Opinion of Advocate General Geelhoed delivered on 28 June 2001

Commission of the European Communities v Federal Republic of Germany

Failure by a Member State to fulfil its obligations - Directive 89/391/EEC - Measures to encourage improvements in the safety and health of workers at work - Articles 9(1)(a) and 10(3)(a) - Employer's duty to keep documents containing an assessment of the risks to safety and health at work

Case C-5/00

European Court reports 2002 Page I-01305

Opinion of the Advocate-General

I – Introduction

1. In this case the Commission claims that the Court, in accordance with Article 226 EC, should declare that the Federal Republic of Germany has failed to introduce all laws, regulations and administrative provisions necessary to implement 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 (hereinafter: the Directive). In particular, the Commission alleges that the Federal Republic of Germany has failed to fulfil its obligations under Articles 9(1)(a) and 10(3)(a) of the Directive, in that it has, in the Arbeitsschutzgesetz (Law on Safety and Health at Work), exempted employers of 10 or fewer workers from the duty to keep documents containing the results of safety and health risk assessments.

2. The German Government rejects this view and argues that the documentation requirements contained in the national provisions correspond to the relevant duties laid down by the Directive. It explains that for small undertakings the requirements with regard to documents are not laid down in the specific law which transposes the Directive, but in special regulations. According to the Commission these special regulations contain lacunae.

II - Legal Framework

A - Community Law

3. According to Article 1, the object of the Directive is to introduce measures to encourage improvements in the safety and health of workers at work. To this end it contains general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation, balanced participation in accordance with national laws and/or practices and training of workers and their representatives, as well as general guidelines for the implementation of the said principles. The Directive is without prejudice to national provisions which are more favourable to protection of the safety and health of workers at work.

4. Without prejudice to the other provisions of the Directive, an employer is required under Article 6(3)(a) of the Directive, taking into account the nature of the activities of the enterprise and/or establishment, to evaluate the risks of safety and health of workers, inter alia, in the choice of work equipment, the chemical substances or preparations used and the fitting-out of work places. Subsequent to this evaluation and as necessary, the preventive measures and the working and production methods implemented by the employer must assure 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 and at all hierarchical levels.

5. Article 9 of the Directive provides:

Various obligations on employers

1. 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;

(b) decide on the protective measures to be taken and, if necessary, the protective equipment to be used;

...

(2) Member States shall define, in the light of the nature of the activities and size of the undertakings, the obligations to be met by the different categories of undertakings in respect of the drawing-up of the documents provided for in paragraph 1(a) and (b) and when preparing the documents provided for in paragraph 1(c) and (d).

6. Article 10 of the Directive, entitled worker information, provides 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' representatives 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);

...

B - Implementation in Germany of the relevant provisions of the Directive

7. The Directive was implemented in German law by 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. Paragraph 1 of this Law refers to the Gesetz über die Durchführung von Massnahmen des Arbeitsschutzes zur Verbesserung der Sicherheit und des Gesundheitsschutzes der Beschäftigung bei der Arbeit (Law on the Implementation of Protective Measures to improve the Safety and Health of Employees at Work (hereinafter: Arbeitsschutzgesetz or ArbSchG).

8. Paragraph 5 of the ArbSchG on the assessment of working conditions provides in subparagraph (1) that the employer must determine, by means of an assessment of the risks faced by employees in connection with their work, what safety and health measures are necessary. This duty is elaborated in detail in Paragraph 5(2) and (3).

9. Paragraph 6(1) of the ArbSchG has the heading Documentation. According to the first sentence of this provision, the employer must keep documents containing inter alia the results of the assessment of risks for employees. The third sentence of Paragraph 6(1) of the ArbSchG exempts small undertakings from this duty to keep documents (hereinafter: the small undertakings rule) and is drafted as follows: 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. According to the final sentence of Paragraph 6(1) of the ArbSchG, when the number of employees is being calculated for the purposes of the third sentence of Paragraph 6(1), part-time workers with a regular working week of 20 hours or less are to be treated as 0.5 of an employee and those with a regular working week of 30 hours or less as 0.75 of an employee.

10. According to Paragraph 2(4) of the ArbSchG other legal provisions within the meaning of the Law are to be understood as being provisions on employee protection to be found in other statutes, regulations and in Unfallverhütungsvorschriften (accident prevention regulations).

