JUDGMENT OF THE COURT (Second Chamber)

25 July 2008 *

In Case C-237/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesverwaltungsgericht (Germany), made by decision of 29 March 2007, received at the Court on 14 May 2007, in the proceedings

Dieter Janecek

v

Freistaat Bayern,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, J. Makarczyk and J.-C. Bonichot (Rapporteur), Judges,

* Language of the case: German.

Advocate General: J. Mazák,
Registrar: B. Fülop, Administrator,

having regard to the written procedure and further to the hearing on 5 June 2008,

after considering the observations submitted on behalf of:

— Mr Janecek, by R. Klinger, Rechtsanwalt,

— the Netherlands Government, by C. Wissels and M. De Grave, acting as Agents,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Commission of the European Communities, by F. Erlbacher, A. Alcover San Pedro and D. Recchia, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 7(3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1; 'Directive 96/62').

2 The reference has been made in the course of proceedings between Mr Janecek and the Freistaat Bayern concerning an application for an order requiring the Freistaat Bayern to draw up an air quality action plan in the Landshuter Allee district in Munich, where the applicant lives, the plan in question to include the measures to be taken in the short term to ensure compliance with the limit set by Community legislation in respect of ambient air emissions of particulate matter PM_{10}.

Legal context

Community legislation

3 According to the 12th recital in the preamble to Directive 96/62:

'… in order to protect the environment as a whole and human health, it is necessary that Member States take action when limit values are exceeded in order to comply with these values within the time fixed'.

4 Annex I to Directive 96/62 contains a list of atmospheric pollutants to be taken into consideration in the assessment and management of ambient air quality. Item 3 in that list refers to '[f]ine particulate matter such as soot (including $[PM]_{10}$)'.

5 Article 7 of Directive 96/62, headed 'Improvement of ambient air quality — General requirements', provides:

'1. Member States shall take the necessary measures to ensure compliance with the limit values.

…

3. Member States shall draw up action plans indicating the measures to be taken in the short term where there is a risk of the limit values and/or alert thresholds being exceeded, in order to reduce that risk and to limit the duration of such an occurrence. …'

6 Article 8 of the directive, headed 'Measures applicable in zones where levels are higher than the limit value', provides:

'1. Member States shall draw up a list of zones and agglomerations in which the levels of one or more pollutants are higher than the limit value plus the margin of tolerance.

Where no margin of tolerance has been fixed for a specific pollutant, zones and agglomerations in which the level of that pollutant exceeds the limit value shall be treated in the same way as the zones and agglomerations referred to in the first subparagraph, and paragraphs 3, 4 and 5 shall apply to them.

2. Member States shall draw up a list of zones and agglomerations in which the levels of one or more pollutants are between the limit value and the limit value plus the margin of tolerance.

3. In the zones and agglomerations referred to in paragraph 1, Member States shall take measures to ensure that a plan or programme is prepared or implemented for attaining the limit value within the specific time-limit.

The said plan or programme, which must be made available to the public, shall incorporate at least the information listed in Annex IV.

4. In the zones and agglomerations referred to in paragraph 1, where the level of more than one pollutant is higher than the limit values, Member States shall provide an integrated plan covering all the pollutants concerned.

…'

7 Article 5(1) of Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air (OJ 1999 L 163, p. 41) provides:

'Member States shall take the measures necessary to ensure that concentrations of PM_{10} in ambient air, as assessed in accordance with Article 7, do not exceed the limit values laid down in Section I of Annex III as from the dates specified therein.

The margins of tolerance laid down in Section I of Annex III shall apply in accordance with Article 8 of Directive 96/62/EC.'

8 Stage 1, section 1 of Annex III to Directive 1999/30 sets out, in a table, the limit values for particulate matter PM_{10}.

National legislation

9 Directive 96/62 was transposed into German law by the Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche, Erschütterungen und ähnliche Vorgänge (Federal Law on protection against the harmful effects of air pollution, noise, vibrations and other types of nuisance on the environment), as published on 26 September 2002 (BGBl I, p. 3830), as amended by the Law of 25 June 2005 (BGBl I, p. 1865; 'the Federal Law on combating pollution').

10 Paragraph 45 of the Federal Law on combating pollution, headed 'Improvement of air quality', provides:

'(1) The competent authorities shall take the measures necessary to comply with the emission values fixed pursuant to Paragraph 48a, in particular by means of the plans provided for under Paragraph 47.

…'

11 Paragraph 47 of that Law, headed 'Air quality plans, action plans, Land regulations', provides:

'(1) Where the limit values plus the statutory margins of tolerance defined by regulation pursuant to Paragraph 48a(1) are exceeded, the competent authorities shall draw up an air quality plan which determines the measures necessary for the permanent reduction of atmospheric pollutants and which complies with the requirements of the regulation.

