JUDGMENT OF THE COURT
15 January 1986 *

In Case 52/84

Commission of the European Communities, represented by its Legal Adviser, Marie-José Jonczy, acting as Agent, with an address for service in Luxembourg at the office of George Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by the Minister for Foreign Relations, Agent: Robert Hoebaer, Director at the Ministry for Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, assisted by Jean-François Bellis, of the Brussels Bar, with an address for service in Luxembourg at the Belgian Embassy, Résidence Champagne, 4 rue des Girondins,

defendant,

APPLICATION for a declaration that, by not complying within the prescribed period with the Commission Decision of 16 February 1983 on aid granted by the Belgian Government to a firm manufacturing ceramic sanitary ware (Official Journal 1983, L 91, p. 32), the Kingdom of Belgium has failed to fulful its obligations under the EEC Treaty,

THE COURT

composed of: U. Everling, President of Chamber, acting as President, R. Joliet (President of Chamber), G. Bosco, T. Koopmans, O. Due, Y. Galmot, C. Kakouris, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: C. O. Lenz
Registrar: J. A. Pompe, Deputy Registrar

* Language of the Case: French.

after hearing the Opinion of the Advocate General delivered at the sitting on 21 November 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an application lodged at the Court Registry on 28 February 1984, the Commission of the European Communities brought an action under the second subparagraph of Article 93 (2) of the EEC Treaty seeking a declaration that, by not complying within the prescribed period with Commission Decision No 83/130/EEC of 16 February 1983 on aid granted by the Belgian Government to a firm manufacturing ceramic sanitary ware, the Kingdom of Belgium had failed to fulfil its obligations under the EEC Treaty.

2 In the disputed decision the Commission found that the acquisition by a public regional holding company of a holding worth BFR 475 million in the capital of an undertaking manufacturing ceramic ware at La Louvière constituted aid of a type which was incompatible with the common market within the meaning of Article 92 of the EEC Treaty and should therefore be withdrawn. The Commission further asked to be informed, within three months of the date on which the decision was notified to the applicant, of the measures which it had taken to comply therewith.

3 The preamble to the decision contains the following recital:

'The purpose of the aid is to permit the maintenance of production capacity and this is likely to strike a particularly grave blow at conditions of competition since free market conditions would normally require the closure of the firm in question so that, in a situation in which the industry is faced with over-capacity, more efficient competitors could expand.'

4 The decision was notified to the Kingdom of Belgium by letter of 24 February 1983. No action was brought before the Court to have the decision declared void.

5 By letter of 3 June 1983 addressed to the competent Member of the Commission, the Belgian Permanent Representative to the European Communities contested the accuracy of the statement of reasons given in the decision and stressed the serious social consequences of closing down the undertaking in question. He also observed that Belgian law did not allow share capital to be refunded except by way of withdrawal from company profits, which was precluded by the results reported by the undertaking. Lastly, the letter requested the Commission to explain to the Belgian authorities what it meant by 'withdrawal of the aid' and what consequences it thought its definition entailed.

6 By letter of 22 July 1983 the Member of the Commission replied, stating *inter alia* that the first priority was to fulfil the obligations arising under Community law. He went on to state that he would be grateful if the Permanent Representative would let him know within 15 days what measures the Belgian Government had adopted in order to comply with the Commission's decision.

7 By letter of 5 September 1983 the Belgian Permanent Representative once again criticized the reasoning given in the decision, and repeated his request for an explanation. The Commission took the view that its decision had not been put into effect and, alarmed at reports appearing in the Belgian press of further aid for the undertaking in question, it brought the present action without answering his letter.

8 In the proceedings before the Court the Commission stressed that, having found that the aid in question was incompatible with the common market, it was obliged under the first subparagraph of Article 93 (2) of the EEC Treaty to require the Member State concerned to abolish or alter the aid within a period determined by the Commission. The Commission asks whether the Belgian Government's submissions do not amount to challenging the validity of the decision, which

according to the case-law of the Court is no longer possible, since the decision was not contested within the period laid down by the third paragraph of Article 173 of the Treaty.

9 In any event, the Commission maintains that the Belgian Government's submissions are unfounded. Unlike the decision in Case 70/72 (judgment of 12 July 1973 *Commission* v *Federal Republic of Germany* [1973] ECR 813), this decision clearly identified the aid to be abolished. It was thus sufficiently precise to be put into effect, and according to the case-law of the Court the Belgian Government could not plead requirements of Belgian law in order to justify its failure to comply with the obligations arising from Community decisions.

10 The Belgian Government contends that the Belgian authorities were not in breach of their obligations under Article 93 (2) of the Treaty. In spite of their repeated requests the Commission, it claims, failed to supply the necessary particulars enabling them to establish what was entailed by the obligation to abolish the alleged aid. They could not therefore be criticized for not discharging that obligation.

11 The Belgian Government also refers to the Second and Seventh Reports on Competition Policy, in which the Commission defined its position as regards the acquisition of holdings by public bodies. In those reports the Commission stated that the conduct of bodies created and financed by the State for the purpose of acquiring holdings in the capital of certain undertakings can only be appraised *ex post facto*. By adopting that policy the Commission itself prevented the withdrawal of capital holdings, because to demand that the holdings should be redeemed would seriously harm the rights of innocent third parties whenever the profits of an undertaking were insufficient to permit such redemption.

12 In this particular case the undertakings did not, according to the Belgian Government, have the profits needed to cover the redemption, and it would therefore have been impossible to implement the decision to the letter without winding up the company. The decision, on the other hand, called for the with-

drawal of the aid, not the winding up of the company. In any case, on 25 January 1985 a general meeting of shareholders passed a resolution winding up the company; the Belgian Government cannot understand what more the Commission expects.

13 The Court has consistently held, most recently in its judgment of 15 November 1983 (Case 52/83 *Commission* v *French Republic* [1983] ECR 3707), that after the expiry of the period laid down in the third paragraph of Article 173 of the Treaty a Member State which is the addressee of a decision adopted under the first subparagraph of Article 93 (2) may not call in question the validity of that decision in the course of legal proceedings commenced pursuant to the second subparagraph of that article. It must be concluded that such is indeed the situation in the present case.

14 In those circumstances the only defence left to the Belgian Government in opposing the Commission's application for a declaration that it failed to fulfil its Treaty obligations would be to plead that it was absolutely impossible for it to implement the decision properly. In this connection it should be noted that the decision demands the withdrawal from the undertaking of a capital holding of BFR 475 million, the acquisition of which was decided upon by the regional authorities on 3 August 1981 and effected by a public regional holding company; that demand is sufficiently precise to be complied with. The fact that, on account of the undertaking's financial position, the Belgian authorities could not recover the sum paid does not constitute proof that implementation was impossible, because the Commission's objective was to abolish the aid, and, as the Belgian Government itself admits, that objective could be attained by proceedings for winding up the company, which the Belgian authorities could institute in their capacity as shareholder or creditor.

15 As regards the Belgian Government's argument that the decision was in fact put into effect inasmuch as the company was wound up early in 1985, it should be noted that the application is concerned with the failure on the part of the Kingdom of Belgium to comply with the decision within the prescribed period and that the decision, which was notified by letter of 24 February 1983, enjoined the Belgian Government to inform the Commission, within three months of notifi-

cation of the decision, of the measures which it had taken to comply therewith. It must therefore be held that, in any event, the decision was not put into effect within the prescribed period.

16 It should be added that the fact that the only defence which a Member State to which a decision has been addressed can raise in legal proceedings such as these is that implementation of the decision is absolutely impossible does not prevent that State — if, in giving effect to the decision, it encounters unforeseen or unforeseeable difficulties or perceives consequences overlooked by the Commission — from submitting those problems for consideration by the Commission, together with proposals for suitable amendments. In such a case the Commission and the Member State concerned must respect the principle underlying Article 5 of the Treaty, which imposes a duty of genuine cooperation on the Member States and Community institutions; accordingly, they must work together in good faith with a view to overcoming difficulties whilst fully observing the Treaty provisions, and in particular the provisions on aid. However, in the present instance, none of the difficulties referred to by the Belgian Government is of that nature, and that Government made no proposals whatever to the Commission for the adoption of other suitable measures; instead, acting through its Permanent Representative and after expiry of the period prescribed for compliance, it confined itself to contesting the accuracy of the reasons recited by the decision, to pleading that it was impossible to redeem the capital holding on account of Belgian legal provisions, and to requesting the Commission to clarify what it meant by 'withdrawal of the aid'. Such an attitude cannot be regarded as consistent with the duty of cooperation mentioned above.

17 It follows from the foregoing that the Court must hold, in the terms set out in the Commission's application, that the Kingdom of Belgium has failed to fulfil its Treaty obligations.

Costs

18 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the defendant has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that, by not complying within the prescribed period with Commission Decision No 83/130/EEC of 16 February 1983 on aid granted by the Belgian Government to a firm manufacturing ceramic sanitary ware, the Kingdom of Belgium has failed to fulfil its obligations under the Treaty;

(2) Orders the Kingdom of Belgium to pay the costs.

Everling Joliet Bosco Koopmans

Due Galmot Kakouris O'Higgins Schockweiler

Delivered in open court in Luxembourg on 15 January 1986.

P. Heim
Registrar

U. Everling
President of Chamber,
acting as President