OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 14 April 2011 [1]

1. In a situation in which preliminary planning permission has been given for a garden centre to be opened on a plot previously occupied by a metal recycling facility and within an area already containing retail and wholesale outlets, workshops and a hotel, but close to an establishment where dangerous substances are present and which is therefore covered by the Seveso II Directive, [2] the German Bundesverwaltungsgericht (Federal Administrative Court) seeks guidance on the obligations imposed on planning authorities.

2. The issues raised concern the obligation to ensure that policies are drawn up and implemented so as to take account of the need, in the long term, to maintain appropriate distances between establishments which pose a risk and buildings and areas used by the public.

3. Does that obligation apply only at the level of land-use planning [3] – that is to say, policy concerning land use over broad delimited areas – or also when individual planning decisions are taken? And, where there is currently public access to premises within a 'danger zone' identified around an establishment, must any change of use within that zone move towards compliance with the long-term aim of maintaining appropriate distances, or

1 — Original language: English.

2 — Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances (OJ 1997 L 10, p. 13; hereinafter 'the Seveso II Directive' or 'the directive'). The commonly used nickname derives from an accidental release of industrial dioxins at the Italian town of Seveso in 1976, which was the stimulus for its predecessor, Council Directive 82/501/EEC of 24 June 1982 on the major-accident hazards of certain industrial activities (OJ 1982 L 230, p. 1; 'the Seveso I Directive'). The directive has been amended on a number of occasions (see, in particular, footnote 7 below). A proposal for its replacement (Proposal for a Directive of the European Parliament and of the Council on control of major-accident hazards involving dangerous substances, COM(2010) 781 final) was submitted to the Council by the Commission on 21 December 2010.

3 — For a discussion of what is meant by 'land-use planning' and the varying terminology used in different Member States, see section 2.1 of *Land use planning guidelines in the context of Article 12 of the Seveso II Directive 96/82/EC as amended by Directive 105/2003/EC*, European Commission Joint Research Centre, Institute for the Protection and Security of the Citizen, Hazard Assessment Unit, September 2006.

is it permissible simply to ensure that the new use is consistent with the existing situation?

4. Those questions arise in a context in which, on the one hand, no land-use plan has in fact been drawn up for the relevant area and, on the other, national law requires planning permission to be given where a development is found to meet certain specified requirements. In the present case, in particular, the development would not impose more stringent accident prevention requirements on the existing establishment.

The Seveso II Directive

5. The directive is stated in Article 1 to be 'aimed at the prevention of major accidents which involve dangerous substances, and the limitation of their consequences for man and the environment, with a view to ensuring high levels of protection throughout the Community in a consistent and effective manner'. The majority of its provisions are concerned with ensuring that operators of establishments where specified dangerous substances are present in excess of specified quantities take the necessary precautions to avoid accidents and that emergency plans are in place in case accidents should none the less occur. Another concern is, however, that the establishments concerned should be sited in such a way as to limit the consequences of such an accident.

6. In that regard, recital 4 in the preamble states that, 'in the light of the accidents at Bhopal and Mexico City, which demonstrated the hazard which arises when dangerous sites and dwellings are close together, the Council Resolution of 16 October 1989 called on the Commission to include in Directive 82/501/EEC [4] provisions concerning controls on land-use planning when new installations are authorised and when urban development takes place around existing installations'.

7. According to recital 22, 'in order to provide greater protection for residential areas, areas of substantial public use and areas of particular natural interest or sensitivity, it is necessary for land-use and/or other relevant policies applied in the Member States to take account of the need, in the long term, to keep a suitable distance between such areas and establishments presenting such hazards and, where existing establishments are concerned, to take account of additional technical measures so that the risk to persons is not increased'.

4 — The Seveso I Directive (see footnote 2 above).

8. Article 12 of the directive is entitled 'Land-use planning'. Article 12(1) provides:

'Member States shall ensure that the objectives of preventing major accidents and limiting the consequences of such accidents are taken into account in their land-use policies and/or other relevant policies. They shall pursue those objectives through controls on:

(a) the siting of new establishments,

(b) modifications to existing establishments covered by Article 10, [5]

(c) new developments such as transport links, locations frequented by the public and residential areas in the vicinity of existing establishments, where the siting or developments are such as to increase the risk or consequences of a major accident.

