JUDGMENT OF THE COURT (Second Chamber)

7 July 2005 *

In Case C-364/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 22 August 2003,

Commission of the European Communities, represented by G. Valero Jordana and M. Konstantinidis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by E. Skandalou, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Greek.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta, R. Schintgen (Rapporteur), P. Kūris and G. Arestis, Judges,

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

having regard to the written procedure and further to the hearing on 10 March 2005,

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

gives the following

Judgment

1 By its application the Commission of the European Communities seeks a declaration that, by not determining the policies or strategies for progressively adapting to the best technology available the steam turbine units and gas turbine units of the power station operated by Dimosia Epicheirisi Ilektrismou (public electricity undertaking, hereinafter 'the DEI'), situated in Linoperamata on the Island of Crete (Greece) (hereinafter 'the power station'), the Hellenic Republic has failed to fulfil its

obligations under Article 13 of Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants (OJ 1984 L 188, p. 20).

Legal framework

2 Under Article 1 of Directive 84/360:

'The purpose of this Directive is to provide for further measures and procedures designed to prevent or reduce air pollution from industrial plants within the Community, particularly those belonging to the categories set out in Annex I.'

3 The industrial plant listed in Annex I to Directive 84/360 includes at point 1.4 thereof thermal power stations (excluding nuclear power stations) and other combustion installations with a nominal heat output of more than 50 MW.

4 Under Article 2(1) of Directive 84/360 atmospheric pollution means 'the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment'.

5 According to Article 2(3) of the directive 'existing plant' means a plant in operation before 1 July 1987 or built or authorised before that date.

6 Article 3 of the directive is worded as follows:

'1. Member States shall take the necessary measures to ensure that the operation of plants belonging to the categories listed in Annex I requires prior authorisation by the competent authorities. The necessity to meet the requirements prescribed for such authorisation must be taken into account at the plant's design stage.

2. Authorisation is also required in the case of substantial alteration of all plants which belong to the categories listed in Annex I or which, as a result of the alteration, will fall within those categories.

3. Member States may require other categories of plants to be subject to authorisation or, where national legislation so provides, prior notification.'

7 Under Article 8 of the directive:

'1. The Council, acting unanimously on a proposal from the Commission, shall if necessary fix emission limit values based on the best available technology not entailing excessive costs, and taking into account the nature, quantities and harmfulness of the emissions concerned.

2. The Council, acting unanimously on a proposal from the Commission, shall stipulate suitable measurement and assessment techniques and methods.'

8 Article 13 of the directive provides:

'In the light of an examination of developments as regards the best available technology and the environmental situation, the Member States shall implement policies and strategies, including appropriate measures, for the gradual adaptation of existing plants belonging to the categories given in Annex I to the best available technology, taking into account in particular:

— the plant's technical characteristics,

— its rate of utilisation and length of its remaining life,

— the nature and volume of polluting emissions from it,

— the desirability of not entailing excessive costs for the plant concerned, having regard in particular to the economic situation of undertakings belonging to the category in question.'

9 Under Article 16(1) of the directive:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 30 June 1987.'

Facts and prelitigation procedure

10 The power station comprises six steam turbine units, two gas turbine units and four diesel turbine units. The first units were installed between 1965 and 1974. Installation of the four last units was authorised in 1986.

11 It is not disputed that the power station is a combustion installation with a nominal heat output of more than 50 MW, as mentioned at point 1.4 of Annex I to Directive 84/360, that it is subject to the monitoring system laid down in Article 3(1) thereof, and that it is an existing plant for the purposes of Article 2(3) of the directive.

12 After receiving a complaint concerning environmental pollution caused by the power station, the Commission by letter dated 12 May 1998 requested the Hellenic authorities to provide information concerning the conditions under which that power station was operated, with particular reference to the obligations under Directive 84/360.

13 Having formed the view that the conditions relating to prior authorisation in Article 3 of Directive 84/360 had not been observed, the Commission on 1 February 1999 addressed a second letter to the Hellenic authorities in which it sought supplementary information concerning authorisation of the extension to the power station.

14 Being of the view that it was clear from the reply to that letter that the Hellenic Republic was not complying with its obligations under Articles 3 and 13 of Directive 84/360, the Commission on 13 April 2000 put that Member State on formal notice to submit to it its observations within a period of two months.

15 By various letters, the Hellenic authorities communicated to the Commission in 2000 and 2001 information concerning, in particular, approval of the extension to the power station, Ministerial Decree No 46998 of 5 June 2000 approving a fresh environmental impact study carried out by the DEI for all plant comprised within the power station, Ministerial Decree No 56512 of 19 May 2001 amending the previous ministerial decree, together with information concerning the authorisations for the operation of the power station granted on 26 February and 27 July 2001.

16 Taking the view that there was a continuing infringement only of Article 13 of Directive 84/360, the Commission by letter of 21 March 2002 addressed a reasoned opinion to the Hellenic Republic requesting it to comply with the obligations under that provision within a period of two months with effect from notification of the reasoned opinion.

17 Since it was not persuaded that the information communicated by the Hellenic authorities in their letters of 10 July and 13 November 2002 was such as to bring to an end the infringement of Article 13 of Directive 84/360, the Commission brought this application.

The application

Arguments of the parties

18 In the Commission's view, it is clear from the information provided by the Hellenic authorities during both the prelitigation procedure and the procedure before the Court that the station is operated on the basis of out-of-date technology which

causes considerable pollution and cannot therefore be described as the 'best available technology' for the purposes of Directive 84/360.

19 Thus, during the course of the years 1992 to 2002 emissions of sulphur dioxide and nitrogen oxide from the station have not diminished. Those emissions vary between 14.2 kilotonnes (in 1995) and 16.3 kilotonnes (in 1999) for sulphur dioxide and between 4.3 kilotonnes (in 1992, 1998 and 2000) and 5 kilotonnes (in 1999) for nitrogen oxide. They accounted for almost all the sulphur dioxide and 50% of the nitrogen oxide emitted in Crete during the period concerned.

20 In regard to the different measures that the Hellenic Republic claims to have adopted in order to comply with the obligation under Article 13 of Directive 84/360, the Commission maintains that those measures:

— are of a general nature and thus do not specifically relate to the power station, or

— have brought about no improvement as the emissions recorded, or

— are not mandatory, or

— do not constitute measures providing for adaptation to the best available technology for the purposes of the directive.

21 Moreover, the Commission notes that the Hellenic authorities laid down no limit values for emissions of sulphur dioxide and nitrogen oxide.

22 In regard to the Hellenic Government's argument that adaptation of the power station to the best available technology would have generated excessive costs for the DEI, the Commission maintains, on the one hand, that those costs are not the only criterion in regard to adaptation laid down in Article 13 of Directive 84/360 and, secondly, that such costs must be relativised regard being had to the years which have elapsed since entry into force of the directive. Nor, moreover, was DEI's financial situation, as reflected in the balance sheet and accounts for 2002, such as to render excessive the costs engendered by the requisite improvements to the power station.

23 First, the Hellenic Government points out that, until adoption of Directive 2001/80/EC of the European Parliament and the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants (OJ 2001 L 309, p. 1), Community legislation did not provide for limit values for emissions by existing plant of the size of that at issue in the present case and that Direcctive 84/360 contains neither a definition of the terms 'best available technology' nor a specific period for the progressive adaptation of existing plant in line with that technology, nor even an indication as to the manner in which the different technologies are to be evaluated.

24 Second, the Hellenic Government emphasises that the level of pollution caused by a given source is determined by the contribution of emissions from that source to the

presence of different pollutants in the atmosphere of the region where that source is situated and by the volume of those emissions. Accordingly, in order to evaluate the adaptation of the station concerned to the best available technology, reference should be made to the specific emissions (assessed in g/kWh) which characterise the average pollution emitted by the station in the long term and not to emissions calculated in absolute terms, namely the quantity of tonnes emitted per annum. In fact, the operating level and increase in the size of the station may have an influence on the quantity of those emissions which, therefore, would not be appropriate for the purposes of the conclusions to be drawn as to the standard of the technology employed.

25 More particularly in regard to the power station, the Hellenic Government stresses that output of energy production increased steeply between 1992 and 2002. However, the figures provided by the DEI show emissions of sulphur dioxide from the power station as having fallen from 18.0 g/kWh in 1992 to 13.0 g/kWh in 2001 and that emissions of nitrogen oxide passed from 4.1 g/kWh in 1998 to 3.9 g/kWh in 2001.

26 Third, the Hellenic Government maintains that, in the context of the implementation of a more general policy and strategy, specific measures for adapting the station to the best available technology have been adopted. Thus, specifically:

— between 1993 and 2002 the maximum sulphur content of fuel was reduced from 4% to 3%, that is to say by 25%;

— the use of fuel oil with a sulphur content of nearly 13% less than the limits laid down at national level brought about a diminution in specific emissions of sulphur dioxide of more than 5 kg/MWh;

— between 1993 and 2002 the maximum sulphur content of gas oil was reduced at national level from 0.5% to 0.035% that is to say by 93%;

— there was a reduction of nearly 46% in the proportion of fuel oil in electricity production in Crete, an increase in the proportion of electricity produced from renewable sources of energy and a reduction in the use of the oldest gas turbines;

— as from 1999 chemical additives intended to improve the combustion of steam turbine units have been in use in order to reduce by around 50% the quantities of suspended particles emitted by those units;

— the burners of five or six of the steam turbine units at the power station were gradually replaced by new 'vapour diffusion' burners, of which two have been operational since 2001 and the other two since 2003, the last being in the process of being installed;

— new obligations relating to supervision of implementation and the monitoring of emissions have been introduced, such as the obligation to install three modern plants for measuring air quality in the area of the power station, a water injection system for reducing nitrogen oxide in the new gas turbine unit, together with systems for measuring and registering concentrations of the power station's atmospheric emissions;

— it was decided in February 2003 progressively to transfer the power station after 2006 to another part of Crete and to install a fourth electric power station on the island capable of using natural gas in such a way as to ensure that the electricity-generating installations might have the best possible environmental performance.

27 The Hellenic Government argues, fourth, that it is not clear from the figures available to it that the power station is the cause of major environmental pollution. Besides, the quality of the environment in the area where the power station is situated is excellent and the low level of pollution there clearly does not present any danger to public health.

28 That government points out, fifth, that DEI's financial situation as described by the Commission cannot lead to any conclusions being drawn regarding the company's financial capacity before 2002. DEI, which was a public company and was only turned into a private company in the course of 2000, did not have the necessary liquidity to effectuate large investments. Indeed the company was still operating at a loss in the years 1998 to 2000. The profitability and financial position of the company only improved from 2001. It cannot therefore be validly argued that DEI was in a position to cover the costs occasioned by the measures — referred to by the Commission — for adapting the station to the best available technology.

Findings of the Court

29 At the outset, it should be noted that Article 13 of Directive 84/360 requires the Member States to implement, in the light of technological developments and the

environmental situation, policies and strategies, including appropriate measures, for the gradual adaptation of plants such as the power station to the best available technology, taking into account various criteria, including in particular the nature and volume of polluting emissions from the plants and the costs incurred as a result of their adaptation to that technology.

30 Whilst it is true, as the Hellenic Government maintains, that it is clear from Article 13 of Directive 84/360 that the Member States enjoy a certain discretion as to the measures appropriate for combating atmospheric pollution, it is none the less true that that provision compels the Member States progressively to adapt the plant covered by the directive to the technology at issue in line with its development.

31 In that regard it is important to note that the volume of emissions from a plant covered by Directive 84/360 certainly has an influence on the kind of measures to be adopted. None the less, it does not follow from that finding that, even on the supposition that the polluting emissions do not attain a significant volume, a Member State is permitted not to adapt that plant to the best available technology. Specifically in light of that finding it must be examined whether the Hellenic Republic has in the present case complied with its obligation under Article 13 of the directive.

32 First, the Hellenic Government asserts that the quality of the environment in the region where the power station is situated is excellent and poses no danger to public health. However, that assertion contradicts the letter of 10 July 2002 sent in response to the Commission's reasoned opinion, in which that government acknowledged that there is a problem of environmental deterioration owing to the operation of that power station.

33 Secondly, Article 1 of the directive seeks to prevent or reduce atmospheric pollution from industrial plants within the Community. For the purposes of Article 2(1) of the directive atmospheric pollution is constituted by the introduction into the atmosphere by man, directly or indirectly, of substances or energy having a harmful effect such as to imperil human health and to damage biological resources and ecosystems.

34 Accordingly, inasmuch as it is undisputed that emissions of sulphur dioxide and nitrogen oxide have harmful effects on human health and on biological resources and ecosystems, the obligation on Member States to adopt the measures necessary to reduce the emissions of those two substances is not dependent, contrary to the assertion of the Hellenic Government, on the general environmental situation of the region in which the industrial plant in question is located.

35 In regard, secondly, to the failure to adopt limit values for emissions from plant such as the power station, Article 13 of Directive 84/360, as the Hellenic Government rightly pointed out, does not expressly oblige the Member States to adopt such values.

36 None the less, the adoption of limit values for the emissions from plants such as the power station would constitute an extremely useful measure in the context of the implementation of a policy or strategy for the purposes of Article 13 of Directive 84/360.

37 In regard, third, to the figures relating to the specific emissions of sulphur dioxide and nitrogen oxide invoked by the Hellenic Government, which are moreover challenged by the Commission, although they reveal a slight decrease in those emissions between 1992 and 2001 it is none the less the case that they do not allow any conclusion to be drawn as to whether the station has been adapted to the best available technology. In fact those figures are at most capable of demonstrating that the measures adopted by the Hellenic Government have brought about a reduction in those emissions.

38 However, the Commission does not criticise the Hellenic Government for not adopting measures of such a nature as to bring about a reduction in the atmospheric pollution generated by the power station but is alleging a failure by it to implement a policy and a strategy for adapting that power station to the best available technology.

39 In regard, fourth, to the different measures cited by the Hellenic Government to prove that it complied with its obligation under Article 13 of Directive 84/360, it should be stated, first of all, that the reduction in the maximum sulphur content of fuel oil and gas oil used by the station may in principle be regarded as a measure for adapting industrial plant such as the station to the best available technology since it is capable of bringing about an appreciable lowering in the level of atmospheric pollution originating from such plant. None the less, that finding presupposes that the sulphur content of the fuel used corresponds to the lowest content available on the market.

40 Yet, in the present case it cannot but be noted that, as the Commission stated in response to a question put by the Court and without that reply being contradicted by the Hellenic Government, the sulphur content of the fuel oil used by the power station, which is 2.6%, is appreciably greater than that of the fuel oil with the lowest sulphur content available on the market, which is 0.4% and far in excess of that of the fuel oil used by industrial plant in the Athens region, which amounts to 0.7%.

41 The argument that the use of fuels with the lowest sulphur content available on the market is not a requirement imposed by Article 13 of Directive 84/360 because it would involve the DEI in excessive costs cannot be upheld.

42 In fact, in the present case it is undisputed that the use of the fuel oil with a sulphur content of around 1% would have given rise to a one-off investment amounting to EUR 3 million and an increase in current expenditure relating to the acquisition of the fuel oil of around EUR 6 million per annum.

43 However, contrary to the Hellenic Government's assertion, those amounts do not constitute excessive costs in relation, on the one hand, to DEI's financial situation, as described by the parties to the dispute and, on the other, to the fact that that undertaking has around 6.7 million customers.

44 The argument that the use of a fuel oil or gas oil with a lower sulphur content would not have been warranted, regard being had to the quality of the environment in the region where the power station is situated, cannot be upheld since, as is plain from paragraph 34 of this judgment, the obligation to reduce the emissions of sulphur dioxide and nitrogen oxide is not subject to the existence of any specific environmental pollution.

45 In regard, next, to the statement that the proportion of fuel oil in energy production in Crete was reduced by nearly 46% between 1992 and 2002, it is sufficient to state that it is too general in nature and does not enable it to be determined whether a reduction of pollution on the same scale was recorded in regard to emissions from the power station.

46 In regard to the use of chemical additives intended to improve the combustion of steam turbine units, it should be noted that the Hellenic Government itself acknowledged that that measure has an effect only on the emission of suspended particles. However, the emission of those particles is not covered by this application.

47 In regard to the progressive replacement of the burners of certain steam turbine units it must be acknowledged that that measure is capable of being regarded as an adaptation of the power station to the best available technology. None the less, in the present case it cannot but be noted that that replacement occurred to a great extent after expiry of the period of two months laid down in the reasoned opinion.

48 Finally, as regards supervisory measures and monitoring of emissions, such measures are indeed capable of constituting an adaptation of a power station to the best available technology, provided however that they go hand in hand with other actions having a direct impact on the emissions of the power station concerned.

49 However, there are no such flanking measures in the present case. In fact, as the Hellenic Government stated in reply to a question raised by the Court at the hearing, monitoring and measuring of emissions which entail the drawing up of different reports addressed to the competent national authorities result, in the event that an irregularity is found, only in a temporary reduction, or suspension, of production of the power station and, thus, of its emissions. In such circumstances, those measures cannot be regarded as an adaptation of the power station to the best available technology.

50 The same is true of the plan progressively to transfer the power station to another region in Crete, since that measure amounts only to a gradual decommissioning of that power station.

51 In light of all the foregoing considerations, it must be concluded that the measures relied on by the Hellenic Government do not constitute the implementation of a policy or strategy for the adaptation of the power station to the best available technology for the purposes of Article 13 of Directive 84/360.

52 Consequently, by not determining the policies or strategies for progressively adapting in line with the best available technology the steam turbine units and the gas turbine units of the DEI power station situated in Linoperamata on the Island of Crete, the Hellenic Republic has failed to fulfil its obligations under Article 13 of Directive 84/360.

Costs

53 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been asked for by the successful party. Since the Commission asked for costs to be borne by the Hellenic Republic and the latter was unsuccessful in its pleas, it must be ordered to pay the costs.

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

1. **Declares that, by not defining the policies or strategies for progressively adapting in line with the best available technology the steam turbine units and the gas turbine units of the power station operated by the Dimosia Epicheirisi Ilektrismou (public electricity undertaking) situated in Linoperamata on the Island of Crete, the Hellenic Republic has failed to fulfil its obligations under Article 13 of Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants;**

2. **Orders the Hellenic Republic to pay the costs.**

[Signatures]