JUDGMENT OF THE COURT (Fifth Chamber)
11 July 2002 *

In Case C-139/00,

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

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

APPLICATION for a declaration that, by failing to take the measures necessary in order to ensure, as regards the three incineration furnaces installed at Mazo and Barlovento on the island of La Palma (Spain), the application of:

— Article 2 of Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants (OJ 1989 L 163, p. 32), inasmuch as those furnaces are operating without the required prior authorisation:

— Article 6 of that directive, inasmuch as, with regard to those furnaces, the competent authorities

— have not taken periodic measurements in respect of the parameters prescribed by that article;

— have not given prior approval for the sampling and measurement procedures and have not determined the location of the measurement points concerned;

— have not laid down any measurement programme;

— Article 7 of that directive, inasmuch as those furnaces are not equipped with auxiliary burners, which would make it possible to maintain the minimum combustion temperature of 850 °C, particularly during start-up and shut-down operations,

the Kingdom of Spain has failed to fulfil its obligations under that directive,

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, D.A.O. Edward and C.W.A. Timmermans (Rapporteur), Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 29 November 2001,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 11 April 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to take the measures necessary in order to ensure, as regards the three incineration furnaces installed at Mazo and Barlovento on the island of La Palma (Spain), the application of:

— Article 2 of Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants (OJ 1989 L 163, p. 32), inasmuch as those furnaces are operating without the required prior authorisation:

— Article 6 of that directive, inasmuch as, with regard to those furnaces, the competent authorities

—have not taken periodic measurements in respect of the parameters prescribed by that article;

— have not given prior approval for the sampling and measurement procedures and have not determined the location of the measurement points concerned;

— have not laid down any measurement programme;

— Article 7 of that directive, inasmuch as those furnaces are not equipped with auxiliary burners, which would make it possible to maintain the minimum combustion temperature of 850 °C, particularly during start-up and shut-down operations,

the Kingdom of Spain has failed to fulfil its obligations under that directive.

Community law

2 Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants (OJ 1984 L 188, p. 20) lays down measures and procedures for preventing and/or reducing air pollution from industrial plants within the Community.

3 Directive 89/369 specified the obligations resulting from Directive 84/360 as regards new municipal waste incineration plants by regulating their authorisation, equipment and operation.

4 Article 2 of Directive 89/369 states:

'Without prejudice to Article 4 of Directive 84/360/EEC, Member States shall take the necessary measures to ensure that the conditions laid down in Articles 3 to 10 of this Directive are attached to the prior authorisation required to operate all new municipal waste incineration plants under Article 3 of Directive 84/360/EEC and under Article 8 of Directive 75/442/EEC.'

5 Article 6 of Directive 89/369 provides:

'1. The following measurements shall be taken at new municipal waste-incineration plants:

(a) concentrations of certain substances in the combustion gases:

(i) concentrations of total dust, CO, oxygen and HCl shall be continuously measured, and recorded in the case of plants of a nominal capacity equal to, or greater than, 1 tonne/h;

(ii) the following shall be measured periodically:

— concentrations of the heavy metals referred to in Article 3(1), of HF, and of SO_2, in the case of plants of a nominal capacity equal to, or greater than, 1 tonne/h,

— concentrations of total dust, of HCl, of CO and of oxygen in the case of plants of a nominal capacity of less than 1 tonne/h,

— concentrations of organic compounds (expressed as total carbon) in general;

(b) operating parameters:

(i) the temperatures of the gases in the area where the conditions imposed by Article 4(1) are satisfied and the water vapour content of the combustion gases shall be continuously measured and recorded. Continuous measurement of the water vapour content shall not be necessary provided that the combustion gas is dried before the emissions are analysed;

(ii) the residence time of the combustion gases at the minimum temperature of 850 °C specified in Article 4(1) must be the subject of appropriate verifications at least once when the incineration plant is first brought into service and under the most unfavourable operating conditions envisaged.

2. The results of the measurements referred to in paragraph 1 shall be standardised at the following conditions:

— temperature 273 K, pressure 101.3 kPa, 11% oxygen or 9% CO_2, dry gas.

Where Article 3(2) is applied, however, they may be standardised at the following conditions:

— temperature 273 K, pressure 101.3 kPa, 17% oxygen, dry gas.

3. All the measurement results shall be recorded, processed and presented in an appropriate fashion so that the competent authorities can verify compliance with the conditions laid down, in accordance with procedures to be decided upon by those authorities.

4. The sampling and measurement procedures used to satisfy the obligations imposed by paragraph 1 and the location of the sampling or measurement points shall require the prior approval of the competent authorities.

5. For the periodic measurements, the competent authorities shall lay down appropriate measurement programmes to ensure that the results are representative of the normal level of emissions of the substances concerned.

The results obtained must be suitable for verifying that the limit values applicable have been observed.'

6 Under Article 7 of Directive 89/369:

'All new municipal waste incineration plants shall be equipped with auxiliary burners. These burners must be switched on automatically when the temperature of the combustion gases falls below 850 °C. They shall also be used during plant start-up and shut-down operations in order to ensure that the abovementioned minimum temperature is maintained at all times during these operations and as long as the waste is in the combustion chamber.'

The pre-litigation procedure

7 In 1993, the Commission received a complaint concerning the authorisation granted by the Cabildo Insular (Island Council) of La Palma for the installation of five incinerator furnaces at several locations on the island (that is, two at El Paso, two at Mazo and one at Barlovento), alleging that the granting of that authorisation and the operation of those furnaces were in breach of Community law.

8 Following that complaint, an exchange of letters and information took place between the Commission and the Spanish Government. The Commission sent the Kingdom of Spain a first letter of formal notice on 26 June 1995. Since that letter had not taken account of certain observations made by the Spanish Government and of subsequent correspondence, the Commission sent that Member State, on 23 September 1997, a supplementary letter of formal notice, requesting it to submit its observations on the complaints relating to the incinerator furnaces at Mazo and Barlovento.

9 In their replies of 24 November 1997 and 28 November 1998, the Spanish authorities set out the various types of action undertaken to improve waste management on the island of La Palma.

10 The Commission, taking the view that the Kingdom of Spain had failed to fulfil certain of its obligations under Directives 84/360 and 89/369, sent a reasoned opinion on 24 July 1998 in which it asked that Member State to take the measures necessary to comply with it within two months of its notification.

11 By letter of 6 August 1998, the Spanish authorities requested a one-month extension of the time-limit. That extension was granted by the Commission, so that the period for responding to the reasoned opinion expired on 24 October 1998. By letter of 20 November 1998, the Spanish Government sent a first response, to which it attached a note from the Cabildo Insular of La Palma providing information on the progress of the proposed integrated waste management plan for the island and on the various measures taken for waste collection and treatment. By letter of 3 February 1999, the Spanish Government sent additional information to the Commission.

12 By letter of 28 May 1999, the Commission requested the Spanish Government to provide it with a copy of the integrated waste management plan for the island of La Palma, to confirm the schedule for closing down the incinerator furnaces and to provide information on the measures adopted to comply with a decision taken in that respect by the Consejería de Industria y Comercio (Ministry of Industry and Trade) of the Government of the Canaries, including *inter alia* the results of the measurements and assessments required by that decision.

13 In response to that letter, the Spanish Government sent the Commission, on 21 June 1999, a copy of the integrated waste management plan for the island of La Palma, approved on 2 October 1998, as well as a preliminary report by the University of La Laguna, of 10 June 1999, proposing a plan of work for the implementation of measures to control the emissions and immissions from the incinerator furnaces.

14 Since it took the view that, according to the information provided by the Spanish Government, the infringements alleged in the reasoned opinion had not been remedied, the Commission decided to bring the present action.

Admissibility

15 The Spanish Government states that, throughout the pre-litigation procedure, the Commission always admitted the existence of authorisation for the installation of incineration furnaces at Mazo and Barlovento, maintaining that 'the authorisation granted for the installation of the furnaces did not lay down the operating conditions required by the Directive'. None the less, in the context of the present action, the Commission is claiming that the installation of those furnaces had not been authorised in accordance with Article 2 of Directive 89/369. The Spanish Government therefore submits that the Commission has

altered its complaint as regards Article 2 of Directive 89/369, in breach of the principle laid down in the case-law of the Court according to which the Commission's reasoned opinion and the application must be based on the same complaints. The present action is therefore inadmissible.

16 The Commission maintains that it is settled case-law that the requirement that the Commission's reasoned opinion and the application must be based on the same complaints cannot be stretched so far as to mean that in every case the statement of the subject-matter of the proceedings in the reasoned opinion must be exactly the same as the form of order sought in the application. The Court has accepted that the form of order sought may be reworded at the time of the application or of the reply in order to take account of arguments presented by the Member State in its response to the reasoned opinion or in its defence. The Commission claims that that case-law applies in this case since it took into account in its application the arguments put forward by the Spanish Government in its response of 3 February 1999 to the reasoned opinion. According to the Commission, since the Spanish Government itself admitted in that response that the three incineration furnaces at Mazo and Barlovento had begun to operate without any prior authorisation, it can hardly accuse the Commission of violating its right to a fair hearing.

17 First of all, in the present case, it must be noted that the legality of the reasoned opinion and of the procedure which preceded it is not in dispute. None the less, the Spanish Government maintains that the complaint relating to Article 2 of Directive 89/369 as set out in the application differs from that contained in the reasoned opinion.

18 It is settled case-law that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for by that provision and that, consequently, the Commission's reasoned opinion and the application must be based on the same complaints (see Case C-11/95 *Commission* v *Belgium* [1996] ECR I-4115, paragraph 73, and Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, paragraph 24).

19 However, that requirement cannot be stretched so far as to mean that in every case the statement of the complaints set out in the letter of formal notice, the wording of the reasoned opinion and the subject-matter of the proceedings must be exactly the same, if the subject-matter of the proceedings has not been extended or altered but has simply been limited (see *Commission* v *Italy*, paragraph 25, and Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 56).

20 In the present case, the rewording in the application of the complaint concerning Article 2 of Directive 89/369 did not extend, alter or even limit the subject-matter of the proceedings as defined in the reasoned opinion.

21 The infringement alleged by the Commission against the Kingdom of Spain concerns, in both the letter of formal notice and the reasoned opinion as well as in the application, the failure of the three incineration furnaces at Mazo and Barlovento to comply with Article 2 of Directive 89/369. In rewording the complaint relating to Article 2 of Directive 89/369 in the application, the Commission merely intended to take account of additional evidence produced after notification of the reasoned opinion.

22 That rewording has had no effect on the Spanish Government's rights of defence. In the context of the present procedure, it has been able to air fully its arguments concerning the granting of prior authorisation to operate in compliance with Article 2 of Directive 89/369 for the incineration plants at Mazo and Barlovento. It will be for the Court to assess their merits in its examination of the subject-matter of the proceedings.

Substance

Article 2 of Directive 89/369

23 The Commission maintains that the incineration plants at Mazo and Barlovento were not covered by an authorisation to operate complying with Article 2 of Directive 89/369, as the Spanish Government admitted in its letter of 3 February 1999 which accompanied the report of 30 November 1998 of the Consejería de Industria y Comercio of the Government of the Canaries (hereinafter 'the report'). The Spanish Government has thus infringed its obligations under that provision.

24 First, the Spanish Government states that Article 2 of Directive 89/369 requires the Member States to take the measures necessary to ensure that the conditions laid down in Articles 3 to 10 of that directive are attached to the prior authorisation required to operate all plants. That obligation was met by the adoption of Real Decreto 1088/1992 de normas sobre limitación de emisiones a la atmósfera de determinados agentes contaminentes procedentes de instalaciones de incineración de residuos municipales (Royal Decree on limiting emissions into the atmosphere of certain polluting agents from municipal waste incineration plants) of 11 September 1992 (BOE No 235 of 30 September 1992, p. 33 356, hereinafter 'Royal Decree 1088/1992').

25 Therefore, since the obligation imposed by Article 2 of Directive 89/369 is of a legislative nature and that provision has been infringed only if no rule implementing it in the national legal order has been adopted, the Commission

cannot charge the Kingdom of Spain with such an infringement by claiming that the furnaces in question supposedly lack the required authorisation to operate.

26 In this case, the Commission does not allege that the Spanish Government did not implement or did not correctly implement in national law the provisions of Directive 89/369. Rather, the Commission's complaint relates to the fact that, in specific cases — that is, for the incineration plants at Mazo and Barlovento — certain obligations under Directive 89/369 have not been complied with.