Member States shall ensure that their land-use and/or other relevant policies and the procedures for implementing those policies take account of the need, in the long term, to maintain appropriate distances between establishments covered by this Directive and residential areas, buildings and areas of public use, major transport routes as far as possible, recreational areas and areas of particular natural sensitivity or interest and, in the case of existing establishments, of the need for additional technical measures in accordance with Article 5 [6] so as not to increase the risks to people.' [7]

Relevant German legislation

9. Paragraph 1(3) of the German Building Code [8] requires municipalities to draw up land-use development plans as soon as, and

5 — Article 10 requires Member States to ensure that, in the event of modification of an establishment, the operator reviews and where necessary revises its major-accident prevention policy, management systems and procedures, and safety report.

6 — Article 5 requires Member States to oblige operators (1) to take all measures necessary to prevent major accidents and limit their consequences for man and the environment and (2) to prove that those measures have been taken.

7 — Second subparagraph as amended by Directive 2003/105/EC of the European Parliament and of the Council of 16 December 2003 (OJ 2003 L 345, p. 97). Rather than a substantive amendment, that appears to be a 'clarification', as referred to in recital 14 of the preamble to the amending directive; previously, 'buildings … of public use', 'major transport routes as far as possible', and 'recreational areas' did not appear in the list of areas in relation to which appropriate distances must be maintained.

8 — Baugesetzbuch (BauGB), of 2004.

in so far as, necessary for urban development. Paragraph 1(7) requires all the various public and private interests to be weighed fairly one against another when such plans are drawn up.

10. Paragraph 34 of the Building Code is entitled 'Permissibility of projects within a built-up area'; subparagraph 1 provides:

'Within built-up areas, a project shall be permissible where, according to the type and scale of the use of the building, method of construction and the plot to be built on, it is in keeping with the features of its immediate surroundings and the provision of utilities has been secured. The requirements relating to healthy living and working conditions must be satisfied; the overall appearance of the locality may not be impaired.'

11. It is common ground that, where no land-use development plan has been drawn up for a given area, planning authorities have no discretion to refuse preliminary planning permission where a project meets the requirements of Paragraph 34 of the Building Code; they are neither required nor permitted to effect a further weighing-up of public and private interests, as is compulsory when drawing up a development plan.

12. Where regionally significant planning projects and measures are concerned, Paragraph 50 of the Pollution Prevention Law [9] requires land earmarked for a particular use to be zoned so as to avoid as far as possible harmful environmental effects and the effects, caused in industrial areas by major accidents within the meaning of Article 3(5) of the Seveso II Directive, [10] on areas which are exclusively or predominantly used for residential purposes and on other areas requiring protection, in particular areas of public use, important traffic routes, leisure areas, especially valuable or sensitive conservation areas, and buildings of public use.

13. Finally, Paragraph 3 of the 12th regulation implementing the Pollution Prevention Law [11] requires operators of establishments posing a risk, in particular, to take the necessary precautions both to prevent major

9 — Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigung, Geräusche, Erschütterungen und ähnliche Vorgänge (Bundes-Immissionsschutzgesetz or BImSchG), of 2002.

10 — Under Article 3(5) of the directive, 'major accident' means 'an occurrence such as a major emission, fire, or explosion resulting from uncontrolled developments in the course of the operation of any establishment covered by this Directive, and leading to serious danger to human health and/or the environment, immediate or delayed, inside or outside the establishment, and involving one or more dangerous substances'.

11 — Zwölfte Verordnung zur Durchführung des Bundes Immissionsschutzgesetzes (12. BImSchV), of 2005.

accidents and to keep the effects of such accidents to a minimum.

