OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 10 December 2009 [1]

I — Introduction

1. The aim of Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances [2] ('the Seveso II Directive') is protection against risk of accident in the industrial use of certain substances. Accordingly, it requires in particular that 'internal and external' emergency plans be drawn up for the establishments to which it applies.

2. The Commission claims that the Spanish authorities have not drawn up external emergency plans for all establishments covered by the Directive. Spain contends that there is no time-limit within which those plans are to be drawn up. Moreover, internal emergency plans have not yet been drawn up and information from the establishments has not yet been received.

1 — Original language: German.

2 — OJ 1997 L 10, p. 13, as amended by Directive 2003/105/EC of the European Parliament and of the Council of 16 December 2003 amending Council Directive 96/82 (OJ 2003 L 345, p. 97).

II — Legal context

3. The relevant rules on emergency plans are set out in Article 11 of the Seveso II Directive:

'1. Member States shall ensure that, for all establishments to which Article 9 applies:

(a) the operator draws up an internal emergency plan for the measures to be taken inside the establishment

— for new establishments, prior to commencing operation;

— for existing establishments not previously covered by Directive 82/501/

EEC, three years from the date laid down in Article 24(1);

— for other establishments, two years from the date laid down in Article 24(1);

— for establishments which subsequently fall within the scope of this Directive, without delay, but at all events within one year after the date on which this Directive applies to the establishment concerned, as laid down in the first subparagraph of Article 2(1);

(b) the operator supplies to the competent authorities, to enable the latter to draw up external emergency plans, the necessary information within the following periods of time:

— for new establishments, prior to the start of operation;

— for existing establishments not previously covered by Directive 82/501/EEC, three years from the date laid down in Article 24(1);

— for other establishments, two years from the date laid down in Article 24(1);

— for establishments which subsequently fall within the scope of this Directive, without delay, but at all events within one year after the date on which this Directive applies to the establishment concerned, as laid down in the first subparagraph of Article 2(1);

(c) the authorities designated for that purpose by the Member State draw up an external emergency plan for the measures to be taken outside the establishment.

2. The emergency plans must be established with the objectives of:

— containing and controlling incidents so as to minimize the effects, and to limit damage to man, the environment and property;

— implementing the measures necessary to protect man and the environment from the effects of major accidents;

— communicating the necessary information to the public and to the services or authorities concerned in the area;

— providing for the restoration and clean-up of the environment following a major accident.

Emergency plans shall contain the information set out in Annex IV.

3. Without prejudice to the obligations of the competent authorities, Member States shall ensure that the internal emergency plans provided for in this Directive are drawn up in consultation with the personnel working inside the establishment, including long-term relevant subcontracted personnel, and that the public is consulted on external emergency plans when they are established or updated.

4. Member States shall ensure that internal and external emergency plans are reviewed, tested, and where necessary revised and updated by the operators and designated authorities at suitable intervals of no longer than three years. The review shall take into account changes occurring in the establishments concerned or within the emergency services concerned, new technical knowledge, and knowledge concerning the response to major accidents.

4a. …

5. …

6. The competent authority may decide, giving reasons for its decision, in view of the information contained in the safety report, that the requirement to produce an external emergency plan under paragraph 1 shall not apply.'

4. In accordance with Article 24(1) and Article 25 thereof, the Seveso II Directive was to be transposed by 3 February 1999.

III — Procedure and forms of order sought

5. According to a report by the Commission on the application of the Seveso II Directive, [3] in Spain, as in other Member States, at the end of 2002 not all the required external emergency plans within the meaning of Article 11 (1)(c) had been drawn up. Following a further request from the Commission, Spain informed it in 2006 that only 35,2% of all the required external emergency plans had been drawn up.

6. The Commission therefore reached the conclusion that Spain had failed to fulfil its obligations under Article 11 of the Seveso II Directive and sent a letter of formal notice to that Member State on 23 March 2007 inviting it to submit its observations. Since, according to the reply of 25 June 2007, some external emergency plans were still outstanding, on 23 October 2007 the Commission sent a reasoned opinion to Spain requiring it to cease the infringement of Community law within a final period of two months.

7. After consideration of Spain's reply of 10 January 2008, the Commission remained of the same view and brought the present action.

3 — Draft Report on the application of Directive 96/82/EC on the control of major-accident hazards involving dangerous substances for the period 2000-2002, http://ec.europa.eu/environment/seveso/pdf/report_en.pdf, visited on 12 November 2009.

8. The Commission claims that the Court should:

— declare that, by failing to draw up external emergency plans for all establishments to which Article 9 of Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances applies, the Kingdom of Spain has failed to fulfil its obligations under Article 11(1)(c) of Directive 96/82/EC;

— order the Kingdom of Spain to pay the costs.

9. Spain contends that the Court should:

— dismiss the action; and

— order the applicant institution to pay the costs.

