# JUDGMENT OF THE COURT (Sixth Chamber)

26 June 2003 *

In Case C-233/00,

**Commission of the European Communities**, represented by G. zur Hausen and J.-F. Pasquier, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**French Republic**, represented initially by J.-F. Dobelle and D. Colas, and subsequently by D. Colas and G. de Bergues, acting as Agents,

defendant,

APPLICATION for a declaration that, by failing correctly to transpose Articles 2(a) and 3(2), (3) and (4) of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (OJ 1990 L 158, p. 56), the French Republic has failed to fulfil its obligations under that directive and under the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC),

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen (Rapporteur), V. Skouris, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: C. Stix-Hackl,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 17 October 2002, at which the Commission was represented by J.-F. Pasquier and the French Republic by C. Isidoro, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 14 January 2003,

gives the following

## Judgment

1 By application lodged at the Court Registry on 13 June 2000, the Commission of the European Communities brought an action under Article 226 EC for a

declaration that, by failing correctly to transpose Articles 2(a) and 3(2), (3) and (4) of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (OJ 1990 L 158, p. 56), the French Republic has failed to fulfil its obligations under that directive and under the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC).

## Legal framework

*Directive 90/313*

2 Under Article 1 of Directive 90/313, its object is 'to ensure freedom of access to, and dissemination of, information on the environment held by public authorities and to set out the basic terms and conditions on which such information should be made available'.

3 Article 2 of Directive 90/313 is worded as follows:

'For the purposes of this directive:

(a) "information relating to the environment" shall mean any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting, or

likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes;

(b) "public authorities" shall mean any public administration at national, regional or local level with responsibilities, and possessing information, relating to the environment with the exception of bodies acting in a judicial or legislative capacity.'

4 Article 3 of Directive 90/313 provides:

'1. Save as provided in this article, Member States shall ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest.

Member States shall define the practical arrangements under which such information is effectively made available.

2. Member States may provide for a request for such information to be refused where it affects:

— the confidentiality of the proceedings of public authorities, international relations and national defence,

— public security,

— matters which are, or have been, *sub judice*, or under enquiry (including disciplinary enquiries), or which are the subject of preliminary investigation proceedings,

— commercial and industrial confidentiality, including intellectual property,

— the confidentiality of personal data and/or files,

— material supplied by a third party without that party being under a legal obligation to do so,

— material, the disclosure of which would make it more likely that the environment to which such material related would be damaged.

Information held by public authorities shall be supplied in part where it is possible to separate out information on items concerning the interests referred to above.

3. A request for information may be refused where it would involve the supply of unfinished documents or data or internal communications, or where the request is manifestly unreasonable or formulated in too general a manner.

4. A public authority shall respond to a person requesting information as soon as possible and at the latest within two months. The reasons for a refusal to provide the information requested must be given.'

5 Pursuant to Article 9(1) of Directive 90/313, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 31 December 1992 at the latest and were forthwith to inform the Commission thereof.

*National legislation*

6 Law No 78-753 of 17 July 1978 establishing various measures to improve relations between administrative authorities and the public and various administrative, social and fiscal provisions (JORF of 18 July 1978, p. 2851) grants individuals a right of access to administrative documents.

7 Title I of Law No 78-753, entitled 'Freedom of access to administrative documents', comprises Articles 1 to 13 of the Law.

8 Article 1 of the Law provides:

'The right of citizens to information shall be specified and guaranteed by the present title as regards freedom of access to administrative documents not relating to individuals.

"Administrative documents" for the purpose of this title shall mean all files, reports, studies, records, minutes, statistics, directives, instructions, circulars, notes and ministerial replies which include an interpretation of the law or a description of administrative procedures, opinions with the exception of opinions of the Conseil d'État or the administrative courts, forecasts and decisions in the form of written documents, aural or visual recordings, or automated processing of information not relating to individuals.'

9 Article 2 of the Law states:

'Subject to Article 6, administrative documents shall as of right be available to persons who request them, whether they are documents of the administrative authorities of the State, local authorities, public undertakings or bodies, even private-law bodies, responsible for the operation of a public service.'

10 Article 4 of that law is worded as follows:

'Access to administrative documents shall take place:

(a) By consultation on site, without charge, unless the document is held in a way which precludes consultation or reproduction;

(b) Subject to the condition that reproduction does not damage the preservation of the document, by issue of a single set of copies, at the expense of the person who requests them, and without those expenses exceeding the actual cost of the workload created by the application of the present title.

The service must issue the copy requested or the notification of a refusal provided for in Article 7.'

11 Article 5 of Law No 78-753 states:

'A committee known as "the Commission on Access to Administrative Documents" shall be responsible for ensuring freedom of access to administrative documents in the conditions laid down in the present title, *inter alia* by giving opinions when reference is made to it by a person who encounters problems in obtaining an administrative document, by advising the competent authorities on any question relating to the application of the present title and by proposing any necessary amendments to the laws or regulations on provision of administrative documents.

The Commission shall draw up an annual report which shall be made public.

The composition and functioning of the Commission provided for under the present article shall be decided by a décret en Conseil d'État (decree adopted after being submitted to the Council of State).'

