JUDGMENT OF THE COURT
9 August 1994 *

In Case C-359/92,

Federal Republic of Germany, represented by Claus-Dieter Quassowski, Regierungsdirektor at the Federal Ministry for Economic Affairs, 76 Villemombler Straße, Bonn, acting as Agent, assisted by Jochim Sedemund, Rechtsanwalt, Cologne,

applicant,

v

Council of the European Union, represented by Rüdiger Bandilla, Director in the Legal Service, and Bjarne Hoff-Nielsen, Adviser in the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Commission of the European Communities, represented by Rolf Wägenbaur, Principal Legal Adviser, assisted by Xavier Lewis, of the Legal Service, acting as

* Language of the case: German.

Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

intervener,

APPLICATION for a declaration that Article 9 of Council Directive 92/59/EEC of 29 June 1992 on general product safety (OJ 1992 L 228, p. 24) is void in so far as it empowers the Commission to adopt, with regard to a product, a decision requiring Member States to take measures from among those listed in Article 6(1)(d) to (h) of the directive,

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida, M. Diez de Velasco and D. A. O. Edward (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse (Rapporteur), M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. v. Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 May 1994, at which the Federal Republic of Germany was represented by Gerhard Rambow,

Ministerialdirektor at the Federal Ministry for Economic Affairs, acting as Agent, and by Jochim Sedemund, Rechtsanwalt, Cologne,

after hearing the Opinion of the Advocate General at the sitting on 8 June 1994,

gives the following

Judgment

1 By application lodged at the Court Registry on 14 September 1992, the Federal Republic of Germany brought an action under the first paragraph of Article 173 of the EEC Treaty for a declaration that Article 9 of Council Directive 92/59/EEC of 29 June 1992 on general product safety (OJ 1992 L 228, p. 24) is void in so far as it empowers the Commission to adopt, with regard to a product, a decision requiring Member States to take measures from among those listed in Article 6(1)(d) to (h) of the directive.

2 Directive 92/59 was adopted under Article 100a of the Treaty for the purpose of ensuring that consumer products placed on the internal market of the Community do not in general present a risk to the consumer under normal conditions of use or, at least, involve only a very low level of risk. Its provisions apply only in so far as more specific Community provisions have not been adopted (Article 1(2) of the directive). It requires both producers and distributors of products to comply with a general safety requirement. Producers are obliged to place only safe products on the market. They must moreover warn the consumer of the risks attaching to the use of the product and take the necessary measures to identify and avoid such risks. Distributors are required to help to ensure compliance with the general safety requirement (Article 3 of the directive).

3 Member States are obliged to adopt the necessary laws, regulations and administrative provisions to ensure compliance with the general safety requirement. In particular, they must establish authorities to check that products placed on the market are safe and confer upon those authorities the necessary powers to take the measures incumbent upon them under the directive (Article 5). Under Article 6 of the directive, Member States must adopt provisions enabling them to take, in compliance with the provisions of the Treaty and in particular Articles 30 and 36 thereof, appropriate measures for the purpose of attaining, *inter alia*, the objectives set out in paragraph 1 of that article.

4 Such measures include those with a view to:

'...

d) subjecting product marketing to prior conditions designed to ensure product safety and requiring that suitable warnings be affixed regarding the risks which the product may present;

e) making arrangements to ensure that persons who might be exposed to a risk from a product are informed in good time and in a suitable manner of the said risk by, *inter alia*, the publication of special warnings;

f) temporarily prohibiting, for the period required to carry out the various checks, anyone from supplying, offering to supply or exhibiting a product or product batch, whenever there are precise and consistent indications that they are dangerous;

g) prohibiting the placing on the market of a product or product batch which has proved dangerous and establishing the accompanying measures needed to ensure that the ban is complied with;

h) organizing the effective and immediate withdrawal of a dangerous product or product batch already on the market and, if necessary, its destruction under appropriate conditions'.

5 The directive lays down procedures for notification and exchanges of information. Under Article 7, where a Member State takes measures which restrict the placing of a product on the market or require its withdrawal from the market, such as those provided for in Article 6(1)(d) to (h), it must inform the Commission which, after consultations with the parties concerned, is to establish whether or not the measure is justified and inform, as appropriate, the other Member States or the Member State concerned.

6 Lastly, the directive contains provisions relating to emergency situations and action at Community level.

7 Article 8 of the directive provides that, where a Member State adopts emergency measures to prevent, restrict or impose specific conditions on the possible marketing or use of a product presenting serious and immediate risks to the health and safety of consumers, it must immediately inform the Commission, which must ascertain whether that information complies with the provisions of the directive and forward it to the other Member States. Those States must inform the Commission of any measures adopted.

8 Article 9 provides as follows:

'If the Commission becomes aware, through notification given by the Member States or through information provided by them, in particular under Article 7 or

Article 8, of the existence of a serious and immediate risk from a product to the health and safety of consumers in various Member States and if:

(a) one or more Member States have adopted measures entailing restrictions on the marketing of the product or requiring its withdrawal from the market, such as those provided for in Article 6(1)(d) to (h);

(b) Member States differ on the adoption of measures to deal with the risk in question;

(c) the risk cannot be dealt with, in view of the nature of the safety issue posed by the product and in a manner compatible with the urgency of the case, under the other procedures laid down by the specific Community legislation applicable to the product or category of products concerned;

and

(d) the risk can be eliminated effectively only by adopting appropriate measures applicable at Community level, in order to ensure the protection of the health and safety of consumers and the proper functioning of the common market,

the Commission, after consulting the Member States and at the request of at least one of them, may adopt a decision, in accordance with the procedure laid down in Article 11, requiring Member States to take temporary measures from among those listed in Article 6(1)(d) to (h).'

9 The procedure provided for in Article 11 of the directive is variant (b) of Procedure III, as described in Article 2 of Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1987 L 197, p. 33). During that procedure, the Commission is assisted by the Committee on Product Safety Emergencies, composed of the representatives of the Member States and chaired by a representative of the Commission. It is the duty of that committee to deliver an opinion on the measures proposed by the Commission. The Commission adopts the measures which are in accordance with the Committee's opinion. If the measures proposed are not in accordance with the Committee's opinion, or in the absence of an opinion from the Committee, the Council adopts measures by a qualified majority, on a proposal by the Commission. If the Council does not act within 15 days of the date on which the proposal was submitted to it, the Commission may adopt the measures proposed, unless the Council has decided against them by a simple majority. Decisions thus adopted are valid for no more than three months, but that period may be prolonged in accordance with the same procedure. Member States must take all necessary measures to implement those decisions within 10 days.

10 Member States were required to comply with the directive by 29 June 1994 at the latest.

11 Although the application by the Federal Republic of Germany expressly seeks a declaration that Article 9 of the directive is void only in so far as it empowers the Commission to adopt, with regard to a product, a decision requiring Member States to take measures from among those listed in Article 6(1)(d) to (h) of the directive, its true purpose, given the structure of Article 9, is to obtain the annulment of the article in its entirety.

12 The Federal Republic of Germany bases its application for annulment on two pleas in law. First, it claims that Article 9 of the directive has no legal base. Second, it claims that the article is contrary to the principle of proportionality. The Council and the Commission contend, for their part, that neither of those two pleas in law is well founded.

The plea in law alleging lack of a legal base

13 According to the German Government, Article 9 empowers the Commission to apply the directive to individual cases. It enables the Commission to take decisions replacing those which the national authorities have taken in order to ensure compliance with national legislation transposing the directive.

14 In its application, the German Government considers that since the directive was adopted on the basis of Article 100a of the Treaty, it can only derive from Article 100a(5), which empowers the Commission to supervise provisional measures taken by the Member States in accordance with the safeguard clauses which are included in a harmonization measure. The German Government claims that the article does not, however, constitute an adequate legal base, since it allows the Commission only to check whether provisional national measures comply with Community law, but not to adopt measures intended to implement the conclusions which must be drawn, at national level, from that finding.

15 In reply, the Council and the Commission submit that Article 100a(5) of the Treaty does not constitute the legal base for Article 9 of the directive. In their view, the directive does not contain any 'safeguard clause' within the meaning of Article 100a(5) of the Treaty, that is to say, any clause authorizing the Member States

to adopt provisional measures on one of the non-economic grounds referred to in Article 36 of the Treaty. Consequently, Article 9 does not lay down a 'Community control procedure' for the provisional measures adopted on the basis of such a clause.