11. From the case-file it is clear that the other legal provisions are to be found in particular in the Arbeitssicherheitsgesetz (the Law on Safety at Work, hereinafter also referred to as ASiG) and in Book VII of the Sozialgesetzbuch (the German Social Law Code), (hereinafter: SGB VII). They also include the implementing regulations (the accident prevention regulations) which are based on that legislation.

12. Paragraph 1 of the ASiG requires an employer, in accordance with the provisions of that Law, to enlist the services of occupational physicians and occupational safety specialists to assist in accident prevention and in health and safety activities, in order to ensure inter alia that the legal provisions in force are applied as appropriate in the circumstances.

13. Paragraph 2(1) of the ASiG provides that the employer must appoint occupational physicians (Betriebsärzte) in writing and assign to them the duties laid down in Paragraph 3 of the ASiG. According to Paragraph 3(1) of the ASiG the duty of occupational physicians is to assist the employer in all matters relating to the protection of workers' health and accident prevention. Under point 1(g) of Paragraph 3(1) of the ASiG they must advise the employer and other persons responsible for the protection of workers and accident prevention in assessing the working conditions.

14. Alongside these provisions, Paragraph 5(1) of the ASiG provides that the employer must appoint occupational safety specialists (Fachkräfte für Arbeitssicherheit) in writing and assign to them the duties laid down in Paragraph 6 of the ASiG. The duties of occupational safety specialists under Paragraph 6 of the ASiG correspond in large measure to those of occupational physicians under Paragraph 3 of the ASiG. The duty of occupational physicians to assess the working conditions under point 1(g) of Paragraph 3(1) of the ASiG corresponds exactly to the duty of occupational safety specialists under point 1(e) of Paragraph 6 of the ASiG.

15. Under point 6 of the first sentence of Paragraph 15(1) of the SGB VII, the industrial accident insurance bodies (Unfallversicherungsträger) are required, on an autonomous basis, to draw up accident prevention regulations concerning the measures that an enterprise must take to fulfil its duties under the Arbeitssicherheitsgesetz. In the pre-litigation phase the German Government provided to the Commission examples of accident prevention regulations for occupational safety specialists taken from three sectors (mechanical engineering and metalworking, the textile and garment industry and the construction industry).

16. Also of importance in this case of failure to comply with Treaty obligations are certain provisions of the Arbeitssicherheitsgesetz under which the Bundesminister für Arbeit und Sozialordnung (Federal Minister for Labour and Social Affairs) can grant exemptions.

17. Paragraph 14(1) of the ASiG empowers the Federal Minister for Labour and Social Affairs to determine by administrative regulation what measures the employer must take to comply with his duties arising under that Law. In so far as this concerns accident prevention regulations, however, the Federal Minister may exercise this power only if the industrial accident insurance bodies have failed within the specified period to issue or amend the necessary accident prevention regulations.

18. Alongside this provision, point 1 of Paragraph 14(2) of the ASiG provides that the Federal Minister may determine that for certain categories of enterprises, taking into account specific criteria, which in particular relate to the number of workers employed, the duties laid down in Paragraphs 3 and 6 of the ASiG need not be fulfilled either wholly or in part. Furthermore, the Federal Minister may determine in accordance with point 2 of Paragraph 14(2) of the ASiG that the duties laid down in Paragraphs 3 and 6 of the ASiG need not be fulfilled either wholly or in part, in so far as this is unavoidable because of shortages of occupational physicians or occupational safety specialists.

III - Procedure and forms of order sought by the parties

19. The Commission put the German Government on notice by a formal letter of 19 November 1997 that in its view the third sentence of Paragraph 6(1) of the ArbSchG, which exempted employers with 10 or fewer employees from the duty to keep documents containing the results of the risk assessment, was in breach of the Directive. The provisions of the Directive in question are Article 9(1)(a), which obliges all employers to possess such an assessment, and Article 10(3)(a), which guarantees access to this assessment for specified groups of persons. After the German Government had rejected this complaint, the Commission delivered its reasoned opinion by letter of 19 October 1998.

20. In its reply of 26 January 1999 the German Government pointed out that the Directive did not lay down a universal duty with regard to the documentation relating to a risk assessment. Furthermore, it added that national law, by reason of the other legal provisions within the meaning of the third sentence of Paragraph 6(1) of the ArbSchG, in particular the Arbeitssicherheitsgesetz and the accident prevention regulations, placed all small undertakings, according to their industrial sector, under the duty with regard to documentation, as prescribed by the Directive.

