concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.

The fact that a practice is in conformity with the requirements of a directive in the matter of protection may not constitute a reason for not transposing that directive into the national legal system by provisions capable of creating a situation which is sufficiently precise, clear and transparent to enable individuals to ascertain their rights and obligations. In order to secure the full implementation of directives in law and not only in fact, Member States must establish a specific legal framework in the area in question.

2. The obligation on Member States to prescribe limit values not to be exceeded within specified periods and under specified conditions, laid down in Article 2 of Directive 80/799 on air quality limit values and guide values for sulphur dioxide and suspended particulates, is imposed 'in order to protect human health in particular'. It implies, therefore, that in all cases where the exceeding of the limit values could endanger human health, individuals must be in a position to rely on mandatory rules in order to be able to assert their rights. Furthermore, the fixing of limit values in a provision whose binding nature is undeniable is also necessary in order that all those whose activities can give rise to nuisances can ascertain precisely the obligations to which they are subject.

3. The subject-matter of an action brought under Article 169 of the Treaty is determined by the Commission's reasoned opinion and, even where the default has been remedied after the time-limit prescribed by the second paragraph of that article has expired, there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur as a result of its default towards other Member States, the Community or private parties.

REPORT FOR THE HEARING
in Case C-361/88 *

I — Facts and legislative background

By Council Directive 80/799/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates (Official Journal 1980 L 229, p. 30, hereinafter referred to as the 'directive'), the Council prescribed the harmonization of national laws on the

* Language of the case: German.

presence of sulphur dioxide and suspended particulates in the air.

As may be seen from its preamble, the directive is intended to eliminate or prevent unequal conditions of competition which could arise from disparities between the various national laws, as well as to protect human health and the quality of the environment.

The fourth recital in the preamble to the directive states more particularly that 'in order to protect human health in particular, it is necessary to set for these two pollutants limit values which must not be exceeded in the territory of the Member States during specified periods . . . '.

Article 2 of the directive provides that the limit values 'which, in order to protect human health in particular, must not be exceeded throughout the territory of the Member States during specified periods and under the conditions laid down in the following Articles' are those set out in Annex I to the directive.

Article 3 of the directive, moreover, is worded as follows:

'1. Member States shall take appropriate measures to ensure that as from 1 April 1983 the concentrations of sulphur dioxide and suspended particulates in the atmosphere are not greater than the limit values given in Annex I, without prejudice to the following provisions.

2. Where a Member State considers that there is a likelihood that, despite the measures taken, the concentrations of sulphur dioxide and suspended particulates in the atmosphere might, after 1 April 1983, exceed in certain zones the limit values given in Annex I, it shall inform the Commission thereof before 1 October 1982.

It shall at the same time forward to the Commission plans for the progressive improvement of the quality of the air in those zones. These plans, drawn up on the basis of relevant information on the nature, origin and evolution of the pollution, shall describe in particular the measures taken or to be taken and the procedures implemented or to be implemented by the Member States concerned. These measures and procedures must bring the concentrations of sulphur dioxide and suspended particulates in the atmosphere within these zones to values below or equal to the limit values given in Annex I as soon as possible and by 1 April 1993 at the latest.'

By virtue of Article 15(1) of the directive the Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within 24 months of its notification. In the present case the directive was notified to the Federal Republic of Germany on 18 July 1990, and ought therefore to have been transposed into national law by 18 July 1982 at the latest.

By letter of 6 May 1986, the Commission informed the Federal Republic of Germany that it considered that it had not complied in all respects with the obligations arising from the directive. The Commission set out five complaints in that respect.

In the first place, the Federal Republic of Germany did not satisfy the obligations arising from Article 2 of the directive. That provision required the Member States to adopt a mandatory rule, accompanied by effective sanctions, which would expressly prohibit, throughout the national territory, the exceeding of the limit values fixed in Annex I to the directive. Such a provision was lacking in German law.

In the second place, the Federal Republic of Germany did not forward to the Commission the plans for the improvement of the quality of the air in the Land of Berlin, with which it should have provided the Commission under the second subparagraph of Article 3(2) of the directive. By letter of 8 October 1982, the Federal Republic of Germany had, in fact, informed the Commission that the concentrations of sulphur dioxide and suspended particulates in the atmosphere in the Land of Berlin might, after the date of 1 April 1983 laid down in Article 3(1) of the directive, exceed the limit values laid down in Annex I to the directive. According to the second subparagraph of Article 3(2) of the directive, the Federal Republic of Germany should, in those circumstances, have at the same time forwarded to the Commission plans for the progressive improvement of the quality of the air in the Land of Berlin, which it did not do.

