# JUDGMENT OF THE COURT (Sixth Chamber)
2 May 1996 *

In Case C-133/94,

**Commission of the European Communities**, represented by Rolf Wägenbaur, Principal Legal Adviser, and Marc H. van der Woude, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

**Kingdom of Belgium**, represented by Jan Devadder, Director of Administration in the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

defendant,

supported by

**Federal Republic of Germany**, represented by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent, D-53107 Bonn,

intervener,

* Language of the case: Dutch.

APPLICATION for a declaration that, by not completely and correctly transposing into Belgian law Council Directive 85/337/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), the Kingdom of Belgium has failed to fulfil its obligations under that directive and Articles 5 and 189 of the EC Treaty,

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris (Rapporteur), President of the Chamber, G. Hirsch, G. F. Mancini, F. A. Schockweiler and P. J. G. Kapteyn, Judges,

Advocate General: P. Léger,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 November 1995, at which the Kingdom of Belgium was represented by Jan Devadder, the Federal Republic of Germany by Ernst Röder and the Commission by Wouter Wils, of its Legal Service,

after hearing the Opinion of the Advocate General at the sitting on 11 January 1996,

gives the following

## Judgment

1 By application lodged at the Court Registry on 6 May 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty

for a declaration that, by not completely and correctly transposing into Belgian law Council Directive 85/337/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, 'the directive'), the Kingdom of Belgium has failed to fulfil its obligations under that directive and Articles 5 and 189 of the EC Treaty.

2 Under Article 12(1) of the directive, Member States had to take the measures necessary to comply with the directive within three years of its notification. Since it was notified on 3 July 1985, this period ran out on 3 July 1988.

3 By letter dated 29 December 1989, the Commission informed the Kingdom of Belgium pursuant to Article 169 of the Treaty that it considered that it had not completely and correctly implemented the directive, and asked the Belgian Government for its observations on this point.

4 The Belgian Government reacted to that letter giving it formal notice on 25 May 1990, sending the Commission additional information on 26 July 1991.

5 Considering that the Belgian Government's response was unsatisfactory, the Commission delivered a reasoned opinion on 3 December 1991 in which it adhered to its complaints against the Kingdom of Belgium and asked it to take remedial action within two months of notification of the opinion.

6 By letters dated 9 December 1991, 3 February 1992 and 23 July 1992, the Belgian Government notified to the Commission a number of measures and proposed measures designed to implement the directive in Belgian law completely.

7 Considering, however, that the directive had not been completely and correctly transposed, the Commission brought the present proceedings.

8 By order of the President of the Court of 25 November 1994, the Federal Republic of Germany was given leave to intervene in support of the form of order sought by the Kingdom of Belgium.

9 In its application, the Commission makes four complaints alleging, respectively, that Article 2(1) and Article 4(1) of the directive, in conjunction with point 2 of Annex I, have been incorrectly transposed at national level, that the Flemish Region has incorrectly transposed Article 2(1) and Article 4(1) of the directive, in conjunction with point 6 of Annex I, that the Flemish Region has also incorrectly transposed Article 4(2) of the directive, in conjunction with Article 2(1), and, lastly, that the Region of the Capital City of Brussels has failed to transpose Articles 7 and 9 of the directive.

10 In its application the Commission also complained that Article 6(2) of the directive, in conjunction with Article 9, had been incorrectly transposed. However, in the light of explanations provided by the Belgian Government, the Commission abandoned that complaint in its reply.

**The complaint alleging that Article 2(1) and Article 4(1) of the directive, in conjunction with point 2 of Annex I, were incorrectly transposed at national level**

11 Article 2(1) of the directive provides as follows:

'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.'

12 Article 4(1) states that:

'Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.'

13 Point 2 of Annex I covers:

'2. Thermal power stations and other combustion installations with a heat output of 300 megawatts or more and nuclear power stations and other nuclear reactors

(except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).'

14 The Commission argues that, under Article 4(1) of the directive, read together with Article 2(1), the projects listed in Annex I must be subjected to an environmental impact assessment. Consequently, Member States were not entitled to introduce any limitation in this area. In Belgium, however, there is no guarantee that a mandatory environmental impact assessment will be carried out in respect of nuclear power stations and other nuclear reactors (except research installations for the production and conversion of fissionable and fertile materials, whose standing power does not exceed 1 kilowatt continuous thermal load) or of installations used solely for the permanent storage or final disposal of radioactive waste.