As a further example of other legal provisions the German Government also pointed to the Biological Agents Regulation (Biostoffverordnung).

21. As a result the Commission brought the present action, which was lodged at the Court Registry on 4 January 2000.

22. The applicant claims that the Court should:

- declare the Federal Republic of Germany in breach of its obligations under 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, inasmuch as, by Paragraph 6 of the ArbSchG, it absolves employers employing 10 or fewer persons from the requirement to keep documents containing the results of risk assessments;

- order the Federal Republic of Germany to pay the costs.

23. The German Government contends that the Court should:

- dismiss the application;

- order the Commission to pay the costs.

24. No hearing was held in this case.

IV - Arguments of the parties

A - Complaints of the Commission

25. In its application the Commission first contends that Article 9(1)(a) of the Directive imposes on employers not only a duty to possess an assessment of the risks to safety and health at work, but also a duty to keep a documentary record of this assessment. In its view, this means that the details must be recorded and kept in such a way as to be accessible and comprehensible for others. In support of this, it puts forward a series of arguments based on the objectives of the Directive and the use of the word documents in Article 9(2) of the Directive.

26. As regards actual implementation of the Directive, the Commission in its application maintains its argument that the exemption of small undertakings by Paragraph 6(1) of the ArbSchG is incompatible with the provisions of the Directive just referred to. It argues that, notwithstanding the particular legal provisions referred to by the German Government, the implementation of the Directive is defective.

27. Thus in its view, for example, the Biological Agents Regulation applies only to activities involving biological agents, but not to other possible risks in the workplace arising from the use of chemical or physical agents in the course of work.

28. It argues also that the accident prevention regulations invoked by the German Government contain various lacunae as regards the implementation of the Directive. These lacunae concern, first, the equivalence of the provisions regarding the documentation of risk assessments and, second, the power of the Minister to exempt certain employers from the duty to carry out risk assessments.

29. As regards the equivalence of the reports produced in the context of the accident prevention regulations and the documentation required by the Directive, the Commission in its reply points to problems both of structure and content.

30. When examining structural equivalence, the Commission emphasises that the duties to report contained in the various accident prevention regulations are not imposed on the employer but on the occupational physicians and occupational safety specialists. Their obligations towards employers are principally of an advisory nature. However, the Commission points out that advice contained in a report to an employer which recommends certain action to be taken cannot be treated as equivalent to the action taken by an employer pursuant to that advice. The German legislation does not compel the employer to use the measures contained in the report as the basis for subsequent action. However, according to the Commission, Article 9(1) of the Directive requires the employer to possess a documented risk assessment and to use this as the basis for the protective and preventive measures to be taken.

31. The Commission also expresses its concern as to whether there is equivalence in terms of content between the reports produced pursuant to the accident prevention regulations and the documentation required by the Directive. It notes that the content of such a report must meet several requirements. In this process, certain elements of risk assessment may well be addressed, while others may not. In order to determine whether or not equivalence in terms of content has been achieved, careful examination is required in each individual case as to whether and to what extent the content of that report meets the requirements of the Directive with regard to risk assessment and the documentation thereof. The Commission contends that it cannot generally be assumed that every report contains an adequate risk assessment, as required by the Directive. For these reasons, the basis on which protective and preventive measures are to be taken may also be deficient. And therefore it may be more difficult for the employer to demonstrate to the supervisory authorities that he has complied with his risk assessment obligations.

32. Second, the Commission contends in its application that under points 1 and 2 of Paragraph 14(2) of the ASiG the Federal Minister may determine that certain duties of the employers, such as the production of reports, need not be fulfilled on account of the number of persons employed. In its view, the existence of this power means that the Community law duty to transpose the Directive into national law by means of mandatory rules has not been satisfied.

33. Finally, the Commission alleges that the Federal Republic of Germany itself further extended the scope of the small undertakings rule by inserting the fourth sentence of Paragraph 6(1) of the ArbSchG by means of the Law of 27 September 1996.

