JUDGMENT OF THE COURT (Sixth Chamber)

27 October 2005 *

In Case C-23/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 25 January 2005,

Commission of the European Communities, represented by G. Rozet and N. Yerrell, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Grand Duchy of Luxembourg, represented by S. Schreiner, acting as Agent,

defendant,

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of J.-P. Puissochet, acting for the President of the Sixth Chamber, S. von Bahr and A. Borg Barthet (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, by failing to bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time

to cover sectors and activities excluded from that directive (OJ 2000 L 195, p. 41) ('the Directive') or, in any event, by failing to communicate them, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 2(1) of the Directive.

2 Article 2(1) of the Directive provides that 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive no later than 1 August 2003, or shall ensure that, by that date at the latest, the two sides of industry have introduced the necessary measures by agreement, the Member States being required to take any necessary measure to enable them at any time to be in a position to guarantee the results imposed by this directive. With regard to doctors in training that date shall be 1 August 2004. They shall forthwith inform the Commission thereof.'

3 Taking the view that the Directive had not been transposed into Luxembourg law within the prescribed period, the Commission initiated the procedure for failure to comply with obligations provided for by the first paragraph of Article 226 EC. After giving the Grand Duchy of Luxembourg formal notice, on 6 October 2003, to submit its observations, the Commission delivered a reasoned opinion on 9 July 2004 requesting that Member State to adopt the measures necessary to comply with that opinion within two months of its notification. The information communicated by the Luxembourg authorities following that opinion indicated that the Directive had still not been transposed and the Commission therefore decided to bring the present action.

4 The Luxembourg Government does not dispute that the Directive has not been transposed within the prescribed period. Nevertheless, it claims that the measures necessary for that purpose are in the process of being drawn up. Moreover, a draft law transposing the Directive has already been prepared.

5 Article 92(2) of the Rules of Procedure provides that the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case.

6 It should be pointed out in this regard that Article 2(1) of the Directive provides that the Member States are to transpose it no later than 1 August 2003. However, with regard to doctors in training that date is to be 1 August 2004. The letter of formal notice which the Commission sent to the Grand Duchy of Luxembourg is dated 6 October 2003. On that date, the time-limit for transposing the Directive in so far as it concerns doctors in training had therefore not yet expired.

7 As the Court has held, in order for a letter of formal notice to be issued, a prior failure by the Member State concerned to fulfil an obligation owed by it must be alleged (see Order in Case C-341/97 *Commission* v *Netherlands* [2000] ECR I-6611, paragraph 18, and Case C-230/99 *Commission* v *France* [2001] ECR I-1169, paragraph 32). Even if that Member State does not consider it necessary to avail itself of the opportunity to submit its observations, such an opportunity constitutes an essential guarantee required by the EC Treaty and amounts to an essential procedural requirement in proceedings relating to the finding of a failure on the part of a Member State. The letter of formal notice cannot therefore relate to failure to transpose a directive in respect of which the time-limit for implementation had not yet expired (see Case 31/69 *Commission* v *Italy* [1970] ECR 25, paragraphs 12 to 14).

8 It follows that, in this case, the alleged failures to fulfil obligations under the Directive, in so far as it relates to doctors in training, have not been proven and the action must be declared inadmissible in part to the extent that it concerns implementation of the Directive with regard to doctors in training.

9 By contrast, as regards the fields to which the Directive applies with the exception of that of doctors in training, it is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, in particular, Case C-323/01 *Commission* v *Italy* [2002] ECR I-4711, paragraph 8, and Case C-322/00 *Commission* v *Netherlands* [2003] ECR I-11267, paragraph 50).

10 In this case, it is common ground that, at the end of the period prescribed in the reasoned opinion, the measures required to ensure transposition of the Directive into national law had not been adopted.

11 In those circumstances, the action brought by the Commission must be regarded as well founded in part.

12 It must accordingly be declared that, by failing to bring into force the laws, regulations and administrative provisions, except as regards the provisions to be adopted in respect of doctors in training, necessary to comply with the Directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 2(1) of that directive.

Costs

13 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 Grand Duchy of Luxembourg has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Sixth Chamber) hereby:

1. **Declares that, by failing to bring into force the laws, regulations and administrative provisions, except as regards those to be adopted in respect of doctors in training, necessary to comply with Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 2(1) of that directive;**

2. **Dismisses the remainder of the action;**

3. **Orders the Grand Duchy of Luxembourg to pay the costs.**

[Signatures]