12 Article 6 of the Law reads as follows:

'The administrative authorities mentioned in Article 2 may refuse to allow consultation of or to provide an administrative document when such consultation or provision would prejudice:

— the confidentiality of the proceedings of the Government and of the responsible authorities attached to the executive;

— the confidentiality of national defence and foreign policy;

— currency and public funds, national security and public security;

— the conduct of proceedings before the courts or of activities preliminary to such proceedings, subject to authorisation by the competent authority:

— the confidentiality of private life and of personal and medical files;

— commercial and industrial confidentiality;

— inquiries by the competent services into fiscal and customs offences;

— or, generally, secrets protected by legislation.

For the purpose of applying those provisions, lists of the administrative documents which may not be supplied to the public because of their character or their subject-matter shall be established by ministerial orders adopted following an opinion by the Commission on Access to Administrative Documents.'

13 Article 7 of Law No 78-753 provides:

'Refusal to supply a document shall be notified to the citizen in the form of a reasoned, written decision. Failure to respond within two months shall be deemed to constitute a refusal.

In the event of an express or tacit refusal, the citizen [may] request an opinion from the commission provided for in Article 5. That opinion must be given at the latest within a month of the reference to the commission. The competent authority must inform the commission of the action which it is taking in the case within two months of receiving that opinion. The time-limit for bringing proceedings shall be extended until the citizen has been notified of the competent authority's response.

When proceedings are brought against a refusal to supply an administrative document, the administrative court must rule within six months of the application being lodged.'

14 Decree No 88-465 of 28 April 1988 on the procedure for access to administrative documents (JORF of 30 April 1988, p. 5900) repealed the second sentence of the first paragraph and the second paragraph of Article 7 of Law No 78-753.

15 Article 2 of that decree provides:

'Failure by the competent authority to reply within one month to a request to supply documents in accordance with Title I of Law No 78-753 of 17 July 1978 shall be deemed to constitute a refusal.

In the event of an express or tacit refusal, the applicant may make a reference to the commission established under Article 5 of Law No 78-753 of 17 July 1978 within two months of notification of the refusal or of the expiry of the period prescribed in the first paragraph of this article.

Reference to the commission under the conditions laid down in the second paragraph of this article is a mandatory prerequisite to any judicial proceedings.

Within one month of reference to it, the commission shall notify its opinion to the competent authority, which shall inform the commission within one month of receiving that opinion of the action it intends to take on the request.

Failure by the competent authority to reply within two months of the applicant's reference to the commission shall be deemed to constitute a refusal.

The time-limit for bringing proceedings shall be extended until the applicant has been notified of the competent authority's response.'

16 Article 5 of Law No 79-587 of 11 July 1979 on the requirement to state reasons for administrative measures and on improving relations between administrative authorities and the public (JORF of 12 July 1979, p. 1711) provides:

'An implied decision made in cases where an express decision would have had to be reasoned is not unlawful merely because reasons are not given for it. Nevertheless, at the applicant's request, made within the time-limit for bringing proceedings, the reasons for any implied refusal shall be notified to him within a month of that request. In that case, the time-limit for bringing proceedings against that decision shall be extended until two months after the day on which the reasons are notified to him.'

**Pre-litigation procedure**

17 By letter of 20 August 1990, the Commission drew attention to the requirement to transpose Directive 90/313 before 31 December 1992.

18 By letter of 28 March 1991, the French authorities sent the Commission a copy of the national provisions which it considered ensured the transposition of that directive into French law, that is to say, Law No 78-753 and Decree No 88-465.

19 By letter of 13 July 1992, the Commission drew the attention of the French authorities to certain aspects of French law which would prevent the result sought by Directive 90/313 from being achieved.

20 Since no reply was received, a reminder was sent to the French authorities on 21 January 1993.

21 By letter of 2 February 1993, those authorities set out their position as regards the observations of the Commission.

22 On 17 November 1994, the Commission sent a letter of formal notice to the French Republic, requesting it to submit its observations on the transposition of Articles 2(a) and 3(2), (3) and (4) of Directive 90/313 into national law within two months of the receipt of that letter.

23 On 23 February 1995, the French Government replied that the national legislation was not contrary to any of the obligations imposed by that directive.

24 On 8 February 1999, the Commission sent the French Republic a reasoned opinion requesting it to adopt, within two months of the notification of that opinion, the measures necessary to comply with the obligations stemming from Articles 2(a) and 3(2), (3) and (4) of Directive 90/313.

25 By letter of 25 June 1999, the French Government replied to that reasoned opinion, denying the infringement alleged by the Commission. It added that, while French law does not include a literal transposition of all the points in the provisions of that directive, it nevertheless lays down broadly equivalent guarantees and, in many areas, imposes even more extensive obligations on administrative authorities. It made clear that the French authorities would nevertheless study the possibilities for improving access to information on the environment.

26 On 19 January 2000, the French Government informed the Commission that a draft law, amending various provisions of national law to reflect Community law in the field of the environment and including a section devoted to access to information on the environment, had just been approved by the cabinet of the Prime Minister and would be communicated to the Commission as soon as it was submitted to the Conseil d'État (France) for an opinion, which was planned for February 2000.

27 Since it considered that the French Republic had not complied with its obligations resulting from the reasoned opinion within the prescribed period laid down therein, the Commission decided to bring the present action.