B - Defence arguments of the Federal Republic of Germany

34. The German Government argues that the small undertakings rule in Paragraph 6(1) of the ArbSchG challenged by the Commission forms part of the tiered approach to transposition adopted by the German legislature. In its view, the small undertakings rule does not lead to the result that small undertakings do not have to keep a written record of the risk assessments; rather, it merely prevents a disproportionate dual burden on small undertakings and is therefore in this respect in accordance with Community policy. It argues that the duty imposed by the Directive to keep adequate written records, by which workers can obtain access to the risk assessment results, is already contained in specific statutory provisions. The German Government emphasises in this context that, even if the Biological Agents Regulation were to be inadequate, every employer is in any event subject to the accident prevention regulations. It contends that both the industrial accident insurance bodies for commerce and agriculture as well as the comparable bodies for the public sector have in this respect fully complied with their duties.

35. According to the German Government, the Arbeitsschutzgesetz and the Arbeitssicherheitsgesetz operate together as a seamless whole in meeting the objectives of the Directive. Paragraph 5 of the ArbSchG and the lists of duties in Paragraphs 3 and 6 of the ASiG correspond directly with one another. Paragraph 5 of the ArbSchG requires every employer to assess the risks facing employees at work. For the employer to fulfil this task, Paragraphs 3 and 6 of the ASiG provide him with competent partners, the occupational safety specialists and occupational physicians. The information and advice provided by these specialists form part of the decisions taken by the employer. In its view therefore, these reports within the meaning of Paragraphs 3 and 6 of the ASiG must, as regards small undertakings, always be seen as also satisfying the requirements of a risk assessment within the meaning of the first sentence of Paragraph 6(1) of the ArbSchG.

36. The German Government rejects the Commission's view that there is no structural or substantive equivalence between the documentation obligations imposed by the accident prevention regulations and those imposed by the Directive.

37. As regards structural equivalence, it points out that Article 9(1)(a) of the Directive requires merely that the employer be in possession of a risk assessment. No specific mention is made as to the author of the report and it is therefore possible that several persons may work together in producing the report. For this reason it argues that Article 9 of the Directive cannot be interpreted as meaning that the employer himself must compile the documentation in full through his own efforts. Given that in larger undertakings the duties of the employer are usually delegated and that not all duties can be carried out by the owner personally, the Directive rightly refrained from imposing such an excessive duty.

38. According to the German Government, the process of risk assessment is in practice one which involves and requires the active participation of all those having responsibility within the undertaking. In this regard the purpose of the duty to produce documentation is to ensure that in the process of risk assessment all relevant circumstances are taken fully into account and assessed. The question of whether the employer adopts the report's recommendations involves a decision-making process, going beyond the plain documentation. Subsequent decisions of the employer cannot themselves form part of the duty to produce documentation.

39. The German Government next argues that, in order to track down and document the risks, the opinions of persons other than the employer himself, for example those of occupational physicians and safety specialists, must also be taken into account. Such persons are more qualified and more impartial than the employer and are therefore in a better position to assess the risks. This is in line with an integrative approach to health and safety at work, as set out in the Directive. According to this approach risk assessment is not left to the employer alone. In its view, it is not decisive that under the Arbeitsschutzgesetz the addressee of the duty to provide documentation is the employer, whereas under the Arbeitssicherheitsgesetz the duty to report is imposed on specialists. The fact that the accident prevention regulations require undertakings to report regularly further demonstrates that employers must actively participate in the compilation of the report.

40. With regard to equivalence in terms of content, the German Government criticises the Commission's point of departure, from which it appears to proceed on the speculative premiss that in a specific case the risk assessment is incomplete. In its view, the measure for assessing equivalence in terms of content must be a comparison at an abstract level of the duties to produce documentation, taking into account the Directive's protective aims. It argues that in this particular case the comparison is successful and that the duties imposed on employers under the Arbeitsschutzgesetz and on occupational physicians and occupational safety specialists under the Arbeitssicherheitsgesetz are in principle equivalent. The choice of methods used by the employer and by the assistant advisers to implement the protective aims of the Directive cannot, in the view of the German Government, form the basis of an action for failure to fulfil Treaty obligations by reason of improper transposition of a directive.

