JUDGMENT OF THE COURT (Fifth Chamber)

7 February 2002 *

In Case C-5/00,

Commission of the European Communities, represented by W. Bogensberger, acting as Agent, with an address for service in Luxembourg,

applicant,

v

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

defendant,

APPLICATION for a declaration that, by exempting, under Paragraph 6(1) of the Gesetz über die Durchführung von Maßnahmen des Arbeitsschutzes zur Verbesserung der Sicherheit und des Gesundheitsschutzes der Beschäftigten bei der Arbeit (Arbeitsschutzgesetz) [Law on the implementation of protective measures to improve the safety and health of employees at work (Law on safety

* Language of the case: German.

and health at work)] of 7 August 1996 (BGBl. 1996 I, p. 1246), employers of 10 or fewer workers from the duty to keep documents containing the results of a risk assessment, the Federal Republic of Germany has failed to fulfil its obligations under Articles 5 and 189 of the EC Treaty (now Articles 10 EC and 249 EC) and Articles 9(1)(a) and 10(3)(a) of 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).

THE COURT (Fifth Chamber),

composed of: S. von Bahr (Rapporteur), President of the Fourth Chamber, acting for the President of the Fifth Chamber, D.A.O. Edward, A. La Pergola, M. Wathelet and C.W.A. Timmermans, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 6 January 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by exempting, under Paragraph 6(1) of the Gesetz über die Durchführung von Maßnahmen des Arbeitsschutzes zur Verbesserung der Sicherheit und des Gesundheitsschutzes der Beschäftigten bei der Arbeit (Arbeitsschutzgesetz) [Law on the implementation of protective measures to improve the safety and health of employees at work (Law on safety and health at work)] of 7 August 1996 (BGBl. 1996 I, p. 1246, hereinafter 'the ArbSchG'), employers of 10 or fewer workers from the duty to keep documents containing the results of a risk assessment, the Federal Republic of Germany has failed to fulfil its obligations under Articles 5 and 189 of the EC Treaty (now Articles 10 EC and 249 EC) and Articles 9(1)(a) and 10(3)(a) of 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, hereinafter 'the Directive').

The Community rules

2 Article 1(2) of the Directive states that it contains general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors and the informing, consultation and balanced participation of workers in accordance with national laws and/or practices and training of workers, as well as general guidelines for the implementation of those principles.

3 Article 6(3)(a) of the Directive imposes an obligation on the employer to 'evaluate the risks to the safety and health of workers', 'taking into account the nature of the activities of the enterprise and/or establishment'. Subsequent to that evaluation and as necessary, the preventive measures and the working and production methods implemented by the employer must ensure an improvement in the level of protection afforded to workers with regard to safety and health and be integrated into all the activities of the undertaking and/or establishment.

4 Article 9 of the Directive, headed 'Various obligations on employers', provides in subparagraph 1(a):

'The employer shall

(a) be in possession of an assessment of the risks to safety and health at work, including those facing groups of workers exposed to particular risks.'

5 Article 10 of the Directive, headed 'Worker information', states in paragraph 3:

'The employer shall take appropriate measures so that workers with specific functions in protecting the safety and health of workers, or workers' represen-

tatives with specific responsibility for the safety and health of workers shall have access, to carry out their functions and in accordance with national laws and/or practices, to:

(a) the risk assessment and protective measures referred to in Article 9(1)(a) and (b)

...'

The national rules

6 Paragraph 5 of the ArbSchG, headed 'Assessment of working conditions', provides in subparagraph (1) that the employer is to determine, by means of an assessment of the risks faced by employees in connection with their work, what safety and health measures are necessary.

7 Paragraph 6, headed 'Documentation', provides in subparagraph (1):

'The employer must be in possession of the necessary documents, having regard to the nature of his activities and the number of his employees, showing the results of the risk assessment, the safety and health measures decided upon by the

employer, and the results of the inspection of such measures. ... Save in so far as may be otherwise prescribed by other legal provisions, the first sentence hereof shall not apply to employers with 10 or fewer employees; in the case of particular risks, the competent authorities may require [the employer] to be in possession of documentation. ...'

8 According to Paragraph 2(4) of the ArbSchG, 'other legal provisions' within the meaning of that law are rules for the protection of workers contained in other laws, regulations and Unfallverhütungsvorschriften (accident prevention regulations, hereinafter 'UVV').

9 Under Paragraph 1 of the Gesetz über Betriebsärzte, Sicherheitsingenieure und andere Fachkräfte für Arbeitssicherheit (Arbeitssicherheitgesetz) [Law on occupational physicians, safety engineers and other occupational safety specialists (Law on safety at work)] of 12 December 1973 (BGBl. 1973 I, p. 1885), as amended by Paragraph 10 of the Law of 25 September 1996 (BGBl. 1996 I, p. 1476, hereinafter 'the ASiG'), the employer is obliged to appoint occupational physicians and occupational safety specialists to provide assistance in the protection of workers and the prevention of accidents, in order to ensure that the legal provisions on occupational safety and health and prevention of accidents are correctly applied, having regard to the specific working conditions in the undertaking.

10 Paragraph 2(1) of the ASiG provides that employers must appoint occupational physicians in writing and assign to them the duties laid down in Paragraph 3 of that law in so far as is necessary with regard to (i) the nature of the undertaking and the accident and health risks to which the workers are exposed, (ii) the size and composition of the workforce and, (iii) the number and type of persons responsible for the protection of workers and the prevention of accidents.

11 According to Paragraph 3(1) of the ASiG, occupational physicians are required to assist the employer in all matters relating to the protection of workers' health and accident prevention. Under Paragraph 3(1)(1)(g), they are required, in particular, to advise the employer and the other persons responsible for the protection of workers and accident prevention in respect of the assessment of working conditions.

12 Similarly, Paragraph 5(1) of the ASiG provides that employers must appoint occupational safety specialists (safety engineers, technicians and foremen) in writing, and assign to them the duties laid down in Paragraph 6 of that law. The duty of occupational safety specialists in respect of the assessment of working conditions, laid down in Paragraph 6(1)(e) of the ASiG, is worded in the same way as that of occupational physicians under Paragraph 3(1)(1)(g) of the same law.

13 Paragraphs 3(1)(1)(g) and 6(1)(e) were inserted into the ASiG by Paragraph 2 of the Gesetz zur Umsetzung der EG-Rahmenrichtlinie Arbeitsschutz und weiterer Arbeitsschutz-Richtlinien (Law transposing the EC safety and health framework directive and other safety and health directives) of 7 August 1996 (BGBl. 1996 I, p. 1246), which transposed the Directive into German law and which incorporates the ArbSchG in Paragraph 1.

14 Paragraph 14 of the ASiG, headed 'Power to enact regulations' provides in subparagraph (1):

'The Federal Minister for Labour and Social Affairs may, with the consent of the Bundesrat, determine, by way of regulation, the measures which employers must

take in order to comply with their obligations under this law. Where institutions providing statutory accident insurance are authorised to regulate the statutory duties in more detail in UVVs, the Federal Minister for Labour and Social Affairs shall only exercise that power if, within a reasonable period of time prescribed by him, the institution providing statutory accident insurance has failed to adopt an appropriate UVV or to amend a UVV which has become unsatisfactory.'

15 Paragraph 14(2) of the ASiG states:

'The Federal Minister for Labour and Social Affairs may, by way of regulation, and with the consent of the Bundesrat:

(1) provide that, for certain types of undertaking, taking into account the circumstances referred to in Paragraphs 2(1)(2) and (3) and 5(1)(2) and (3), the obligations laid down in Paragraphs 3 and 6 need not be fulfilled either wholly or in part;

2. provide that, in certain types of undertaking, the obligations laid down in Paragraphs 3 and 6 need not be fulfilled either wholly or in part, where this is unavoidable because a sufficient number of occupational physicians or occupational safety specialists are not available.'