In the third place, the network of measuring stations established by the Federal Republic of Germany did not cover the entire territory of that Member State, contrary to what is required by Article 6 of the directive. Furthermore, the Federal Republic of Germany failed to fulfil its obligation to the Community by not informing the Commission, despite being asked to do so, of the exact locations of the existing measuring stations.

In the fourth place, it followed from Article 6 of the directive, read in conjunction with Annexes I and IV thereto, that the stations established under Article 6 of the directive must carry out measurements continuously. The German legislation did not envisage such an obligation. The Commission questioned the Federal Republic of Germany as to whether measurements were actually carried out continuously in that Member State, but did not receive an answer. Consequently, it had to be considered that continuous measurements were not carried out in the Federal Republic of Germany.

In the fifth place, since the Federal Republic of Germany had chosen to proceed according to the methods of sampling and analysis laid down in Annex IV to the directive, as it was authorized to do by Article 10(2) of the directive, it was required, under Article 10(3) of the directive, to take measurements in parallel at a series of representative stations, and to forward the results of those measurements to the Commission at regular intervals, at least twice a year. The Federal Republic of Germans had admitted, in correspondence preceding the letter of formal notice, that it had not satisfied that obligation.

The Commission concluded that the Federal Republic of Germany had not fulfilled all its obligations under Articles 2, 3, 6 and 10 of the directive. In accordance with Article 169 of the Treaty, it invited that Member State to submit its observations on the matter, allowing it a period of two months to do so.

By letter of 4 September 1986, the Federal Republic of Germany disputed the complaints contained in the letter of formal notice.

With regard to the first complaint, the Federal Republic of Germany maintained that it had transposed the limit values resulting from the combined provisions of Articles 2 and 10(2) and of Annex IV to the directive, into provisions of national law having mandatory force.

In that respect, it pointed out that Paragraph 48 of the Federal Law on protection again the harmful effects on the environment of air pollution, noise, vibrations and other types of nuisance of 15 March 1974 (BGBl., I, p. 721, hereinafter the 'Law on protection against pollution') authorizes the Federal Government to adopt, after hearing the sectors concerned and receiving the consent of the Bundesrat, general administrative provisions on, in particular, the limit values for pollution which may not be exceeded for reasons of health protection.

On the basis of that provision, the Federal Government adopted, in 1974, the first general administrative instruction to implement the law on protection against pollution (hereinafter the 'technical circular "air"'). This had been amended on several occasions, in particular on 27 February 1986 (GMBl., p. 95), in order to ensure its compliance with the directive.

Paragraph 2.5.1 of the technical circular 'air' fixes, for sulphur dioxide and suspended particulates, nuisance values which correspond to those appearing in Annex IV to the directive. Moreover, paragraph 2.5 of the circular provides that the nuisance values are validly established only if they are obtained in accordance with the method envisaged in paragraph 2.6 of the same circular. That method corresponds to the one laid down by Annex IV of the directive.

The Federal Republic of Germany contended, furthermore, that the technical circular 'air' was a mandatory rule.

It referred in that respect to a judgment of the Oberverwaltungsgericht Lüneberg of 28 February 1985, concerning the coal-fired power station at Buschhaus (DVBl., 1985, p. 132), according to which 'if the provisions of the technical circular "air" must be observed, by the courts as well, it is not therefore solely because they are founded on scientific data, but also because of the procedure which led to their adoption, namely the fact that they were adopted by the highest level of the executive, which possesses the legitimacy required for that purpose, and that that adoption came about on the basis of the central procedure for fixing values envisaged by paragraph 48 of the federal Law on protection against pollution with the participation of the sectors concerned . . . '.

In a related area, the Bundesverwaltungsgericht held, in a judgment of 19 September 1985 concerning the nuclear power station at Wyhl (DÖV, 1986, p. 431), that the general basis for calculating exposure to radiation on the occasion of radioactive discharges in the air or in the water (a directive of the Minister for the Interior concerning Paragraph 45 of the Regulation on protection against radiation of 15 August 1979, GMBl. p. 371) was

intended 'to put the legal rule into concrete form and that, unlike administrative provisions which only interpret a legal rule, the general basis for calculation was binding on the administrative courts within the limits laid down by the legal rule . . . '.

Relying on that reasoning, the Federal Republic of Germany maintained that the technical circular 'air' was a rule of general application: although that circular applied, in the words of paragraph 1, only to plant subject to an authorization within the meaning of Paragraph 4 of the Law on protection against pollution, the limit values which it fixed were applicable whatever the origin of the pollution. Indeed, the technical circular 'air' put into concrete form the imprecise legal concept of 'effect harmful to the environment' contained in the Law on protection against pollution. That concept must have the same meaning every time it is used in the Law on protection against pollution and the regulations implementing it.

