JUDGMENT OF THE COURT (Sixth Chamber)
7 November 1996 *

In Case C-221/94,

Commission of the European Communities, represented by Anders C. Jessen, of its Legal Service, and Jean-Francis Pasquier, a national official on secondment to that service, both acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Grand Duchy of Luxembourg, represented by Nicolas Schmit, Director for International Economic Relations and Cooperation at the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the offices of that Ministry,

defendant,

APPLICATION for a declaration that, by not adopting within the period laid down the laws, regulations and administrative provisions necessary to comply with Council Directive 91/263/EEC of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity (OJ 1991 L 128, p. 1) and, in any event, by not immediately informing the Commission of such measures, the Grand Duchy of Luxembourg has failed to fulfil its obligations under the directive and in particular under Article 17 thereof,

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber (Rapporteur), J. L. Murray, C. N. Kakouris, P. J. G. Kapteyn and H. Ragnemalm, Judges,

Advocate General: C. O. Lenz,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 13 June 1996, at which the Grand Duchy of Luxembourg was represented by Patrick Kinsch, of the Luxembourg Bar, and the Commission by Jean-Francis Pasquier,

after hearing the Opinion of the Advocate General at the sitting on 12 September 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 28 July 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by not adopting within the period laid down the laws, regulations and administrative provisions necessary to comply with Council Directive 91/263/EEC of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity (OJ 1991 L 128, p. 1) and, in any event, by not immediately informing the Commission of such measures, the Grand Duchy of Luxembourg had failed to fulfil its obligations under the directive and in particular under Article 17 thereof.

2 As is clear from its title, the purpose of Directive 91/263 is to approximate the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity. In accordance with Article 17 of the directive, Member States were to take the measures necessary to comply with the directive by not later than 6 November 1992 and forthwith to inform the Commission thereof.

3 Not having been notified by the Luxembourg Government of the adoption of any measures, the Commission, by letter of 21 December 1992, put it on notice to submit its observations, in accordance with Article 169 of the Treaty.

4 When it received no reply, the Commission, on 7 February 1994, sent the Luxembourg Government a reasoned opinion by which it requested that government to take the measures necessary to comply with Directive 91/263 within two months of the opinion's notification. When that opinion also failed to produce any response, the Commission commenced these proceedings.

5 Before the Court, the Luxembourg Government argues, first, that Directive 91/263 was already applicable since a grand-ducal regulation of 15 December 1988 implementing Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment (OJ 1986 L 217, p. 21) already covers the same subject-matter as Directive 91/263.

6 Secondly, the defendant Government relies on a Law of 10 August 1992 creating the Posts and Telecommunications Corporation, which turned the former Posts and Telecommunications Office into a public undertaking enjoying financial and administrative autonomy and having legal personality. It contends that this Law created a national regulatory authority distinct from the operator and that the

policy of the Grand Duchy in this matter has always been liberal. Lastly, it observes that there is already a draft Law for transposing Directive 91/263 and Council Directive 93/97/EEC of 29 October 1993 supplementing Directive 91/263/EEC in respect of satellite earth station equipment (OJ 1993 L 290, p. 1).

7 Having regard to those considerations, the Luxembourg Government considers that the result envisaged by Directive 91/263 has now been achieved and that the principles of that directive, namely the free movement of terminal equipment and mutual recognition of their conformity, are applied by the Grand Duchy.

The Grand-Ducal Regulation of 15 December 1988

8 Since this regulation has transposed Directive 86/361 by incorporating the entire directive in an annex, the aims and the provisions of that directive and of Directive 91/263 must first be examined in order to determine whether, through transposition of the first directive, the Grand Duchy of Luxembourg has adopted the measures necessary to implement the second.

9 The fifth recital in the preamble to Directive 86/361 states that: '... the mutual recognition of type approval for telecommunications terminal equipment constitutes a major step towards the creation of an open and unified market for such equipment'. The sixth recital in the preamble to that directive states that progress towards this objective can be made only in stages since situations differ and technical and administrative constraints exist in the Member States.

10 The seventh recital in the preamble to Directive 86/361 identifies the mutual recognition of conformity tests on mass-produced terminal equipment as the initial

stage of mutual recognition of type approval sought for such equipment. With that in view, Article 1 of that directive provides that: 'The Member States shall implement the mutual recognition of the results of tests of conformity with common conformity specifications for mass-produced telecommunications terminal equipment in accordance with the detailed rules set out in this Directive'.

11 Under Article 7(1) and (2) of Directive 86/361 the Member States are to inform the Commission of the authorities competent in their territory to issue type approval for terminal equipment and of the test laboratories which they have approved as competent for the purpose of verifying the conformity of terminal equipment with the common conformity specifications defined in point 13 of Article 2 of that directive. Those laboratories are also competent to issue, where necessary, the certificates of conformity provided for in Article 7(3), which contain all the information relating to the measures.