16 Paragraph 15(1)(6) of the Sozialgesetzbuch VII (Social Code, Book VII, BGBl. 1996 I, p. 1254, hereinafter 'the SGB VII') states that institutions providing statutory accident insurance (Unfallversicherungsträger) (hereinafter 'accident

insurance institutions') are to issue UVVs having the status of autonomous legal rules, prescribing the measures which the employer must take to comply with his obligations under the ASiG.

17 Paragraph 15(4) of the SGB VII provides:

'The regulations provided for in subparagraph (1) shall require the authorisation of the Federal Ministry for Labour and Social Affairs. The decision on authorisation shall be taken in consultation with the supreme administrative authorities of the *Länder*. Where regulations are adopted by an accident insurance institution which is subject to supervision by a *Land*, the decision shall be taken by the highest administrative authority of that *Land* in consultation with the Federal Minister for Labour and Social Affairs.'

Pre-litigation procedure

18 The Commission took the view that the Directive had not been satisfactorily transposed into German law and initiated the procedure for infringement. After giving the Federal Republic of Germany an opportunity to submit its observations, the Commission sent a reasoned opinion to that Member State by letter of 19 October 1998, calling on it to take the requisite measures to fulfil its obligations under the Directive within two months from notification of that opinion.

19 Since the Commission was not satisfied with the German Government's reply to the reasoned opinion, it brought the present action.

Findings of the Court

20 The Commission claims that Paragraph 6 of the ArbSchG, which exempts employers with 10 or fewer employees from the duty to keep documents showing the results of the assessment of risks to workers in connection with their work, is contrary to Article 9(1)(a) of the Directive, which requires all employers to be in possession of such an assessment, and Article 10(3)(a) of the Directive, which guarantees access to that assessment for certain persons.

21 The German Government contends that, under the ASiG, read in conjunction with Paragraph 15(1)(6) of the SGB VII and the UVVs adopted for each sector by the accident insurance institutions, all undertakings, including those with 10 or fewer employees, are obliged to appoint occupational physicians and occupational safety specialists who are themselves required to draw up reports containing an assessment of occupational risks. Consequently, the obligation laid down in Article 9(1)(a) of the Directive is fully met.

22 The Commission raises two objections in respect of the provisions relied on by the German Government.

23 First, the Commission claims that the obligation requiring occupational physicians and occupational safety specialists to draw up reports on the performance of their duties, which arises from the ASiG, read in conjunction with Paragraph 15(1)(6) of the SGB VII and the UVVs, is not equivalent to the employer's obligation to be in possession of a risk assessment under Article 9(1)(a) of the Directive. First, it is not the employer but the occupational physicians and the occupational safety specialists who are under the obligation to

draw up the reports, and the employer is not obliged to follow the recommendations made in those reports. Second, the content of the reports drawn up by the occupational physicians and occupational safety specialists is not equivalent to the content of the documentation required under the Directive.

24 At the outset, it should be observed that Article 9(1)(a) of the Directive imposes a duty on the employer to be in possession of documents containing an assessment of the risks to safety and health at work, documents to which workers and/or their representatives with specific responsibility for the safety and health of workers must have access under Article 10(3)(a) of the Directive.

25 As the Advocate General has observed at point 60 of his Opinion, Article 9(1)(a) of the Directive does not, on the other hand, lay down any conditions with regard to the authorship of the documents containing the results of the risk assessment.

26 Moreover, the employer's obligation to adopt measures on the basis of the results of the risk assessment derives not from that provision but from Article 6 of the Directive, which is not at issue in the present case.

27 Therefore, the relevant question is whether the reports drawn up by the occupational physicians and occupational safety specialists on the performance of their task pursuant to the provisions relied upon by the German Government, namely the ASiG, Paragraph 15(1)(6) of SGB VII and the UVVs, have the same subject-matter as the documents containing a risk assessment required under Article 9(1)(a) of the Directive, and, accordingly, have a similar content to those documents.

