

JUDGMENT OF THE COURT (Fifth Chamber)

22 May 2003 \*

In Case C-103/01,

**Commission of the European Communities**, represented by J. Schieferer, acting as Agent, with an address for service in Luxembourg,

applicant,

v

**Federal Republic of Germany**, represented by W.-D. Plessing, B. Muttelsee-Schön and H.-W. Rengeling, acting as Agents,

defendant,

\* Language of the case: German.

supported by

French Republic, represented by G. de Bergues and D. Colas, acting as Agents,  
with an address for service in Luxembourg,

intervener,

APPLICATION for a declaration that, by making, by means of the legislation of certain *Länder*, personal protective equipment for firefighters subject to additional requirements, although it complies with the requirements of Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment (OJ 1989 L 399, p. 18), and bears the EC marking, the Federal Republic of Germany has failed to fulfil its obligations under Articles 1 and 4 of that directive,

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, D.A.O. Edward,  
A. La Pergola, P. Jann (Rapporteur) and A. Rosas, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,  
Registrar: H.-A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 24 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 10 December 2002,

gives the following

### Judgment

- 1 By application lodged at the Court Registry on 2 March 2001, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by making, by means of the legislation of certain *Länder*, personal protective equipment for firefighters subject to additional requirements, although it complies with the requirements of Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment (OJ 1989 L 399, p. 18, hereinafter ‘the PPE Directive’), and bears the EC marking, the Federal Republic of Germany has failed to fulfil its obligations under Articles 1 and 4 of that directive.

## Legal framework

- 2 Article 1 of the PPE Directive, as amended by Council Directive 93/68/EEC of 22 July 1993 (OJ 1993 L 220, p. 1), provides, among other things:

‘1. This Directive applies to personal protective equipment, hereinafter referred to as “PPE”.

It lays down the conditions governing its placing on the market and free movement within the Community and the basic safety requirements which PPE must satisfy in order to ensure the health protection and safety of users.

2. For the purposes of this Directive, PPE shall mean any device or appliance designed to be worn or held by an individual for protection against one or more health and safety hazards.

PPE shall also cover:

- (a) a unit constituted by several devices or appliances which have been integrally combined by the manufacturer for the protection of an individual against one or more potentially simultaneous risks;

- (b) a protective device or appliance combined, separably or inseparably, with personal non-protective equipment worn or held by an individual for the execution of a specific activity;
  
- (c) interchangeable PPE components which are essential to its satisfactory functioning and used exclusively for such equipment.

...

4. This Directive does not apply to:

- PPE covered by another directive designed to achieve the same objectives as this Directive with regard to placing on the market, free movement of goods and safety,
  
- the PPE classes specified in the list of excluded products in Annex I, independently of the reason for exclusion mentioned in the first indent.’

3 Article 4(1) of the PPE Directive states:

‘Member States may not prohibit, restrict or hinder the placing on the market of PPE or PPE components which comply with the provisions of this Directive and which bear the EC marking attesting their conformity to all the provisions of this Directive, including the certification procedures in Chapter II.’

- 4 Annex I to the PPE Directive contains the exhaustive list of PPE classes not covered by that directive. Under point 1 of that annex, PPE designed and manufactured specifically for use by the armed forces or in the maintenance of law and order (helmets, shields, etc.) is excluded.

### Facts and pre-litigation procedure

- 5 The Commission's attention was drawn to the fact that the legislation of certain German *Länder* made firefighters' equipment subject to requirements which were not to be found in the PPE Directive. In the *Land* of Lower Saxony, for example, safety belts had to comply with the specifications of a national technical standard. In North Rhine-Westphalia, the legislation required the certification of helmets by a body established in that *Land*.
- 6 Since it took the view that those provisions were not compatible with Articles 1 and 4 of the PPE Directive, the Commission sent a letter of formal notice to the German Government on 19 March 1998.
- 7 In its reply, dated 25 May 1998, the German Government asserted that the organisation of fire brigades comes within the legislative competence of the *Länder* which state, in their legislation, whether such brigades constitute bodies responsible for securing public safety or order. If such is the case, PPE which is designed and manufactured exclusively for that type of body is excluded from the scope of the PPE Directive. That Government claims that it cannot therefore be stated, generally, that German firefighters do not form part of the armed forces or services which maintain public order. The fire brigades of the *Land* of Lower Saxony, particularly, are bodies responsible for securing public safety or order and the safety belt in question is specifically intended for their equipment.

- 8 Since it was not satisfied with that explanation, the Commission sent a reasoned opinion to the Federal Republic of Germany by letter of 21 October 1998 requesting it to take the measures necessary to comply with it within a period of two months from its notification.
- 9 In a letter of 18 December 1998, the German Government informed the Commission that it had written to the Ministries of the Interior of the *Länder* requesting them to amend their legislation concerning the provision of PPE in order to adapt it to Community law. In another letter of 8 December 2000, that Government explained that it was still awaiting replies by the *Länder*.
- 10 It is in those circumstances that the Commission brought this action.

## The action

### *Observations submitted to the Court*

- 11 The Commission submits that the application of the PPE Directive depends solely on the definition in Community law of the expression ‘armed forces or in the maintenance of law and order’, which does not include fire brigades. The simple administrative organisation of firefighters is, in that regard, irrelevant. Their specific task is different from the tasks conferred on the armed forces or for the maintenance of law and order. The latter expression refers to the very essence of the exercise of public authority.

- 12 The words 'armed forces or in the maintenance of law and order' designate armies and armed forces of order. The examples mentioned in the list of exclusions set out in Annex I to the PPE Directive, namely helmets and shields, permit, according to the Commission, the clear statement that they relate to intervention forces which must be able to defend themselves against attack by other persons. PPE manufactured specifically for such units must satisfy the particular safety requirements for violent clashes and are not therefore ordinary goods found on the market. Such is not the case for equipment which is not manufactured specifically for public fire brigades, but for all firefighters, including those in undertakings and factories.
- 13 Since public and private fire brigades fulfil similar tasks in dealing with fires, explosions, accidents and natural disasters, their powers in relation to the maintenance of law and order are not of the essence of their tasks. In addition, such powers have no connection with their protective equipment, designed for firefighting and for the other appropriate tasks of firefighters.
- 14 The German Government seeks to show, at the outset, that the safety belt which is the source of these proceedings for failure to fulfil obligations was designed and manufactured specifically for the protection of firefighters against danger in their training, exercises and attendances. According to that Government, the technical circular relating to that safety belt regulates its dimensions as well as its inspection, and imposes the obligation to stamp it with a mark. The use of an identical belt, worn during exercises and on active duty by all firefighters, is of decisive importance for saving themselves and others and, in particular, colleagues in difficulty. It enables a firefighter to protect himself by the safety rope against the danger of falling from ladders and from other unsafe places. The German Government states that it includes an axe and its protective cover, in compliance with the DIN 14924 standard. Moreover, detailed particulars concerning the belt are necessary because it may be, for example, that rescue can be carried out only with the aid of ropes and rescue apparatus described with



precision. That is why the use and the putting into service of firefighters' equipment is governed by rules which apply uniformly at federal level. A successful attendance involving the cooperation of several units can be guaranteed only if those units have rescue equipment which all complies with the same standards of manufacture and safety.

- 15 In so far as the interpretation of the expression 'forces for the maintenance of law and order' is concerned, the German Government maintains that the powers and duties of the fire brigades in the *Länder* are part of the kernel of the exercise of public authority. Public fire brigades, in compliance with the laws of the *Länder*, take the measures necessary to protect the public and individuals against the danger to their life, health and possessions, of fires, explosions, accidents and other emergency situations such as natural disasters. Attendances by public fire brigades may also involve restrictions of fundamental rights. To perform their task, fire brigades have powers of execution and may, if need be, use force against property or persons.

- 16 With regard to the systematic interpretation of the provisions of the PPE Directive, the German Government refers to Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1) and Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1989 L 393, p. 18). Those two directives lay down minimum requirements. The fact that it could be lawful to impose additional or different conditions for equipment cannot, according to the German Government, be without consequence for the PPE directive. The coherent interpretation of those three directives must take into account, as far as concerns free movement of goods, provisions on the protection of workers using personal protective equipment.

- 17 The German Government also sets up a comparison with the rules of the EC Treaty regarding the freedom of movement of workers. Under Article 48(4) of the EC Treaty (now, after amendment, Article 39(4) EC), all posts which involve direct or indirect participation in the exercise of public authority and in duties whose object is the protection of the general interests of the State or of other public authorities are excluded from the scope of the provisions on the freedom of movement of workers. Likewise, it is the tasks and duties which have been allotted to the fire brigades which should be decisive, according to that Government, as far as concerns the interpretation of the derogations set out in the PPE Directive.
- 18 The German Government maintains, furthermore, that it enjoys, in relation to the interpretation of the derogations from the PPE Directive, a discretion to determine both the tasks of public authority of the forces of law and order and the level of protection of the PPE manufactured for them.
- 19 Moreover, the interpretation of Article 1(4) of the PPE Directive, read in conjunction with point 1 of Annex I thereto, must observe the principles for the exercise of powers, which are the principles of subsidiarity and proportionality set out in the second and third paragraphs of Article 3b of the EC Treaty (now the second and third paragraphs of Article 5 EC).
- 20 The Commission disputes the systematic interpretation suggested by the German Government, arguing that it is necessary to consider the requirements of the PPE Directive primarily from the point of view of the internal market, since it is a directive aimed at the approximation of the laws of the Member States. In order to facilitate the free movement of goods, that directive sets out the essential requirements which PPE must satisfy.

- 21 By contrast, the aim of Directives 89/391 and 89/656, the directives relied upon by the German Government, is the improvement of the safety conditions and of the protection of the health of workers at work and they contain minimum requirements for safety and for protection of health for the use by workers of PPE. The protective equipment of firefighters is excluded from the application of those directives, as is clear from Article 2(2) thereof.
- 22 The French Government argues that the interpretation of the expression ‘PPE designed and manufactured specifically for use by the armed forces or in the maintenance of law and order (helmets, shields, etc.)’ does not involve the question whether the users of the equipment at issue can or cannot be described as armed forces or forces for the maintenance of law and order, but whether the material in issue is specifically intended for military or police purposes. In order to answer the argument relied upon by the German Government, it is therefore necessary to show that the equipment in issue is not equipment which can be used only for military or police purposes.
- 23 Conversely, the reasoning adopted by the Commission is liable to lead it to impinge on the organisation of the armed forces, which is a prerogative of the Member States alone. Such an approach would be contrary to the Court’s case-law and to the Treaty on the European Union, in the context of which the common foreign and security policy forms the second pillar.

### *Findings of the Court*

- 24 At the outset, it is appropriate to state that it is clear from the sixth recital in the preamble to the PPE Directive that it seeks, by harmonising the national provisions relating to PPE, to ensure the free movement of those products, without in any way reducing the valid level of protection already required in the Member States.

- 25 It is stated in the seventh recital in the preamble to the PPE Directive that the provisions governing the design and the manufacture of PPE laid down therein are fundamental, in particular, to attempts to ensure a safer working environment.
- 26 In order to take account of the objectives of health, safety at work and protection of users, Article 3 of the PPE Directive provides that the PPE to which it applies must satisfy the basic health and safety requirements set out in Annex II to that directive.
- 27 Paragraph 3.1.2.2 of the said Annex II contains specific requirements for the prevention of falls from a height, Paragraph 3.6 thereof is devoted to protection against heat and/or fire and Paragraph 3.10.1 to respiratory protection.
- 28 It is clear from this that the PPE Directive takes account, in particular, of the specific risks to which firefighters are exposed by establishing the essential safety requirements which PPE intended for their protection must satisfy.
- 29 Therefore, considerations connected to the dangers to which firefighters are exposed in the course of their training, exercises and attendances cannot, in themselves, justify a derogation from the provisions of the PPE Directive.
- 30 Moreover, the PPE Directive does not preclude a Member State from requiring fire brigades to be equipped with rescue apparatus which all complies with the same standards of manufacture and safety in order to ensure its compatibility.

- 31 In addition, it follows from Article 1(4) of the PPE Directive that PPE intended to be used by fire brigades falls outside the scope of that directive only if it can be considered to have been designed and manufactured specifically for the forces which maintain law and order within the meaning of point 1 of Annex I to that directive.
- 32 Since that provision constitutes an exception to the principle of free movement of goods, as laid down in Article 30 of the EC Treaty (now, after amendment, Article 28 EC) and implemented for PPE by Article 4(1) of the PPE Directive, it must be interpreted strictly (see, concerning the exceptions provided for by Article 36 of the EC Treaty (now, after amendment, Article 30 EC), Case 46/76 *Bauhuis* [1977] ECR 5, paragraph 12, and, in general, Case 199/84 *Migliorini and Fischl* [1985] ECR 3317, paragraph 14).
- 33 In that regard, it is clear from the case-law of the Court that the Community legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems unless there is express provision to that effect (Case 64/81 *Corman* [1982] ECR 13, paragraph 8, and Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 30).
- 34 The wording of point 1 of Annex I to the PPE Directive does not contain any express reference to national legal systems.
- 35 In addition, that provision defines the exception to the scope of the PPE Directive by reference to the precise task which is the maintenance of law and order. PPE which is thus outside the scope of the PPE Directive must be designed and manufactured specifically for the performance of that task.

- 36 The tasks of fire brigades ordinarily consist of rescuing persons and property from fires, traffic accidents, explosions, floods or other disasters. Those tasks differ from those of the forces whose main task is the maintenance of law and order.
- 37 Consequently, PPE intended to protect firefighters from the dangers to which they are exposed in the performance of their usual duties as so described cannot be considered to have been designed and manufactured specifically to be used in the maintenance of law and order.
- 38 The protection requirements of public fire brigades in the performance of their usual duties do not differ from those of private law corps of firefighters, even if the latter have no powers of public authority.
- 39 On the other hand, if fire brigades were called upon, in certain circumstances, to contribute to the maintenance of law and order and were provided, for that purpose, with PPE designed and manufactured specifically for the performance of that task, such equipment would be covered by the derogation provided for by point 1 of Annex I to the PPE Directive.
- 40 However, that does not apply to the PPE in issue in this case, since the Federal Republic of Germany does not claim that the safety belts and helmets in question were used for the protection of firefighters when not performing their usual duties.

- 41 It follows that PPE designed and manufactured for the use of firefighters in performing the duties described in paragraph 36 of this judgment does not come within the list of exclusions set out in point 1 of Annex I to the PPE Directive.
- 42 That conclusion is not undermined by the arguments which the defendant seeks to draw from Directives 89/391 and 89/656. They were adopted on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), and seek to improve the safety and health of workers. It is compatible with that objective that those directives contain minimum rules and permit provisions which are more favourable to the protection of workers.
- 43 By contrast, the PPE Directive was adopted on the basis of Article 100a of the EC Treaty (now, after amendment, Article 95 EC). In order to attain the objective of ensuring the free movement of PPE between the Member States, that directive must preclude them from prohibiting, restraining or interfering with the putting on the market of such equipment, which satisfies its provisions and which bears the EC marking.
- 44 The Federal Republic of Germany cannot rely on Article 48(4) of the Treaty, either. While that provision excludes from the scope of the freedom of movement of workers employment in the public service which involves direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities (see Case 149/79 *Commission v Belgium* [1980] ECR 3881, paragraph 10, and Case C-290/94 *Commission v Greece* [1996] ECR I-3285, paragraph 2), it furnishes no material relating to the extent of a derogation contained in a directive whose objective is to facilitate the free movement of goods and which excludes only PPE specifically designed and manufactured for

use by the armed forces or in the maintenance of law and order. That derogation clearly does not cover all PPE used by persons vested with powers of public authority or responsible for safeguarding the general interests of the State.

- 45 With regard to the discretion which the defendant wishes to see recognised, it could not extend beyond the limits set by the provision containing the derogation in question. While it is permissible for the Member States to define the tasks and powers attributed to the forces for the maintenances of law and order and to determine the level of their protection, it does not follow that they are also entitled to use their own definitions of PPE for the purposes of the application of the derogation in issue.
- 46 By harmonising the national provisions relating to PPE intended for the protection of firefighters in the performance of their usual duties, the PPE Directive does not infringe either the principle of subsidiarity or that of proportionality.
- 47 With regard to the principle of subsidiarity, since the national provisions in question differ significantly from one Member State to another, they may constitute, as is noted in the fifth recital in the preamble to the PPE Directive, a barrier to trade with direct consequences for the creation and operation of the common market. The harmonisation of such divergent provisions may, by reason of its scope and effects, be undertaken only by the Community legislature (see, to that effect, Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraphs 180 to 182).
- 48 With regard to the principle of proportionality, the inclusion of PPE intended for the protection of firefighters in the scope of the PPE Directive is appropriate in



order to ensure the free movement of that equipment between the Member States and does not go beyond what is necessary to obtain that aim. It does not encroach on the competence of those States to define the tasks and powers of fire brigades and to ensure their personal protection. Nor does it encroach, as the French Government submits, on the organisation of the armed forces and those for the maintenance of law and order.

- 49 Since the derogation provided for by point 1 of Annex I to the PPE Directive does not apply to this case, the *Länder* were not entitled, by virtue of Article 4(1) thereof, to impose additional conditions on PPE which satisfies the provisions of that directive and bears the EC marking.
- 50 It follows from all the foregoing that by subjecting, by means of the legislation of certain *Länder*, PPE for firefighters to additional requirements despite the fact that it complies with the requirements of the PPE Directive and bears the EC marking, the Federal Republic of Germany has failed to fulfil its obligations under Articles 1 and 4 of that directive.

## Costs

- 51 Under Article 69(2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for an order that the Federal Republic of Germany pay the costs and since the latter 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 French Republic must pay its own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that by subjecting, by means of the legislation of certain *Länder*, personal protection equipment for firefighters to additional requirements despite the fact that it complies with the requirements of Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment and bears the EC marking, the Federal Republic of Germany has failed to fulfil its obligations under Articles 1 and 4 of that directive;
2. Orders the Federal Republic of Germany to pay the costs;
3. Orders the French Republic to pay its own costs.

Wathelet

Edward

La Pergola

Jann

Rosas

Delivered in open court in Luxembourg on 22 May 2003.

R. Grass

M. Wathelet

Registrar

President of the Fifth Chamber