Case 383/85

Commission of the European Communities
v
Kingdom of Belgium

(Failure of a Member State to fulfil its obligations — Failure to implement a judgment — Transfer of officials' pension rights)

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Opinion of Mr Advocate General Mancini delivered on 20 October 1987 3073
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Summary of the Judgment

Action for failure to fulfil obligations — Judgment of the Court establishing such a failure — Failure to implement the judgment — Justification based on the national legal order — Unacceptable
(EEC Treaty, Arts 169 and 171)

REPORT FOR THE HEARING
delivered in Case 383/85 *

I — Facts

In its judgment of 20 October 1981 the Court declared that:

'The Kingdom of Belgium, by refusing to adopt the measures necessary for the transfer to the Community pension scheme of sums due to be repaid under the Belgian

* Language of the case: French

pension scheme or the actuarial equivalent of retirement pension rights acquired thereunder, as provided for by Article 11(2) of Annex VIII to the Staff Regulations of Officials of the European Communities, has failed to fulfil its obligations under the EEC Treaty.'

In a letter of 16 December 1981, the Commission requested the Belgian Government to implement the abovementioned provision of the Staff Regulations in the light of the judgment of 20 October 1981. Since the Belgian Government did not inform the Commission of the provisions adopted to comply with the judgment, the Commission wrote to that government on 31 July 1984 calling upon it to submit its observations. In reply, the Belgian Government, in a letter of 3 October 1984, informed the Commission that the competent Belgian authorities had just submitted to the Minister for Finance for his signature a draft law amending the Belgian legislation in order to bring it into line with the Staff Regulations of Officials and authorize the transfer or purchase of pension rights. In a letter of 23 October 1984, the Belgian Government asked the Commission for information with a view to preparing a draft law permitting the transfer to the Communities of amounts intended to give effect, in the Community institutions, to periods of affiliation to a Belgian pension scheme.

On 8 May 1985, the Commission delivered a reasoned opinion to the Belgian Government. In a letter dated 8 July 1985, the Permanent Representative of Belgium to the European Communities informed the Commission of a draft law establishing certain relations between Belgian pension schemes and those of bodies established under public international law. On 22 November 1985 the Commission submitted its observations to the Belgian Government on the terms of that draft law and stated that even if Belgium adopted it, it would not cease to be in breach of its obligations under the EEC Treaty. The Commission therefore informed the Belgian Government that the infringement procedure initiated under Article 171 of the Treaty would be pursued. The Commission brought the present action by letter of 26 November 1985.

II — Written procedure and conclusions

The Commission's application was lodged at the Court Registry on 28 November 1985.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

The Commission claims that the Court should:

(i) declare that by failing to adopt the measures necessary to comply with the judgment of the Court of Justice of 20 October 1981 in Case 137/80 the Kingdom of Belgium has failed to fulfil its obligations under Article 171 of the EEC Treaty;

(ii) order the Kingdom of Belgium to pay the costs.

The Kingdom of Belgium, although it did not submit any express conclusions, has given the Court to understand that it considers that the application should be dismissed as inadmissible.

III — Submissions and arguments of the parties

Subject-matter of the application

The Government of the Kingdom of Belgium observes first of all, without expressly raising an issue of admissibility, that the draft law to which the Commission refers in its application cannot be the subject of an application to the Court.

As the Court has consistently held, the scope of an action is delimited by the preliminary administrative procedure, and both the Commission's reasoned opinion and its application must be founded on the same grounds and submissions. It was for that reason that the Court, in its judgment of 7 February 1984 in Case 166/82 *Commission* v *Italian Republic* [1984] ECR 459, eliminated from the debate a draft law submitted to the Commission after the delivery of the reasoned opinion.

Moreover, reference may not in any event be made in an application to the contents of a text which is merely a draft and therefore has no legal effect. Finally, reference to the contents of a draft law in the application constitutes an unacceptable intervention by the Commission in the legislative process.

The Commission observes in that regard that reference was made in the application to the Belgian draft law only for the purpose of ensuring correct implementation of the judgment of the Court of 20 October 1981 and without any intention to interfere in the national legislative process.

Substance of the case

The Commission alleges that the Kingdom of Belgium has not yet implemented the aforementioned judgment of the Court. It admits that the draft law submitted by the Belgian Government constitutes a step forward but claims that it does not entirely fulfil Belgium's obligations under Article 11(2) of Annex VIII to the Staff Regulations.

In the Commission's view the Belgian Government is required to adopt provisions applying specifically to officials of the Communities and may not merely extend the existing national provisions. The need to deal simultaneously with the transfer of pension rights of other international officials does not justify delay in fulfilling Community obligations.

Moreover, internal difficulties cannot justify a delay in implementing the abovementioned decision of the Court. The Commission also explains in detail why the draft law does not correspond in several respects to the requirements of Community law.

The Government of the Kingdom of Belgium contends that the delay in implementing the judgment is due essentially to the fact that the concept of transfers of pension rights does not exist in Belgian law. It is therefore necessary to lay down in legislation new rules, which must in addition be applicable to the various pension schemes existing in Belgium.

According to the Belgian Government, an interministerial working party was set up to

study the scope of the judgment of the Court of 20 October 1981 and draw up solutions. In the light of the conclusions of that working party, the Secretary of State for Pensions asked the pensions administration in June 1983 to prepare a draft law covering all pension schemes. On 13 June 1985, the Secretary of State for Pensions initiated the procedure preceding the submission of the draft law to the Bureau of the Houses of Parliament, a procedure involving consultations with various authorities and bodies, including the opinion of the Council of Ministers and that of the Conseil d'État.

The Belgian Government adds that it will be necessary for the regions to adopt measures necessary to achieve the objective of the draft law after it is adopted.

IV — Oral procedure

At the hearing on 7 July 1987, the Court heard the oral arguments of the parties. The Advocate General delivered his Opinion on 20 October 1987.

By telex of 27 October 1987, the Belgian Government asked the Court to adjourn delivery of the judgment in view of the fact that a draft law permitting the transfer of the pension rights in question was being prepared. By letter of 5 November 1987, the Commission agreed to support that application, stating that it had no objection to an adjournment *sine die*. On 19 November 1987, the President of the Court decided to adjourn deliberations in the case for four months. Subsequently, the matter was further adjourned on several occasions on the Commission's application on the ground that negotiations were in course with the Belgian authorities with a view to preparing a draft law implementing Article 11(2) of Annex VIII to the Staff Regulations. The most recent adjournment expired on 30 April 1989.

Since the court which had heard the case could not be reconstituted with the necessary quorum, the Court, after hearing the views of the Advocate General, decided, on 6 July 1989, to order the reopening of the oral procedure, in accordance with Article 61 of the Rules of Procedure.

Diez de Velasco
Judge-Rapporteur