorisation by the competent authority in the Member State concerned, in which emission standards shall be laid down. Such standards shall be based on the quality objectives, which shall be fixed as provided for in paragraph 3.

3. The programmes referred to in paragraph 1 shall include quality objectives for water; these shall be laid down in accordance with Council directives, where they exist.

4. The programmes may also include specific provisions governing the composition and use of substances or groups of substances and products and shall take into account the latest economically feasible technical developments.

5. The programmes shall set deadlines for their implementation.

6. Summaries of the programmes and the results of their implementation shall be communicated to the Commission.

7. The Commission, together with the Member States, shall arrange for regular comparisons of the programmes in order to ensure sufficient coordination in their implementation. If it sees fit, it shall submit relevant proposals to the Council to this end.'

11 Article 10 provides: 'Where appropriate, one or more Member States may individually or jointly take more stringent measures than those provided for under this Directive.'

12 Article 12 provides:

'1. The Council, acting unanimously, shall take a decision within nine months on any Commission proposal made pursuant to Article 6 ...

...

2. The Commission shall, where possible within 27 months following notification of this directive, forward the first proposals made pursuant to

Article 7(7). The Council, acting unanimously, shall take a decision within nine months.'

The pre-litigation procedure

13 The Commission states that it requested the German Government by letter of 4 April 1990 to send it information on substances discharged into the aquatic environment and the quality objectives for various aquatic environments laid down in the discharge authorisations, and to give reasons if no quality objectives were being pursued or there was no timetable for them to be laid down.

14 On 21 September 1990 the German authorities replied that in accordance with Article 10 of the directive they had adopted measures more stringent than those provided for in Article 7, inasmuch as under the Wasserhaushaltsgesetz (Law on water use, 'the WHG') all discharges of waste water into the aquatic environment are subject to administrative authorisation. Furthermore, the administrative provisions laid down in that regard set minimum conditions adapted to the state of technology, without distinguishing between List I and List II substances and regardless of the situation of the aquatic environment. Moreover, the German authorities had adopted sectoral rules and standards which essentially reflected the groups of substances set out in the directive.

15 The Commission considered that reply insufficient to comply with the directive, and by letter of 4 February 1992 initiated the procedure under Article 169 of the Treaty by formally requesting the German Government to submit within two months its observations on the establishment and implementation of the

programmes and on the laying down of quality objectives under Article 7 of the directive.

16 In its reply of 25 August 1992, the German Government questioned the need to draw up programmes and to lay down quality objectives, reiterating its argument that the WHG laid down requirements more stringent than those contained in the directive: in the first place, the standards used in laying down the minimum requirements covered all substances, secondly, water analyses had shown there to be no pollution of the aquatic environment in Germany, and finally the competent authorities of the Länder (under management plans) or the Federal Government (under administrative provisions adopted on the basis of Article 7(a) of the WHG) were entitled to lay down requirements over and above the state of technology, restricting production or prohibiting discharge, for example.

17 Unsatisfied by the explanations of the German authorities, the Commission sent the German Government a reasoned opinion on 22 June 1994 in which it concluded that the Federal Republic of Germany had not transposed Article 7 of the directive. Accordingly, it requested that State to take the necessary steps, within two months, to comply with its obligations under the directive.

18 The Commission considered the German Government's reply, dated 28 October 1994, to the reasoned opinion, to be unsatisfactory; it therefore brought these proceedings.

Admissibility

19 The German Government raised an objection of inadmissibility on the ground of breach by the Commission of the principle of collegiality in the adoption of the reasoned opinion and the initiation of proceedings.

20 However, in light of the Court's judgment of 29 September 1998 in Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraphs 27 to 51), the German Government withdrew that objection at the hearing, with the result that there is no need to examine it.

Substance

21 It is important to note at the outset that, at the hearing, the Commission made it clear that the action concerns only the 99 substances currently included in the first indent of List II of the annex to the directive ('the substances at issue'). Accordingly, the alleged infringement must be construed as concerning only those substances and not those mentioned in the second indent of that list.

22 The Commission alleges that the German Government, in breach of the requirements of Article 7 of the directive, did not adopt programmes including quality objectives with a view to reducing pollution of water by the substances at issue. The measures mentioned by the German Government, such as the standards used, the management plans and other administrative provisions adopted, do not constitute programmes within the meaning of Article 7 of the directive. In any event, those measures are not apt to reduce aquatic pollution by substances emanating from diffuse sources.