41. In the view of the German Government, the Commission errs in its contention that the transposition of the Directive is defective, in so far as it relates to Paragraph 14 of the ASiG. From the principle of subsidiarity anchored in Paragraph 14(1) of the ASiG it follows that, where the autonomously drafted accident prevention regulations comply with the provisions of the Arbeitssicherheitsgesetz and Book VII of the Socialgesetzbuch, no further administrative regulations may be issued by the relevant minister. In the present case all the industrial accident insurance bodies have issued accident prevention regulations in an appropriate manner. For that reason also the Federal Minister has not exercised his power under point 1 of Paragraph 14(2) of the ASiG. Furthermore, the German Government points out that since the Arbeitssicherheitsgesetz came into force the Federal Minister has on no occasion exercised his power under Paragraph 14(2) of the ASiG. As a matter of practice the Federal Minister could not in any event create such exemptions from the duty to provide documentation, as this would conflict with the provisions of the Directive.

42. With regard to the Commission's complaint that the scope of the exemption for small undertakings in Paragraph 6(1) of the ArbSchG was broadened by the insertion of the fourth sentence, the German Government argues that, as regards the volume of work carried out, this provision ensures that there is now equal treatment of those employers who employ and those who do not employ part-time workers. Moreover, the insertion of the fourth sentence changes nothing with regard to the meaning and purpose of Paragraph 6 of the ArbSchG.

V – Appraisal

43. In order to resolve this problematic issue, it may first be useful to sketch out briefly the scope of the dispute and the duties imposed by the Directive before going on to evaluate the Commission's application in the light of the arguments presented.

A - Subject-matter of the dispute

44. The dispute is limited to the implementation of the duties with regard to documentation under Articles 9(1) and 10(3) of the Directive, in circumstances where the employer employs 10 or fewer persons. The Commission clearly proceeds on the basis that Paragraph 6 of the ArbSchG wholly and properly implements the duties with regard to documentation in respect of employers who employ more than 10 persons. It may further be noted that the criticisms of the Commission relate to the duty of the employers concerned to be in possession of an assessment of the risks to safety and health at work and to their duty to adopt measures ensuring that those entitled to do so have access. The Commission's complaint does not extend to the measures which an employer must take as a result of this risk assessment.

45. Moreover, this case is primarily concerned with the duty under Article 9(1) of the Directive to be in possession of documents containing the risk assessment results. If the Federal Republic of Germany has not transposed this provision correctly into national law, it then follows a fortiori that Article 10(3) of the Directive has also been inadequately transposed. If the employer is not in possession of the risk assessment, then obviously neither the employees nor their representatives can have access to it.

B - The duties imposed by the Directive

46. While the scope of the Directive is broad, the Member States none the less have a measure of discretion in implementing its specific duties.

47. As the Court has recently confirmed, the scope of application of a directive which contains general principles concerning improvements in the safety and health of workers at work must be broadly interpreted. This can be seen both from the object of the Directive and from the wording of Article 2. According to this provision, the Directive applies to all sectors of activity, both public and private, save only where the characteristics peculiar to certain specific public service activities inevitably conflict with it. From this it follows further that exemptions from the scope of application of the Directive must be narrowly construed.

48. I conclude from this case-law that the Directive in principle protects all workers irrespective of the size of the undertaking in which they are employed. Article 9(2) of the Directive, which provides that Member States must define the obligations to be met by employers in respect of the documentation to be provided in the light of the nature of the activities and size of the undertakings, must not in my opinion be understood as permitting the Member States to exempt certain categories of undertaking from the duties laid down in Article 9(1) of the Directive. In this respect the objective of improving the actual conditions of work cannot be rendered subordinate to purely economic considerations such as a possibly disproportionate bureaucratic burden being placed on small undertakings.

49. That, however, does not stand in the way of the conclusion, as the German Government correctly pointed out, that that provision gives Member States the opportunity to issue different regulations to be observed by different categories of undertaking in fulfilling their duty with regard to documentation under Article 9 of the Directive. While every employer must be in possession of a documented risk assessment as such, Member States may, when fleshing out the nature of this obligation, take into account the activities and size of the undertaking. Such an interpretation is in accordance with the second subparagraph of former Article 118a(2) of the EC Treaty. According to that provision, directives based on Article 118a of the EC Treaty were required to avoid imposing administrative, financial and legal constraints which would hold back the creation and development of small and medium-sized undertakings.

50. The fact that the protective aim of the Directive must be broadly interpreted is also evident from the broad outline of the risks which must be considered within the framework of the Directive. According to the 15th recital, the provisions of the Directive apply to all conceivable risks to the health and safety of workers. These include those risks which arise from the use at work of chemical, physical and biological agents and those risks which concern workers' safety, hygiene and health. All of these factors must be taken into account in the transposition and application of the duties arising with regard to risk assessment and the documentation thereof.

51. In the pre-litigation procedure the German Government challenged the Commission's view that the risk assessment must be recorded in a permanent, that is to say, written or electronic manner. However, in the course of these proceedings it appears to accept the Commission's view. Having regard to the objectives of the Directive, I indeed also take the view that under Article 9 the employer must possess the risk assessment in such a form that access to it at all times is guaranteed for the persons affected such as, for example, those mentioned in Article 10(3)(a) of the Directive and also for bodies such as the labour inspectorate, which supervises compliance with health and safety provisions. The Commission, in my view correctly, has argued that it is only when the risk assessment has actually been recorded that the workers can be best informed about it and the employer prove to the supervisory authorities that he has complied with his duties of documentation.

52. The Directive imposes a duty on employers to assess the risks, to retain this assessment in a documentary form, to make this information available to those entitled to see it and, on the basis of the assessment, to develop protective and preventive measures which contribute to improving safety and health of workers at work. In the Commission's view, the party which compiles the risk assessment must be the employer. I, however, share the view of the German Government, as indicated in its rejoinder, that the Directive does not specify who must compile the risk assessment. Article 9(1)(a) requires only that the employer is in possession of a risk assessment. This provision does not exclude the possibility that the risk assessment and its compilation can be carried out by a third party. In the final analysis, what is important is that the employer, in accordance with Article 6(3)(a) of the Directive, uses the risk assessment to assure an improvement in the level of protection afforded to workers with regard to health and safety.

C - Evaluation of the Commission's case

53. According to Article 18(1) of the Directive, read in conjunction with Articles 10 EC and 249 EC, the Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 31 December 1992. The question which now arises is whether the Federal Republic of Germany has failed to impose the duties contained in Articles 9(1)(a) and 10(3)(a) of the Directive on employers employing 10 or fewer workers.

54. The core of the Commission's contention is that the system chosen by the Federal Republic of Germany, according to which the duties with regard to documentation imposed on small firms are contained in special regulations, contains lacunae and that therefore the relevant provisions of the Directive have neither been transposed in full nor in a binding manner. In this connection the Commission points to inadequacies in the Arbeitssicherheitsgesetz and in the Biological Agents Regulation put forward as an example by the German Government in its communication of 26 January 1999.

55. In the pre-litigation phase the German Government did not deny the possibility of lacunae in the Biological Agents Regulation but asserted that the accident prevention regulations issued in accordance with the Arbeitssicherheitsgesetz and Book VII of the Socialgesetzbuch provide a comprehensive system which transposes the duties with regard to documentation for employers employing 10 or fewer workers. I will therefore restrict my analysis to the latter provisions.

56. The first question which emerges is whether the system, pursuant to which the accident prevention regulations are issued for each sector by the industrial accident insurance bodies, can as such satisfy the requirements for the transposition of the relevant provisions of the Directive.

57. In my opinion this is perfectly possible. According to the consistent case-law of the Court, in order to transpose a directive within the meaning of the third paragraph of Article 249 EC the Member States must achieve the objects of the directive, by creating a specific legal framework, such that national law corresponds

with that contained in the directive and that no uncertainty exists with regard to the content of the national provisions, their complete compatibility with the directive and their formally binding nature. Within these boundaries, however, the choice of form and methods is a matter for the Member States. Just as the Federal Republic of Germany may implement the Directive through territorially decentralised measures, it may also do this, as in the present case, through functionally decentralised provisions, according to which the industrial accident insurance bodies - bodies corporate as a matter of public law - set down the duties with regard to documentation in autonomous regulations, subject to the approval of the Federal Minister. The accident prevention regulations must be published and are, following the Minister's approval and their publication, binding on employers and on their workers. Although the several tiers of implementation measures involved create as a whole an impression of complexity, for the individual employer employing 10 or fewer workers no doubt can exist that he must observe the relevant accident prevention regulations issued for that sector.

58. The accident prevention regulations therefore have the status of rules of public law and are therefore suited to fulfilling the duties arising out of the Directive. Moreover, this is not disputed by the Commission. The question which must subsequently be posed is whether the reports produced within the framework of the accident prevention regulations are actually equivalent to the documentation required by the Directive. For the Commission this is out of the question with regard to the German system. In its view, the German system lacks both the employer's express declaration that he has accepted the recommendations made in the report and that he will use these as the basis for adopting further protective measures (structural equivalence), and the equivalence of standards, in respect of the assessment of risks (substantive equivalence).