15 In its rejoinder the Belgian Government states that, in that respect, the directive has been implemented in national law as a result of the amendments which the Royal Decree of 23 December 1993 (*Moniteur Belge* of 2 February 1994, p. 2142) made to the Royal Decree of 28 February 1963 laying down General Rules for the Protection of the Public and Workers against the Danger of Ionizing Radiation.

16 Whilst not contesting that the transposition carried out complies with the directive, the Commission adheres to its complaint. On the one hand, Belgium failed to implement the directive completely and correctly within the time-limit laid down by the reasoned opinion of 3 December 1991. On the other, on the date when the proceedings were brought, the Commission was unaware of the implementing measures adopted, since it was officially informed of them only by letter of 12 September 1994.

17 It should be noted in this regard that the Court has consistently held that the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the

period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299, paragraph 13).

18 In this case, the alleged implementing measures were adopted after the time-limit set by the reasoned opinion had expired.

19 Accordingly that complaint must be upheld.

**The complaint alleging that the Flemish Region incorrectly transposed Article 2(1) and Article 4(1) of the directive, in conjunction with point 6 of Annex I**

20 Point 6 of Annex I to the directive mentions 'integrated chemical installations' as being among the projects subject to assessment.

21 In the Flemish Region, the environmental impact assessment procedure was incorporated into existing consent procedures for establishments constituting a nuisance and establishments not constituting a nuisance.

22 Ps far as establishments constituting a nuisance are concerned, the consent procedures are governed by the Decree of the Flemish Council of 28 June 1985 relating to Anti-Pollution Consent (*Moniteur Belge* of 17 September 1985, p. 13304).

23 Pursuant to that decree, the Flemish Executive adopted on 23 March 1989 Order 89-928 (*Moniteur Belge* of 17 May 1989, p. 8442). Article 3(6) of that order defines integrated chemical installations as installations 'for the chemical processing of:

(a) unsaturated aliphatic hydrocarbons with less than 5 carbon atoms per molecule;

(b) cyclic unsaturated hydrocarbons including aromatics with less than 9 carbon atoms per molecule;

with a capacity of 100 000 tonnes per annum or more'.

24 The Commission maintains that the Flemish Executive interpreted the concept of 'integrated chemical installations' narrowly. Fixing quantitative criteria affords no guarantee that all integrated chemical installations will be subjected to an environmental impact assessment. Only installations for the processing of the substances mentioned under (a) and (b) of the Flemish Executive's definition and, of them, only those with a minimum processing capacity of at least 100 000 tonnes will be subjected to the assessment procedure. Yet point 6 of Annex I to the directive does not embody any quantitative limitation.

25 The Belgian Government takes the view that the concept of 'integrated chemical installations' is vague, as the Commission itself has acknowledged by providing a more precise definition of that concept in its proposal relating to the amendment

of the directive (document COM(93) 575 final, OJ 1994 C 130, p. 8). Accordingly and on grounds of legal certainty, the Flemish Government had no option other than to give a content to that concept itself. The reason why saturated hydrocarbons are not mentioned in its definition is that they are almost never used as basic chemical components owing to their low reactivity. In addition, the capacity criterion, which does not relate to production capacity expressed in terms of the quantity of finished product but to processing capacity expressed in terms of the quantity of basic components (small molecules), also does not limit the scope of the directive in real terms. Accordingly, the definition in question covers the most important chemical installations located in the territory of the Flemish Region.

26 The Court finds in this regard that point 6 of Annex I to the directive does not introduce any limitation as to the integrated chemical installations subject to assessment. On the contrary, when the Community legislature wished to limit the duty to carry out an assessment, it made express provision to that end. It did so in particular in points 1, 2, 5, 7 and 8 of that annex.

27 Besides, the crucial feature of the concept of 'integrated chemical installations' is precisely the fact that they are integrated, since other chemical installations come under point 6 of Annex II. As the Advocate General observed in points 36, 37 and 38 of his Opinion, the Flemish legislation neither specifies nor defines that concept and whether a chemical installation is integrated does not depend on its processing capacity or on the type of chemical substances processed in it but on the existence of interlinked production units constituting in terms of their operation a single production unit.

28 It follows that that complaint must also be upheld.

**The complaint alleging that the Flemish Region incorrectly transposed Article 4(2) of the directive in conjunction with Article 2(1)**

29 Article 4(2) of the directive provides as follows:

'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.