23 In order to challenge the merits of the action, the German Government relies on three pleas: first, the possibility open to Member States under Article 10 of the directive to adopt more stringent measures; secondly, the alleged failure by the Commission to act, inasmuch as it did not propose to the Council limit values for emissions as regards the substances at issue; and [thirdly], in the alternative, since

the German legislation on water protection displays at least the same features as the programmes provided for in Article 7 of the directive it actually transposes that article, with the result that the WHG does in essence amount to a programme satisfying the requirements of that provision of the directive.

The first defence plea

24 Relying on Article 10 of the directive, which authorises the Member States to adopt more stringent measures than those provided for in the directive, the German Government contends that it has in fact adopted measures of that kind by laying down, on the basis of Article 7a of the WHG, uniformly applicable limit values for emissions in the case of all List I and II substances. Thus, the administrative authorisation required in Germany for all discharges of those substances into water, regardless of which list the substance comes under, cannot be granted unless the discharges are kept at a low level to comply with the limit values for emissions.

25 It should be noted that it has not been denied that the German Government has laid down a system of prior authorisations for discharges of the substances at issue and set emission standards which reflect the limit values. The point of contention between the Commission and the German Government therefore merely concerns the need to draw up programmes and lay down quality objectives, notwithstanding the measures already adopted by the German authorities.

26 First, in the German Government's view, the structure of the directive is such that, once limit values for emissions have been put in place, ensuring their observance results in full implementation of the directive which then no longer requires

programmes to be drawn up or quality objectives to be laid down under Article 7 of the directive.

27 As regards the need for programmes to be drawn up in respect of the substances at issue, it should be noted that even if they are List I substances the Council has not yet determined emission limit values, as provided for in Article 6 of the directive. Those substances are therefore to be provisionally treated as List II substances governed by Article 7 of the directive (see *inter alia* Case C-207/97 *Commission* v *Belgium* [1999] ECR I-275, paragraphs 34 and 35).

28 Under that provision the Member States are required, *inter alia*, to adopt programmes which include both water quality objectives and a requirement that any discharge of substances in List II be subject to prior authorisation laying down emission standards calculated on the basis of those quality objectives.

29 Accordingly, the laying down by a Member State of limit values for emissions of List II substances is not sufficient to exempt that Member State from drawing up the programmes provided for in Article 7 of the directive.

30 In addition, those programmes, contrary to the German Government's assertions, are necessary because where the Council has not laid down limit values for emissions of List I substances, they constitute the sole means of verifying that the Member States have adopted measures under the directive to combat water pollution.

31 After summaries of the programmes and the results of their implementation have been communicated to the Commission under Article 7(6) of the directive, the

Commission, together with the Member States, must arrange for regular comparisons of the programmes in order to ensure sufficient coordination in their implementation and, if it sees fit, must submit proposals to the Council which are to be decided upon by the latter under Article 12(2) of the directive.

32 It follows that failure by a Member State to draw up programmes may undermine the comparative examination for the purposes of harmonisation of the different rules governing water protection in the Member States, thus preventing full implementation of Articles 7(7) and 12(2) of the directive.

33 As regards more specifically the need to lay down quality objectives, the German Government maintains that the implementation, by laying down limit values for emissions, of a system of protection analogous to that provided for in Article 6 of the directive exempts it from the requirement to lay down such objectives.

34 That argument cannot be upheld. Whilst Article 6(2) of the directive requires the Council to lay down the quality objectives for List I substances, Article 7(3) of the directive imposes the same obligation on Member States in regard to List II substances. The Community legislature therefore attaches particular importance to the laying down of quality objectives for all the substances referred to in the directive.

35 The importance attached to quality objectives is further borne out by Article 6(3) of the directive, under which 'the limit values established in accordance with paragraph 1 shall apply except in the cases where a Member State can prove to the Commission, in accordance with a monitoring procedure set up by the Council on a proposal from the Commission, that the quality objectives established in accordance with paragraph 2, or more severe Community quality

objectives, are being met and continuously maintained throughout the area which might be affected by the discharges because of the action taken, among others, by that Member State'. The effect of that provision, as the Advocate General pointed out at paragraph 41 of the Opinion, is that although a derogation may be granted in respect of observance of limit values, it may not be granted as far as observance of quality objectives is concerned.

36 Furthermore, as the Commission has rightly observed, programmes including quality objectives are also necessary to cover cases of pollution by substances emanating from diffuse sources.