## The action

### *Preliminary observations*

28 On 13 September 2001, the French Government informed the Court that the measures made known in its letter of 19 January 2000 had been adopted and to that effect presented Law No 2000-321 of 12 April 2000 on the rights of citizens

in their dealings with administrative authorities (JORF of 13 April 2000, p. 5646) and Order No 2001-321 of 11 April 2001 on the transposition of Community directives and the implementation of certain provisions of Community law in the field of the environment (JORF of 14 April 2001, p. 5820). The Government states that those pieces of legislation have also been sent to the Commission, with a request that it discontinue its action.

29 By letter of 24 September 2001, the Commission informed the Court that it did not intend to discontinue its action.

30 It should be pointed out in that regard that it is settled case-law that whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (see, *inter alia*, Case C-152/00 *Commission* v *France* [2002] ECR I-6973, paragraph 15).

31 Moreover, the Court has repeatedly held that, under the system established by Article 226 EC, the Commission enjoys a discretionary power as to whether it will bring an action for failure to fulfil obligations and it is not for the Court to judge whether that discretion was wisely exercised (see, *inter alia*, Case C-236/99 *Commission* v *Belgium* [2000] ECR I-5657, paragraph 28). It is therefore a matter for the Commission alone to decide whether it will continue such an action (see, to that effect, Case C-474/99 *Commission* v *Spain* [2002] ECR I-5293, paragraph 25), all the more so since, even where the default has been remedied after the time-limit given in the reasoned opinion has expired, there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur, as a result of its default, towards other Member States, the Community or private parties (see to that effect, *inter alia*, Case C-166/00 *Commission* v *Greece* [2001] ECR I-9835, paragraph 9).

32 In those circumstances, neither of the two pieces of national legislation referred to in paragraph 28 of the present judgment can be taken into account by the Court in its examination of the present action.

33 In support of its application, the Commission relies on five grounds:

— incomplete transposition of Article 2(a) in conjunction with Article 3(1) of Directive 90/313, in that the scope of the obligation to supply information relating to the environment is narrower under the French legislation than under that directive;

— incorrect transposition of the first subparagraph of Article 3(2) of Directive 90/313, inasmuch as the French legislation provides, among the exceptions to the obligation to supply that information, a ground for refusal which is not provided for by the directive;

— failure to transpose the second subparagraph of Article 3(2) of Directive 90/313, because of the failure of the French legislation to mention the obligation to supply in part information relating to the environment where it is possible to separate out information on items which may justify a refusal;

— failure to transpose Article 3(3) of Directive 90/313, in that the French legislation has not provided for the possibility of refusing a request for the supply of unfinished documents or data or internal communications or a request which is manifestly unreasonable or formulated in too general a manner, and

— incorrect transposition of Article 3(4) of Directive 90/313, on the ground that the French legislation allows requests for information relating to the environment to be refused by implied decisions for which reasons are not given.

34 It is appropriate to consider successively the merits of those various grounds.

*The too limited scope of the French legislation in respect of the obligation to supply information relating to the environment*

Arguments of the parties

35 The Commission alleges that the French Government gave to Law No 78-753 a narrower material scope than that of Directive 90/313, inasmuch as the term 'administrative documents' in that law is more restrictive than 'information relating to the environment' within the meaning of the directive.

36 Even if the Commission recognises that that term is wider in scope than that of 'administrative measure' under French law, it nevertheless covers only those documents held by administrative authorities which are related to a public service activity or to carrying out such a service, whereas the notion of 'information relating to the environment' used in the directive does not entail any limitation of that kind.

37 Therefore, documents which are not available pursuant to Law No 78-753, even when they contain information relating to the environment which may be of interest to citizens, include certain non-regulatory decisions of public authorities relating to the management of their private domain (for example, authorisation to occupy or use that domain) or the management of industrial and commercial public services (for example, contracts with users of water or energy services) or indeed private-law contracts between a public authority and a private person or even between two public authorities.

38 The French Government replies that this first ground is incorrect and, in the alternative, not proved.

39 Admittedly, it does not deny that 'information relating to the environment' within the meaning of Directive 90/313 must be interpreted broadly, but the term 'administrative documents' referred to in Law No 78-753 is also very extensive, since it includes documents of a private nature which are related to public service and/or the public responsibilities carried out by private persons. That term includes, in addition to administrative measures, private-law measures of public authorities and measures taken by private persons and held by those authorities, in so far as they are more or less related to carrying out a public service. Therefore, the only restriction to the classification 'information relating to the environment' within the meaning of Directive 90/313 concerns documents held by a public authority acting as a private person and without any connection with public service.

40 Moreover, the Commission has not actually demonstrated that 'administrative documents' is less comprehensive than 'information relating to the environment'. It has not succeeded in proving that there exists information held by the French public authorities which falls within the scope of Directive 90/313 but is not covered by Law No 78-753. In particular, the Commission has never provided a single example where information relating to the environment has not been given the status of 'administrative document' within the meaning of that law.