(2) Where there is a risk of the emission limit values or alert thresholds defined by regulation pursuant to Paragraph 48a(1) being exceeded, the competent authority shall draw up an action plan laying down the measures to be taken in the short term which must be capable of reducing that risk or of limiting the duration of such an occurrence. Action plans may be incorporated in an air quality plan pursuant to subparagraph 1.

…'

12 The emission limit values referred to in Paragraph 47 of the Federal Law on combating pollution are fixed in the 22nd regulation for the implementation of that Law, which provides, in Paragraph 4(1):

'The average emission limit value over a 24-hour period in respect of PM_{10}, having regard to the protection of human health, is 50 µg/m^3, which may be exceeded 35 times in a calendar year …'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Mr Janecek lives on the Landshuter Allee on Munich's central ring road, approximately 900 metres north of an air quality measuring station.

14 Measurements taken at that station have shown that, in 2005 and 2006, the limit value fixed for emissions of particulate matter PM_{10} was exceeded much more than 35 times, even though that is the maximum number of instances permitted under the Federal Law on combating pollution.

15 It is common ground that an air quality action plan exists in respect of the city of Munich, that action plan having been declared mandatory on 28 December 2004.

16 However, the applicant in the main proceedings brought an action before the Verwaltungsgericht (Administrative Court) Munich for an order requiring the Freistaat Bayern to draw up an air quality action plan in the Landshuter Allee district, so as to determine the measures to be taken in the short-term in order to ensure compliance with the maximum permitted number of instances — 35 per year — of the emission limit value for particulate matter PM_{10} being exceeded. The Verwaltungsgericht Munich dismissed that action as unfounded.

17 On appeal, the Verwaltungsgerichtshof (Higher Administrative Court) took a different view, holding that the residents concerned may require the competent authorities to draw up an action plan, but that they are not entitled to insist that it must include the particular measures that would guarantee compliance in the short-term with the emission limit values for particulate matter PM_{10}. According to the Verwaltungsgerichtshof, the national authorities are required only to ensure that such a plan pursues that objective to the extent to which it is possible and proportionate for it to do so. Consequently, it ordered the Freistaat Bayern to draw up an action plan complying with those requirements.

18 Mr Janecek and the Freistaat Bayern appealed to the Bundesverwaltungsgericht (Federal Administrative Court) against the judgment of the Verwaltungsgerichtshof. According to the Bundesverwaltungsgericht, the applicant in the main proceedings cannot rely on any entitlement to have an action plan drawn up pursuant to Paragraph 47(2) of the Federal Law on combating pollution. The Bundesverwaltungsgericht takes the view, moreover, that neither the spirit nor the letter of Article 7(3) of Directive 96/62 confers a personal right to have an action plan drawn up.

19 The referring court states that, even though the — albeit unlawful — failure to adopt an action plan does not, under national law, prejudice the rights of the applicant in the main proceedings, he is not without the means to ensure compliance with the legislation. Protection against the harmful effects of particulate matter PM_{10} should

be secured by measures that are independent of such a plan, which the persons concerned are entitled to require the competent authorities to implement. Thus, effective protection is assured, under the same conditions as those that would result from the drawing-up of an action plan.

20 The Bundesverwaltungsgericht recognises, however, that there is a school of thought which draws different conclusions from the Community rules in question, namely that the third parties affected are entitled to have action plans drawn up, which appears to be confirmed by the judgment in Case C-59/89 *Commission* v *Germany* [1991] ECR I-2607.

21 In those circumstances, the Bundesverwaltungsgericht decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 7(3) of Council Directive 96/62… to be interpreted as meaning that a third party whose health is impaired is entitled to the preparation of an action plan even if, irrespective of any action plan, he is in a position to enforce his right to avoid any detriment to his health as a result of the emission limit value for particulate matter PM_{10} being exceeded, by bringing an action for intervention by the public authority?

(2) If so, is a third party who is affected by such concentrations of particulate matter PM_{10} as could be detrimental to health entitled to have an action plan drawn up laying down the measures to be taken in the short term to ensure strict compliance with the emission limit value for particulate matter PM_{10} ?

(3) If the answer to Question 2 is in the negative, to what extent must the measures included in an action plan serve to reduce the risk of exceeding the limit value and to limit the duration of such an occurrence? Can an action plan be limited, on the principle of "one step at a time", to measures which, while not

guaranteeing compliance with the limit value, nevertheless contribute in the short term to improvements in ambient air quality?'