37 Secondly, the German Government considers that Article 7 of the directive is not applicable in the present case because the method for laying down limit values for emissions applied by the German authorities is intrinsically more stringent than drawing up programmes and complying with quality objectives. It contends that the directive itself lays down the method for setting limit values for emissions with a view to eliminating pollution caused by List I substances, which are considered more dangerous, whereas for List II substances, which are supposed to be less dangerous, the directive does not provide for the elimination of pollution by such substances but for the establishment of programmes including quality objectives with a view to its reduction. Thus, by laying down emission limit values for all the substances, the German Government adopted more stringent measures than those provided for in the directive.

38 The German Government considers that the fact that the measures are more stringent is borne out by the steady improvement in water quality in Germany. The question whether a national measure constitutes a more stringent measure within the meaning of Article 10 of the directive falls to be examined in the light of the improvement in water quality actually obtained. As regards 72 of the substances at issue the quality objectives proposed either by a group of experts from the Commission or by a committee of German experts have already been

achieved. As regards the remaining 27 substances, the German Government states that it has no information on measurements for objective reasons, either because the substances have no effect, or because certain pesticides are prohibited in Germany, or because it is not possible to verify the quality objectives of the technical composites by analysis. In addition, the water-quality maps drawn up every five years show the steady improvement in water quality in Germany.

39 Although it is true that the Council's fixing of emission limit values is intended to eliminate water pollution by List I substances, the elimination is not likely to be brought about by the mere fixing of limit values; in the end, as the Advocate General pointed out at paragraph 45 of his Opinion, it is entirely dependent on the level at which they are fixed.

40 Accordingly, the German Government's argument that it may be inferred from the directive itself that the method of emission limit values constitutes in itself a more stringent instrument than the programmes referred to in Article 7 must be rejected as unfounded.

41 As to the German Government's argument concerning the improvement of water quality in Germany, it does not show conclusively that the method chosen by it is more stringent than the programmes provided for in Article 7 of the directive. Even if water quality has improved in Germany, that result which the German authorities claim to have achieved is no different from that which they would have achieved under the programmes provided for in Article 7 of the directive, as the Advocate General pointed out at paragraph 50 of his Opinion.

42 In view of the need to draw up programmes and quality objectives as established at paragraphs 27 to 36 of this judgment, the fact that the result sought by the

directive may be attained by an improvement in water quality does not dispense the German Government from its obligation to adopt the measures provided for in Article 7 of the directive.

43 Accordingly, the German Government's first defence plea must be rejected as unfounded.

The second defence plea

44 The German Government claims that the infringement alleged against it is a consequence of a failure to act by the Commission itself. In fact, as regards the List I substances at issue, the Commission ought, in compliance with its obligation under Article 6 of the directive, to have proposed to the Council that it adopt uniform emission limit values at Community level. If such a proposal had been made, the infringement alleged against Germany would have lost its purpose because Article 7 of the directive would no longer apply to the substances at issue. Consequently, in the present case, the Commission's action against the German Government for an infringement brought about by its own failure to act contravenes the general principle of good faith.

45 It is sufficient to state in that connection that the directive itself lays down in binding manner the measures to be taken by the Member States where the Council does not fix emission limit values for List I substances. It follows that the directive does not dispense the Member State from complying with the obligations it imposes pending adoption of measures by the Council under Article 6.

46 It should be added that, in any event, failure to act by the Commission, which gives rise to a cause of action in its own right, has no bearing on an action for a

Treaty infringement (see to that effect the judgment in Joined Cases 2/62 and 3/62 *Commission* v *Luxembourg and Belgium* [1962] ECR 425).

47 Accordingly, the second defence plea of the German Government must be rejected as unfounded.

The third defence plea

48 The German Government contends that the actual transposition of Article 7 of the directive is secured by the German legislation. In its view, the WHG satisfies the requirements of that article because it constitutes in essence a programme within the meaning of the first paragraph of that article. In order to determine whether the WHG satisfies the requirements of the directive as regards programmes, it is necessary to have regard to their legal nature, their content, their binding force and the period for their implementation.

49 As to the legal nature of the programmes provided for in Article 7 of the directive, the German Government considers that to be a matter for the Member States, who are not bound as to the form and means to be used.

50 As to programme content, Article 7 of the directive lays down the requirement of prior authorisation, which has been complied with. On the other hand, as regards quality objectives, the German Government agues that the purpose of the programmes provided for in Article 7 of the directive is to reduce water pollution.

Consequently, inasmuch as there is no pollution, there is no requirement to lay down quality objectives.

51 As to the binding force of the programmes, the German Government maintains that the quality objectives, unlike the emission levels laid down in the discharge authorisations, cannot have binding force, since they merely give expression to the ideal sought in environmental matters and cannot by themselves influence the conduct of individuals. The quality objectives acquire binding force only when observance of the binding rules of which individuals are the addressees is assessed in the light of those objectives.

52 As regards, finally, the periods for implementing the programmes, to be determined under Article 7(5) of the directive, the German Government considers that such a period needs to be laid down only in the case of the quality objectives mentioned in Article 7(3) of the directive.

53 The German Government adds that, in addition to the measures provided for in the WHG and in other provisions concerning the composition and use of substances or groups of substances, it also adopted in conjunction with neighbouring States, various crossborder action programmes to reduce water pollution, as well as measures taken pursuant to recommendations adopted under the aegis of various international conferences.

54 As regards this last plea, neither the WHG nor the other measures adopted by the German Government can be deemed to constitute correct implementation of the

directive, which requires, as stated in paragraph 28 hereof, the adoption of programmes including the quality objectives laid down therein.

55 In accordance with the Court's case-law, programmes to be drawn up under Article 7 of the directive must be specific (see *inter alia Commission* v *Belgium*, cited above, paragraph 39).

56 It has also been held that what is specific to the programmes in question is the fact that they must embody a comprehensive and coherent approach, covering the entire national territory and providing practical and coordinated arrangements for the reduction of pollution caused by any of the substances in List II which are relevant in the particular context of the Member State concerned, in accordance with the quality objectives fixed by those programmes for the waters affected. They differ, therefore, both from general hygiene programmes and from overall *ad hoc* measures designed to reduce water pollution (see *Commission* v *Belgium*, cited above, paragraph 40).

57 The Court also added that the quality objectives fixed by those programmes on the basis of analyses of the waters affected serve as the point of reference for calculating the emission standards specified in the prior authorisations (*Commission* v *Belgium*, cited above, paragraph 41).

58 Consequently, neither general rules nor ad hoc measures adopted by a Member State which, though comprising a wide range of water-protection standards, none the less do not lay down quality objectives relating to a given watercourse or area of water can be deemed to constitute a programme within the meaning of Article 7 of the directive.

59 As to the German Government's argument that so long as there is no water pollution there is no requirement for quality objectives to be laid down, it should

be remembered that the purpose of the programmes referred to in the first paragraph of Article 7 of the directive is to reduce water pollution. Under the definition in Article 1(2)(e) of the directive, 'pollution' means 'the discharge by man, directly or indirectly, of substances or energy into the aquatic environment, the results of which are such as to cause hazards to human health, harm to living resources and to aquatic ecosystems, damage to amenities or interference with other legitimate uses of water'. The requirement to draw up programmes extends therefore to waters affected by such discharges.

60 As the Advocate General points out at paragraph 76 of his Opinion, any discharge of one of the substances at issue will inevitably lead, sooner or later, to pollution of the aquatic environment affected by it.

61 Thus, under the directive the obligation on Member States to draw up programmes including quality objectives is conditioned not by a finding of actual water pollution by List II substances, governed by Article 7 of the directive, but by discharges of those substances into the aquatic environment.

62 Accordingly, the German Government's third defence plea must likewise be rejected as unfounded.

63 It follows that in breach of its obligations the German Government did not transpose Article 7 of the directive into national law.

64 Consequently, by not adopting in accordance with Article 7 of the directive programmes including quality objectives in order to reduce pollution by 99

substances on List I of the annex to the directive, which under the first indent of List II must be treated as List II substances, the Federal Republic of Germany has failed to fulfil its obligations under the directive.

Costs

65 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 for costs against the Federal Republic of Germany, which essentially failed in its submissions, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that by not adopting, in accordance with Article 7 of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, programmes including quality objectives to reduce pollution**

by 99 substances on List I of the annex to the directive, which under the first indent of List II must be treated as List II substances, the Federal Republic of Germany has failed to fulfil its obligations under the directive;

2. Orders the Federal Republic of Germany to pay the costs.

Schintgen Hirsch Ragnemalm

Delivered in open court in Luxembourg on 11 November 1999.

R. Grass — J.C. Moitinho de Almeida

Registrar — President of the Sixth Chamber