28 First, it should be observed that the reports drawn up by occupational physicians and occupational safety specialists under the ASiG, read in conjunction with Paragraph 15(1)(6) of the SGB VII and the UVVs, must, according to the documents before the Court, include the results of an assessment of working conditions. Second, Paragraph 5 of the ArbSchG, headed 'Assessment of working conditions', establishes the duty to assess the safety and health risks to workers at work.

29 Therefore, the subject-matter of the reports drawn up by occupational physicians and occupational safety specialists under the ASiG, read in conjunction with Paragraph 15(1)(6) of the SGB VII and the UVVs, does not seem to differ significantly from that of the documents containing the results of the risk assessment required under Paragraph 6(1) of the ArbSchG.

30 The subject-matter of the documents showing the results of the risk assessment required under the ArbSchG has not been the subject of any criticism by the Commission and appears, prima facie, to be the same as that of the documents containing a risk assessment which are required under the Directive.

31 Accordingly, it must be held that the Commission has failed to show that the occupational physicians' and occupational safety specialists' reports required under the ASiG, read in conjunction with Paragraph 15(1)(6) of the SGB VII and the UVVs, have a different subject-matter or content from the documents containing a risk assessment which are required under Article 9(1)(a) of the Directive.

32 Therefore, the Commission's first complaint must be rejected as unfounded.

33 Second, the Commission states that, under Paragraph 14(2) of the ASiG, the Federal Minister of Labour and Social Affairs may — with the agreement of the Bundesrat — for certain types of undertaking, having regard *inter alia* to the number of workers employed by them, exempt the occupational physicians and occupational safety specialists from all or part of the obligations set out in Paragraphs 3 and 6 of that law, which include the obligation to draw up reports, thereby relieving the undertakings concerned of the obligation to be in possession of those reports in such a way as to permit an exemption from the obligation laid down in Article 9(1)(a) of the Directive.

34 According to the German Government, the Federal Minister for Labour and Social Affairs may only use his power to grant exemptions under Paragraph 14(2) of the ASiG when the accident insurance institutions have not adopted UVVs or have failed to amend UVVs which have become unsatisfactory, that is to say, in the same circumstances as those laid down for the adoption of regulatory measures by the Minister under Paragraph 14(1) of that law. Since all the accident insurance institutions have adopted satisfactory UVVs, it is no longer possible to grant any exemption from the obligation to draw up reports.

35 In that respect, it should be noted that a provision which, for certain types of undertaking, having regard *inter alia* to the number of workers employed by them, grants the competent Federal minister the power to exempt occupational physicians and occupational safety specialists the obligation to draw up reports on the assessment of working conditions seems to be clearly contrary to Articles 9(1)(a) and 10(3)(a) of the Directive, inasmuch as undertakings

employing 10 or fewer workers may thereby be absolved of the obligation to keep a risk assessment in documentary form.

36 Moreover, it is not evident from the wording of Paragraph 14(1) of the ASiG or Paragraph 14(2) of that law, or from any of the circumstances of the present case, that the power to grant exemptions set out in Paragraph 14(2) is subject to the condition that the accident insurance institutions have failed to adopt UVVs or to amend UVVs which have become unsatisfactory.

37 In the light of all the foregoing, it must be held that, by failing to ensure that the obligation laid down in the Directive to be in possession of an assessment in documentary form of the risks to safety and health at work applies to employers of 10 or fewer workers in all circumstances, the Federal Republic of Germany has failed to fulfil its obligations under Articles 9(1)(a) and 10(3)(a) of the Directive.

Costs

38 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 Federal Republic of Germany has been unsuccessful, the Federal Republic of Germany must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. Declares that, by failing to ensure that the obligation to be in possession of an assessment in documentary form of the risks to safety and health at work, as laid down by 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, applies to employers of 10 or fewer workers in all circumstances, the Federal Republic of Germany has failed to fulfil its obligations under Articles 9(1)(a) and 10(3)(a) of that directive;

2. Orders the Federal Republic of Germany to pay the costs.

von Bahr Edward La Pergola

Wathelet Timmermans

Delivered in open court in Luxembourg on 7 February 2002.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber