JUDGMENT OF THE COURT
11 August 1995 *

In Case C-431/92,

Commission of the European Communities, represented initially by Ingolf Pernice, of the Legal Service, acting as Agent, and then by Rolf Wägenbaur, Principal Legal Adviser, acting as Agent, assisted by Alexander Böhlke, of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, Villemomblerstraße 76, D-5300 Bonn 1, acting as Agent, assisted by Dieter Sellner, Rechtsanwalt, Oxfordstraße 24, D-5300 Bonn 1,

defendant,

supported by

United Kingdom of Great Britain and Norther Ireland, represented by S. Lucinda Hudson, of the Treasury Solicitor's Department, with an address for service in Luxembourg at the embassy of the United Kingdom, 14 Boulevard Roosevelt,

* Language of the case: German.

intervener,

APPLICATION for a declaration that, by granting development consent by decision of 31 August 1989 for the construction of a new block at the Großkrotzenburg thermal power station without a preliminary environmental impact assessment, the Federal Republic of Germany has failed to comply with its obligations under Articles 5 and 189 of the EEC Treaty read in conjunction with Council Directive 85/377/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), and in particular Articles 2, 3 and 8 of that directive,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, F. A. Schockweiler and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, C. N. Kakouris (Rapporteur), J. C. Moitinho de Almeida, J. L. Murray, D. A. O. Edward and J.-P. Puissochet, Judges,

Advocate General: M. B. Elmer,
Registrar: R. Grass,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 30 November 1994 at which the Commission was represented by Rolf Wägenbaur, assisted by Alexander Böhlke, the Federal Republic of Germany by Dieter Sellner and the United Kingdom by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Derrick Wyatt, Barrister,

after hearing the Opinion of the Advocate General at the sitting on 21 February 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 23 December 1992, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by granting development consent by decision of 31 August 1989 for the construction of a new block at the Großkrotzenburg thermal power station without a preliminary environmental impact assessment, the Federal Republic of Germany has failed to comply with its obligations under Articles 5 and 189 of the EEC Treaty read in conjunction with Council Directive 85/377/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), and in particular Articles 2, 3 and 8 of the directive.

2 The directive was adopted on the basis of Articles 100 and 235 of the Treaty. According to the first recital in the preamble, 'the ... action programmes of the European Communities on the environment ... affirm the need to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes ...' The eleventh recital states further that 'the effects of a project on the environment must be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life'.

3 Article 1 of the directive provides:

'1. This directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

2. For the purposes of this directive:

"project" means:

— the execution of construction works or of other installations or schemes,

...

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

3. The competent authority or authorities shall be that or those which the Member States designate as responsible for performing the duties arising from this directive.

...'

4 Article 2 provides:

'1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment

by virtue *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this directive.

...'

5 Article 3 provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— the interaction between the factors mentioned in the first and second indents,

— material assets and the cultural heritage.'

6 Article 4 provides:

'1. ... projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

...'

7 Paragraph 2 of Annex I refers in particular to 'Thermal power stations ... with a heat output of 300 megawatts or more'. Paragraph 12 of Annex II refers in particular to 'Modifications to development projects included in Annex I'.

8 Article 5 concerns the measures which the Member States must adopt to ensure that the developer supplies certain information specified in Annex III to the directive. Article 6 refers to the measures which the Member States must take to ensure that the national authorities likely to be concerned by the project in question are consulted and that the public concerned is informed and has the opportunity to express an opinion. Article 8 provides that 'Information gathered ... must be taken into consideration in the development consent procedure.'

9 Pursuant to Article 12(1) of the directive, the Member States were required to take the measures necessary to comply with the directive within three years of its notification. Since the directive was notified on 3 July 1985, that period expired on 3 July 1988.

10 According to the documents before the Court, in Germany the directive was belatedly transposed into national law by the Law of 12 February 1990 which came into force on 1 August 1990 (BGBl. I, p. 205).

11 Following a complaint that the Regierungspräsidium (District Office) Darmstadt as competent authority had granted consent on 31 August 1989 for the construction of a new block with a heat output of 500 megawatts at the Großkrotzenburg thermal power station without carrying out the preliminary environmental impact assessment required by the directive, the Commission on 15 May 1990 sent Germany a letter before action under Article 169 of the Treaty. In that letter it observed that the consent concerned a project for the construction of a thermal power station within the meaning of paragraph 2 of Annex I to the directive and that an assessment of its effects on the environment was therefore mandatory by virtue of Article 4(1) of the directive.

12 The Commission's reservations were not dispelled by the information given in Germany's letters in response of 16 and 17 August 1990. It therefore delivered a reasoned opinion on 25 September 1991 to which Germany replied by letter of 27 January 1992. Not content with Germany's reply, the Commission accordingly brought the present action.

Admissibility

13 Germany raises a preliminary plea that the action is inadmissible on the ground that the form of order sought in the application is too imprecise since what is sought is a declaration that the directive and 'in particular' Articles 2, 3 and 8 thereof have been infringed. Germany considers that only the infringement of the provisions of the directive expressly referred to, and not a general complaint that the directive has been breached, may be taken into account.

14 That plea cannot be accepted.

15 The express reference to Articles 2, 3 and 8 of the directive in the form of order sought in the application enabled Germany to understand unequivocally that an infringement of those specific provisions was alleged. In its context, the adverbial phrase 'in particular' was used in the sense of 'specifically' in order to designate precisely those articles of the directive which had been infringed. It could not therefore have led Germany to believe that the application also concerned infringements of other unspecified provisions of the directive and thus have given rise to uncertainty as to the scope of the proceedings.

16 Secondly, Germany submitted at the hearing before the Court that the infringement of Article 2 of the directive is not referred to in the conclusions arrived at in the reasoned opinion and was raised for the first time in the application. Since the subject-matter of the action is determined, according to settled case-law, by the pre-litigation procedure, Germany considers that the complaint concerning the infringement of that provision is inadmissible.

17 That plea must be rejected.

18 Although Article 2 of the directive is not formally referred to in the conclusions arrived at in the reasoned opinion, it is none the less mentioned in the body of the opinion among the provisions invoked by the Commission.

19 Thirdly, Germany submits that the action is inadmissible on the ground that proceedings can be initiated under Article 169 of the Treaty only in respect of failure to implement or incorrect implementation of a directive and not simply, as in this case, in respect of failure in a specific case to apply a directive which has not yet been implemented. The object of proceedings for a declaration of failure by a Member State to fulfil its obligations is to encourage the Member State concerned to put an end to existing infringements of the Treaty. Since Germany has implemented the directive in the meantime, it considers that the Commission no longer has any legal interest in bringing proceedings, particularly since the procedure which the Commission initiated simultaneously for a declaration that Germany has incorrectly implemented the directive is not yet before the Court.

20 That plea of inadmissibility must also be rejected.

21 In exercising its powers under Articles 155 and 169 of the Treaty, the Commission does not have to show that there is a specific interest in bringing an action. Article 169 is not intended to protect the Commission's own rights. The Commission's function, in the general interest of the Community, is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end (Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 15, and Case C-422/92 *Commission* v *Germany* [1995] ECR I-1097, paragraph 16).

22 Given its role as guardian of the Treaty, the Commission alone is therefore competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct

or omission attributable to the Member State concerned on the basis of which those proceedings should be brought. It may therefore ask the Court to find that, in not having achieved, in a specific case, the result intended by the directive, a Member State has failed to fulfil its obligations.

23 In this case, Germany's submissions as to the inadmissibility of the action essentially come down to the fact that at the material time it had not yet implemented the directive. A Member State may not, however, plead the fact that it has not taken the necessary measures to implement a directive in order to prevent the Court from dealing with an application for a declaration that it has failed to fulfil a specific obligation flowing from that directive.

24 Finally, Germany submits that the case-law of the Court of Justice recognizes the direct effect of the provisions of a directive only where they confer specific rights on individuals. Articles 2, 3 and 8 of the directive, however, do not confer such rights. Since the Commission itself does not argue that the contested decision granting development consent failed to take account of the legal position of individuals protected by the directive, the latter's provisions cannot have direct effect irrespective of whether they are unconditional and sufficiently precise. The German authorities were not therefore required to apply them directly before implementing the directive. In their view, the action is consequently inadmissible.

25 That argument cannot be accepted either.

26 In its application, the Commission complains that Germany has not observed, in a specific case, the obligation flowing directly from the directive to assess the environmental impact of the project concerned. The question which arises is thus whether the directive is to be construed as imposing that obligation. That question is quite separate from the question whether individuals may rely as against the

State on provisions of an unimplemented directive which are unconditional and sufficiently clear and precise, a right which has been recognized by the Court of Justice.

27 Since none of the pleas of inadmissibility has been accepted, the action must be held to be admissible.

Substance

Application of the directive in time

28 In Case C-396/92 *Bund Naturschutz in Bayern and Others* v *Freistaat Bayern* [1994] ECR I-3717, paragraphs 19 and 20, the Court of Justice ruled that, regardless of whether the directive permits a Member State to waive the obligations concerning the environmental impact assessment in respect of consent procedures already initiated before the deadline for implementation, namely 3 July 1988, the directive in any case precludes such a waiver for procedures initiated after that date.

29 In this case, the documents before the Court show that the application for consent for the project at issue was lodged with the Regierungspräsidium Darmstadt by PreußenElektra AG, the developer, on 26 July 1988, and thus after 3 July 1988. Consequently, the obligation imposed by the directive to carry out an environmental impact assessment could not in principle be waived in respect of the consent procedure for the project at issue.

30 The German Government argues, however, that the formal application for consent of 26 July 1988, accompanied by the complete file on the project, had been preceded by a preliminary stage which was a significant part of the consent procedure. During that preliminary stage, which was initiated on 18 May 1987, the competent authority was to advise the developer on the content and lodging of the application for consent. A series of meetings took place at which specialist departments were also represented. In addition the project is said to have been notified on 7 March 1988 to the competent authority in accordance with the Landesplanungsgesetz (Law of the *Land* of Hesse on planning).

31 That argument cannot be accepted.

32 Informal contacts and meetings between the competent authority and the developer, even relating to the content and proposal to lodge an application for consent for a project, cannot be treated for the purposes of applying the directive as a definite indication of the date on which the procedure was initiated. The date when the application for consent was formally lodged thus constitutes the sole criterion which may be used. Such a criterion accords with the principle of legal certainty and is designed to safeguard the effectiveness of the directive. The Court moreover followed this approach in *Bund Naturschutz*, cited above (paragraph 16).

33 The consent procedure for the project at issue must accordingly be regarded as having been initiated after the deadline of 3 July 1988, with the result that the project was required to undergo an assessment of its effects on the environment in accordance with the directive.

Categorization of the project at issue

34 Germany, supported by the United Kingdom, submits that the new block at the Großkrotzenburg thermal power station is not a project within the meaning of Article 4(1) of the directive but a modification to a project. It cannot be regarded as in any way self-contained, but at a functional level is part of the power station as a whole. The consent at issue accordingly concerns a modification to a pre-existing power station. What is at issue is a modification to a project within the meaning of paragraph 12 of Annex II to the directive, a modification which in accordance with Article 4(2) of the directive the Member States may, rather than must, make subject to an environmental impact assessment.

35 By virtue of paragraph 2 of Annex I to the directive, projects for thermal power stations with a heat output of 300 megawatts or more must undergo a systematic assessment. For the purposes of that provision, such projects must be assessed irrespective of whether they are separate constructions, are added to a pre-existing construction or even have close functional links with a pre-existing construction. Links with an existing construction do not prevent the project from being a 'thermal power station with a heat output of 300 megawatts or more' so as to bring it within the category headed 'Modifications to development projects included in Annex I', mentioned in paragraph 12 of Annex II.

36 In this case, it is common ground that the construction at issue is a block of a thermal power station with a heat output of 500 megawatts. It is therefore a project within the meaning of Article 4(1) of, and Annex I to, the directive. That project was required to undergo an assessment of its effects on the environment in accordance with the directive.

Obligation to carry out an assessment in accordance with the directive

37 Germany submits that Articles 2, 3 and 8 of the directive, which it is alleged to have infringed, are not so clear and precise as unequivocally to lay down a specific obligation and thus for their application by the national authorities to be mandatory.

38 That argument cannot be accepted.

39 Article 2 of the directive lays down an unequivocal obligation, incumbent on the competent authority in each Member State for the approval of projects, to make certain projects subject to an assessment of their effects on the environment. Article 3 prescribes the content of the assessment, lists the factors which must be taken into account in it, and leaves the competent authority a certain discretion as to the appropriate way of carrying out the assessment in the light of each individual case. Article 8 furthermore requires the competent national authorities to take into consideration in the development consent procedure the information gathered in the course of the assessment.

40 Regardless of their details, those provisions therefore unequivocally impose on the national authorities responsible for granting consent an obligation to carry out an assessment of the effects of certain projects on the environment.

The question whether there has been a failure to fulfil the obligation to carry out an assessment

41 Germany submits, finally, that an assessment of the effects of the project at issue on the environment was carried out by the competent authority on the basis of the national legislation then in force, namely the Bundesimmissionsschutzgesetz of 15 March 1974 (German Federal Law on the protection of the environment). Although that assessment was not formally based on the directive, it is said by Germany to have complied with all its requirements.

42 The Commission does not deny that there was an assessment of the effects on the environment of the project at issue. However, that assessment does not satisfy the present requirements of the directive, which are stricter than the national legislation then in force. In particular, it did not comply with the obligation to take account of the interaction between the factors referred to in the first and second indents of Article 3 of the directive (human beings, fauna, flora, soil, water, air, climate and the landscape), an obligation which requires an overall assessment of those factors.

43 According to the documents before the Court, an environmental impact assessment was carried out in the course of the procedure for the grant of consent for the project by the Regierungspräsidium Darmstadt. The developer provided in particular information on the environmental impact of the project which was considered by the Commission itself as sufficient from the point of view of the requirements of Article 5 of, and Annex III to, the directive. That information also concerned the interrelationship between the factors referred to in Article 3 of the directive. Finally, it is common ground that the infor-

mation was made available to the public concerned who had the opportunity to express an opinion. In those circumstances, the objective of making the public aware of the environmental implications of a project on the basis of specific information provided by the developer was attained.

44 It is also apparent from the disputed decision of the Regierungspräsidium Darmstadt of 31 August 1989 and its report of 11 November 1991 drawn up in response to the reasoned opinion that the authority in question integrated the information gathered and the reactions of the sectors concerned in the consent procedure, and took that into account in its decision approving the project.

45 In the light of those considerations, the Commission should have specified on what specific points the requirements of the directive were not complied with during the procedure for consent for the project at issue and should have provided appropriate evidence of non-compliance. Its application does not include such details backed by specific evidence. It must therefore be dismissed as unfounded.

Costs

46 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 Germany has not asked for the Commission to be ordered to pay the costs, the two parties must be ordered to bear their own costs. The United Kingdom, as intervener, is also to bear its own costs in accordance with Article 69(4) of the Rules of Procedure.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the parties, including the intervener, to bear their own costs.

Rodríguez Iglesias Schockweiler Kapteyn Mancini

Kakouris Moitinho de Almeida

Murray Edward Puissochet

Delivered in open court in Luxembourg on 11 August 1995.

R. Grass G. C. Rodríguez Iglesias

Registrar President