Facts, procedure and questions referred

14. Franz Mücksch OHG ('Mücksch') has been granted preliminary planning permission [12] by the city of Darmstadt to build a garden centre with a sales area of 9 368 m^2 on a plot, hitherto occupied by a metal recycling facility, which it owns on an industrial estate to the north west of the city. The surrounding area contains retail and wholesale outlets, workshops and a hotel. The plot is bordered to the north by railway lines, beyond which lie industrial premises owned by Merck KG aA ('Merck'), which fall within the scope of the Seveso II Directive and the 12th regulation implementing the Pollution Prevention Law. [13]

It appears that no land-use development plan has been drawn up for the area concerned, [14] nor is the project 'regionally significant' within the meaning of Paragraph 50 of the Pollution Prevention Law.

15. Merck has lodged an objection to the preliminary planning permission, on which Land Hessen (the regional authority in whose territory Darmstadt lies) must rule. Mücksch seeks to have the objection dismissed.

16. In the course of the proceedings, an impact report was drawn up, setting out compliance boundaries in respect of the established potential hazards posed by Merck's site, based on guidance from the Federal Ministry of the Environment. Mücksch's plot lies entirely within those boundaries.

17. At first instance, Land Hessen was ordered to dismiss Merck's objection. Appeals by Merck and Land Hessen were dismissed, and those parties have appealed further to the referring court on a point of law. They claim that the appeal court did not interpret national law in conformity with the Seveso II Directive, Article 12(1) of which, in their submission, precludes authorisation of Mücksch's project.

12 — 'Bauvorbescheid'; the German Government explains in its observations that this is a type of binding preliminary decision which often concerns only compliance with planning laws. It provides a degree of legal certainty but does not itself authorise building works to begin.

13 — It was stated at the hearing that significant quantities of the toxic gas chlorine are stored on the premises and used in the production of, in particular, liquid crystals.

14 — The German Government states in its observations that it is rare for the requirement to draw up such a plan to give rise to an enforceable duty to do so.

18. The Bundesverwaltungsgericht states that, under national law, taken alone, the construction of the garden centre is permitted, and the appeals must be dismissed. The centre is 'in keeping' with its surroundings within the meaning of Paragraph 34(1) of the Building Code and due consideration has been given to neighbouring premises, including those of Merck; if it is built, the requirements already imposed on Merck by major accident prevention rules will not change. Moreover, the project meets healthy living and working conditions requirements. Nor are there any reasons to refuse authorisation on grounds under the Pollution Prevention Law. Consequently, the planning authority's decision, which is not discretionary in those circumstances, must be favourable.

19. However, the referring court is unsure whether Article 12(1) of the Seveso II Directive requires any change of land-use in the vicinity of an establishment covered by the directive to respect an 'appropriate distance'. If so, national law would have to be interpreted and applied in accordance with that requirement. In that regard, the question arises whether Article 12(1) concerns only the policy level of land-use planning or also the specific application of planning rules in individual cases. In the latter event, it is important to know whether, in circumstances of mixed land use such as those in the present case, the directive prohibits a change of use which does not favour the obligatory long-term objective of maintaining appropriate distances, or whether national rules which require authorisation for such a change of use take sufficient account of that objective.

20. The Bundesverwaltungsgericht has therefore referred the following questions to the Court for a preliminary ruling:

'(1) Is Article 12(1) of [the Seveso II Directive] to be interpreted as meaning that the Member States' obligations contained therein, in particular the obligation to ensure that their land-use policies and the procedures for implementing those policies take account of the need, in the long term, to maintain appropriate distances between the establishments covered by the directive and buildings of public use, are addressed to planners who have to take decisions on land-use by weighing up the public and private interests affected, or are they also addressed to planning authorities who have to take a non-discretionary decision on the authorisation of a project in an already built-up area?

(2) If Article 12(1) of the Seveso II Directive is also addressed to the planning

permission authorities who have to take a non-discretionary decision on the authorisation of a project in an already built-up area:

Do the abovementioned obligations include a prohibition on authorising the siting of a building of public use which fails to maintain – as required by the principles applicable to overall planning – an appropriate distance from an existing establishment, where there are already several comparable buildings of public use close to the establishment, where the operator does not – as a result of the new project – have to reckon with additional requirements concerning the limitation of the consequences of an accident, and where the requirements relating to healthy living and working conditions are satisfied?

(3) If the answer to this question is in the negative:

Does a legislative provision under which it is mandatory to authorise the siting of a building of public use in the circumstances set out in the previous question sufficiently take into account the need to maintain distances?'

21. Written observations have been submitted to the Court by Mücksch, Merck, the German Government and the European Commission, all of whom were represented at the hearing on 27 January 2011.

Assessment

22. As I have noted, the order for reference raises two basic issues. First, does Article 12(1) of the directive impose obligations only at the level of land-use planning, or also at the level of individual decisions to grant or refuse authorisation for particular projects (question 1)? Second, to what extent may those obligations preclude authorisation, in particular non-discretionary authorisation, of a project which does not reduce – in fact, even increases – the presence of members of the public in the vicinity of an establishment which poses a risk, although other nearby premises are used by the public in any event and the project requires no extra safety measures (questions 2 and 3)? I shall address those issues in turn.

Level at which the obligations apply

23. Article 12(1) of the Seveso II Directive requires Member States, inter alia, to 'ensure

that the objectives of preventing major accidents and limiting the consequences of such accidents are taken into account in their land-use policies and/or other relevant policies' and that 'their land-use and/or other relevant policies and the procedures for implementing those policies' take account of the need, in the long term, to maintain appropriate distances between establishments covered by the directive and buildings and areas frequented by the public.

24. That wording already makes it clear that the obligations cover not only land-use policies but also 'other relevant policies'. Such policies cannot but include those which govern the granting or refusal of individual planning permissions, which are of the utmost relevance to land-use policies. It is further clear that the 'procedures for implementing those policies' must take account of the need, in the long term, to maintain appropriate distances. Again, such procedures cannot but include those which lead to the granting or refusal of planning permission in individual cases, which constitute, *par excellence*, the implementation of planning policies.

25. Given wording of such transparent meaning, some very strong reason indeed would be required before it could be concluded that Article 12(1) of the directive did not concern individual planning decisions as well as overall land-use policy.

26. Mücksch endeavours to derive such a reason from the repeated references to land-use 'policy' and 'planning' in the directive, in the *travaux préparatoires* and in the Commission guidelines,[15] and from the explicitly long-term nature of the objective concerned. The German Government puts forward similar arguments, although it accepts that Article 12(1) may constrain individual planning decisions in cases where no overall land-use policy or plan has been determined for a particular area.

27. Those arguments are not without foundation, but I do not think that they can lead to the conclusion that Article 12(1) does not impose obligations also at the level of individual planning decisions, whether an overall plan has been drawn up or not.

28. It is indeed clear that the directive contemplates – even requires – a system in which the objectives of Article 12(1) are pursued, in

15 — See footnote 3 above.

the first place, through land-use planning (the policy level). A coherent and coordinated approach is called for if those objectives are to be satisfactorily achieved, and a requirement which primarily concerned individual decisions could not easily be reconciled with such an approach. Once a coherent and coordinated approach is in place, on the other hand, it is to be expected that individual planning decisions will comply with it and the objectives will be achieved on the ground, not only on paper.

29. However, one can readily imagine circumstances in which that scenario does not hold true. In the case in the main proceedings, no land-use plan has in fact been drawn up for the area concerned. In other cases, a plan may have been drawn up but might prove not to have taken adequate account of the need to maintain appropriate distances. Or, depending upon national rules, the land-use plan might not impose mandatory constraints on the authorities responsible for deciding on individual applications for planning permission.

30. Yet the second subparagraph of Article 12(1) of the directive explicitly requires Member States to ensure, in particular, that the long-term need to maintain appropriate distances *is* taken into account in the procedures for implementing their relevant policies. That can only mean that the national system, whatever its detailed workings, must ensure that the need in question is taken into account at some stage – and at the latest at the final stage – in the procedure leading to the granting or refusal of each individual planning application in the vicinity of an establishment covered by the directive. If that were not so, the directive could be at risk of being deprived of any real effect in this regard.