27 In accordance with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC), a directive is to be binding, as to the result to be achieved, upon each Member State to which it is addressed. As is clear from, *inter alia*, Case C-60/01 *Commission* v *France* [2002] ECR I-5679, paragraph 33), Directive 89/369 imposes on the Member States obligations, formulated in clear and unequivocal terms, in order to achieve a certain result, that their incineration plants meet detailed and precise requirements within the stated time-limits. Accordingly, a Member State will comply with its obligations under Directive 89/369 and thus achieve the result prescribed therein only if, in addition to the correct implementation of the provisions of that directive into domestic law, the incineration plants located in its territory have in actual fact been commissioned and operate in accordance with the requirements of the provisions of Directive 89/369. It follows that, contrary to the Spanish Government's assertion, the correct transposition in domestic law of the provisions of Directive 89/369 is not sufficient to comply with the obligations imposed by that directive.

28 In those circumstances, the argument of the Spanish Government based on the correct transposition in domestic law of Directive 89/369 is irrelevant to the complaints put forward by the Commission in the context of the present infringement proceedings and must, therefore, be rejected.

29 Second, the Spanish Government states that it never admitted in its responses to the reasoned opinion that the incineration plants at Mazo and Barlovento had been commissioned without having been granted the required prior authorisation. It maintains that, to the contrary, those plants had received two authorisations. On the one hand, they were the subject of an 'authorisation of land use', issued on 24 April 1990 (hereinafter 'the authorisations of 24 April 1990'). On the other hand, they were subject to the mandatory activity rating and an assessment of remedial measures, carried out by the Cabildo Insular of La Palma on 9 January 1992 (hereinafter 'the authorisations of 9 January 1992'.)

30 The Court holds that the Commission's argument that the Spanish Government admitted in its response of 3 February 1999 to the reasoned opinion that no authorisation in accordance with Article 2 of Directive 89/369 had been granted to the plants in question, is based upon an incorrect reading of the report annexed to the response.

31 In paragraphs 2 and 3 of the report, the Spanish authorities merely mentioned that, 'in compliance with Articles 3 and 4 of Law 21/1992 on industry', an authorisation in that respect from the Consejería de Industria y Comercio of the Government of the Canaries was not necessary, but did not, however, assert that no other prior authorisation to operate was required for the plants in question. In addition, in paragraph 4 of that report, they state that 'with respect to industrial pollution, the Consejería de Industria y Comercio had to take steps during the commissioning authorisation phase', without admitting, however, that there was no commissioning authorisation phase for the incineration plants at Mazo and Barlovento.

32 Therefore, since the Spanish authorities did not admit in the report that no prior authorisation to operate meeting the requirements of Article 2 of Directive 89/369 had been issued for the incineration plants at Mazo and Barlovento, the

Commission cannot refer to that report as sufficient proof of the alleged infringement of that provision.

33 It is therefore necessary to consider whether infringement of Article 2 of Directive 89/369 can be demonstrated on the basis of other information, in the light of the fact that the Spanish Government maintains that it complied with that provision by granting the authorisations of 24 April 1990 and those of 9 January 1992.

34 As concerns the authorisations of 24 April 1990, the Commission states that they relate to regional planning controls. Such authorisations were necessary in this case because the land allocated for the construction of the incinerator furnaces at Mazo and Barlovento was classified as rural and, without the authorisations, it was not therefore possible to build the plants there. Therefore, the Commission maintains that the authorisations of 24 April 1990 cannot be regarded as prior authorisations to operate which meet the requirements of Article 2 of Directive 89/369.

35 It is sufficient to note that the Spanish Government explained at the hearing that, in this case, the prior authorisations to operate which it regards as complying with Article 2 of Directive 89/369 were the authorisations of 9 January 1992 granted by the Cabildo Insular of La Palma for the plants in question on the basis of the Reglamento de Actividades Molestas, Insalubres, Nocivas y Peligrosas (Regulation on activities that constitute a nuisance or are health-endangering, harmful or dangerous), approved by Decree No 2414 of 30 November 1961 (BOE No 292 of 7 December 1961, hereinafter 'the Regulation of 1961'). The Spanish Government itself thereby conceded that the authorisations of 24 April 1990 were not authorisations in accordance with the terms of Article 2 of Directive 89/369.

36 In addition, it follows that the Spanish Government's argument that the plants in question were not new plants, so that Directive 89/369 does not apply to them, must also be dismissed. A new plant within the meaning of Directive 89/369 is, under Articles 1(5) and 12(1), an incineration plant whose authorisation to operate was issued after 1 December 1990. Since the Spanish Government has stated that it was the authorisations of 9 January 1992 which must be considered prior authorisations to operate in accordance with Article 2 of Directive 89/369, the plants in question are therefore new within the meaning of Directive 89/369, and it applies to them.

37 None the less, in order to establish an infringement of Article 2 of Directive 89/369, it is still necessary to establish that the authorisations of 9 January 1992 cannot be considered to be prior authorisations to operate which satisfy the conditions which follow from that provision.

38 The Commission takes the view that the authorisations of 9 January 1992 do not fulfil those conditions. The Regulation of 1961, in particular, makes clear that the purpose of those authorisations is to control, in a general fashion, the impact of a given activity on environmental health and safety and working conditions for employees. The authorisations of 9 January 1992 lay down only three remedial measures, that is, to carry out periodic measurements of fumes, gas, and ash emissions and of opacity levels; to take action to exterminate rats; and to monitor compliance with the national provisions relating to safety and health in the workplace.

39 In addition, the Commission maintains that an authorisation in accordance with Article 2 of Directive 89/369 must be granted to all operators of a plant which fulfils the conditions laid down in Articles 3 to 10 of that directive, whereas authorisations such as those of 9 January 1992 are discretionary in character. Moreover, the Commission recalls that Directive 89/369 was implemented in

Spanish law by Royal Decree 1088/1992. That Decree makes no reference to authorisations based on the Regulation of 1961, such as those of 9 January 1992. To the contrary, it refers to other types of authorisation which already existed in Spanish law at the time when the incineration plants at Mazo and Barlovento were commissioned in January 1992, but which were never granted to those plants.

40 The Spanish Government maintains that the Commission, in stating that the authorisations of 9 January 1992 are not comparable to the authorisations required by the text transposing Directive 89/369 in Spanish law, has lost sight of the fact that that directive had not yet been implemented in national law when those authorisations were granted. In addition, it states that those authorisations required environmental remedial measures and that their objective can therefore be treated as 'effective protection of the environment' referred to in the 11th recital in the preamble to Directive 89/369.

41 First of all, it should be borne in mind that under Article 2 of Directive 89/369, the granting of a prior authorisation to operate a new municipal waste-incineration plant, which is already required on the basis of other directives, must be conditional on compliance with the conditions laid down in Articles 3 to 10 of that directive. Therefore, assuming that authorisations granted on the basis of the Regulation of 1961 have an objective comparable to that of the authorisations referred to in Article 2 of that Directive, they must also meet the requirements which follow from that provision.

42 Examination of the contents of the authorisations of 9 January 1992 shows that the incineration plants at Mazo and Barlovento were made subject to remedial measures such as periodic measurements, by the competent authorities, of fumes, gas and ash emissions in order to determine whether the plants are fulfilling the relevant conditions laid down in the national law currently in force. Those authorisations also show that the competent authorities must visit the plants in question prior to their commissioning, in order to ascertain whether the remedial measures have been carried out.

43 Therefore, on the basis of the contents of the authorisations of 9 January 1992, it cannot be excluded that, taking account of the remedial measures set out therein, at least some of the conditions laid down in Articles 3 to 10 of Directive 89/369 have in fact been met in the present case.

44 In order to establish that that was the case, it would have been necessary to examine, on the one hand, the contents of the national legislation referred to in the authorisations of 9 January 1992 and, on the other, whether the requirements set out in that legislation complied with the conditions laid down in Articles 3 to 10 of Directive 89/369.

45 According to settled case-law, in proceedings under Article 226 EC for failure to fulfil obligations it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption (Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6; Case C-62/89 *Commission* v *France* [1990] ECR I-925, paragraph 37; Case C-300/95 *Commission* v *United Kingdom* [1997] ECR I-2649, paragraph 31; and Case C-408/97 *Commission* v *Netherlands* [2000] ECR I-6417, paragraph 15).

46 In this case, the Commission, by asserting merely that the authorisations of 9 January 1992 are of a different kind from and have an objective other than those referred to in Article 2 of Directive 89/369, has not provided the Court with the information which would enable it to carry out the examination described in paragraph 44 of the present judgment. The Court is therefore not in a position to establish whether the authorisations of 9 January 1992, which could have an objective comparable to that of the authorisations required under Article 2 of Directive 89/369, comply with one, several or even all the conditions laid down in Articles 3 to 10 of that directive.

47 Consequently, it must be held that the Commission has not established to the requisite legal standard that the Spanish Government has failed to fulfil its obligations under Article 2 of Directive 89/369.

Articles 6 and 7 of Directive 89/369

48 The Commission claims that the Spanish Government admitted, in its response of 3 February 1999 to the reasoned opinion, that, in breach of Article 6 of Directive 89/369, it had not taken periodic measurements of combustion gases from the incineration plants at Mazo and Barlovento, approved sampling and measurement procedures or laid down measurement programmes for those plants. In addition, the Spanish Government also admitted in that response that the incineration plants at Mazo and Barlovento had not been equipped with auxiliary burners in accordance with Article 7 of that directive.

49 In these proceedings, before the Court, the Spanish Government did not respond to those charges by the Commission. It must be concluded that the Spanish Government does not dispute them. Moreover, no documents in the case indicate that the commissioning and operation of the incineration plants of Mazo and Barlovento complied with the conditions laid down in Articles 6 and 7 of Directive 89/369.

50 Furthermore, as regards the argument raised by the Spanish Government to justify the infringement, based on the absence of negative effects on the environment from the operation of the furnaces in question, it must be stated that, even if the impact of those plants on the environment had reached an unacceptable level for the environment, that result would not relieve the Spanish Government from securing compliance with the conditions laid down in Articles 6 and 7 of Directive 89/369. As noted in paragraph 27 of this judgment, a Member State has complied with its obligations under Directive 89/369 and thus achieved the result laid down by the Directive only if the incineration plants

located in its territory have been commissioned and operate in accordance with the requirements of the provisions of that directive.

51 As to the argument of the Spanish Government based on the dismantling of the furnaces in question and their closure in September 2000, it is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing at the end of the period laid down in the reasoned opinion and that subsequent changes cannot be taken into account by the Court (Case C-214/96 *Commission* v *Spain* [1998] ECR I-7661, paragraph 25, and Case C-384/97 *Commission* v *Greece* [2000] ECR I-3823, paragraph 35). In the light of the fact that the dismantling of the incineration plants at Mazo and Barlovento and their closure occurred after the period laid down in the reasoned opinion expired, that is, after 24 October 1998, that argument must be dismissed.

52 For all the reasons set out above, it must be held that, by failing to adopt the measures necessary in order to ensure, as regards the three incineration furnaces installed at Mazo and Barlovento on the island of La Palma, the application of:

— Article 6 of Directive 89/369, inasmuch as, with regard to those furnaces, the competent authorities

— have not taken periodic measurements in respect of the parameters prescribed by that article;

— have not given prior approval for the sampling and measurement procedures and have not determined the location of the measurement points concerned;

— have not laid down any measurement programme;

— Article 7 of that directive, inasmuch as those furnaces are not equipped with auxiliary burners, which would make it possible to maintain the minimum combustion temperature of 850 °C, particularly during start-up and shut-down operations,

the Kingdom of Spain has failed to fulfil its obligations under that directive. The remainder of the action is dismissed.

Costs

53 Under Article 69(3) of the Rules of Procedure, the Court may, *inter alia*, order that the costs be shared where each party succeeds on some and fails on other heads. Since the Commission has failed on one head, it must be ordered to pay one third of the costs and the Kingdom of Spain two thirds of the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by failing to adopt the measures necessary in order to ensure, as regards the three incineration furnaces installed at Mazo and Barlovento on the island of La Palma, the application of:

— Article 6 of Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants, inasmuch as, with regard to those furnaces, the competent authorities

— have not taken periodic measurements in respect of the parameters prescribed by that article;

— have not given prior approval for the sampling and measurement procedures and have not determined the location of the measurement points concerned;

— have not laid down any measurement programme;

— Article 7 of that directive, inasmuch as those furnaces are not equipped with auxiliary burners, which would make it possible to maintain the minimum combustion temperature of 850 °C, particularly during start-up and shut-down operations,

the Kingdom of Spain has failed to fulfil its obligations under that directive;

2. Dismisses the remainder of the action;

3. Orders the Commission of the European Communities to pay one third of the costs and the Kingdom of Spain two thirds of the costs.

Jann Edward Timmermans

Delivered in open court in Luxembourg on 11 July 2002.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber