JUDGMENT OF THE COURT (First Chamber)

9 March 2006 *

In Case C-65/04,

ACTION under Article 141 EA for failure to fulfil obligations, brought on 13 February 2004,

Commission of the European Communities, represented by L. Ström van Lier and J. Grunwald, acting as Agents, with an address for service in Luxembourg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by C. Jackson and C. Gibbs, acting as Agents, and by D. Wyatt QC and S. Tromans, Barrister, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

supported by:

French Republic, represented by R. Abraham, G. de Bergues, E. Puisais and C. Jurgensen, acting as Agents, with an address for service in Luxembourg,

intervener,

THE COURT (First Chamber),

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

Advocate General: L.A. Geelhoed,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 October 2005,

after hearing the Opinion of the Advocate General at the sitting on 1 December 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities is seeking a declaration from the Court that, by failing to give the public likely to be affected in the event of a radiological emergency prior information on the local emergency plan existing in Gibraltar, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 5(3) of Council Directive 89/618/Euratom of 27 November 1989 on informing the general public about health protection measures to be applied and steps to be taken in the event of a radiological emergency (OJ 1989 L 357, p. 31; hereinafter 'the directive').

Legal context

2 Articles 30 EA and 31 EA provide for basic standards to be laid down within the European Community for the protection of the health of workers and the general public against the dangers arising from ionising radiations.

3 Having been adopted on the basis of Article 31 of the EAEC Treaty, the directive is intended, according to Article 1 thereof, 'to define, at Community level, common objectives with regard to measures and procedures for informing the general public for the purpose of improving the operational health protection provided in the event of a radiological emergency'.

4 Article 5 of the directive reads as follows:

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

...

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

...'

Pre-litigation procedure

5 During 2000 the Commission received several complaints relating to repair work that was being carried out in Gibraltar harbour from May onwards of that year to the United Kingdom's nuclear-powered submarine *Tireless* following an incident with its nuclear reactor.

6 By letter of 10 October 2000, the Commission asked the United Kingdom to forward to it the information given to the public about health protection measures that would apply to them and the steps they would have to take in the event of a radiological emergency.

7 In their response of 14 November 2000, the United Kingdom authorities stated that the EAEC Treaty did not apply to the use of nuclear energy for military purposes. Nevertheless, they pointed out that there was an intervention plan for the area of Gibraltar, the Gibraltar Public Safety Scheme ('Gibpubsafe'), which was available in the Gibraltar public library.

8 Taking the view that Gibpubsafe did not comply with the directive, the Commission sent the United Kingdom authorities a letter of formal notice on 21 March 2002, maintaining, in particular, that, as regards arrangements for providing the population likely to be affected in the event of a radiological emergency with prior information, merely making Gibpubsafe available in a public library could not be considered a satisfactory transposition of the directive.

9 The United Kingdom authorities replied to that letter of formal notice by letter of 17 May 2002. In that letter, they merely stated their reasons for considering that activities relating to military nuclear propulsion systems fall outside the tasks assigned to the Community by the EAEC Treaty.

10 In its reasoned opinion sent to the United Kingdom on 23 October 2002, the Commission maintained, in particular, that Title II, Chapter 3, of the EAEC Treaty does not exclude ionising radiations resulting from military activities and requested

the United Kingdom authorities to take the measures necessary to comply with the reasoned opinion within two months of receipt thereof.

11 As those authorities maintained their position in their reply of 20 December 2002 to that reasoned opinion, the Commission decided to bring the present action.

Procedure before the Court and forms of order sought

12 By order of 16 June 2004, the President of the Court granted the French Republic leave to intervene in the present case in support of the form of order sought by the United Kingdom.

13 The Commission claims that the Court should:

— declare that, by not giving the public likely to be affected in the event of a radiological emergency prior information on the local emergency plan existing in Gibraltar, the United Kingdom has failed to fulfil its obligations under Article 5(3) of the directive, and

— order the United Kingdom to pay the costs.

14 The United Kingdom and the French Republic submit that the application should be dismissed and the Commission should be ordered to pay the costs.

The action

15 It is clear from the documents filed with the Court that when the United Kingdom's nuclear-powered submarine *Tireless* was laid up for repair in Gibraltar harbour in May 2000 the Commission asked the United Kingdom to forward to it the information given to the public pursuant to Article 5(3) of the directive about health protection measures to be applied in the event of a radiological emergency.

16 The question whether military uses of nuclear energy may fall within the scope of the EAEC Treaty has already been decided by the Court in Case C-61/03 *Commission* v *United Kingdom* [2005] ECR I-2477.

17 In that judgment, the Court stated first of all that several provisions of the EAEC Treaty confer on the Commission substantial powers which enable it to intervene actively, by means of legislation or in the form of an opinion containing individual decisions, in various spheres of activity which, in the Community, are concerned with the use of nuclear energy. By way of example, the Court mentioned, apart from the provisions of Title II, Chapter 3, of that Treaty, on health and safety, in particular

Articles 34 EA, 35 EA and 37 EA, the provisions of Title II, Chapter 1, on promotion of research, observing that the text of those provisions does not in any way specify whether the activities thus governed are exclusively civil (see *Commission* v *United Kingdom*, cited above, paragraph 35).

18 The Court went on to state that the application of such provisions to military installations, research programmes and other activities might be such as to compromise essential national defence interests of the Member States (see *Commission* v *United Kingdom*, cited above, paragraph 36).

19 On the basis of those considerations, the Court concluded that, in view of the absence in the EAEC Treaty of any derogation laying down the detailed rules according to which the Member States would be authorised to invoke and protect those essential interests, activities falling within the military sphere are outside the scope of that Treaty (see *Commission* v *United Kingdom*, cited above, paragraph 36).

20 The Commission acknowledges that both the present case and *Commission* v *United Kingdom*, cited above, concern the same point of law.

21 At the hearing, however, the Commission stated that the information which Member States are required, under Article 5 of the directive, to give to the public about health protection measures to be adopted in the event of a radiological

emergency is a civil defence matter and not a military matter. Applying that directive would not therefore be likely to harm the military interests of those States.

22 That line of argument cannot be accepted.

23 It is common ground that in the present case the source of the nuclear energy is of military origin.

24 To accept that in such a situation the obligation laid down in Article 5 of the directive is incumbent none the less on Member States would amount to recognising that the provisions of the EAEC Treaty concerning health and safety, in particular Article 31 EA, which provides the basis for that directive, are different in scope from the other provisions of that Treaty.

25 Whether the provisions of that Treaty applied to activities within the military sphere would thus depend on the nature and scope of the obligations which those provisions impose on Member States. It would therefore be necessary to assess in each case the damage which performance of those obligations may cause to the essential national defence interests of those States.

26 As the Advocate General has rightly observed in point 31 of his Opinion, that proposition was rejected by the Court in *Commission* v *United Kingdom*, cited

above. It is very clear from that judgment that the use of nuclear energy for military purposes falls outside the scope of all the provisions of the EAEC Treaty, not just some of them.

27 As the scope of provisions of secondary legislation cannot validly exceed that of their legal basis, the inapplicability of Article 31 EA to military activities necessarily means that the directive does not apply to such activities.

28 It is important to note, however, that that finding does not by any means reduce the vital importance of the objective of protecting the health of the public and the environment against the dangers related to the use of nuclear energy, including for military purposes. In so far as the EAEC Treaty does not provide the Community with a specific instrument in order to pursue that objective, it is possible that appropriate measures might be adopted on the basis of the relevant provisions of the EC Treaty (see *Commission* v *United Kingdom*, cited above, paragraph 44).

29 In those circumstances, it must be stated that in the case of the repair of a nuclear-powered submarine Article 5(3) of the directive does not require the United Kingdom to inform the public who might be affected in the event of a radiological emergency about health protection measures that would apply to them.

30 The Commission's application must therefore be dismissed.

Costs

31 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the United Kingdom has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, Member States which have intervened in the proceedings must bear their own costs.

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

1. Dismisses the application;

2. Orders the Commission of the European Communities to pay the costs;

3. Orders the French Republic to bear its own costs.

[Signatures]