31. I should make it clear, however, that such a conclusion in no way detracts from the primary requirement of ensuring that the need to maintain appropriate distances is duly taken into account at the upstream stage, namely that of land-use planning. [16]

Extent of the relevant obligation

32. It follows from my analysis of the first issue that the authorities responsible for evaluating Mücksch's planning application must,

16 — In Case C-36/10 *Commission* v *Belgium* (judgment of 30 September 2010), the Commission argued, without being challenged in that regard by the Member State, that it was insufficient to transpose the second subparagraph of Article 12(1) of the Seveso II Directive by requiring that the need to maintain appropriate distances be taken into account only at the stage of deciding on planning applications.

when deciding whether to grant or refuse that application, 'take account of the need, in the long term, to maintain appropriate distances' between Merck's premises and Mücksch's proposed garden centre.

33. But the referring court needs to know more precisely what that obligation involves before it can rule on the appeal. In setting out and explaining questions 2 and 3, it identifies a number of factors which may be relevant in that regard: (i) the fact that no land-use plan has been drawn up, so that the authorising authority's remit is limited to verifying compliance with the Building Code; (ii) the fact that the garden centre project does comply with the Building Code and must therefore be authorised under national law; (iii) the fact that, whether the project is carried out or not, other buildings and areas in the near vicinity are and will continue to be frequented by the public; (iv) the fact that, if the project is carried out, it will lead to greater, rather than lesser, frequentation by the public; and (v) the fact that, if the project is carried out, no greater safety requirements will be imposed on Merck than if it is not.

34. Of those factors, (i) and (ii) are relevant to the question whether the national procedural framework, which requires a favourable decision in circumstances such as those of the present case, complies with the requirements of the directive. Factors (iii), (iv) and (v), on the other hand, concern the substantive, rather than the procedural, requirements of the directive; the question is whether, singly or in combination, they may require a favourable or unfavourable decision in circumstances such as those of the case in the main proceedings.

35. Before considering those two sets of factors, I think it helpful to examine more closely the wording of the provision in issue.

Wording of Article 12(1) of the directive

36. The final report of the impact assessment study carried out prior to the current proposal to replace the Seveso II Directive [17] states that the directive 'includes requirements on land-use planning for new installations and a vaguely phrased requirement "to take account of the need in the long term to

17 — Impact assessment study into possible options for amending the Seveso Directive, European Commission, Directorate-General Environment, September 2010 (http://ec.europa.eu/environment/seveso/pdf/Seveso%20IA_Final%20report.pdf), p. 94. The legislative proposal is cited in footnote 2 above.

maintain appropriate distances" which could include existing installations'. The Commission's staff working paper accompanying the proposal [18] states that 'the issue of existing establishments that are already situated in the immediate vicinity of residential areas and other areas frequented by the public, which is being addressed at national level by some Member States, is not covered at present'.

37. Whilst it may be legitimate to describe the requirement as 'vaguely phrased', I cannot agree that there is any doubt as to whether it applies to existing establishments. It explicitly refers to 'establishments covered by this Directive', and there is no question but that the directive covers existing establishments. Nor, indeed, has any other view been expressed at any stage in the present proceedings.

38. However, it is true that some exegesis is required.

39. First, the expression 'appropriate distances' leaves considerable scope for interpretation. That is both natural and inevitable, since there can be no precise, absolute and objective limits to the 'danger zone' around any establishment and such limits will in any event vary according to, inter alia, the nature of the risk and the safety measures put in place. It will therefore be necessary, whenever the need to maintain such distances is taken into account, for the relevant distance to be assessed. Depending on the circumstances, the assessment might be effected in the abstract, according to standardised criteria based on relevant factors, or on a concrete, case-by-case basis if required at the level of individual planning permission. It might give rise to an arbitrary, absolute limit (for example, a prohibition of any public frequentation of land or premises within a given distance from the establishment) or take a more flexible approach based on specific circumstances (such as geographical features, prevailing wind directions or the frequency and intensity of public use). Neither approach appears to be precluded by the directive.