12 However, although the aim of Directive 86/361 is the mutual recognition and harmonization of conformity rules, it is still essential, as the Advocate General points out in point 12 of his Opinion, for type approval to be carried out in each Member State since recognition in the other Member State applies only to test results.

13 Finally, Article 9 of Directive 86/361 gives the Commission responsibility for examining the detailed rules for the second stage of the establishment of a market in terminal equipment without internal frontiers covering, in particular, the implementation of mutual recognition of type approval and requires it to submit proposals to the Council on this matter.

14 As far as Directive 91/263 is concerned, the first recital in its preamble states that Directive 86/361 envisaged, in Article 9, a further stage for full mutual recognition of type approval for terminal equipment. That statement is clear evidence of the differences which exist between the two directives.

15 The aim of Directive 91/263 is in fact wider than that of Directive 86/361: it is in fact to achieve full mutual recognition of type approval of terminal equipment so that each terminal equipment in question receives one type approval, valid throughout the Community. Similarly, the scope of Directive 91/263 is wider than that of Directive 86/361 since it covers both terminal equipment intended to be connected to the public telecommunications network (Article 1) and equipment which is capable of being connected to the public network but which is not intended for such a purpose (Article 2).

16 Article 3 of Directive 91/263 requires the Member States to take all appropriate measures to ensure that terminal equipment may be placed on the market and put into service only if it complies with the requirements laid down in the directive when it is properly installed and maintained and used for its intended purpose. It follows that the directive provides for the recognition of not only the results of tests carried out in the other Member States but also of type approvals.

17 Terminal equipment must also meet the three requirements laid down in points (c), (e) and (f) of the first paragraph of Article 4, regarding electromagnetic compatibility, effective use of the radio frequency spectrum, and interworking of terminal equipment with public telecommunications network equipment for the purpose of establishing, modifying, charging for, holding and clearing real or virtual connections. Those requirements do not appear in the list of the essential requirements set out in point 17 of Article 2 of Directive 86/361.

18 When terminal equipment satisfies the provisions of Directive 91/263, Member States may not impede the placing on the market and the free circulation and use

on their territory of that equipment (Article 5). Furthermore, Member States assume that terminal equipment conforming to national standards implementing the relevant harmonized standards for which the references were published in the Official Journal are in conformity with the essential requirements laid down in points (a) and (b) of the first paragraph of Article 4. Moreover, Article 6(2) of Directive 91/263 provides for the adoption by the Commission of measures relating to the essential requirements indicated in the directive.

19 Directive 91/263 also introduced a system of EC marking for terminal equipment complying with the requirements of the directive, which was not provided for by Directive 86/361.

20 On the basis of those considerations, it is evident that national provisions simply reproducing the text of Directive 86/361 are not sufficient to transpose Directive 91/263.

Law of 10 August 1992

21 As the Advocate General points out in point 25 of his Opinion, it was already obligatory, under Article 6 of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ 1988 L 131, p. 73), for undertakings offering goods and/or services in the telecommunications sector to be separate from the body empowered to grant type approval. In view of the foregoing considerations, it is clear beyond dispute that the scope and aims of Directive 91/263 go further than the relevant national provisions in force. Consequently, this argument must be rejected.

The liberal policy of the Grand Duchy of Luxembourg and the draft grand-ducal regulation

22 As regards the arguments which the Luxembourg Government draws from its liberal policy on terminal equipment, it is sufficient to point out here that, according to the case-law of the Court, the fact that a practice is in conformity with the requirements of a directive in the matter of protection may not constitute a reason for not transposing that directive into national law by provisions capable of creating a situation which is sufficiently precise, clear and transparent to enable individuals to ascertain their rights and obligations (see, in particular, to this effect the judgment in Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 24). Nor is a draft regulation capable of the transposing of Directive 91/263.

23 In those circumstances, it must be held that, in failing to adopt within the period laid down the laws, regulations and administrative provisions necessary to comply with Directive 91/263, the Grand Duchy of Luxembourg has failed to fulfil its obligations under the directive and in particular under Article 17 thereof.

Costs

24 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, by failing to adopt within the period laid down the laws, regulations and administrative provisions necessary to comply with Council Directive 91/263/EEC of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity, the Grand Duchy of Luxembourg has failed to fulfil its obligations under the directive and in particular under Article 17 thereof;**

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

Mancini Murray Kakouris

Kapteyn Ragnemalm

Delivered in open court in Luxembourg on 7 November 1996.

R. Grass

Registrar

G. F. Mancini

President of the Sixth Chamber