The questions referred for a preliminary ruling

Observations submitted to the Court

22 The applicant in the main proceedings submits that, whenever the failure of national authorities to comply with the requirements of a directive designed to protect public health could endanger human health, the persons concerned must be in a position to rely on the mandatory rules included in that directive (see, as regards Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates (OJ 1980 L 229, p. 30), Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 16; and, as regards Council Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States (OJ 1975 L 194, p. 26) and Council Directive 79/869/EEC of 9 October 1979 concerning the methods of measurement and frequencies of sampling and analysis of surface water intended for the abstraction of drinking water in the Member States (OJ 1979 L 271, p. 44), Case C-58/89 *Commission* v *Germany* [1991] ECR I-4983, paragraph 14).

23 Taking the view that Directive 96/62 is designed to protect human health, the applicant in the main proceedings maintains that Article 7(3) of that directive constitutes a mandatory rule which requires an action plan to be drawn up even where there is merely a risk that a limit value may be exceeded. The obligation to draw up such a plan in that situation, the existence of which is not disputed in the main proceedings, is therefore a rule upon which the applicant is in a position to rely, on the basis of the case-law referred to in the previous paragraph of the present judgment.

24 With regard to the content of the action plan, the applicant in the main proceedings submits that it must lay down all the appropriate measures to ensure that the period during which the limit values are exceeded is kept to a minimum. That follows, in particular, from the broad logic of Article 7(3) of Directive 96/62 — which states clearly that action plans must be drawn up where there is a mere risk of those values being exceeded — and Article 8(3) of the directive, according to which, where limit values have already been exceeded, the Member States must take measures to ensure that a plan or programme is prepared or implemented for attaining the limit value within the specific time-limit.

25 The Netherlands Government submits that Article 7(3) of Directive 96/62 does not confer on third parties a personal right to have an action plan drawn up. The Member States, it argues, have a wide discretion in respect of both the adoption of action plans and the determination of their content.

26 It follows, the Netherlands Government continues, from Article 7(3) that the Community legislature intended to leave to the Member States the power to put in place an action plan and to take the ancillary measures which they consider necessary and proportionate in order to attain the result envisaged.

27 Accordingly, it continues, Article 7(3) of Directive 96/62 does not impose any obligation on the Member States as to the result to be achieved. Their broad discretion allows the Member States to weigh up different interests and to adopt specific measures, taking account of compliance with limit values as well as of other interests and obligations, such as free movement within the European Union.

28 Thus, the Member States are required only to put in place action plans setting out the measures to be taken in the short-term in order to reduce the risk of those values being exceeded or to limit the duration of such an occurrence.

29 The Austrian Government points out that the Court has held that the Community-law provisions which fix limit values for the protection of human health also confer on the persons concerned a legally enforceable right to compliance with those limit values (Case C-59/89 *Commission* v *Germany*).

30 However, the Austrian Government takes the view that, while Article 7(3) of Directive 96/62 may have direct effect, it does not follow from this that Article 7(3) establishes a personal right on the part of individuals to have action plans drawn up, since, in its view, that provision covers only the adoption of measures — in the context of national programmes — which are liable to help ensure compliance with limit values.

31 The Commission submits that it is apparent from the wording of Directive 96/62, in particular the combined provisions of Articles 7(3) and 2(5) and the 12th recital in the preamble to the directive, that the fixing of limit values in respect of particulate matter PM_{10} serves to protect human health. The Court has established in relation to similar provisions that, whenever the exceeding of limit values was capable of endangering human health, the persons concerned were in a position to rely on those rules in order to assert their rights (Case C-361/88 *Commission* v *Germany*, paragraph 16; Case C-59/89 *Commission* v *Germany*, paragraph 19; and Case C-58/89 *Commission* v *Germany*, paragraph 14).

32 According to the Commission, the principles identified in those judgments apply to the action plans provided for under Directive 96/62. The competent authority is therefore obliged to draw up such plans where the conditions laid down by that directive are satisfied. It follows that a third party who is affected by the limit values being exceeded is in a position to assert his right to the preparation of an action plan, which is required for the attainment of the objective relating to the limit values set by that directive.

33 With regard to the content of the action plans, the Commission's response is based on the terms of Article 7(3) of Directive 96/62, according to which those action plans must provide for measures 'to be taken in the short term… in order to reduce [the risk of the limit values being exceeded] and to limit the duration of such an occurrence'.

The Commission takes the view that the competent authority has a discretion to take the measures which it considers to be the most appropriate, provided that those measures are designed in the light of what is actually possible and legally proportionate, in such a way as to enable levels to drop back below the prescribed limit values within the shortest possible time.

The Court's findings

The preparation of action plans

34 By its first question, the Bundesverwaltungsgericht is asking whether an individual can require the competent national authorities to draw up an action plan in the case — referred to in Article 7(3) of Directive 96/62 — where there is a risk that the limit values or alert thresholds may be exceeded.

35 That provision places the Member States under a clear obligation to draw up action plans both where there is a risk of the limit values being exceeded and where there is a risk of the alert thresholds being exceeded. That interpretation, which follows from a straightforward reading of Article 7(3) of Directive 96/62, is, moreover, confirmed in the 12th recital in the preamble to the directive. What is laid down in relation to the limit values applies all the more with regard to the alert thresholds, in respect of which, moreover, Article 2 — which defines the various terms used in the directive — provides that 'immediate steps shall be taken by the Member States as laid down in this Directive'.

36 In addition, the Court has consistently held that individuals are entitled, as against public bodies, to rely on the provisions of a directive which are unconditional and sufficiently precise (see, to that effect, Case 148/78 *Ratti* [1979] ECR 1629, paragraph 20). It is for the competent national authorities and courts to interpret national

law, as far as possible, in a way that is compatible with the purpose of that directive (see, to that effect, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8). Where such an interpretation is not possible, they must disapply the rules of national law which are incompatible with the directive concerned.

37 As the Court of Justice has noted on numerous occasions, it is incompatible with the binding effect which Article 249 EC ascribes to a directive to exclude, in principle, the possibility of the obligation imposed by that directive being relied on by persons concerned. That consideration applies particularly in respect of a directive which is intended to control and reduce atmospheric pollution and which is designed, therefore, to protect public health.

38 Thus, the Court has held that, whenever the failure to observe the measures required by the directives which relate to air quality and drinking water, and which are designed to protect public health, could endanger human health, the persons concerned must be in a position to rely on the mandatory rules included in those directives (see Case C-361/88 *Commission* v *Germany*; Case C-59/89 *Commission* v *Germany*; and Case C-58/89 *Commission* v *Germany*).

39 It follows from the foregoing that the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts.

40 The fact that those persons may have other courses of action available to them — in particular, the power to require that the competent authorities lay down specific measures to reduce pollution, which, as indicated by the referring court, is provided for under German law — is irrelevant in that regard.

41 Directive 96/62 does not place any restrictions on the measures which may be adopted pursuant to other provisions of national law; moreover, it contains wording that is quite specific with regard to planning for the purposes, as stated in the 12th recital in the preamble to the directive, of protecting the environment 'as a whole', taking account of all the factors to be considered, such as, in particular, the requirements for the operation of industrial installations or travel.

42 The answer to the first question must therefore be that Article 7(3) of Directive 96/62 must be interpreted as meaning that, where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution.

The content of action plans

43 By its second and third questions, the Bundesverwaltungsgericht is asking whether the competent national authorities are obliged to lay down measures which, in the short term, would ensure that the limit value is attained, or whether they can confine themselves to taking measures to ensure a reduction in instances of the limit value being exceeded or limits on their duration and which are, consequently, liable to make it possible for the situation to be improved gradually.

44 According to Article 7(3) of Directive 96/62, action plans must include the measures 'to be taken in the short term where there is a risk of the limit values and/or alert thresholds being exceeded, in order to reduce that risk and to limit the duration of such an occurrence'. It follows from that very wording that the Member States are not obliged to take measures to ensure that those limit values and/or alert thresholds are never exceeded.

45 On the contrary, it is apparent from the broad logic of the directive — which seeks an integrated reduction of pollution — that it is for the Member States to take measures capable of reducing to a minimum the risk of the limit values and/or alert thresholds being exceeded and the duration of such an occurrence, taking into account all the material circumstances and opposing interests.

46 It must be noted in this regard that, while the Member States thus have a discretion, Article 7(3) of Directive 96/62 includes limits on the exercise of that discretion which may be relied upon before the national courts (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 59), relating to the adequacy of the measures which must be included in the action plan with the aim of reducing the risk of the limit values and/or alert thresholds being exceeded and the duration of such an occurrence, taking into account the balance which must be maintained between that objective and the various opposing public and private interests.

47 Therefore, the answer to the second and third questions must be that the Member States are obliged, subject to judicial review by the national courts, only to take such measures — in the context of an action plan and in the short term — as are capable of reducing to a minimum the risk that the limit values or alert thresholds may be exceeded and of ensuring a gradual return to a level below those values or thresholds, taking into account the factual circumstances and all opposing interests.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 7(3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003, must be interpreted as meaning that, where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution.**

2. **The Member States are obliged, subject to judicial review by the national courts, only to take such measures — in the context of an action plan and in the short term — as are capable of reducing to a minimum the risk that the limit values or alert thresholds may be exceeded and of ensuring a gradual return to a level below those values or thresholds, taking into account the factual circumstances and all opposing interests.**

[Signatures]