To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

30 In the Flemish Region, Article 3 of Order 89-928 contains the list of establishments constituting a nuisance which must be subjected to assessment in accordance with the Degree of the Flemish Council of 28 June 1985 relating to Anti-Pollution Consent.

31 As regards establishments not constituting a nuisance, the Organic Law on Land-Use Planning and Town Planning of 29 March 1962 (*Moniteur Belge* of 12 April 1962, p. 3000) set up a procedure for the grant of planning permission. Pursuant to that law, the Flemish Executive adopted, among other things, Order 89-929 of 23 March 1989 (*Moniteur Belge* of 17 May 1989, p. 8450), which governs the assessment of effects on the environment of works and acts falling within the scope of the Organic Law of 29 March 1962. Article 2 of that order lists the projects having to be subjected to environmental impact assessment.

32 The Commission argues that Article 4(2) of the directive, when read in the light of Article 2(1), requires the Member States to examine the characteristics of each of the projects listed in Annex II specifically on a case-by-case basis. That examination will enable it to be decided subsequently whether, by reason of the nature, size or location of the project considered, an environmental impact assessment is necessary. The second subparagraph of Article 4(2) of the directive enables Member States to facilitate that examination by establishing criteria and/or thresholds. In contrast, it does not allow them to establish criteria and/or thresholds for exempting in advance certain projects listed in Annex II from that examination.

33 In the Commission's view, however, the legislation in force in the Flemish Region does not satisfy that requirement. The lists set out in Article 3 of Order 89-928 and Article 2 of Order 89-929 do not cover all the projects mentioned in Annex II. As a result, the projects not covered will never be examined in order to determine whether their characteristics are such as to require an environmental impact assessment.

34 The Belgian Government argues that, when it adopted the orders at issue, the Flemish Government took the view that, in the light of the state of the environment in Flanders, only some categories of projects mentioned in Annex II, which come within the thresholds and other criteria which it has established, ought, by reason of their nature, to be subjected to environmental impact assessment. It therefore considered implicitly that the characteristics of all the other projects mentioned in Annex II are such that it is unnecessary to subject them to assessment.

35 According to the Belgian Government, supported by the German Government, it does not appear from any provision of the directive that the Member States are only entitled to assess *in concreto* whether the characteristics of individual projects are such as to make it unnecessary to carry out an environmental impact assessment. Member States are also entitled to consider generally that the characteristics of certain projects listed in Annex II are such that assessment is unnecessary. The two governments refer in this connection to the wording of Article 4(2).

36 The German Government submits in particular that the wording of that provision suggests that the projects to be assessed should be determined in the abstract, since, if that were not so, it would not be the Member States, but the competent authorities in each case, which would have to determine whether a project ought to be subjected to assessment. In addition, the distinction made between 'classes' and 'projects' in the eighth and ninth recitals in the preamble to the directive and in Article 4(2) thereof shows that the choice of projects whose effects on the environment must be assessed may be carried out in the abstract.

37 The German Government further maintains that the fact that, under Article 2(3) of the directive, exemption from the requirement to make an assessment is possible only in the case of projects coming under Article 4(1) is an argument against the need for a detailed examination of projects mentioned in Annex II.

38 The Belgian Government adds that, according to the Commission's report to the European Parliament and the Council on the implementation of the directive (document COM(93) 28, Vol. 1, 2 April 1993), most Member States have interpreted Article 4(2) in the same way as the Flemish Government.

39 Lastly, the Belgian and German Governments refer, in support of their argument, to the proposal for the amendment of the directive made by the Commission to the Council (document COM(93) 575 final, cited above). In particular, the Commission proposed the adoption of a new Article 4(3), which, combined with a new Annex IIa, would require Member States to determine on a case-by-case basis whether an assessment is necessary. That proposal would be otiose if the obligation arising under it were already part of the law in force.

40 It should first be made clear that, as stated in paragraphs 33 and 34 of this judgment, the Flemish legislation excludes totally and definitively from environmental

impact assessment certain classes of projects mentioned in Annex II. The question is therefore whether such exclusion is permitted by Article 4(2) of the directive.