The Federal Republic of Germany explained, moreover, that appropriate measures were taken to ensure the actual observance of the limit values fixed in the technical circular 'air', as required by Article 3 of the directive.

First of all, it adopted a series of laws and regulations, containing penal and administrative sanctions, which ensured that the concentrations of harmful substances in the air remained lower than the limit values fixed in the directive. It referred in that respect to the amendments made, after the adoption of the directive in question, to the Law on protection against pollution, to the regulation implementing that law (fourth regulation implementing the Law on protection against pollution, of 24 July 1985, BGBl., I, p. 1586), to the technical circular 'air' . . . .

Next, anti-smog regulations had been adopted by all the Länder, with the exception of Bremen and Schleswig-Holstein, in which high concentrations of harmful substances were not normally produced.

Finally, the Federal Republic of Germany emphasized that, under Paragraph 47 of the Law on protection against pollution, the competent authorities of the Länder must draw up plans for the protection of the air when air pollution produce effects harmful to the environment or when such harmful effects are to be expected.

The Federal Republic of Germany concluded from the foregoing that its legal system met in every respect the requirements of Articles 2 and 3 of the directive. The first complaint of the Commission was not, therefore, well founded.

As regards the second complaint, concerning the failure to forward plans for the improvement of the quality of the air in the Land of Berlin, the Federal Republic of Germany listed a series of measures, already taken or projected, aimed at reducing air pollution in Berlin.

In respect of the third complaint, concerning the obligation to establish measuring stations throughout the entire

national territory, the Federal Republic of Germany contended that Article 6 of the directive did not oblige it to set up measuring stations with an equal density throughout the entire national territory. It emphasized, in that respect, that Article 6 prescribed the establishment of measuring stations 'in particular in zones where the limit values referred to in Article 3(1) are likely to be approached or exceeded and in the zones referred to in Article 3(2)'. It was justified, therefore, in the light of directive, in setting up more measuring stations in zones showing heavy pollution than in less polluted zones. The Federal Republic of Germany had provided, annexed to its reply, lists showing the positions of the measuring stations. It was apparent from those lists that the stations covered the entire territory of the Member State in question.

With regard to the fourth complaint, concerning the obligation to carry out measurements continuously, the Federal Republic of Germany explained that in the Länder where pollution was heaviest, continuous measurements were actually carried out. In the Länder where less pollution occurred, measures were carried out by soundings. In the Länder where the level of pollution was very low, measures by soundings were not carried out.

With regard to the fifth complaint, concerning the taking of measurements in parallel and the regular forwarding of the results of those measurements to the Commission, the Federal Republic of Germany stated that it had forwarded the results of the measurements taken in parallel to the Commission for the period up to 31 March 1985. It acknowledged that it was late in forwarding the last report and gave an assurance that it would hence-forward observe the deadlines.

The Commission considered that the explanations provided by the Federal Republic of Germany were not satisfactory and, accordingly, delivered a reasoned opinion on 12 November 1987.

As regards the first complaint, concerning the absence of a rule imposing compulsory limit values for the entire national territory regarding the presence in the air of sulphur dioxide and suspended particulates, the Commission maintained that the provisions adopted by the Federal Republic of Germany did not have the mandatory and general nature required by Article 2 of the directive.

Thus, the Law on protection against pollution did not fix general limit values, which had to be observed on the entire national territory and which applied whatever the origin of the pollution.

The technical circular 'air' concerned only plant for which a licence was required (paragraph 1, first indent, of that circular), it does not apply generally, but only when certain licences were granted and certain controls carried out (paragraph 1, second indent, of that circular), and the limit values which it fixed were only to be observed in the zone surrounding the plant.

The anti-smog regulations adopted by the Länder, to which the Federal Republic of

Germany referred in its reply to the letter of formal notice, might possibly satisfy the requirements of the directive. However, the Federal Republic of Germany had supplied no details of those regulations. In particular, it had not specified the limit values or the methods envisaged in those regulations, thus preventing the Commission from ascertaining whether they complied with the directive.

Finally, Paragraph 47 of the Law on protection against pollution, which required the Länder to draw up plans for the protection of the air when effects harmful to the environment had appeared or were likely to appear, was too vague a provision. It did not fix, in particular, limit values beyond which it was compulsory to establish a plan for the protection of the air.

With regard to the second complaint, concerning the failure to forward plans for the improvement of the quality of the air in the Land of Berlin, the Commission considered that the measures described in the reply to the letter of formal notice did not guarantee the observance of the limit values fixed in the directive.

With regard to the third complaint, concerning the obligation to establish measuring stations throughout the entire national territory, the Commission disputed the interpretation given by the Federal Republic of Germany to Article 6 of the directive. According to the Commission, that provision obliged the Member States to establish measuring stations throughout the entire national territory, without leaving them any discretion in that respect.

With regard to the fourth complaint, concerning the obligation to carry out measures continuously, the reply given by the Federal Republic of Germany to the letter of formal notice revealed that continuous measurements were not carried out in certain Länder, in particular in Bavaria and Hesse.

With regard to the fifth complaint, concerning the taking of measurements in parallel and the forwarding of the results thereof to the Commission at regular intervals, the Commission maintained that the Federal Republic of Germany had omitted to forward the results of the measurements at regular intervals, at least twice a year, as required by Article 10(3) of the directive.

On 19 May 1988 the Federal Republic of Germany submitted its observations to the Commission in reply to the reasoned opinion.

It first of all pointed out that the concrete results obtained by virtue of the measures which it had adopted were more than satisfactory. Thus, since 1986, there was no further indication that the limit values fixed by the directive were exceeded.

With regard, more particularly, to the first complaint, concerning the absence of a rule fixing compulsory limit values for the entire national territory, the Federal Republic of Germany maintained that the technical circular 'air' fixed nuisance values for the application of the law on protection against pollution which were of general application and mandatory.

It pointed out, in that respect, that the Oberverwaltungsgericht of the Land of North Rhine-Westphalia, in a judgment of 9 July 1987 (DVBl., 1988, p. 152), held that as an 'administrative provision giving concrete effect to a legal rule', paragraph 2.5.1 of the technical circular 'air', which fixed the nuisance values, was binding on the administrative courts within the framework of the limits fixed by the legal rule. The Oberverwaltungsgericht thus followed the reasoning which the Bundesverwaltungsgericht had adopted in the abovementioned judgment of 19 December 1985, concerning the nuclear power station at Wyhl. The Oberverwaltungsgericht stated that the technical circular 'air' had a mandatory nature because it had been adopted on the basis of Paragraph 48 of the Law on protection against pollution and because that provision empowered the Federal Government to adopt mandatory rules.

With regard to the anti-smog regulations adopted by the Länder, the Federal Republic of Germany explained that they were based on model bills of the Länder Committee for Protection against Pollution. It enclosed with the papers submitted to the Court a 'synoptic table of the anti-smog regulations', of March 1987, published by the Federal Office for the Environment.

Besides, Paragraph 47 of the Law on protection against pollution left the authorities of the Länder only a limited discretion concerning the decision whether or not to implement a plan for the protection of the air. Those authorities were required to draw up a plan for the protection of the air unless another means existed of preventing the nuisance values fixed in the technical circular 'air' from being exceeded. In addition, it was proposed to amend the Law on protection against pollution in such a way that the drawing up and implementation of plans for the protection of the air would be compulsory when certain nuisance values, in particular those fixed in the directive, were exceeded.

With regard to the second, third and fourth complaints, the Federal Republic of Germany supplied certain items of information concerning the plan for the improvement of the quality of the air in the Land of Berlin, as well as the siting and operation of the measuring stations. It followed from that information that the three complaints in question were not justified.

With regard to the fifth complaint, concerning the taking of measurements in parallel and the forwarding of the results of those measurements to the Commission, the Federal Republic of Germany asserted that it had been agreed with the Commission that the first reports should cover the period from 1 April 1983 to 31 March 1984. Once the first difficulties in forwarding them had been overcome, the reports were forwarded, since the observation period 1985-1986, in accordance with the rules laid down. The Federal Republic of Germany gave its assurance that it would continue to comply scrupulously with the requirements of the directive.

On 13 December 1988 the Commission brought the present action for failure on the part of a Member State to fulfil its obligations.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

It decided, however, to submit questions to the Federal Republic of Germany and to the Commission. Those questions were answered within the time allowed.

II — Forms of order sought by the parties

The *Commission* claims that the Court should:

— declare that the Federal Republic of Germany has failed to fulfil its obligations under the Treaty by not adopting all the laws, regulations and administrative provisions necessary for the complete transposition into national law of Council Directive 80/779 of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates, as well as of the conditions for its application;

— order the Federal Republic of Germany to pay the costs.

The *Federal Republic of Germany* contends that the Court should:

— dismiss the application;

— order the Commission to pay the costs.

III — Arguments of the parties

According to the *Commission*, the Federal Republic of Germany has not satisfied the obligation, arising from Article 2(1) of the directive, to adopt a mandatory rule prohibiting, in a general way and for the entire national territory, the exceeding of the limit values arising from that provision. Nor has the Federal Republic of Germany taken the appropriate measures to ensure that those limit values are actually observed, as required by Article 3(1) of the directive.

The German legislation on the subject is based on a conception completely different from that underlying the directive. While the directive requires the adoption of mandatory provisions ensuring compliance throughout the national territory with the limit values which it lays down, the German legislation is confined to prescribing a series of methods for achieving compliance with those limit values, without setting them out in mandatory rules. That procedure does not satisfy the requirements of the directive.

The Federal Republic of Germany is not justified in maintaining that the technical circular 'air' constitutes a general and mandatory rule imposing the observance throughout the whole of its territory of the limit values fixed in the directive.

First of all, the sphere of application of that circular is limited. It is expressly specified in paragraph 1 of the circular that it applies only to plant subject to an authorization. Furthermore, the rules specified in the circular are to be observed only on the occasion of certain specific administrative measures relating to that plant: permission to construct or modify such plant, obli-

gations imposed *a posteriori,* inquiries into the nature and level of discharges from that plant as well as the nuisances coming from the zone in which that plant was operated (paragraph 1, second indent, of the circular). The limit values laid down in the technical circular 'air' are not applicable, therefore, when nuisances have causes other than the operation of plant for which a licence is required, as, for example, a high density of traffic, private heating systems or imported pollution.

Moreover, even in cases where the nuisance values laid down in the technical circular 'air' do apply, those values are not recognized, by the case-law of the Bundesverwaltungsgericht, as having the nature of mandatory provisions but only that of a 'suitable, if not optimal, source of information' (judgment of 17 February 1978, BVerwG 55, p. 258).

The judgment of the Bundesverwaltungsgericht of 19 December 1985, concerning the nuclear power station at Wyhl, to which the Federal Republic of Germany referred in the course of the pre-litigation procedure, does not concern administrative circulars adopted on the basis of Paragraph 48 of the Law on protection against pollution, but another circular, concerning the regulation on protection against radiation. The Bundesverwaltungsgericht stated in the judgment in question that it was leaving open the question of 'how far the mandatory nature' (of the provision at issue in that case) '... goes in the case in point'. It is not correct, therefore, to maintain that the Bundesverwaltungsgericht recognized generally, in the aforementioned judgment, that administrative circulars constitute legal rules.

In a judgment of 1986, given on the subject of a circular relating to subsidies the Bundesverwaltungsgericht even stated that 'administrative circulars — whatever their practical effects may be — are not legal rules within the meaning of Paragraph 47 of the Code of Administrative Procedure' (BVervG DÖV 1987, pp. 289 to 291).

The Bundesverfassungsgericht was even more clear in a recent judgment concerning a circular relating to tax law: 'General administrative circulars ... are not laws within the meaning of Article 20(3) and of Article 97(1) of the Basic Law (in the sense that statutes are binding on judges ...' (BverF, NJW, 1989, pp. 666 and 667)).

According to the Commission, it is thus clearly established that administrative circulars are not, in general, recognized as legal rules. That solution is also necessary in the light of Article 80(1) of the Basic Law. That provision makes the adoption of legal rules by the administration subject to certain conditions which are not satisfied in the present case.

The Commission goes on to point out that, since the technical circular 'air' does not have the nature of a mandatory rule in its own sphere of application, which is that of plant subject to an authorization, then a fortiori it cannot have such a nature outside that specific sphere of application, as the Federal Republic of Germany wrongly contends.

Finally, it is recognized, in case-law as well as in academic legal writing, that adminis-

trative circulars need not necessarily be observed when the situation is atypical, that is to say a situation 'which the author of the administrative provisions could not, or did not wish to, resolve by reason of the fact that he had to regulate the problem in a general way'. The administrative authorities are free, in such a case, to derogate from the provisions of the circular.

The Commission concludes from the foregoing that, at the present time, there exists in the Federal Republic of Germany no mandatory rule which prohibits, generally and for the entire territory of that Member State, the exceeding of the limit values laid down by the directive.

Furthermore, the Federal Republic of Germany has not taken the appropriate measures to ensure that the limit values laid down by the directive are actually observed, as required by Article 3 of the directive.

Thus, the Federal Republic of Germany itself recognized, in the course of the pre-litigation procedures, that no anti-smog regulations existed for the Länder of Bremen and Schleswig-Holstein, that is to say for a large part of the territory of that Member State. In addition, the existing anti-smog regulations contain limit values much less severe than those laid down by the directive (0,60 mg/m³ instead of 0,06 mg/m³ for sulphur dioxide). On that last point, the Commission admits, however, that it is scarcely possible to compare those values because the reference periods are not the same. Finally, the fact that the anti-smog regulations are sometimes implemented proves that, in fact, it does sometimes happen that the limit values laid down by the directive are exceeded.

As for the plans for the protection of the air which the Länder must draw up when air pollution produces effects which are harmful to the environment or when such effects are to be expected (Paragraphs 44 to 47 of the Law on protection against pollution), they, also, do not allow it to be guaranteed that the limit values fixed in the directive will actually be observed.

First of all, the measures of protection and prevention to be taken in the framework of those plans for the protection of the air do not concern the whole national territory, but only the zones previously described as 'exposed zones' by the regulations of the Länder.

Next, the administrative authorities have a discretion as regards the decision to implement plans for the protection of the air, as follows in particular from Paragraph 44(2) of the Law on protection against pollution. Under that provision, exposed zones are those in which effects 'especially' harmful to the environment are produced or foreseeable. In the same way, Paragraph 47 of the Law does not provide that the competent authorities must ('müssen') draw up, in certain situations, a plan for the protection of the air, but only that they are to ('sollen') do so.

Moreover, the procedures necessary to implement the measures laid down within the framework of the plans for the protection of the air are so complicated that they do not permit rapid action to be taken to ensure effective observance of the limit values.

Finally, it is not apparent from any law or regulation that in the case of the regional plans for the protection of the air the limit values envisaged by the directive are to be regarded as binding. The Federal Republic of Germany has pointed out that an amendment of the Law on protection against pollution was in the course of preparation: under that amendment it becomes compulsory to draw up and implement plans for the protection of the air when the limit values fixed by the directive are exceeded. The Commission contends that, as long as those amendments have not been made to the Law on protection against pollution, it does not satisfy the requirements of the directive.

The Commission therefore asks the Court to declare that the Federal Republic of Germany has not completely transposed the directive into national law.

The *Federal Republic of Germany* contends that the application should be dismissed.

The action is based wholly on the idea that the transposition of the directive requires the adoption of a statutory provision expressly prohibiting, on the entire territory of the Member State in question, the exceeding of the limit values set out in the directive.

In reality, the directive does not in the least require the Member States to adopt an express provision prohibiting the exceeding of the limit values which it fixes. Article 3(1) of the directive is confined to requiring the adoption of 'appropriate measures' to achieve a defined objective, namely that 'as from 1 April 1983 the concentrations of sulphur dioxide and of suspended particulates in the atmosphere are not greater than the limit values given in Annex I . . . '.

The directive, then, leaves the Member States freedom of choice as to the method to be adopted in order to achieve the objective which it lays down, namely the observance of certain specified limit values.

Those limit values are actually observed in the Federal Republic of Germany. It is apparent from the measurements carried out by an extremely dense network of stations, covering the entire national territory, that since 1983 the limit values have not longer been reached. In 1988 the values measured were even, on average, more than 50% below the limit values. Furthermore, those measurements were carried out, in accordance with paragraph 2.6 of the technical circular 'air', within a very narrow radius around the plants giving out harmful substances, while the directive allows the values to be measured at places which are not necessarily as close to the source of the emission of pollution. The measurements carried out in Germany are therefore effected according to a more stringent method than is required by the directive.

The facts thus prove that the German system of environmental protection is appropriate for ensuring compliance with the objective laid down by the directive.

With regard to the point that certain Länder sometimes implement anti-smog regulations, that does not mean that the limit values fixed in the directive are exceeded. The plans contained in the anti-smog regulations serve to provide a rapid response when certain limit values are temporarily exceeded, but such instances have no decisive effect on the annual mean value of discharges, which has to be used in application of the directive.

More generally, the Federal Republic of Germany explains that its regulations in the matter of environmental protection are based on three fundamental principles.

In the first place, the German system is not based solely, as is the directive, on the principle of protection, which requires measurements to be taken in order to confront a concrete threat. The German system is based, in addition, on the principle of prevention. This implies that, before any concrete threat even appears, all precautions are taken to maintain pollution at a level sufficiently low for a real danger not even to arise.

In the second place, the German legal system is characterized by the fact that it is intended to remedy the causes of the pollution, and that the measurements which it envisages are aimed each time at the natural element which is threatened, namely air, water, etc. Selective measurements are taken, therefore, in the areas where they are necessary, while no measurements are taken when the critical threshold of pollution is not likely to be reached. By virtue of that system, the objective of the protection of the element under threat is fully achieved on the entire national territory.

In the third place, the basic conditions for the protection of the environment are laid down in legal rules, while the implementation of those legal rules and of the legal concepts which they employ comes in administrative provisions of a technical nature. These are adopted according to a special procedure, consisting in particular of consultation with the sectors concerned. That procedure guarantees the adoption of appropriate rules in spheres concerning science as well as technique and law, while at the same time satisfying the requirements of clarity and legal certainty.

Those three principles explain the particular properties of the German regulations called into question in the present case.

The provisions of the Law on protection against pollution which are inspired by the principle of prevention leave a certain margin of discretion to the administrative authority. On the other hand, the provisions governing situations characterized by concrete threats to the health of the population leave no discretion to the administration.

Furthermore, the Law on protection against pollution contains a series of provisions intended to prevent the appearance of possible causes of pollution. Those provisions carry penal sanctions. The law in question contains, in particular, rules intended to protect certain specified natural elements. Thus, Paragraph 44 et seq. of the Law relate to the monitoring of air pollution and to plans for the protection of the air. It is the principle of the campaign against the causes of pollution that explains that measures of a regional nature, like the anti-smog regulations, are only provided in the zones where atmospheric pollution is likely to appear.

Finally, Paragraph 48 of the Law on protection against pollution refers to administrative provisions concerning the technical methods of the combat against pollution, in particular for laying down limit values for nuisance. Those administrative provisions must be adopted in accordance with a special procedure, calling for the cooperation of the sectors concerned, which are listed in Paragraph 51 of the Law. It involves representatives from science, persons concerned, affected economic sectors, affected transport services and the highest administrative authorities of the Land responsible for protection against nuisances. In accordance with Paragraph 48 of the law, the provisions adopted must receive the consent of the Bundesrat.

The rules adopted on the basis of Paragraph 48 of the Law on protection against pollution are not, therefore, ordinary administrative provisions. Since they complement a mandatory rule, they take on the same binding nature as the latter. It was necessary to have resort to such a two-tier system of legislation because of the highly technical nature of environmental law. Moreover, the Community institutions resort to an analogous procedure in the harmonization directives, in which they refer to documents containing technical rules which themselves acquire a binding nature only by being attached to the directive.

In German law, there is in any event no doubt as to the obligatory nature of the provisions of the technical circular 'air'. The Federal Republic of Germany has annexed to its rejoinder a study carried out by the Federal Ministry of the Environment, Nature Protection and Nuclear Safety, from which it is apparent that the obligatory nature of the technical circular 'air' is acknowledged in case-law and in academic legal writing.

With regard to the Commission's complaint to the effect that the limit values fixed in the technical circular 'air' are only applicable to plants subject to a licence (paragraph 1 of that circular), the Federal Republic of Germany contends that the concept of 'effects harmful to the environment' must necessarily be interpreted in one and the same way in the whole sphere of application of the Law on protection against pollution. That interpretation is the one contained in the technical circular 'air', which lays down the limit values beyond which the presence of sulphur dioxide and suspended particulates in the atmosphere represents a danger to human health. The Federal Republic of Germany has therefore transposed the limit values envisaged by the directive for the whole sphere of environmental protection.

As for the fact that certain Länder have not defined any 'exposed zones', the Federal Republic of Germany contends that it would be pure formalism to compel the Member States to implement extensive measures of prevention and control in areas where there is no likelihood that the limit values prescribed by the directive will be exceeded. In any event, the law on protection against pollution mandatorily prescribes the drawing-up of plans for the protection of the air when the measurements carried out give rise to a fear that the limit values will be exceeded and when that risk cannot be otherwise eliminated.

IV — Replies to questions put by the Court

A — *Questions put to the Federal Republic of Germany*

By the first question, the Federal Republic of Germany was requested to forward to the Court the bill amending the Law on protection against pollution to which it referred in particular on page 7, paragraph III of its observations of 19 May 1988 (reply to the reasoned opinion). It was asked to specify the present stage of preparation of the proposed amendment.

In reply, the Federal Republic of Germany forwarded the text of the bill of the third Law amending the Law on protection against pollution (Bundestagsdrucksache 11/4909). It pointed out that, in the meantime, that amendment was adopted by the Bundestag on 11 May 1990, published in the *Bundesgesetzblatt* on 22 May 1990 (BGBl., I, p. 870), and entered into force on 1 September 1990.

It informed the Court that the text of the Law on protection against pollution, in the version in force as from 1 September 1990, was at the same time the subject of a new publication in the *Bundesgesetzblatt* (BGBl. 1990, First Part, p. 880). It also enclosed the text of the Law in its new version.

The Federal Republic of Germany added that the amendments henceforth introduced are drafted — even though Community law does not require it — so as to be so broad in scope that even the Commission's legal complaints underlying the present action — already unfounded in the context of the previous legal situation — must be rejected.

By a second question, the Court asked the Federal Republic of Germany whether the fact that that bill envisaged an express obligation to draw up plans for the protection of the air when the limit values fixed by Directives 80/779 and 82/884/EEC were reached do not prove that no such obligation exists in the present state of German law on the environment.

The Federal Republic of Germany replied in the negative. It added the following:

'Even according to the version of Paragraph 47 of the Law as hitherto in force there was an obligation to draw up plans for the protection of the air when the limit values fixed by Directives 80/779 and 82/884 were reached. In that respect, the new version of Paragraph 47 does not make a substantive amendment to the law in force; it is of a declaratory nature.

The following teleological and systematic observations enable it to be understood:

(a) It is apparent from the preamble to the bill (Bundestagsdrucksache 4909, p. 22; on Paragraph 1: no 21) that the new version of Paragraph 47(1) is intended to provide a legal basis enabling, even outside the exposed zones (now: zones of control) fixed by the first sentence of Paragraph 44(1) of the Law on protection against pollution, an action plan to be drawn up relating to a defined territory (and not to plant) in the form of a plan for the protection of the air, even if it is possibly a question only of restricting certain individual harmful substances arising locally.

In that respect, the new Paragraph 47(1) goes beyond the former version of the Law. In so far as, outside the zones of control already fixed, the exceeding of the limit values is, in practice, ruled out, taking into account the ground covered by those zones, the geographical extension of the area of application of Paragraph 47 has consequences only in the case of a possible exceeding of the national limit values (applicable to plants), which can be exceeded even when the limit values of the directive are not yet reached.

(b) The former version of the second sentence of Paragraph 47(1) of the Law was as follows:

"If that evaluation indicates that, throughout or in certain parts of the exposed zone, effects harmful to the environment due to air pollution exist *or are foreseeable*, the competent authority for that zone, according to the law of the Länder, *shall* draw up a plan for the protection of the air."

On the subject of that wording, it is right to emphasize two elements of legislative interpretation which are mandatory in German law:

— when the limit values fixed for the protection of health by the applicable Community directive are exceeded, there are "effects harmful to the environment" within the meaning of the Law on protection against pollution and, consequently, of Paragraph 47(1);

— the direction "shall" in Paragraph 47 involves a mandatory obligation in all situations where health, which is a legally protected interest, is threatened, which is the case when there are "effects harmful to the environment".

On those two points, reference may be made to the arguments previously put forwarded by the Federal Republic of Germany in its submissions in the present case and in Case C-59/89.

In all cases of air pollution below the threshold of those limit values — therefore, in particular, in cases where the exceeding of the limit values is only "foreseeable" in the absence of intervention by the authorities — the competent authority may determine whether it is capable of countering the threat that the limit values will be exceeded — and, consequently, the threat that effects harmful to the environment and endangering health will occur — by other measures equally effective or possibly more effective. In the second sentence of Paragraph 47(1) in its new version, the legislature has continued, as in the past, to leave to the competent authorities that margin of discretion in the sphere which is upstream from the exceeding of the limit values. In the former version, the second sentence of Paragraph 47(1) of the Law on protection against pollution therefore covered — with regard to the obligation to draw up plans for the protection of the air — what is divided, in the new version, between the first and second sentences of paragraph 1. In the new version, the first sentence specifies the provisions which apply in the event of relevant limit values being exceeded, and which were already applicable taking into account the mandatory interpretation of the former version of Paragraph 47, while the second sentence governs, in an autonomous way, the sphere of prevention, which, hitherto, equally came within the scope of the single sentence of the former version.

As to the substance, there is, accordingly, no amendment.'

By the third question, the Federal Republic of Germany was asked to forward to the Court the model bills for anti-smog regulations drawn up by the Länder Committee on page 5, paragraph II, 1, of its observations of 19 May 1988 (reply to the reasoned opinion).

In reply to that question, the Federal Republic of Germany forwarded the model bill for anti-smog regulations, confirming that it served as the basis for all the Länder for adopting their own anti-smog regulations, and enabling them to intervene in situations of atmospheric pollution of short duration.

B — *Question put to the Commission*

Question: The Commission is asked to state whether the complaints set out in paragraphs 2, 3, 4 and 5 of the letter of formal notice of 6 May 1986 were repeated in the application or in the reply, and, if so, at what precise places in the application or the reply it has set out arguments in support of those complaints.

Answer: 'The Commission concentrated its application on paragraph 1 of its letter of formal notice, namely the absence of an effective limit value applicable to the entire territory and of a guarantee that the limit value laid down by the directive would be observed. With regard to the complaints set out in paragraphs 2 to 5 of the letter of formal notice, there was no longer any reason, at the time when the action was brought, to allege serious infringements of the provisions of the directive.'

R. Joliet
Judge-Rapporteur