IV — Law

10. In accordance with Article 11(1)(c) of the Seveso II Directive, the competent authorities of the Member States are, for all establishments to which the Directive applies, to draw up an external emergency plan for the measures to be taken outside the establishment.

11. However, Spain submits that the outstanding external emergency plans do not yet have to be drawn up. Article 11(1)(c) of the Seveso II Directive does not fix any time-limit for the drawing up of external emergency plans.

12. Where a directive contains no specific time-limit for its transposition, normally the general time-limit for transposition applies. [4] However, both parties rightly refer to Article 11 (1)(b) of the Seveso II Directive, which gives the operators of the establishments lengthy periods within which to supply the information necessary to the external emergency plans. Thus the external emergency

4 — See Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, paragraph 11, on the identification of special protection areas for birds.

plans cannot be drawn up before the information is received.

13. The Commission accepts that the obligation to draw up external emergency plans is linked to the time-limits for supplying the necessary information.

14. Of course, the time-limits under Article 11(1)(b) of the Seveso II Directive cannot be directly applied to Article 11(1)(c) thereof. That is because the competent authorities need sufficient time in which to draw up an external emergency plan after the information has been received.

15. Accordingly, there is no clear time-limit stated in the Directive for the drawing up of the external emergency plans.

16. Nevertheless, Article 11 (1)(c) of the Seveso II Directive does contain an unconditional obligation on the Member States, which is extremely important to the aims of the Directive. As Article 41 (1) of the Charter of Fundamental Rights of the European Union expressly provides, public authorities must, in addition, fulfil their obligations within a given time-limit in compliance with the principle of good administration, to which the Member States must also have regard when applying Community law. [5] Thus the Member States may not unduly delay the drawing up of the external emergency plans. [6]

17. Accordingly, it is necessary to determine what period is appropriate for the drawing up of an external emergency plan. As a general rule, that should be determined on the basis of all material circumstances. [7] While this may depend on the facts of each individual case, [8] the Commission can, nevertheless, in principle, prove a complaint of a country-wide infringement conclusively by reference to statistics. Where it proceeds on that basis, individual cases need be investigated only

5 — Case C-428/05 *Laub* [2007] ECR I-5069, paragraph 25.

6 — Accordingly the Court has already held, in its (unpublished) judgments of 12 March 2009 in Case C-289/08 *Commission* v *Luxembourg* and in Case C-342/08 *Commission* v *Belgium*; in its judgment of 2 April 2009 in Case C-401/08 *Commission* v *Austria*; and in its judgment of 15 October 2009 in Case C-30/09 *Commission* v *Portugal*, that the Member States concerned have infringed Article 11 of the Seveso II Directive because external emergency plans had not been drawn up in respect of all establishments.

7 — See, with regard to the appropriate duration of proceedings before courts, Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland* v *Commission* [2009] ECR I-6155, paragraph 181, with further references), and Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler* v *Commission* [2009] ECR I-7191, paragraph 144, with further references). C.f., on the examination of the appropriate time-limit for the implementation of a judgment in infringement proceedings, Case C-568/07 *Commission* v *Greece* [2009], ECR-4505, paragraph 51 et seq.).

8 — As per the judgments cited in footnote 7 with regard to the duration of court proceedings.

where the Member State's defence is based on individual cases.

18. In the present case it is not in dispute that for a number of years the required external emergency plans have not been available in Spain in respect of all establishments covered by the Directive. It is true that the figures are not sufficiently detailed to allow it to be established in which cases the time-limits for the supply of the necessary information under Article 11(1)(b) of the Seveso II Directive expired some time ago. In its defence, however, Spain does not raise the argument that the period for drawing up external emergency plans was not sufficient. It must therefore be assumed that there was sufficient time available for those emergency plans to be drawn up.

19. Rather, Spain submits that the external emergency plans have not been drawn up because the competent authorities first had to wait for the internal emergency plans and the information from the establishments. It must be acknowledged, in response to that submission, that, without those steps being taken by the establishments, the external emergency plans cannot be drawn up.

20. However, the Member States are obliged, in accordance with Article 11 (1)(a) and (b) of the Seveso II Directive, to ensure the establishments compliance with their obligation within the time-limit. [9] Spain cannot justify its failure to draw up external emergency plans in good time on the fact that it failed to fulfil its prior obligation.

21. The action must therefore be upheld.

V — Costs

22. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs.

9 — C.f. *Commission* v *Portugal* (cited in footnote 6, paragraph 17).

VI — Conclusion

23. I therefore propose that the Court:

'1. Declare that, by failing to draw up external emergency plans for all establishments to which Article 9 of Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances applies, the Kingdom of Spain has failed to fulfil its obligations under Article 11(1)(c) of Directive 96/82;

2. Order the Kingdom of Spain to pay the costs.'