41 Whilst it appears from that provision that Member States may always specify certain 'types' of projects as being subject to assessment or may establish criteria and/or thresholds for determining which projects are to be subject to assessment, it must be emphasized that that power of the Member States is conferred within each of the classes listed in Annex II. This means that the Community legislature itself considered that all the classes of projects listed in Annex II may possibly have significant effects on the environment depending on the characteristics exhibited by those projects at the time when they were drawn up.

42 It follows that the criteria and/or the thresholds mentioned in Article 4(2) are designed to facilitate the examination of the actual characteristics exhibited by a given project in order to determine whether it is subject to the requirement to carry out an assessment and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged on the territory of a Member State.

43 Consequently, Article 4(2) does not empower the Member States to exclude generally and definitively from possible assessment one or more classes mentioned in Annex II.

44 In view of that finding, the aforementioned arguments put forward by the Belgian and German Governments to the effect that Article 4(2) does not preclude the possibility for a Member State to determine the projects to be subjected to assessment in the abstract using criteria and/or thresholds and therefore does not require a

decision to be taken on each specific project are irrelevant to this case, irrespective as to whether they are based on a correct interpretation of Article 4(2).

45 In view of the foregoing it must be held that the Flemish legislation at issue does not correctly transpose Article 2(1) and Article 4(2) of the directive, since it impliedly excludes in advance all the classes of projects mentioned in Annex II which are not covered by that legislation from the possibility of assessment, even if it should prove that the characteristics of projects belonging to those classes are such as to require such assessment.

46 It follows that that complaint must be upheld.

**The complaint alleging that the Flemish Region and the Region of the Capital City of Brussels failed to transpose Articles 7 and 9 of the Directive**

47 Article 7 of the directive provides as follows:

'Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall forward the information gathered pursuant to Article 5 to the other Member State at the same time as it makes it available to its own nationals. Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between two Member States on a reciprocal and equivalent basis.'

48 Article 9 provides for the public to be informed of the content of the final decision. The last paragraph of that article states as follows:

'If another Member State has been informed pursuant to Article 7, it will also be informed of the decision in question.'

49 The Commission asserts that the Flemish Region and the Region of the Capital City of Brussels have failed to transpose Articles 7 and 9 of the directive.

50 The Belgian Government admits that the Commission's complaint is well founded as regards the Flemish Region. It states, however, that a preliminary-draft decree exists which, when adopted, will bring the infringement complained of to an end.

51 In contrast, as far as the Region of the Capital City of Brussels is concerned, the Belgian Government considers that Articles 7 and 9 do not have to be transposed, on the ground that the geographical situation and the urban nature of that region preclude the establishment of industrial installations liable to have effects on the environment which would have consequences in other Member States.

52 That argument must be rejected.

53 The argument based on the geographical situation of the Region of the Capital City of Brussels is based on the assumption that only projects located in frontier

regions are capable of affecting the environment in another Member State. Yet, as the Commission has rightly observed, that assumption is wrong since it ignores the possibility of air-or water-borne pollution.

54 As for the argument based on the urban nature of the Region of the Capital City of Brussels, the Commission stated at the hearing, without being contradicted by the Belgian Government, that there are major chemical and petrochemical industries in that region.

55 Accordingly the Commission's complaint must be upheld.

56 Since the Kingdom of Belgium has failed to fulfil its specific obligations under the directive, no purpose is served by considering the question whether it has thereby also failed to fulfil its obligations under Article 5 of the Treaty (see Case C-374/89 *Commission* v *Belgium* [1991] ECR I-367, paragraph 13).

57 In the light of the foregoing it must be held that, by not completely and correctly transposing into Belgian law Directive 85/337, the Kingdom of Belgium has failed to fulfil its obligations under that directive and under Article 189 of the EC Treaty.

## Costs

58 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Belgium has been unsuccessful, it

must be ordered to pay the costs. In accordance with the first subparagraph of Article 69(4) of those Rules, the Federal Republic of Germany, which intervened in the proceedings, must be ordered to bear its own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, by not completely and correctly transposing into Belgian law Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, the Kingdom of Belgium has failed to fulfil its obligations under that directive and under Article 189 of the EC Treaty;**

2. **Orders the Kingdom of Belgium to pay the costs;**

3. **Orders the Federal Republic of Germany to bear its own costs.**

Kakouris Hirsch Mancini

Schockweiler Kapteyn

Delivered in open court in Luxembourg on 2 May 1996.

R. Grass C. N. Kakouris

Registrar President of the Sixth Chamber