59. In the action for failure to fulfil Treaty obligations brought under Article 226 EC, the Commission as applicant must prove the alleged breach and provide the Court with the information needed to enable it to determine whether the obligation has not been fulfilled. In my opinion the Commission has not proved satisfactorily that the German system, both in terms of structure and content, does not correspond with the relevant provisions of the Directive.

60. As regards the question of structural equivalence, as already mentioned, I agree with the defence submission of the German Government that Article 9(1)(a) of the Directive merely requires that the employer be in possession of a risk assessment. The provision does not lay down any conditions with regard to authorship of the reports containing the risk assessments. It is perfectly conceivable that small undertakings will carry out the risk assessment with the help of third parties, such as occupational physicians and other specialists, who have a thorough knowledge of the necessary area. The quality of the risk assessments may in this way be improved, thereby contributing to the achievement of the Directive's aims. In this context it must be noted that under Article 7(3) of the Directive the employer must make use of competent external services if protective and preventive measures cannot be organised for lack of competent personnel in the undertaking.

61. Nor am I convinced by the Commission's criticism that the German legislature does not compel the employer to use the measures set out in the report as the basis for the protective and preventive measures which he must adopt. I cannot read such a duty into Article 9(1)(a) of the Directive. In the context of the Directive the risk assessment must indeed be used to adopt measures which assure an improvement in the level of protection afforded to workers with regard to safety and health. None the less, the duty of the employer actually to adopt the necessary measures is not laid down in Article 9 of the Directive, but in Article 6. In its reasoned opinion, however, the Commission did not allege any breach of Article 6 of the Directive, such that this argument need not, in my view, be considered in the present case.

62. In respect of the question of equivalence of content, the German Government has pointed to the concordance of the duties with regard to documentation contained both in the Arbeitssicherheitsgesetz and the Arbeitsschutzgesetz.

63. According to point 1(g) of Paragraph 3(1) and point 1(e) of Paragraph 6 of the ASiG, the occupational physicians and specialists advise employers in their assessment of working conditions. Paragraph 5 of the ArbSchG is also entitled assessment of working conditions (Beurteilung der Arbeitsbedingungen). According to the latter provision the employer must adopt protective measures on the basis of a risk assessment. Paragraph 5(3) of the ArbSchG provides examples of risks which could occur, in particular as a result of the fitting-out and setting-up of the workplace, through physical, chemical and biological effects, through the choice and use of tools and equipment and through the arrangement of work and production processes and of working time.

64. Point 1(g) of Paragraph 3(1) and point 1(e) of Paragraph 6 of the ASiG were both inserted by the same Law as was Paragraph 5 of the ArbSchG. This Law of 7 August 1996 served to implement the Directive in the Federal Republic of Germany. As a result of this I am of the opinion that it was the intention of the German legislature that, as regards the risk assessment, the Arbeitssicherheitsgesetz and the Arbeitsschutzgesetz should both be interpreted in the same fashion. The outline in Paragraph 5(3) of the ArbSchG also corresponds in my view to the broad outline of the concept of risk found in the Directive. Therefore there are good reasons for concluding that the duty to report under the ASiG and under Paragraph 5 of the ArbSchG embraces the notion of risk assessment for workers within the meaning of the Directive. This refutes the contentions of the Commission that the report of the specialists engaged serves to fulfil a range of functions and that it cannot generally be assumed that the content of the individual reports corresponds with the demands imposed by the Directive regarding risk assessment.

65. Nevertheless there are two further possible criticisms of the system by which the Directive is implemented through the accident prevention regulations.

66. First, the question arises as to whether the form in which the reports must be compiled in accordance with accident prevention regulations corresponds with the form of documentation prescribed by the Directive, that is to say, in writing and/or electronically. The three accident prevention regulations shown to the Commission by the Federal Republic of Germany do not point to any firm conclusions. As the Commission has not at any point

alleged that the form of the accident prevention regulations is incompatible with the requirements of the Directive, I will not consider this possible infringement.

67. Second, the question arises as to whether for every sector of the economy in Germany, and therefore for every individual employer, accident protection regulations have actually been issued, approved and entered into force. Should this not be the case, it cannot then be said that the transposition into German law of the relevant provision of the Directive is without lacunae.

68. The German Government has indicated that accident prevention regulations have meanwhile been put in place for all sectors of the economy, whether public or private. This has not been contested by the Commission. In its observations, the latter challenged in particular the form of implementation chosen by the Federal Republic of Germany, whereby it has, in my opinion, not established that the German implementation provisions do not in this respect provide complete coverage. The Commission has failed to produce concrete evidence that accident prevention regulations have not been issued in respect of a particular sector.

69. It remains now to examine whether or not the enabling powers contained in Paragraph 14 of the ASiG produce lacunae in the German system.

70. In my opinion the power to vary contained in Paragraph 14(1) of the ASiG, which is challenged by the Commission, does not in the present case pose any problems as regards the proper transposition of the Directive. This provision permits the Federal Minister to determine which measures an employer must adopt in order to fulfil his duties under the ASiG. In so far as the responsibility for implementing the law has been transferred to the industrial accident insurance bodies, the Federal Minister can only make use of this power if the insurance bodies have failed in their tasks. If, as alleged by the German Government and not refuted by the Commission, accident prevention regulations have in fact been issued for every sector of the economy, then the subsidiary provision contained in Paragraph 14(1) of the ASiG would be redundant. Moreover, under Paragraph 15(4) of the SGB VII the Minister must in any event reject accident prevention regulations laid before him should these be inadequate.

71. On the other hand, the power to exempt contained in Paragraph 14(2) of the ASiG is in my opinion contrary to a proper and unambiguous implementation into national law of the provisions at issue here. This provision allows the Federal Minister to exempt certain categories of enterprise from complying with the duties contained in Paragraphs 3 and 6 of the ASiG. The Commission rightly complains that the Federal Minister is permitted inter alia to determine that, by reason of the number of persons employed in the enterprise, the employer need not compile a report containing the risk assessment. This means that, for example, particular employers could in practice be freed from the duties contained in point 1(g) of Paragraph 3(1) and in point 1(e) of Paragraph 6 of the ASiG. In such a situation the system would no longer be comprehensive and employers who, according to the Directive, are required to fulfil the necessary duties with regard to documentation could be unlawfully exempted from it as the Directive does not envisage such possibilities for the exemption of small undertakings.

72. In my opinion, the defence of the German Government is not tenable. The assertion that the Federal Minister has hitherto never made use of the power of exemption does not exclude the possibility of its future use. Moreover, as regards the proper implementation of directives, the argument that no breach of a directive has in practice arisen is untenable. In order to ensure the full legal and not only practical application of directives, the Member States are required to put in place an unambiguous legal framework covering the area in question, which is not achieved here because of the special exemption power in Paragraph 14(2) of the ASiG. The argument that this power has never been used because to do so would be contrary to the Directive is equally untenable. This would essentially amount to a form of interpretation of national law in line with the Directive which would lack the clarity and precision necessary for the implementation of directives in order to ensure legal certainty.

73. Finally, I would like to point out with regard to the scope of the small undertakings rule that in principle it makes no difference whether or not the exemption contained in the third sentence of Paragraph 6(1) of the ArbSchG has been extended by the Federal Republic of Germany to include undertakings in which there are no more than 20 persons employed on a part-time basis. Within the framework of the German system, the extension of the scope of this provision means that more employers must comply with their duties with regard to documentation according to other legal provisions, that is to say, according to the provisions of the accident prevention regulations instead of the provisions of the Arbeitsschutzgesetz. This amendment also leads to the situation that more employers can be exempted from their duties by the Federal Minister by means of Paragraph 14(2) of the ASiG, even though the extension of the small undertakings rule as such has nothing to do with this power of exemption.

VI – Costs

74. As I consider the Commission's complaint to be well founded only in part, it is in my view appropriate that each party should bear its own costs.

VII – Conclusion

75. As a result of the foregoing I propose that the Court should:

(a) declare that the Federal Republic of Germany has failed to fulfil its obligations under Articles 10 EC and 249 EC and under 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, in that it has given the Federal Minister in Paragraph 14(2) of the Arbeitssicherheitsgesetz the power to determine that specific categories of undertakings, in certain circumstances relating in particular to the number of persons employed, are to be exempted from the duties laid down in Paragraphs 3 and 6 of the Arbeitssicherheitsgesetz;

(b) dismiss the remainder of the action;

(c) order the Commission of the European Communities and the Federal Republic of Germany each to pay their own costs.