JUDGMENT OF THE COURT (First Chamber)

9 December 2004 *

In Case C-177/03,

ACTION for failure to fulfil obligations under Article 141 EA, brought on 16 April 2003,

Commission of the European Communities, represented by J. Grunwald and B. Stromsky, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues and E. Puisais, acting as Agents,

defendant,

* Language of the case: French.

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, K. Lenaerts, J.N. Cunha Rodrigues (Rapporteur), M. Ilešič and E. Levits, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 1 July 2004,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to find that, by failing to take the measures needed to comply with Articles 2, 3, 5, 6, 7 and 8 of Council Directive 89/618/Euratom of 27 November 1989 on informing the general public about health protection measures to be applied and steps to be taken in the event of a radiological emergency (OJ 1989 L 357, p. 31; 'the Directive'), the French Republic has failed to fulfil its obligations under that Directive.

Legal background

2 According to Article 1 of the Directive:

'This directive is intended to define, at Community level, common objectives with regard to measures and procedures for informing the general public for the purpose of improving the operational health protection provided in the event of a radiological emergency.'

3 Article 2 of the Directive provides:

'For the purposes of this directive, "a radiological emergency" means any situation:

1. that follows:

(a) an accident in the territory of a Member State involving facilities or activities referred to in point 2 from which a significant release of radioactive material occurs or is likely to occur; or

(b) the detection, within or outside its own territory, of abnormal levels of radioactivity which are likely to be detrimental to public health in that Member State; or

(c) accidents other than those specified in (a) involving facilities or activities referred to in point 2 from which a significant release of radioactive material occurs or is likely to occur; or

(d) other accidents from which a significant release of radioactive material occurs or is likely to occur;

2. that is attributable to the facilities or activities referred to in point 1(a) and (c), viz.:

(a) any nuclear reactor, wherever located;

(b) any other nuclear-fuel-cycle facility:

(c) any radioactive-waste management facility;

(d) the transport and storage of nuclear fuels or radioactive wastes;

(e) the manufacture, use, storage, disposal and transport of radioisotopes for agricultural, industrial, medical and related scientific and research purposes; and

(f) the use of radioisotopes for power generation in space vehicles.'

4 In the terms of Article 3 of the Directive:

'For the purposes of applying this directive, the terms "significant release of radioactive material" and "abnormal levels of radioactivity which are likely to be detrimental to public health" are to be understood as covering situations likely to result in members of the public being exposed to doses in excess of the dose limits prescribed under the directives laying down basic Community safety standards for radiological protection ...'.

5 Article 5 of the Directive provides:

'1. Member States shall ensure that the population likely to be affected in the event of a radiological emergency is given information about the health-protection measures applicable to it and about the action it should take in the event of such an emergency.

2. The information supplied shall at least include the elements set out in Annex I.

3. This information shall be communicated to the population referred to in paragraph 1 without any request being made.

4. Member States shall update the information and circulate it at regular intervals and whenever significant changes in the arrangements that it describes take place. This information shall be permanently available to the public.'

6 According to Article 6 of the Directive:

'1. Member States shall ensure that, when a radiological emergency occurs, the population actually affected is informed without delay of the facts of the emergency, of the steps to be taken and, as appropriate to the case in point, of the health-protection measures applicable to it.

2. The information provided shall cover the points contained in Annex II which are relevant to the type of radiological emergency.'

7 Article 7 of the Directive provides:

'1. Member States shall ensure that any persons who are not on the staff of the facilities and/or not engaged in the activities defined in Article 2(2) but who might be involved in the organisation of emergency assistance in the event of a radiological emergency are given adequate and regularly updated information on the health risks their intervention might involve and on the precautionary measures to be taken in such an event; this information shall take into account the range of potential radiological emergencies.

2. As soon as a radiological emergency occurs, this information shall be supplemented appropriately, having regard to the specific circumstances.'

8 Article 8 of the Directive provides:

'The information referred to in Articles 5, 6 and 7 shall also mention the authorities responsible for implementing the measures referred to in those articles.'

9 Pursuant to the third paragraph of Article 161 EA, a directive is binding on every Member State to which it is addressed as to the result to be achieved, whilst the choice of form and methods is left to the national authorities.

The pre-litigation procedure

10 After formally calling on the French Republic to submit its observations, on 27 July 2000 the Commission sent to it a reasoned opinion to the effect that that Member State had not taken the measures necessary to comply with certain provisions of the Directive and requiring it to take such measures within a period of two months as from notification of that opinion. That period was extended, at the request of the French authorities, until 27 October 2000.

11 The French Republic then adopted a number of legislative measures with a view to transposing the Directive. Not satisfied with those measures, the Commission commenced the present action by application lodged on 16 April 2003.

The positions of the parties

12 The Commission claims that the Court should:

— declare that, by not taking the measures needed to comply with Articles 2, 3, 5, 6, 7 and 8 of the Directive, the French Republic has failed to fulfil its obligations under that Directive, and

— order the French Republic to pay the costs.

13 In support of its application, the Commission puts forward six complaints based on each of those provisions respectively.

14 In the part of its defence relating to the forms of order sought by it, the French Government contends that the Commission should abandon its first, fourth and sixth complaints. However, in its rejoinder, it contends that those complaints should be rejected. However, it admits that the fifth complaint is well founded.

The French Government's alternative submissions

15 Although the French Government contended, principally, that the first, fourth and sixth complaints made by the Commission should be rejected, it also expressed the view that the Commission should abandon those complaints.

16 In that connection, it must be pointed out that the Court cannot give a decision on a request that the Commission withdraw a complaint in proceedings for failure of a Member State to fulfil its obligations. Under the system established by Article 141 EA, the Commission enjoys a discretion as to whether to bring proceedings for failure to fulfil obligations and it is not for the Court to consider whether the exercise of that discretion is appropriate (see, to that effect, Case C-236/99 *Commission* v *Belgium* [2000] ECR I-5657, paragraph 28, and Case C-383/00 *Commission* v *Germany* [2002] ECR I-4219, paragraph 19).

17 In contrast, it is incumbent on the Court to consider, if appropriate, whether an action under Article 141 EA is inadmissible as having been brought out of time or as constituting a misuse of procedure (see Case 7/71 *Commission* v *France* [1971] ECR 1003, paragraphs 2 to 13).

18 In this case, the period laid down in the reasoned opinion expired on 27 October 2000, whilst the action was brought on 16 April 2003, that is to say almost two years and six months later. During that period, the Member State concerned adopted numerous significant measures in the relevant sphere. Both the French Government and the Commission have devoted a large part of their pleadings to a discussion as to whether those national measures adopted after 27 October 2000 were adequate to ensure implementation of the Directive, although it is abundantly clear that the Court cannot take account of that discussion.

19 It is settled case-law that the question whether or not 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 and that the Court cannot take account of any subsequent changes (see, in particular, Case C-211/02 *Commission* v *Luxembourg* [2003] ECR I-2429, paragraph 6).

20 The bringing of an action for failure to fulfil obligations in such circumstances is hardly compatible with the system established by Article 141 EA. The proper conduct of the pre-litigation procedure provided for in that Article constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (see, to that effect, the order of the Court of 11 July 1995 in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraph 17, and Case C-392/99 *Commission* v *Portugal* [2003] ECR I-3373, paragraph 133).

21 Where the relevant national provisions have fundamentally changed between the expiry of the period laid down for compliance with the reasoned opinion and the lodging of the application, that change in circumstances may render the judgment to be given by the Court otiose. In such situations, it may be preferable for the

Commission not to bring an action but to issue a new reasoned opinion precisely identifying the complaints which it intends pursuing, having regard to the changed circumstances (see, to that effect, the order in *Commission* v *Spain*, cited above, paragraph 24).

22 Nevertheless, although the conditions under which the Commission has brought the present action render examination of the dispute by the Court more complex, it must be accepted that they are not such as to justify dismissing the action as inadmissible.

The first complaint, concerning Article 2 of the Directive

23 The Commission divides this complaint into four parts. First, it claims that the French Republic has not fully transposed the definition of the 'radiological emergency' mentioned in Article 2 of the Directive, since Decree No 88-622 of 6 May 1988 on emergency plans, adopted pursuant to Law No 87-565 of 22 July 1987 on the organisation of civil security, protection of forests against fire and the prevention of major risks (JORF of 8 May 1988, p. 6636) covers only some of the situations referred to in that article. The activities mentioned in Article 2(2)(d), (e) and (f) are not covered by the abovementioned decree. Second, Article 6(1) of that decree relates only to nuclear reactors of a thermal power exceeding 10 megawatts, whereas, in contrast, the Directive is applicable to all nuclear reactors. Third, according to the Commission, Article 6(2) of that decree does not extend to the facilities referred to in Article 1(2) of the Directive. Finally, that decree relates only to facilities situated in France, contrary to the requirements of Article 2(1)(b) and (c) of the Directive.

24 The French Government replies that the inadequacies alleged by the Commission were rectified by the amendments made by Decrees No 2002-367 of 13 March 2002 (JORF of 20 March 2002, p. 4955) and No 2003-295 of 31 March 2003 (JORF of 2 April 2003, p. 5776).

25 As pointed out in paragraph 19 of this judgment, the existence of a failure to fulfil obligations must be considered in relation to the situation prevailing at the end of the period laid down for compliance with the reasoned opinion and changes made thereafter cannot be taken into account. In this case, it is common ground that the period laid down in that opinion, and extended at the request of the French authorities, expired on 27 October 2000. The assessment as to whether or not there has been a failure to fulfil obligations must therefore relate to the French legislation in force on that date.

26 As in force on that date, Article 6 of Decree No 88-622 provided:

'Special intervention plans shall be drawn up to deal with particular risks linked with the existence or operation of works or facilities serving a fixed and clearly defined area.

The following shall be covered by a special intervention plan:

1. Sites with at least one basic nuclear facility of any of the following kinds:

(a) a nuclear reactor of a thermal power exceeding 10 megawatts;

(b) a plant for the processing of irradiated nuclear fuels;

(c) a plant for the separation of isotopes from nuclear fuels;

(d) a plant for the chemical conversion of nuclear fuels;

(e) a plant for the manufacture of nuclear fuels.

...'

27 As regards the first part of this complaint, Decree No 88-622 does not expressly mention any of the activities listed in Article 2(2)(d), (e) and (f) of the Directive. Whilst the situations which the decree covers may possibly concern one or other of those activities, they do so to only a very limited extent. It must be held that, as a result, that decree does not fully comply with the Directive.

28 As regards the second part of this complaint, Article 6(1)(a) of Decree No 88-622 is concerned with nuclear reactors of a thermal power exceeding 10 megawatts, whereas the Directive, and in particular Article 2(2)(a) thereof, is applicable to all nuclear reactors. In that respect therefore, that decree is likewise not in conformity with the Directive.

29 By the third part of this complaint, the Commission alleges that:

'... the classified installations referred to in Article 6(2) of Decree No 88-622 do not include any facility covered by Article 1(2) of the Directive. In fact, by its initial reference to the decree provided for in Article 7-1 of Law No 76-663 and, as amended by Decree No 2002-367, by its present reference to Article 515-8 of the Code de l'Environnement (Environmental Code), Article 6(2) of Decree No 88-622 in fact concerns those classified installations for which an easement has been established in the public interest. Having regard to the nomenclature of classified installations which has been submitted (and which, in a version dating back to April 2000, was forwarded by the French authorities by letter of 18 October 2000), it must be observed that headings 1700 to 1721, which correspond to radioactive substances, do not in any case bear the reference "S", which corresponds to "easement in the public interest", and are not therefore covered by Article 6(2) of Decree No 88-622.'

30 The purport of this part of the complaint is difficult to understand. The nature of the nomenclature referred to and its connection with the implementation of the Directive are not explained. Decree No 2002-367 cannot be taken into account by the Court for the reasons set out in paragraphs 19 and 25 of this judgment. Finally, although the Commission mentions Article 1(2) of the Directive several times, the Directive does not contain any such provision.

31 It follows that, in the absence of the necessary clarity, the third part of the first complaint must be rejected.

32 As regards the fourth part of this complaint, Decree No 88-622 clearly refers only to facilities situated in France, whereas Article 2(1)(b) and (c) of the Directive refer to

accidents occurring outside the national territory of the Member State concerned. That decree does not therefore conform with the Directive on that point.

33 Accordingly, on 27 October 2000, and to the extent indicated in paragraphs 27, 28 and 32 of this judgment, the French legislation in force had not properly transposed Article 2 of the Directive.

The second complaint, concerning Article 3 of the Directive

34 The Commission submits that the French legislation does not contain any definition of the terms 'significant release of radioactive material' and 'abnormal levels of radioactivity which are likely to be detrimental to public health' within the meaning of Article 3 of the Directive. Such a definition is necessary in order to determine precisely and with an adequate degree of legal certainty those situations to which the national implementing measures apply.

35 The French Government replies that an adequate definition was introduced into French legislation by the abovementioned Decree No 2003-295 and by an order of 2 June 2003 (in fact, 17 October 2003) setting up a national network of environmental radioactivity measures (JORF of 28 October 2003, p. 18382).

36 For the reasons set out in paragraphs 19 and 25 of this judgment, those measures cannot be taken into account by the Court and the existence of the alleged failure to fulfil obligations must be assessed by reference to the legislation of the defendant Member State as in force on 27 October 2000.

37 The French Government does not deny that, on that date, its legislation did not include any definition of the terms to which the Commission refers.

38 According to the information produced to the Court, the French provisions in force as at 27 October 2000 did not include any indication of the dose limits of which the risk of excedence necessarily triggers the taking of measures to inform the general public, as provided for by the Directive.

39 It follows that on that date and to that extent, the French legislation in force had not adequately transposed Article 3 of the Directive.

The third complaint, concerning Article 5 of the Directive

40 The Commission's complaint is as follows:

'Accordingly [the first and second complaints having been upheld], Article 5 of the Directive ... , which governs the advance provision of information to the population

likely to be affected in the event of the radiological emergency, has not been completely transposed for all the facilities and activities defined in Article 2 of the Directive, for the reasons already given in paragraphs 29 to 38 [the paragraphs which set out the second and third complaints] of the present application. Not all the population concerned is covered by the national measures implementing the Directive.'

41 It appears from the above that the third complaint is a mere consequence of the existence of the failures alleged in the first and second complaints. It cannot therefore stand alone.

42 One and the same complaint cannot be upheld twice against a Member State in proceedings for failure to fulfil obligations.

43 Consequently, the third complaint must be rejected.

The fourth complaint, concerning Article 6 of the Directive

44 The Commission submits that the arrangements for informing the population actually affected, as provided for by the French laws or regulations, differ from those referred to in Article 6 of the Directive. The latter requires that population to be

informed 'without delay'. However, the third paragraph of Article 7 and the second paragraph of Article 9 of Decree No 90-394 of 11 May 1990 on the Code Nationale d'Alerte (National Alert Code, JORF of 15 May 1990, p. 9585) provide that the population is to be informed within the time-limits laid down either by the minister or by the prefect.

45 In its defence, the French Government refers to Decree No 2001-368 of 25 April 2001 concerning information as to risks and action to be taken in emergencies, amending Decree No 90-394 of 11 May 1990 concerning the National Alert Code (JORF of 28 April 2001, p. 6737) and the order of 30 November 2001 setting up an emergency alert mechanism around a basic nuclear facility for which there is a special intervention plan (JORF of 14 December 2001, p. 19848). In its rejoinder, the French Government also refers to Articles L.1333-3 and L.1333-8 of the Code de la Santé Publique (Public-Health Code), as set out in Order No 2001-270 of 28 March 2001 (JORF of 31 March 2001, p. 5057) and Law No 2001-398 of 9 May 2001 (JORF of 10 May 2001, p. 7325).

46 Since those provisions were adopted after 27 October 2000, the Court cannot take account of them for the reasons set out in paragraphs 19 and 25 of this judgment.

47 It is therefore necessary to limit the Court's examination to Decree No 90-394 of 11 May 1990. The third paragraph of Article 7 and the second paragraph of Article 9 of that decree provided that the radio and television messages confirming the alert and giving the population guidance as to the action to be taken were to be broadcast within the time-limits laid down either by the minister responsible for civil security or by the prefect responsible for managing assistance measures, and were to be repeated, if necessary, at a frequency to be determined by that person.

48 It must be pointed out that that provision did not fully implement Article 6 of the Directive, according to which the population actually affected must be informed without delay of any emergency and of the steps to be taken.

49 It follows that, to that extent, the national legislation in force on the date of expiry of the period set for compliance with the reasoned opinion had not adequately transposed Article 6 of the Directive.

The fifth complaint, concerning Article 7 of the Directive

50 The Commission submits that Article 7 of the Directive, concerning information for intervention teams, has not been fully transposed into French law. Circular No 1102 of 29 September 1987 concerning the organisation of first-day medical care in the event of a radiological or nuclear accident (urgent medical aid) is not sufficient to meet the objectives of that article. It does not fulfil the requirements of legal certainty laid down by the settled case-law of the Court.

51 The French Government does not deny that this complaint is well founded. It has given notice of its intention to amend as soon as possible Article R.1333-85 of the Public-Health Code with a view to ensuring full transposition of Article 7 of the Directive, but no such amendment has yet been made.

52 It must be emphasised that the said Circular No 1102 contains no provision concerning information for assistance teams.

53 Moreover, the order of 21 November 1994 on the training of professional firefighters (JORF of 7 January 1995, p. 319), in its initial version, is applicable only to firefighters and not to other persons likely to be involved in the organisation of assistance.

54 Moreover, although that order provides for specialised training relating to radiological risks, it is clear from Articles 23(2) and 27(2) thereof that the training is provided only on an optional basis for the purposes of promotion to a higher grade. For the last-mentioned reason, that training does not correspond to the adequate and regular training which is made compulsory by Article 7 of the Directive.

55 It follows that, to the extent indicated, the French rules in force on 27 October 2002 had not adequately implemented Article 7 of the Directive.

The sixth complaint, concerning Article 8 of the Directive

56 The Commission points out that, according to Article 8 of the Directive, the information referred to in Articles 5, 6 and 7 is also to 'mention the authorities responsible for implementing the measures referred to in those articles'. The practice of the French authorities, whereby details of the responsible authorities are given through the media used for informing the general public, cannot in that respect be regarded as sufficient to ensure the correct and complete implementation of Article 8 of the Directive. It does not meet the requirements of legal certainty.

57 It must be borne in mind that, according to the very terms of the third paragraph of Article 161 EA, the Member States are entitled to choose the form and methods for implementing directives which best ensure the result to be achieved by the directives. It is clear from that provision that the transposition of a directive into national law does not necessarily require legislative action in each Member State. Thus, the Court has repeatedly held that it is not always necessary formally to enact the requirements of a directive in a specific express legal provision (see, to that effect, Case C-233/00 *Commission* v *France* [2003] ECR I-6625, paragraph 76, and Case C-296/01 *Commission* v *France* [2003] ECR I-13909, paragraph 55).

58 It is in the light of that case-law that the Commission's sixth complaint must be considered.

59 In this case, the Commission has not in any way demonstrated that compliance with the obligation laid down in Article 8 of the Directive requires specific implementing measures to be incorporated into national law.

60 Moreover, the Commission acknowledges the existence of a practice on the part of the French authorities, whereby details of the responsible authorities are given through the media used for informing the general public, but has not shown how that practice is contrary to the obligation laid down in Article 8 of the Directive.

61 Accordingly, the sixth complaint must be rejected as unfounded.

62 In view of the foregoing, it must be held that, by failing to take by 27 October 2000 all the measures needed to comply with Articles 2, 3, 6 and 7 of the Directive, the French Republic has failed to fulfil its obligations under that Directive.

Costs

63 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, under Article 69(3) of the same Rules, the Court may order that the costs be shared or decide that the parties are to bear their own costs if each succeeds on some and fails on other heads of claim. In this case, since each party has in part been unsuccessful, they must be ordered to bear their own costs.

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

1. **Declares that, by failing to take by 27 October 2000 all the measures needed to comply with Articles 2, 3, 6 and 7 of Council Directive 89/618/Euratom of 27 November 1989 on informing the general public about health protection measures to be applied and steps to be taken in the event of a radiological emergency, the French Republic has failed to fulfil its obligations under that Directive;**

2. **For the rest, dismisses the application;**

3. **Orders the parties to bear their own costs.**

Signatures.