16 The Council and the Commission contend that the legal base of Article 9 of the directive is Article 100a(1) of the Treaty, in conjunction with the third indent of Article 145 thereof. They submit that Article 9 empowers the Commission to adopt 'ad hoc' harmonization measures in the form of decisions which are addressed to Member States, but do not have direct effect with respect to individuals, where emergency measures can be adopted only at Community level and certain conditions are fulfilled.

17 The German Government objects to that argument essentially on the ground that the sole aim of Article 100 et seq. of the Treaty, and of Article 100a(1) in particular, is the approximation of laws and that those articles do not therefore confer power to apply the law to individual cases in the place of the national authorities, as permitted by Article 9 of the directive. The German Government further observes that the powers conferred upon the Commission by Article 9 thus exceed those which, in a federal state such as the Federal Republic of Germany, are enjoyed by the *Bund* in relation to the *Länder*, since, under the German Basic Law, the implementation of federal laws rests with the *Länder*. Lastly, the German Government submits that Article 9 cannot be regarded as constituting an implementing power, within the meaning of the third indent of Article 145 of the Treaty, since that article does not embody a substantive power of its own, but merely authorizes the Council to confer implementing powers on the Commission where a legal base exists in primary Community law for the act to be implemented and its implementing measures.

18 It is important to note, in the first place, that Article 100a(5) of the Treaty cannot constitute the legal base for Article 9 of the directive as, moreover, the parties themselves have recognized.

19 Article 100a(5) of the Treaty provides: 'The harmonization measures ... shall, in appropriate cases, include a safeguard clause authorizing the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Community control procedure.'

20 That article only concerns supervision, by the Community authorities, of measures taken by the Member States. The purpose of Article 9 of the directive, however, is not to introduce a control procedure of that kind. It sets out a Community procedure for the coordination of national measures with respect to a product, in order to ensure that it may circulate freely throughout the Community without danger to the consumer.

21 Secondly, the question arises whether Article 100a(1) of the Treaty, supplemented by the third indent of Article 145, constitutes an appropriate legal base for Article 9 of the directive, as the Council and the Commission contend.

22 As the Court stated in Case C-41/93 (*France* v *Commission* [1994] ECR I-1829, paragraph 22), for the purposes of implementing the objectives set out in Article 8a of the EEC Treaty (now Article 7a of the EC Treaty), Article 100a(1) of the Treaty empowers the Council to adopt, in accordance with the procedure laid down therein, measures which have as their object the abolition of barriers to trade arising from differences between the provisions laid down by law, regulation or administrative action in Member States.

23 However, the harmonization effected by the directive is of a particular type, which the Council, by reference to the terms used in the third recital in the preamble to the directive, describes as 'horizontal' harmonization.

24 According to the fourth recital in the preamble, the directive establishes at Community level 'a general safety requirement for any product placed on the market that is intended for consumers or likely to be used by consumers'. In accordance with that 'general safety requirement' (see Title II), producers are obliged, first, to place only safe products on the market; second, to provide consumers with the relevant information to enable them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings, and to take precautions against those risks; and third, to adopt measures commensurate with the characteristics of the products which they supply, to enable them to be informed of risks which those products might present and to take appropriate action including, if necessary, withdrawing the product in question from the market to avoid those risks. Distributors are required to act with due care in order to help to ensure compliance with the general safety requirement (Article 3 of the directive).

25 The directive requires Member States to adopt the necessary laws, regulations and administrative provisions to make producers and distributors comply with their obligations under it in such a way that products placed on the market are safe. In particular, Member States must establish or nominate authorities to monitor the compliance of products with the obligation to place only safe products on the market and arrange for such authorities to have the necessary powers to take the appropriate measures incumbent upon them under the directive, including the possibility of imposing suitable penalties in the event of failure to comply with the obligations deriving from it (Article 5 of the directive).

26 Under Article 6 of the directive, Member States must, for the purposes of Article 5, have the necessary powers, acting in accordance with the degree of risk and in conformity with the Treaty, and in particular with Articles 30 and 36 thereof, to adopt appropriate measures to attain, *inter alia*, the objectives laid down in Article 6(1)(a) to (h).

27 However, Articles 7 and 8 of the directive entrust the Commission with the task of supervising measures taken by Member States which are likely to hinder trade.

28 Under Article 7, Member States must inform the Commission of measures which restrict the placing of a product or product batch on the market or require its withdrawal from the market, such as those provided for in Article 6(1)(d) to (h), specifying their reasons for adopting them.

29 Under Article 8, Member States must as a matter of urgency inform the Commission of emergency measures which they have adopted or decided to adopt in order to prevent, restrict or impose specific conditions on the possible marketing or use, within their territory, of a product or product batch by reason of a serious and immediate risk presented by the said product or product batch to the health and safety of consumers. Member States may also pass on to the Commission any information in their possession regarding the existence of a serious and immediate risk before deciding to adopt the measures in question.

30 Under the scheme established by the directive, it is possible, even likely, that differences may exist between the measures taken by Member States. As the eighteenth recital in the preamble states, such differences may 'entail unacceptable disparities in consumer protection and constitute a barrier to intra-Community trade'.

31 Under that scheme, the nineteenth recital in the preamble to the directive indicates, it may also be necessary to cope with serious product-safety problems which affect or could affect, in the immediate future, all or a large part of the Community and which, in view of the nature of the safety problem posed by the product and of its

urgency, cannot be dealt with effectively under the procedures laid down in the specific rules of Community law applicable to the products or category of products in question.

32 The Community legislature therefore considered it necessary, in order to cope with a serious and immediate risk to the health and safety of consumers, to provide for an adequate mechanism allowing, in the last resort, for the adoption of measures applicable throughout the Community, in the form of decisions addressed to the Member States (see the twentieth recital in the preamble to the directive).

33 For that purpose, Article 9 of the directive empowers the Commission, on the basis of the information received, to act in cases where a product placed on the market puts in serious and immediate jeopardy the health and safety of consumers in a number of Member States and those States differ with respect to the measures adopted or planned with regard to that product, that is to say, where such measures do not provide the same level of protection and thereby prevent the product from moving freely within the Community. Article 9 provides that, to the extent that effective protection can be ensured only by action at Community level and no other procedure specifically applicable to the product can be used, the Commission may adopt a decision requiring Member States to take temporary measures from among those listed in Article 6(1)(d) to (h).

34 As is apparent from the eighteenth, nineteenth and twentieth recitals of the preamble to the directive and from the structure of Article 9, the purpose of that provision is to enable the Commission to adopt, as promptly as possible, temporary measures applicable throughout the Community with respect to a product which presents a serious and immediate risk to the health and safety of consumers, so as to ensure compliance with the objectives of the directive. The free movement of

goods can be secured only if product safety requirements do not differ significantly from one Member State to another. A high level of protection can be achieved only if dangerous products are subject to appropriate measures in all the Member States.

35 Such action must be taken by the Commission in close cooperation with the Member States. For one thing, decisions taken at Community level may be adopted by the Commission only after consulting the Member States and at the request of a Member State. For another, such measures may be adopted by the Commission only if they are in accordance with the opinion of a committee composed of the Member States' representatives and a Commission representative. Otherwise the measure must be adopted by the Council within a specified period. Lastly, those decisions are addressed only to Member States. The twentieth recital in the preamble to the directive states that such decisions are not of direct application to traders in the Community and must be incorporated in a national measure.

36 Thus, in the circumstances set out in Article 9, action by the Community authorities is justified by the fact that, in the terms used in Article 9(d), 'the risk can be eliminated effectively only by adopting appropriate measures at Community level, in order to ensure the protection of the health and safety of consumers and the proper functioning of the Common Market'.

37 Such action is not contrary to Article 100a(1) of the Treaty. The measures which the Council is empowered to take under that provision are aimed at 'the establishment and functioning of the internal market'. In certain fields, and particularly in that of product safety, the approximation of general laws alone may not be sufficient to ensure the unity of the market. Consequently, the concept of 'measures for

the approximation' of legislation must be interpreted as encompassing the Council's power to lay down measures relating to a specific product or class of products and, if necessary, individual measures concerning those products.

38 So far as concerns the argument that the power thus conferred on the Commission goes beyond that which, in a federal state such as the Federal Republic of Germany, is enjoyed by the *Bund* in relation to the *Länder*, it must be borne in mind that the rules governing the relationship between the Community and its Member States are not the same as those which link the *Bund* with the *Länder*. Furthermore, the measures taken for the implementation of Article 100a of the Treaty are addressed to Member States and not to their constituent entities. Nor do the powers conferred on the Commission by Article 9 of the directive have any bearing upon the division of powers within the Federal Republic of Germany.

39 Accordingly the legal base of the powers delegated to the Commission by Article 9 of the directive is Article 100a(1) of the Treaty.

40 Since the German Government does not dispute that such power may accrue to the Commission if its legal base is Article 100a of the Treaty, there is no need to address the question whether the third indent of Article 145 of the Treaty is applicable in this case.

41 It follows from the foregoing that the first plea in law put forward by the Federal Republic of Germany must be rejected.

Breach of the principle of proportionality

42 The German Government claims that Article 9 of the directive fails to comply with the principle of proportionality in two essential respects. First, the powers given to the Commission are not appropriate for the purpose of ensuring a high level of protection with respect to public health since the adoption of a decision at Community level is no guarantee that the measures taken will be the most suitable. Second, those powers encroach unnecessarily upon the Member States' own powers since the Commission can attain the same objectives by recourse to the infringement procedure under Article 169 of the Treaty and, where appropriate, by making an application to the Court for the adoption of interim measures.

43 The Council and the Commission contend, for their part, that Article 9 of the directive is not in breach of the principle of proportionality. They submit that action by the Commission, in the situations envisaged by the article, is not only appropriate but also necessary in order to attain the objectives set out in the directive and, in particular, in order to ensure a high level of protection for consumers whilst maintaining the proper functioning of the internal market. In their view, those objectives cannot be attained by means of the infringement procedure, especially in emergency situations.

44 As the Court has consistently held (see, in particular, Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 19), the principle of proportionality requires that measures taken by the Community institutions should be appropriate to achieve the objective pursued without going beyond what is necessary to that end.

45 The powers conferred on the Commission by Article 9 are appropriate for the purpose of attaining the objectives pursued by the directive, that is to say, ensuring a

high level of protection for the health and safety of consumers whilst eliminating barriers to trade and distortions of competition arising as a result of disparities between national measures taken in relation to consumer products. The difficulties which might arise if the appropriate measures are determined on a case by case basis cannot lead to the opposite conclusion.

46 Those powers are not excessive in relation to the objectives pursued. Contrary to the assertion made by the German Government, the infringement procedure laid down in Article 169 of the Treaty does not permit the results set out in Article 9 of the directive to be achieved.

47 In the first place, no obligation can be placed on Member States by means of the infringement procedure to take a specified measure from among those listed in Article 6(1)(d) to (h) of the directive.

48 Secondly, as the Council and the Commission point out in their observations, even if Member States are required to adopt certain specified measures under the directive, the Commission would be obliged to bring proceedings for failure to fulfil its obligations against every Member State that had not adopted such measures, inevitably rendering the procedure more cumbersome.

49 Lastly, even if such proceedings were initiated and held by the Court to be well founded, it is not certain that a declaration by the Court to that effect would enable the objectives set out in the directive to be achieved as effectively as would be the case by a Community harmonization measure.

50 In particular, the infringement procedure would not enable consumer protection to be secured in the shortest possible time. That procedure, which comprises a pre-litigation stage and, where necessary, a contentious stage, inevitably takes a certain amount of time even though, as the German Government points out, the Commission can apply to the Court for the adoption of interim measures. Furthermore, a declaration that a Member State has failed to fulfil its obligations would, in the circumstances envisaged, presuppose a cautious appraisal, scarcely compatible with urgency, of the need to adopt a particular measure, since the directive merely requires Member States to adopt the measures necessary to compel producers, intermediaries and distributors to place and leave on the market only products which are safe.

51 The second plea in law must therefore be rejected.

52 It follows that the application of the Federal Republic of Germany must be dismissed.

Costs

53 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs. The Commission, which has intervened in the proceedings, must, in accordance with the first paragraph of Article 69(4) of the Rules of Procedure, bear its own costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application.

2. Orders the Federal Republic of Germany to pay the costs and the Commission, as intervener, to bear its own costs.

Due Mancini Moitinho de Almeida

Diez de Velasco Edward

Kakouris Joliet Schockweiler

Rodríguez Iglesias Grévisse

Zuleeg Kapteyn Murray

Delivered in open court in Luxembourg on 9 August 1994.

R. Grass O. Due

Registrar President