40. Next, the expression 'in the long term' is not only indefinite in itself; it might also refer either to an undefined target deadline in the future or to a need to maintain the required distances on an essentially permanent basis. In its observations, the Commission has stressed the latter interpretation, suggesting that Member States must preserve existing appropriate distances, both now and for the future. It seems to me that the two interpretations in fact converge and that the wording may support both. Thus, where appropriate distances are already observed, there is a need to keep them for the (long-term) future; where they do not, there is a need to introduce them

18 — SEC(2010) 1590 final, section 2.5, p. 13.

as a long-term goal. In neither case, however, is a definite time-frame expressed.

41. Lastly, it should be noted that, as Article 12(1) is phrased, the 'need' to maintain appropriate distances does not itself constitute an obligation or requirement imposed on Member States or their authorities. What Member States are required to do is to ensure that their policies and implementing procedures 'take account' of that need. In other words, the need in question must be, as it were, entered into the balance sheet; it must be weighed up against other relevant needs and interests when elaborating or implementing the policies concerned. Such a process does not lend itself to automatic decisions predetermined by law and arrived at by the simple application of a formula.

Procedural requirements of the directive

42. The essentials of the situation before the referring court are the following. Under German law, where no land-use plan has been drawn up for a particular area, the authority responsible for deciding on planning applications within that area must examine each application for compliance with the Building Code and certain other provisions. It has no discretion to take account of other factors – such as the need, in the long term, to maintain appropriate distances – but must approve the application (at least as far as preliminary planning permission is concerned) if such compliance is established. Compliance having been established in the case in the main proceedings, preliminary permission has necessarily been granted.

43. In accordance with my analysis, such a situation is not compatible with Article 12(1) of the directive. That provision envisages that, in general, land-use plans will be drawn up. Where such plans are drawn up, they must take account of the need to maintain appropriate distances. Where they are not, that need must be taken into account – together with any other requirements imposed by the Building Code or other applicable legislation – in the course of the procedure leading to the grant or refusal of individual planning permission. That has not happened in the main proceedings.

44. Consequently, it seems to me, the Bundesverwaltungsgericht must, as it states itself, interpret and apply its national law in such a way as to give effect to the directive. In either event, the automatic approval given does not appear compatible with the directive.

45. That, however, cannot mean that planning permission must be refused. A refusal which did not take reasoned account of the need to maintain appropriate distances could be no more valid than an approval given in those circumstances. When the competent authority takes a new decision, therefore, taking account of the need in question, it will have to decide what weight to give to the other three factors referred to in the order for reference, namely, the presence of other buildings and areas of public use, the increase in the number of people frequenting the vicinity of Merck's establishment and the absence of any necessity to impose a requirement that Merck introduce increased safety measures if Mücksch's project is approved.

Substantive requirements of the directive

46. In the case in the main proceedings, an impact report has defined a zone around Merck's establishment, the limits of which, it may be assumed, have been judged to represent an 'appropriate distance' for the purposes of the directive. [19] The zone covers mixed-use land and includes a number of other buildings and areas used by the public. [20] At present, therefore, the kind of appropriate distance contemplated by the directive does not appear to be maintained. However, where no decision falls to be taken with regard to the use of existing buildings and areas, there is no scope for taking into account the need, in the long term, to maintain such distances (other than by means of summary expropriation or demolition orders, which are not contemplated by the directive).

47. That need must, on the other hand, be taken into account when evaluating Mücksch's project, which involves changing the use of a plot of land within that area. The plot's present use, as a scrap metal recycling facility, may be assumed to involve the regular presence of employees to operate the facility, together with less regular frequentation by persons delivering scrap to be recycled or collecting recycled products. The proposed garden centre seems likely to involve greater frequentation by members of the public as (potential) customers, without any probable drop in the number of employees or deliveries. The presence of more people within the 'danger zone' around Merck's establishment,

19 — See point 16 above. As I have noted, there can be no fixed definition of what constitutes an appropriate distance, but it must imply some margin of appreciation on the part of the authority determining it and, where appropriate, the courts reviewing such determination.

20 — It is common ground that Merck's establishment was originally situated at a greater distance from the city, parts of which have crept towards it – reminding the agent for the German Government, as he stated at the hearing, of Birnam Wood coming to Dunsinane (*Macbeth*, Act 5).

while obviously without effect on the risk of an accident occurring, could well render the consequences of such an accident more severe, if it were to occur. However, it is common ground that the safety measures currently taken by Merck are considered adequate even if public frequentation of the zone is increased to the extent predicted if Mücksch's project goes ahead. This may suggest either that the increased frequentation is marginal in the context of the industrial estate as a whole (which, it will be recalled, already contains retail and wholesale outlets, workshops and a hotel), or that the safety measures in place represent more than the bare minimum required.

48. All of those factors seem to me to be relevant to the planning authority's necessary consideration of the need, in the long term, to maintain appropriate distances. None of them, however, seems decisive for the final outcome of that consideration.

49. The fact that the project makes no change to the overall character of the zone, as a mixed-use area which will inevitably remain a mixed-use area for some time to come, and the fact that Merck will not have to take any more stringent safety measures if it is carried out, would appear to indicate that the project is at least compatible with the status quo. A possible increase in the severity of the consequences of any possible accident, on the other hand, does not appear to be so obviously compatible with the long-term aim of maintaining appropriate distances; projects which, on the contrary, decrease that severity would seem preferable as a general rule.

50. That said, I cannot find anything in Article 12(1) of the directive which would impose an automatic refusal of planning permission for any project resulting directly in an increase in public frequentation of the 'danger zone' around an establishment stocking dangerous substances. Indeed, such an increase might not be inimical to the long-term aim in all circumstances: for example, an increase in frequentation in one part of the zone, if coupled with, say, a decrease of frequentation in another part or the gradual displacement of all residential premises from the zone,[21] might enable more effective prevention and evacuation measures to be implemented, thus contributing to the overall aims of the directive. Moreover, it must be borne in mind that, even once the parameters of the 'need, in the long term, to maintain appropriate distances' have been determined, that need is itself merely one – albeit a very important one – of the factors to be taken into account when reaching a decision. Indeed, if the directive were to entail an absolute prohibition of the kind envisaged, it would be

21 — In this context, it should be borne in mind that residential accommodation is often used 24 hours a day, seven days a week, whereas industrial or commercial premises are frequented during more limited periods.

difficult to see how the second need which the same subparagraph requires to be taken into account – namely the need, 'in the case of existing establishments, … for additional technical measures in accordance with Article 5 so as not to increase the risks to people' – could often be relevant.

51. Finally, it should be borne in mind that the Seveso II Directive strikes a certain balance between the responsibilities of operators of establishments posing a risk (which concern principally safety measures and emergency plans) and those of the national authorities charged with supervising those establishments and the risks posed (including planners' responsibility for taking account of the need, in the long term, to maintain appropriate distances). The approach advocated by Merck in the present proceedings, which would require overriding weight to be given to the interests of operators of establishments posing a risk, would, it seems to me, tip that balance too far in favour of the operators.

52. I conclude, therefore, that the factors to which the national court refers in the context of questions 2 and 3, while they must be taken into account when evaluating Mücksch's planning application, cannot in themselves be decisive in determining the outcome of that evaluation but must be weighed against each other and against any other relevant considerations when reaching a decision.

Conclusion

53. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the questions raised by the Bundesverwaltungsgericht to the following effect:

On a proper construction of Article 12(1) of Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances,

(1) the need, in the long term, to maintain appropriate distances between establishments where dangerous substances are present and, in particular, buildings

and areas of public use must be taken into account not only when determining land-use plans at a policy level but also throughout any procedure involving the evaluation of specific projects and a decision as to whether individual planning permission should be granted or refused;

(2) where planning permission is sought for an individual project in an area in respect of which no land-use policy or plan has been established, the authority called upon to decide on the application must ensure that it takes that need into account;

(3) in doing so, that authority must have regard to factors such as the presence of existing buildings and areas used by the public in the vicinity of the establishment concerned, the fact that the project will lead to increased frequentation of the area or the fact that it will not impose greater safety requirements on the establishment concerned; such individual factors are not, however, decisive in themselves as to the outcome of the planning application.