Findings of the Court

41 Is is noteworthy that, according to the French Government, the term 'administrative documents' used in Law No 78-753 also covers, in addition to administrative measures, private-law measures of public authorities and measures held by those authorities but taken by private persons; nevertheless, as the French Government itself admits, that is true only in so far as those measures 'are more or less related to carrying out a public service'. In that context, the French Government specifies that only documents held by a public authority acting as a private person and without any connection with public service are not covered by Law No 78-753, but it considers that nor do such documents amount to 'information relating to the environment' within the meaning of Directive 90/313.

42 It should also be recalled that, under Article 2(a) of Directive 90/313, 'information relating to the environment' refers, for the purposes of the directive, to 'any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes'.

43 However, that definition does not include any indication such as to support the argument of the French Government that a document without any connection with public service should not be regarded as 'information relating to the environment' within the scope of Directive 90/313.

44 In the light of its actual wording and taking account, in particular, of the use of the words 'any... information', the scope of application of Article 2(a), and consequently of Directive 90/313, must be considered to have been intended to be wide. It thus covers all information which relates either to the state of the environment or to activities or measures which could affect it, or to activities or measures intended to protect the environment, without the list in that provision including any indication such as to restrict its scope, *inter alia* in the manner suggested by the French Government.

45 That finding is supported by the interpretation already given to that provision by the Court in Case C-321/96 *Mecklenburg* [1998] ECR I-3809, paragraphs 19 to 22. In particular, the Court thus held in paragraph 20 of that judgment that the Community legislature purposely avoided giving any definition of 'information relating to the environment' which could lead to the exclusion of any of the activities engaged in by the public authorities.

46 Moreover, it follows from the use of the words 'including administrative measures' in Article 2(a) of Directive 90/313 that 'information relating to the environment' must logically be of a wider scope than all the activities of the public authorities.

47 It follows that Directive 90/313 applies to any measure, of whatever kind, which is likely to affect or protect the state of one of the sectors of the environment covered by that directive, so that, in contrast to what the French Government puts forward as its principal argument, 'information relating to the environment' within the meaning of that directive must be understood to include documents which are not related to carrying out a public service.

48 In those circumstances, the Commission's first complaint is well founded.

*The existence of a ground for refusing to supply information relating to the environment, which is not provided for under Directive 90/313*

Arguments of the parties

49 The Commission criticises the fact that, as regards the list of exceptions to the obligation to supply information relating to the environment, the final indent of the first paragraph of Article 6 of Law No 78-753 laid down a ground for refusal which is not set out in the first subparagraph of Article 3(2) of Directive 90/313, namely where 'secrets protected by legislation' would be prejudiced.

50 Not only does that law thereby add to the provisions of Directive 90/313, by broadening the field of the exceptions exhaustively provided for in the directive, but the notion of 'secrets protected by legislation' is also formulated too generally to ensure application in compliance with the spirit of the directive.

51 The French Government denies that the list of exceptions laid down in Law No 78-753 is wider than that in the first subparagraph of Article 3(2) of Directive 90/313. The general category of 'secrets protected by legislation' was introduced into that law in order to regroup the various special sets of rules on confidentiality of data which, moreover, often have nothing to do with the environment.

52 The French Government maintains that in order to establish an infringement in the present case the Commission had to identify the special sets of rules which are not in compliance with Directive 90/313, and the action should thus have been directed against those special sets of rules and not against the general category of 'secrets protected by legislation'.

53 However, the Commission has not been able to identify a single secret protected by legislation which is not covered by one of the grounds for refusal listed in the first subparagraph of Article 3(2) of the directive, namely 'public security', 'commercial and industrial confidentiality' or 'the confidentiality of personal data and/or files'.

54 Moreover, no complaint or action has ever been lodged by an individual, which proves that the notion of 'secrets protected by legislation' within the meaning of the French legislation is not such as unduly to widen one of the exceptions listed in the first subparagraph of Article 3(2) of Directive 90/313.

Findings of the Court

55 For the purpose of ruling on the merits of the second ground, it must first be pointed out that it is clear from the very wording of the first subparagraph of Article 3(1) of Directive 90/313 that information relating to the environment must be made available to any person at his request and without his having to prove an interest, and that this obligation lies with public authorities, 'save as provided in this article'.

56 Therefore, Article 3(2) and (3) of the directive lists a number of grounds which can justify a refusal to provide information relating to the environment only as an exception to the principle of freedom of access to such information, which provides the basis for the directive.

57 It follows that, as exceptions to the principle of supplying information relating to the environment, which forms the purpose of Directive 90/313, those grounds for refusal must be interpreted strictly, so that it is appropriate to consider that the derogations set out in Article 3(2) and (3) are the subject of an exhaustive list and refer to 'certain specific and clearly defined cases' in which 'it may be justified to refuse a request for information relating to the environment' (see the seventh recital in the preamble to Directive 90/313).

58 In the present case, it appears that Law No 78-753 has made use of all the exceptions referred to in Article 3(2) of the directive, which expressly and specifically include requests for information affecting the confidentiality of the proceedings of public authorities, the confidentiality of international relations, the confidentiality of national defence, public security, commercial and industrial confidentiality and the confidentiality of personal data.

59 However, the last indent of the first paragraph of Article 6 of Law No 78-753 also authorises public authorities to refuse to allow consultation of or to provide an administrative document whose dissemination would prejudice, 'generally, secrets protected by legislation'.

60 Such a ground for refusal, which is not mentioned in the exhaustive list of exceptions in the first subparagraph of Article 3(2) of Directive 90/313, therefore clearly exceeds the scope of those exceptions.

61 Moreover, the ground for refusal in question merely makes reference to 'legislation', with no further details. As the Commission rightly maintains, that ground is worded in such a general manner that it is not clear which cases are being referred to — other than those in the preceding indents of the first paragraph of Article 6, which already cover all the exceptions listed in Article 3(2) of Directive 90/313 — so that that ground for refusal is likely to create legal uncertainty by failing to ensure that public authorities will apply it in accordance with the spirit of the directive.

62 The French Government's argument that no individual has ever lodged a complaint alleging incorrect application of the first subparagraph of Article 3(2) of Directive 90/313 must be rejected in the light of the Court's case-law, according to which failure to comply with an obligation imposed by a rule of Community law is itself sufficient to constitute the breach, and the fact that such a failure had no adverse effects is irrelevant (see Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraphs 60 and 61, and Case C-333/99 *Commission* v *France* [2001] ECR I-1025, paragraph 37). It also follows that the argument that there has been no known case in practice in which the directive was infringed cannot be accepted (see Case C-131/88 *Commission* v *Germany* [1991] ECR I-825, paragraph 9).

63 In the light of the preceding explanations, it must be held that the Commission's second complaint is also well founded.

*Failure to transpose the obligation to supply in part information relating to the environment*

Arguments of the parties

64 The Commission alleges that the French Government has not expressly reproduced in Law No 78-753 the obligation laid down in the second subparagraph of Article 3(2) of Directive 90/313 to supply in part information relating to the environment where it is possible to separate out information on items which may justify a refusal to provide information.

65 The French Government has not really disputed that complaint before the Court.

Findings of the Court

66 First, the Court has already held that the second subparagraph of Article 3(2) of Directive 90/313 requires the Member States to supply information from which it is possible to separate out information on items which may be covered by the requirements of confidentiality or privilege. It inferred that that provision imposes on Member States an obligation which is precise as regards the result to be obtained and directly affects the legal situation of individuals, who are thus entitled to obtain information under the conditions laid down in that provision (Case C-217/97 *Commission* v *Germany* [1999] ECR I-5087, paragraph 33).

67 Second, it is common ground that at the time the period prescribed in the reasoned opinion expired, French law did not include any provision transposing the rule provided in the second subparagraph of Article 3(2) of Directive 90/313.

68 In the absence of any express provision concerning the supply in part of information relating to the environment, the obligation to supply that information in part is not guaranteed in a manner sufficiently clear and precise to ensure legal certainty and to enable persons who may submit a request for information to know the full extent of their rights (see, to that effect, *Commission* v *Germany*, cited above, paragraphs 34 and 35).

69 In those circumstances, the Commission's third complaint must be upheld.

*Failure to transpose Article 3(3) of Directive 90/313*

Arguments of the parties

70 The Commission claims that even though Article 3(3) of Directive 90/313, which allows the competent authorities to refuse a request for information which is unreasonable or formulated in too general a manner or relates to unfinished or internal documents or data, sets out only an option open to the Member States, that rule must nevertheless be formally transposed into domestic law where a Member State chooses to rely on it.

71 In the absence of express transposition, individuals are not able to know with the requisite clarity the extent of their rights under the directive in that regard. The general legal context which, according to the French Government, is provided by the case-law of the Conseil d'État on the subject is not sufficient to ensure the application of the provision at issue in such a way that there is no risk of its being incorrectly implemented.

72 Although it does not deny the absence of any relevant specific national legislation, the French Government does maintain that the domestic legal context, namely Law No 78-753 as interpreted by the case-law of the Conseil d'État, ensures in a clear and precise manner that a public authority can refuse a request which is vague or unreasonable or involves the supply of unfinished or internal documents.

73 Article 3(3) of Directive 90/313 simply confers on public authorities an option which has already been acknowledged by the Conseil d'État, and the mere codification of that option cannot protect any right of individuals.

74 While it is true that, as regards the Commission's third ground, express transposition of the second subparagraph of Article 3(2) of the directive would effectively advertise that provision, that is not the case as regards the present ground, which concerns Article 3(3). The concepts of misuse of rights and preliminary measure exist in the legal systems of most of the Member States, including the French Republic, and, moreover, they are not applied only as regards the right of access to information relating to the environment. Therefore, even if Directive 90/313 had not expressly laid down the option to refuse to supply information in the case of requests which are unreasonable or formulated

in too general a manner or even relate to internal or unfinished documents, the national authorities could nevertheless rely on those principles to justify a refusal. Formal transposition, aside from merely rewriting the case-law of the Conseil d'État, would only codify general principles which are widely known and upheld by settled case-law.

Findings of the Court

75 In order to evaluate the merits of the Commission's fourth ground, it should be recalled that, according to settled case-law, each of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective it pursues (see, *inter alia*, Case C-478/99 *Commission* v *Sweden* [2002] ECR I-4147, paragraph 15).

