JUDGMENT OF THE COURT
24 March 1994 *

In Case C-80/92,

Commission of the European Communities, represented by Richard Wainwright, Legal Adviser, and Virginia Melgar, a French official on secondment to the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Legal Service, Wagner Centre, Kirchberg,

applicant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by Susan Cochrane of the Treasury Solicitor's Department, acting as Agent, assisted by Eleanor Sharpston, Barrister, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

v

Kingdom of Belgium, represented by Jan Devadder, Director of Administration in the Ministry of Foreign Affairs, acting as Agent, assisted by Eduard Marissens, of

* Language of the case: French.

the Brussels Bar, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

defendant,

APPLICATION for a declaration that, by adopting the Law of 30 July 1979 and the implementing Decrees of 15 October 1979 and 19 October 1979 relating to radiocommunications, the Kingdom of Belgium has failed to fulfil its obligations under Articles 30, 34 and 59 of the EEC Treaty,

THE COURT,

composed of: G. F. Mancini, President of Chambers, acting as President, J. C. Moitinho de Almeida and D. A. O. Edward (Rapporteur) (Presidents of Chambers), R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg and J. L. Murray, Judges,

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 15 December 1993,

after hearing the Opinion of the Advocate General at the sitting on 12 January 1994,

gives the following

Judgment

1 By application lodged at the Court Registry on 12 March 1992, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by adopting the Law of 30 July 1979 and the implementing Decrees of 15 October and 19 October 1979 relating to radiocommunications, the Kingdom of Belgium has failed to fulfil its obligations under Articles 30, 34 and 59 of the EEC Treaty.

2 The marketing and use in Belgium of radiocommunications transmitters, transceivers and receivers are governed by the Law of 30 July 1979 relating to radiocommunications (*Moniteur Belge* of 30 August 1979) and by the implementing decrees relating to radiocommunications (Royal Decree of 15 October 1979 and Ministerial Order of 19 October 1979, *Moniteur Belge* of 30 October 1979).

3 Under Article 3 (1) of the Law of 30 July 1979,

'It is an offence for any person within the Kingdom or on board a ship, boat, aircraft or any other carrier governed by Belgian law, to possess a radiocommunica-

tions transmitter or receiver, or to set up and operate a radio station or network, unless he obtains written authorization from the Minister. Such authorization is personal and may be withdrawn.'

4 Article 4 (c) of the Law of 30 July 1979 provides as follows:

'It is an offence for any person within the Kingdom or on board a ship, boat, aircraft or any other carrier governed by Belgian law:

(...)

(c) to receive or attempt to receive radiocommunications that are not intended for that person. If such radiocommunications are received unintentionally, they may not be reproduced or communicated, and their actual existence may not be disclosed, except where required or authorized by law.'

5 Article 7 (1) of that Law provides that 'no radiocommunications transmitter or receiver may be offered for sale or rental unless the model has been certified by the authorities as satisfying the technical requirements set by the Minister'. On the other hand, under Article 7 (2) the Minister 'or his representative may dispense with certification for prototypes of equipment intended solely for export'.

6 In its reasoned opinion of 14 May 1990 and its application, the Commission claimed that:

— the prohibition on receiving radio and television broadcasts, laid down by Article 4 (c) of the Law of 30 July 1979, is contrary to Article 59 of the Treaty,

— the requirement that receivers be submitted for administrative certification, as provided for by Article 7 of that Law, is contrary to Article 30 of the Treaty,

— the possibility of dispensing with certification for transmitters or transceivers intended for export, provided for by Article 7 of the Law, is contrary to Article 34 of the Treaty.

7 At the outset, it is to be noted that, in its reply, the Commission withdrew its complaint of infringement of Article 59 of the Treaty, the complaint having been founded on an incorrect reading of the relevant provisions of the national legislation. At the hearing, the Commission further acknowledged that in its reply to the reasoned opinion the Belgian Government had already clearly shown that the contested provisions were in no way incompatible with Article 59.

8 The Commission can therefore be taken to have abandoned that point, and consequently judgment need be given only on the complaints based on the infringement of Articles 30 and 34 of the Treaty.

The complaint concerning receivers, based on the infringement of Article 30 of the Treaty

9 According to the Commission, supported by the United Kingdom, the procedure for certifying radiocommunications receivers (with the exception of those intended exclusively for the reception of radio or television broadcasts), as provided for by Article 7 of the Belgian Law, and the procedure for ministerial authorization for the possession of such equipment, as provided for by Article 3 (1) of that Law, are

contrary to the requirements of Article 30 of the Treaty, in so far as they affect receivers lawfully manufactured and marketed in other Member States.

10 In its reply to the Commission's reasoned opinion, the Belgian Government acknowledged that, given the nature of the equipment in question and, in particular, the fact that the risk of interference, while real, was slight, the requirement of prior certification in force at present could in some cases be disproportionate. Therefore, the system of certification applicable to the possession of such equipment, and also to the setting up and operation of a station or network intended exclusively for reception, could effectively be replaced by a declaration procedure.

11 The Belgian Government contended, however, that neither existing technology (especially the forthcoming high-technology receivers) nor present ability to protect certain signals by coding radiocommunications (in the case of the army, gendarmerie and so on) warranted the abandonment of all forms of supervision. It added that, unlike equipment with parabolic aerials, scanners presented an appreciably greater risk of interference with, and invasion of privacy of, radiocommunications. However, in accordance with the principle of proportionality, it had been decided to establish a procedure for declaring the possession and setting up of such equipment, since a procedure of that kind would not constitute an obstacle to the free movement of goods.

12 In its defence, the Belgian Government contended that the Commission's action was devoid of purpose, as the Commission had not set out its reasons for not accepting the proposal in the defendant's reply to the reasoned opinion, namely to replace the certification and ministerial authorization procedures simply by a declaration procedure. However, the Belgian Government did not claim to have replaced the former procedures by the latter.

13 In its reply, the Commission stated that, subject to more detailed consideration of the proposed measure, the system for declaring receivers could be accepted, unless the declaration was required as a preliminary to their being marketed and imported. However, it claimed that the proposal to set up an administrative declaration procedure only met the complaint concerning the procedure for certification prior to the marketing and importation of receivers, while the system of applying for ministerial authorization was maintained with respect to the possession of such equipment.

14 In its rejoinder, the Belgian Government restated its view that the action was devoid of purpose in so far as it related to the certification procedure, but did not indicate that the declaration procedure had been introduced. As to ministerial authorization for the possession of receivers, the Belgian Government claimed that replacing the certification procedure simply with a declaration procedure would eliminate the requirement that possession of such equipment had to be authorized. Moreover, it drew the Court's attention to its answer to a question raised by the Court in its judgment in Case C-46/90 *Lagauche* [1993] ECR I-5267, according to which the procedure for authorizing possession related only to the stock of radiocommunications equipment held by traders and its aim was simply to check that only equipment previously certified was marketed within the Kingdom.

15 In its intervention, filed after the rejoinder, the United Kingdom, while supporting the position of the Commission in so far as the latter referred to the requirement that all receivers should be certified, emphasized the fact that radiocommunications receivers are not always electromagnetically harmless or neutral. Because they contain electronic components, receivers are capable of causing interference

with other equipment, even though they receive signals only and are not designed to emit them. Therefore, if such interference is caused or is reasonably to be foreseen, a requirement such as the procedure for certifying receivers may well be justified, provided that it is not discriminatory and is proportionate to the aim pursued.

16 In reply to a question from the Court, the Belgian Government pointed out that 'after the Commission gave its assent in the reply', it had replaced the procedure for certifying equipment capable only of reception with a declaration procedure. However, at the hearing it acknowledged that nothing had been published in that regard 'in view of the lack of full agreement on the part of the Commission' and that the persons concerned could obtain information only by applying 'to the proper departments'.

17 In these circumstances, the Commission's complaint is to be understood as relating to the requirement of certification for all receivers, with the exception of those intended exclusively for the reception of radio or television broadcasts, irrespective of whether the equipment is capable of causing interference or whether it has been manufactured or certified in another Member State.

18 Far from challenging that complaint, the Belgian Government has expressly acknowledged that the requirement that all receivers, of whatever kind, should be certified, constitutes an obstacle to intra-Community trade which is disproportionate to the aim pursued. In its defence, however, the Belgian Government contends that the action is devoid of purpose, in view, first, of the offer in the reply to the reasoned opinion to replace the certification procedure simply with a declaration procedure and, secondly, of the fact that the appropriate departments were instructed to replace the former procedure with the latter.

19 As to that, it is sufficient to find that no amendment of the legislation at issue was implemented before the expiry of the period set by the reasoned opinion. In any event, such an amendment would be irrelevant for the purposes of giving judgment on the subject-matter of this action.

20 Furthermore, it must be borne in mind that, as the Court has consistently held, mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty (see the judgment in Case C-381/92 *Commission* v *Ireland* [1994] ECR I-215, at paragraph 7).

21 In the circumstances, and without the need to consider whether a certification procedure is appropriate for certain equipment capable of reception only but liable to cause interference, it must be held that by adopting and maintaining in force a certification procedure applied without distinction to all radiocommunications equipment capable of reception only, with the sole exception of equipment intended exclusively for the reception of radio or television broadcasts, provided for by Article 7 of the Law of 30 July 1979 relating to radiocommunications and by the implementing decrees relating to radiocommunications, the Kingdom of Belgium has failed to fulfil its obligations under Article 30 of the Treaty.

The complaint concerning transmitters or transceivers intended for export, based on the infringement of Article 34 of the Treaty

22 The Commission does not dispute that the Belgian legislation establishes for transmitters or transceivers a general system of advance regulation through certification, which is intended to ensure the proper working of the telecommunications net-

work and user safety, and which is justified by objective and legitimate requirements in the general interest.

23 However, the Commission's complaint relates to the fact that, in the case of equipment intended for export, a certification procedure of that kind is neither necessary nor justified and is therefore incompatible with Article 34 of the Treaty. The possibility of obtaining ministerial exemption from certification for such equipment presupposes that the certification procedure referred to by the Commission is lawful. The Belgian Government disputes that view.

24 It should be borne in mind that, as the Court has consistently held, Article 34 of the Treaty concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a special advantage for national production or for the domestic market of the State in question (see the judgment in Case C-47/90 *Delhaize Frères et Le Lion* [1993] ECR I-3669, at paragraph 12).

25 In that connection, the Belgian legislation relating to transmitters and transceivers applies both to products intended for the Belgian market and to those intended for export, while the latter alone qualify for exemption from certification. That fact cannot, however, be regarded as constituting a difference in treatment between domestic trade and export trade which has as its specific object or effect the restriction of patterns of exports.

26 Accordingly, the complaint based on the infringement of Article 34 of the Treaty must be rejected.

Costs

27 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, the first subparagraph of Article 69 (3) provides that the Court may order that the costs be shared in whole or in part, where each party succeeds on some and fails on other heads. Under the first subparagraph of Article 69 (4), Member States which intervene in the proceedings are to bear their own costs.

28 In the circumstances of the present case, the costs incurred by the Commission and the Kingdom of Belgium are to be shared. The United Kingdom, as intervener, is to bear its own costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by adopting and maintaining in force a certification procedure applied without distinction to all radiocommunications equipment capable of reception only, with the sole exception of equipment intended exclusively for the reception of radio or television broadcasts, provided for by Article 7 of the Law of 30 July 1979 relating to radiocommunications and by the implementing decrees relating to radiocommunications, the Kingdom of Belgium has failed to fulfil its obligations under Article 30 of the EEC Treaty;

2. Dismisses the remainder of the application;

3. Orders the parties to bear their own costs;

4. Orders the United Kingdom, as intervener, to bear its own costs.

Mancini Moitinho de Almeida Edward

Joliet Schockweiler Rodríguez Iglesias

Grévisse Zuleeg Murray

Delivered in open court in Luxembourg on 24 March 1994.

R. Grass
Registrar

G. F. Mancini
President of the Second and Sixth Chambers
acting as President