76 While it is therefore essential that the legal situation resulting from national implementing measures is sufficiently precise and clear to enable the individuals concerned to know the extent of their rights and obligations, it is none the less the case that, according to the very words of the third paragraph of Article 189 of the Treaty, Member States may choose the form and methods for implementing directives which best ensure the result to be achieved by the directives, and that provision shows that the transposition of a directive into national law does not necessarily require legislative action in each Member State. The Court has thus repeatedly held that it is not always necessary formally to enact the requirements of a directive in a specific express legal provision, since the general legal context may be sufficient for implementation of a directive, depending on its content. In particular, the existence of general principles of constitutional or administrative law may render superfluous transposition by specific legislative or regulatory measures provided, however, that those principles actually ensure the full application of the directive by the national authorities and that, where the relevant provision of the directive seeks to create rights for individuals, the legal situation arising from those principles is sufficiently precise and clear and that the

persons concerned are put in a position to know the full extent of their rights and, where appropriate, to be able to rely on them before the national courts (see, *inter alia,* Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraphs 22 and 23, and Case C-217/97 *Commission* v *Germany*, cited above, paragraphs 31 and 32).

77 Consequently, it is important in each individual case to determine the nature of the provision, laid down in a directive, to which the action for infringement relates, in order to gauge the extent of the obligation to transpose imposed on the Member States.

78 As regards the present case, it should be stated that, in contrast to a provision such as the second subparagraph of Article 3(2) of Directive 90/313, which confers on individuals a specific right to obtain in part information relating to the environment from which it is possible to separate out information on items which is not to be provided (see, in that regard, paragraphs 66 and 68 of the present judgment), Article 3(3) of the directive only grants Member States a mere option (as can clearly be seen from the use of the verb 'may') to refuse to grant a request for information in certain specified cases and, in particular, that provision does not confer any specific right on individuals, nor indeed does it impose on them any precise and particular obligation. On the contrary, that provision merely provides the possibility, for public authorities alone, to refuse to supply such information in certain cases which are exhaustively listed.

79 Moreover, in paragraph 33 of Case C-217/97 *Commission* v *Germany*, cited above, the Court already made a similar distinction between the second subparagraph and the first subparagraph of Article 3(2) of Directive 90/313;

the wording of the second provision is fully comparable to that of Article 3(3), which is at issue in connection with the present ground.

80 It follows that the transposition of Article 3(3) of Directive 90/313 does not require that provision to be enacted in precisely the same words in national law but the general legal context may be sufficient if it actually ensures the full application of that directive in a sufficiently clear and precise manner.

81 In particular, as regards a provision such as Article 3(3) of Directive 90/313, the requirement for specific transposition would be of very little practical use since that provision is drafted in very general terms and sets out rules which are in the nature of general principles common to the legal systems of the Member States.

82 Compliance with a provision of a directive which exhibits those characteristics must thus be essentially ensured when it is applied in practice to a specific situation, regardless of whether it is transposed into national law in precisely the same words.

83 In those circumstances, a general legal context, which finds expression in the present case in the existence of concepts whose content is clear and precise and which are applied in the framework of settled case-law of the Conseil d'État, must be held to be sufficient for the purpose of properly transposing Article 3(3) of Directive 90/313.

84 The Court has thus held that the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (see, in particular, Case C-300/95 *Commission* v *United Kingdom* [1997] ECR I-2649, paragraph 37). Similarly, it is appropriate to take into account the interpretation given by those courts to the general principles of law upheld in the national legal system.

85 In this instance, the information available to the Court gives no indication that a general legal context such as that relied on by the French Government does not actually ensure the full application of Directive 90/313.

86 The Commission did not put forward in support of its fourth ground any decision by the French courts which affirms an interpretation of Law No 78-753 inconsistent with Article 3(3) of that directive and, moreover, there is no reason to consider, in the light of the documents in the case, that those courts do not interpret national law in the light of the wording and the objective of that directive and do not actually ensure its full application in accordance with the requirements of the third paragraph of Article 189 of the Treaty.

87 Since the Commission is required to prove the alleged infringement, by providing the Court with the information necessary for it to determine whether the infringement is made out, and may not rely on any presumption (see, *inter alia*, *Commission* v *United Kingdom*, cited above, paragraph 31), the Commission's fourth complaint must be rejected.

*The existence of implied refusals for which reasons are not given*

Arguments of the parties

88 According to the Commission, the mechanism of 'implied refusal' in French law, provided for in Article 2 of Decree No 88-465, by reason of which failure by the competent authority to reply within one month to a request to supply administrative documents is to be deemed to constitute a refusal, is incompatible with Article 3(4) of Directive 90/313.

89 Article 3(4) clearly imposes an obligation on the public authority concerned to give reasons for any refusal to provide the information requested. By contrast, the mechanism of tacit refusal, under Article 2 of Decree No 88-465, effectively eliminates the mandatory effect of the requirement to state reasons imposed by Article 3(4) of that directive.

90 In its reply, the Commission adds that the effect of the application of that decree is to allow a belated statement of reasons for implied refusals to provide information, that is to say, beyond the period of two months prescribed in Article 3(4) of Directive 90/313. However, that provision makes clear that the statement of reasons must be made at the time when the refusal decision is adopted and cannot be regularised after the event. The same conclusion follows from the judgment in Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, paragraph 22.

91 It is true that the opportunity provided in Article 5 of Law No 79-587 for individuals to obtain the reasons for any implied refusal within a month of

submission of a request to that effect could lead to compliance with the time-limit of two months prescribed in Article 3(4) of Directive 90/313, but only on the — essentially theoretical — condition that the applicant reacts immediately to the failure of the authorities to reply within one month. In any event, that procedure imposes on the person concerned the obligation, which is not provided for under the directive, to request that the reasons for the refusal at issue be provided.

92 The French Government contends, as its principal argument, that Article 3(4) of Directive 90/313 imposes on a public authority two distinct obligations, set out in two sentences which are independent of one another. Thus, in accordance with the first sentence of that provision, the authority must respond to a request for information as soon as possible and at the latest within two months of the request being made. Under the second sentence of that provision, the public authority must give the reasons for a refusal to provide the information. Since the second sentence does not make any reference to the first, it cannot be maintained that that provision requires the refusal to provide the information requested to be accompanied by the reasons for it. Moreover, the second sentence of Article 3(4) does not confine the obligation to give reasons within any set period. It follows that that obligation is subject only to the condition that reasons be given within a period which must be reasonable so as not to deprive the provision in question of practical effect.

93 The Government adds, in the alternative, that the first sentence of Article 7 of Law No 78-753 clearly lays down the obligation for the authorities to give reasons for any decision to refuse to provide information and also specifies that that response must be in writing. Nevertheless, where, in conflict with the rule laid down in Article 7, a public authority which does not exercise all due care has not responded to a request for information, the national legislation has provided for the fiction of an implied refusal intended to protect individuals by preventing their being deprived of the opportunity to bring proceedings before the courts by the non-existence of an act open to challenge where the authorities fail to respond. In those circumstances, it would be incorrect to consider that that mechanism allows an authority not to provide a reasoned response to the request submitted to it.

94 Moreover, even in the event of an implied refusal, the situation is governed by Article 5 of Law No 79-587, under which an informal appeal is available to the individual for the purpose of obtaining the reasons to which he is entitled.

Findings of the Court

95 The Commission does not complain that the French Republic has failed formally to transpose the general obligation, laid down in the first sentence of Article 3(4) of Directive 90/313, to respond to a request for information relating to the environment at the latest within two months.

96 The Commission confines its complaint to the specific case of implied refusal as provided for under French law.

97 In that regard, the Commission points out in essence that the effect of the mechanism provided for in Article 2 of Decree No 88-465 is to eliminate the obligation to provide reasons 'from the outset and in any event' for each refusal. During the written procedure, it insisted on the fact that the reasons for a refusal must accompany the decision itself, so that the mechanism of implied refusal is in itself incompatible with Directive 90/313.

98 The Commission adds that nor is the right for an applicant to obtain a statement of reasons consistent with Directive 90/313. First, that possibility imposes on the applicant a burden not provided for under the directive, which lays down the obligation automatically to provide reasons for a refusal to provide information, irrespective of a prior request to that effect. Secondly, such a statement of reasons

for refusal would almost always be provided outside the two-month period prescribed by the directive, since compliance with that time-limit requires that the applicant act immediately after one month without a reply from the authorities and that the latter actually react within the following month.

99 In order to rule on the merits of that argument, it must first be stated that Article 7 of Law No 78-753 expressly provides that the refusal to provide information must take the form of a 'reasoned, written decision'.

100 The obligation to provide reasons for any refusal therefore arises from the very wording of that law.

101 Moreover, the French Government maintains, without any contradiction on that point by the Commission, that under French law failure to give reasons for adverse administrative decisions concerning natural and legal persons constitutes a defect subject to sanction by the competent courts.

102 The French Government adds that the fiction of implied refusal is in no way intended to allow the authorities to fail to comply with the obligation to state reasons, but that it seeks to protect citizens who, where a public authority fails to exercise due care, are thus able to challenge before the courts the refusal which the authorities' failure to reply within one month is deemed to constitute. The mechanism of refusal inferred from the competent authority's failure to react is thus in no way intended to evade the authorities' obligation to state reasons.

103 It should next be pointed out that the wording of Article 3(4) of Directive 90/313 is not unambiguous as regards the issue of law to be resolved in the present case.

104 The wording of that provision does not permit a clear response to the question whether it means, as the Commission maintains, that the statement of reasons must accompany the refusal or, as that institution stated at the hearing, whether the reasons must at least be provided within two months of submission of the initial request, or whether, on the other hand, there is no direct link between the two sentences which make up that provision, so that, as the French Government contends, the second does not confine the obligation to state reasons within any set period — subject to application of the principle of a reasonable period decided in the individual case — and thus allows the reasons for that refusal to be communicated subsequently.

105 In that context, the French Government put forward a contrary argument, which relies on a proposal to amend Directive 90/313, the text of which, were it to be adopted, would in future uphold the contention that the refusal is to be accompanied by the reasons for it.

106 Article 4(4) of the Common Position (EC) No 24/2002 of 28 January 2002 adopted by the Council with a view to adopting a Directive of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313 (OJ 2002 C 113, p. 1) is worded as follows: '[a] refusal to make available all or part of the information requested shall be notified to the applicant... within the time-limits referred to in Article 3(2)(a) or, as the case may be, (b). The notification shall state the reasons for the refusal and include information on the review procedure provided for in accordance with Article 6'.

107 The willingness of the competent Community institutions to amend the wording of Article 3(4) of Directive 90/313 in order to clarify its scope could indeed be an indication that that provision, in its present form, does not require the refusal and the reasons for it to be notified at the same time. At the very least, the proposed amendment indicates that such a requirement is not clear from the provision currently in force.

108 Moreover, the Commission itself softened its position by stating, at the hearing, that the reasons for the refusal must, in any event, be given within two months of the submission of the initial request, which amounts to conceding that they may be separated from the refusal itself.

109 Finally, paragraph 22 of *Michel* v *Parliament*, cited above, which is relied on by the Commission, cannot be applied by analogy to the present case, since that judgment was given in a different context from that of the present action.

110 On the other hand, it is important to point out that, in paragraph 15 of Case 222/86 *Heylens and Others* [1987] ECR 4097, the Court expressly acknowledged that the authorities could notify the reasons on which a refusal is based in a subsequent communication.

111 In the light of the foregoing, it must be held that, in contrast to what the Commission claims, the fiction by which the failure of the authorities to reply is deemed to constitute an implied refusal cannot, as such, be considered incompatible with the requirements of Directive 90/313 on the sole ground that a tacit refusal by definition does not include any reasons. Moreover, as Community law currently stands, the wording of that directive does not provide sufficient justification for the alleged necessity that the refusal be accompanied by the reasons for it.

112 On the other hand, the fact that, under the French legislation, the interested party is required within a certain period, where the authorities fail to reply, to request that the latter provide the reasons for refusing his request for information is clearly not consistent with either the wording of Article 3(4) of Directive 90/313 or the spirit of the directive.

113 First, it is clear from the very wording of that provision, which states that '[t]he reasons for a refusal... must be given', that the provision of reasons for any refusal is an obligation for the authorities. To regard that requirement as a mere right for citizens to request the reasons for such a decision would considerably narrow the scope of such an obligation.

114 Secondly, the purpose of Directive 90/313 is to ensure freedom of access to information on the environment, without the applicant having to prove an interest to justify his request, and to avoid any obstacle to that freedom (see, to that effect, Case C-217/97 *Commission* v *Germany*, cited above, paragraphs 47 and 58).

115 It follows that Article 3(4) of the directive requires the public authority automatically to provide the reasons for its refusing a request for information relating to the environment, without the applicant having to submit a request for that purpose, even if, where the authorities fail to reply, those reasons may be notified to the applicant at a later date.

116 The interpretation of the French Government, according to which Directive 90/313 does not lay down any precise period within which the reasons for a tacit refusal of such a request for information must be notified, so that it is appropriate to apply a reasonable delay, cannot be accepted.

117 That interpretation would deprive Article 3(4) of Directive 90/313 of a substantial part of its effectiveness.

118 On the other hand, in the case of an implied refusal of a request for information relating to the environment, the reasons for that refusal must be notified within two months of the submission of the initial request, since that notification must, in that situation, be regarded as a 'response' for the purposes of Article 3(4) of the directive.

119 Consequently, it must be concluded that the Commission's fifth complaint is well founded only in so far as it alleges that the French Republic has failed to provide, in the case of an implied refusal of a request for information relating to the environment, that the public authorities are required to provide the reasons for that refusal automatically and at the latest within two months of the submission of the initial request. The remainder of the complaint must, on the other hand, be dismissed.

120 Taking account of all the preceding considerations, it must be held that:

— by restricting the obligation to supply information relating to the environment to 'administrative documents' within the meaning of Law No 78-753;

— by providing, as one of the grounds for refusing to supply such information, that consultation or provision of the document would prejudice, 'generally, secrets protected by legislation';

— by failing to include in the national legislation a provision under which information relating to the environment is to be supplied in part where it is possible to separate out information on items concerning the interests referred to in Article 3(2) of Directive 90/313 which may accordingly justify a refusal, and

— by failing to provide, in the case of an implied refusal of a request for information relating to the environment, that the public authorities are required to provide the reasons for that refusal automatically and at the latest within two months of the submission of the initial request,

the French Republic has failed to fulfil its obligations under Articles 2(a) and 3(1), (2) and (4) of that directive.

121 The remainder of the application must be dismissed.

## Costs

122 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 the Commission has applied for costs and the French Republic has been unsuccessful in its main submissions, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that:

by restricting the obligation to supply information relating to the environment to 'administrative documents' within the meaning of Law No 78-753 of 17 July 1978 establishing various measures to improve relations between the administrative authorities and the public and various administrative, social and fiscal provisions;

by providing, as one of the grounds for refusing to supply such information, that consultation or provision of the document would prejudice, 'generally, secrets protected by legislation';

by failing to include in the national legislation a provision under which information relating to the environment is to be supplied in part where it is possible to separate out information on items concerning the interests referred to in Article 3(2) of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, which may accordingly justify a refusal, and

by failing to provide, in the case of an implied refusal of a request for information relating to the environment, that the public authorities are required to provide the reasons for that refusal automatically and at the latest within two months of the submission of the initial request,

the French Republic has failed to fulfil its obligations under Articles 2(a) and 3(1), (2) and (4) of that directive;

2. Dismisses the remainder of the application;

3. Orders the French Republic to pay the costs.

Puissochet Schintgen Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 26 June 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber