JUDGMENT OF THE COURT
18 December 1986 *

In Case 93/85

Commission of the European Communities, represented by John Forman, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, also a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by B. E. McHenry, of the Treasury Solicitor's Department, acting as Agent, assisted by Francis Jacobs, QC, with an address for service in Luxembourg at the British Embassy, 28 boulevard Royal,

defendant,

APPLICATION for a declaration that, by not complying with the invitation addressed to it by the Commission pursuant to the first subparagraph of Article 10 (2) of Council Regulation No 2891/77 of 19 December 1977 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources and by subsequently refusing to pay the interest due under Article 11 of that regulation, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under the Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, Y. Galmot, C. Kakouris and F. Schockweiler (Presidents of Chambers), G. Bosco, T. Koopmans, U. Everling, R. Joliet and G. C. Rodríguez Iglesias, Judges,

Advocate General: C. O. Lenz
Registrar: B. Pastor, Administrator

* Language of the Case: English.

having regard to the Report for the Hearing and further to the hearing on 8 July 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 4 November 1986,

gives the following

JUDGMENT

1 By an application lodged at the Court Registry on 11 April 1985, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that the United Kingdom of Great Britain and Northern Ireland had failed to fulfil its obligations under that Treaty by not complying with the invitation addressed to it by the Commission pursuant to the first subparagraph of Article 10 (2) of Council Regulation No 2891/77 of 19 December 1977 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (Official Journal 1977, L 336, p. 1) and by subsequently refusing to pay the interest due under Article 11 of that regulation.

2 Reference is made to the Report for the Hearing for the facts and the arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

3 The first subparagraph of Article 9 (1) of Regulation No 2891/77 provides that the amount of own resources, that is to say, in particular, agricultural levies and the like and Common Customs Tariff duties and the like (see Article 2 of Council Decision 70/243/ECSC, EEC, Euratom of 21 April 1970, Official Journal, English Special Edition, 1970 (I), p. 224), 'shall be credited by each Member State to the account opened for this purpose in the name of the Commission with its Treasury or with the body it has appointed'.

4 Article 10 (1) of Regulation No 2891/71 provides: 'The entry referred to in Article 9 (1) shall be made at the latest by the 20th day of the second month following the month during which the entitlement was established'.

5 By way of derogation to the rule set out in Article 10 (1), Article 10 (2) provides as follows:

'If necessary, Member States may be invited by the Commission to bring forward by one month the entering of resources other than VAT resources on the basis of the information available to them on the 15th of the same month.

Each entry brought forward shall be adjusted the following month when the entry mentioned in paragraph 1 is made. This adjustment shall entail the negative entry of an amount equal to that given in the entry brought forward.'

6 In addition, Article 11 stipulates that: 'Any delay in making the entry in the account referred to in Article 9 (1) shall give rise to the payment of interest by the Member State concerned at a rate equal to the highest rate of discount ruling in the Member States on the due date. That rate shall be increased by 0.25 of a percentage point for each month of delay. The increased rate shall be applied to the entire period of delay.'

7 In the spring of 1983 agricultural expenditure reached such a high level that, for the first time, the Commission saw fit to resort to the provisions of Article 10 (2), quoted above. To that end it sent telex messages to the Member States on 28 April 1983 inviting them to bring forward to 20 May the entering of own resources established in April and normally due by 20 June.

8 The United Kingdom did not act on that invitation; it did not pay the resources in question until one month later.

9 Following an exchange of letters the Commission initiated the procedure provided for in the first paragraph of Article 169 of the EEC Treaty by sending the United Kingdom a letter giving it formal notice, followed by a reasoned opinion. In response to the Commission's letter giving it formal notice and the reasoned opinion, the United Kingdom stated that it stood by its point of view, whereupon the Commission brought this action before the Court of Justice.

10 In its application the Commission alleges that the United Kingdom has infringed Article 10 (2) and Article 11 of Regulation No 2891/77.

The first claim: the alleged infringement of Article 10 (2) of Regulation No 2891/77

11 The Commission contends that Article 10 (2) of Regulation No 2891/77 imposes a genuine obligation on the Member States. The Member States are, in its view, obliged to comply with invitations made by the Commission pursuant to the aforesaid provision asking Member States to bring forward the entering of the own resources which each of them has established.

12 Accordingly, the Commission considers that, by not complying with the invitation addressed to it on 28 April 1983 pursuant to Article 10 (2) of Regulation No 2891/77, the United Kingdom has failed to fulfil its obligations under that provision.

13 The United Kingdom contends that Article 10 (2) imposes no obligation on the Member States. In its opinion, if the Member States do not agree to make the advance payment requested by the Commission under Article 10 (2), the Commission may make use of the facility afforded by Article 12 (2) of Regulation No 2891/77. Article 12 (2) provides as follows: 'If the cash resource requirements are in excess of the assets of the accounts, the Commission may draw in excess of the total of these assets. In this event, it shall inform the Member States in advance of any foreseeable excess requirements.'

14 The United Kingdom authorities were, according to the United Kingdom, willing to comply with the Commission's invitation but parliamentary approval was necessary since, in the United Kingdom's view, the payment in question was not one which it was required to make in order to meet an obligation under Community law. However, owing to the dissolution of Parliament on 13 May 1983, the United Kingdom Government was unable to obtain the parliamentary approval which it considered to be necessary before it could comply with the Commission's invitation.

15 It is appropriate to point out that the sums involved in this case constitute own resources of the Communities within the meaning of the Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources.

16 Under the system instituted by that decision and by Regulation No 2891/77 the Member States are merely to establish those resources and make them available to the Commission.

17 Pursuant to Article 6 of the Decision of 21 April 1970 and Article 1 of Regulation No 2891/77 the role of Member States is limited to establishing the Communities' own resources in accordance with their national provisions laid down by law, regulation or administrative action and subsequently making them available to the Commission. Under Article 9 (1) of Regulation No 2891/77, own resources are made available by crediting them to the account opened for that purpose in the name of the Commission with the Treasury or the body appointed for that purpose by the Member State. The fifth subparagraph of Article 3 (1) of the Decision of 21 April 1970 provides that each Member State is to be refunded 10% of the amount of own resources paid by it, in order to cover expense incurred in collection.

18 On the other hand, responsibility for administering, at Community level, the system established by the Decision of 21 April 1970 and Regulation No 2891/77 lies with the Commission, in accordance with the principles laid down in the financial provisions of the Treaty, and in particular Article 205.

19 Accordingly, the own resources established by the various Member States are made available to the Commission pursuant to Article 1 of Regulation No 2891/77. Under Article 4, each Member State is to provide the Commission with particulars of the departments responsible for establishing own resources and of the national legal provisions applicable thereto. Article 5 and Article 7 (3) provide that each Member State is to forward to the Commission an annual summary account and a monthly statement of accounts for own resources.

20 It is within that context that Article 10 (2) derogates from the principle laid down in Article 10 (1) that the entry of the amount of own resources established by each Member State in the course of a given month is to be made 'at the latest' by the 20th day of the second month following the month during which the entitlement was established. The purpose of Article 10 (2) is to enable the Commission 'if necessary' to bring forward by one month the entering of own resources other than VAT resources in order to counter any cash-flow problems that the Commission may experience over a certain period.

21 In view of the autonomy conferred on the Commission with regard to the management of own resources and of the allocation of tasks as between the Commission and the Member States under the system established by the Decision of 21 April 1970 and Regulation No 2891/77, the exercise of the power provided for in Article 10 (2) cannot be dependent on the agreement of the various Member States.

22 Indeed, as the Commission has rightly argued, only the Commission can assess whether it is necessary to bring forward the entering of own resources since the Member States are responsible only for collecting the resources and making them available but not for their management; they are under a duty to bring forward the entry of own resources as requested without expressing their agreement or disagreement.

23 The opposite view put forward by the United Kingdom would, moreover, deprive Article 10 (2) of its effectiveness. If one or other of the Member States refused to make the advance payment requested by the Commission, the Commission would not have all the own resources already established at its disposal by what it considers to be the most appropriate date and there would be a risk of a shortfall in the Commission's accounts, which is precisely what Article 10 (2) is designed to avoid.

24 As regards the United Kingdom's argument based on Article 12 (2), it is appropriate to observe that that provision does indeed afford the Commission an alternative means of resolving any cash-flow problems, but one which differs in several respects from the facility afforded by Article 10 (2).

25 Whereas Article 10 (2) merely provides for own resources being entered one month before the date by which the entry would normally have to be made, Article 12 (2) enables the Commission to make drawings in excess of the total assets shown in the accounts opened in its name in each Member State pursuant to Article 9 (1). Consequently, where the Commission decides to make use of Article 12 (2), it is not calling on funds corresponding to own resources already established by the Member States, as it does under Article 10 (2), but is obtaining actual financial contributions from the Member States, if only on a temporary basis.

26 The basic difference between the possibility provided for in Article 12 (2) and that provided for in Article 10 (2) is borne out by the fact that whereas the second subparagraph of Article 10 (2) provides for a mandatory system of adjustment to be effected the month following the month in which the advance payment was made, Article 12 (3) merely provides, as regards cases covered by Article 12 (2), that the difference between the overall assets in the Commission's accounts and its cash resource requirements is to be divided among the Member States, 'as far as possible, in proportion to the estimated budget revenue from each of them'. Likewise, Article 12 (2), unlike Article 10 (2), requires the Commission to inform the Member States in advance of foreseeable excess requirements.

27 Accordingly, the United Kingdom's argument to the effect that Article 12 (2) forms an alternative to Article 10 (2) disregards the particular characteristics of each of those provisions. In any event, the choice of which of those provisions to invoke is a matter for the Commission alone and cannot depend on the refusal of one or more Member States to comply with an invitation made pursuant to Article 10 (2).

28 It must therefore be held that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under the first subparagraph of Article 10 (2) of Council Regulation No 2891/77 of 19 December 1977 (Official Journal 1977, L 336, p. 1) by not complying with the invitation addressed to it pursuant to that provision by the Commission by telex message of 28 April 1983.

The second claim: the alleged infringment of Article 11 of Regulation No 2891/77

29 On the basis of Article 11 of Regulation No 2891/77, which provides that 'any delay in making the entry in the account referred to in Article 9 (1) shall give rise to the payment of interest by the Member State concerned', the Commission contends that the United Kingdom is under a duty to pay default interest on the amount of own resources established in April 1983 and entered in the Commission's account on 20 June rather than on 20 May, as the Commission requested pursuant to Article 10 (2).

30 The Commission argues that by refusing to pay such interest the United Kingdom infringed Article 11.

31 The United Kingdom's main argument is that since, in its view, Article 10 (2) imposes no obligation on the Member States, they are not under a duty to pay default interest if they do not make the advance payment as requested by the Commission.

32 In the light of the interpretation of Article 10 (2) set out above, invitations addressed to the Member States by the Commission pursuant to Article 10 (2) place the Member States under an obligation to bring forward by one month the entering of own resources established during the preceding month.

33 It follows that if a Member State fails to enter the own resources by the date prescribed in such an invitation, it must pay interest in accordance with the provisions of Article 11.

34 In the alternative, the United Kingdom submits that it acted in good faith. In reliance on the wording of Article 10 (2) it considered that it was not under an obligation to comply with the Commission's request for advance payment. As a result, these proceedings relate to an unintentional infringement of a Community obligation, the very existence of which will be uncertain until the Court delivers its judgment.

35 Furthermore, the United Kingdom maintains that the interest payment provided for in Article 11 is a sanction and a particularly severe one in relation to the gravity of the infringement, since Article 11 provides that the rate of interest applied should be equal to the highest rate of discount ruling in the Member States on the due date, which in this case results in a rate of 20.5%.

36 That argument also cannot be accepted.

37 As the Court has stated in its judgment of 20 March 1986 in Case 303/84 *Commission* v *Federal Republic of Germany* [1986] ECR 1171, the very wording of Article 11 shows that interest is payable in respect of 'any delay' in crediting the amounts to the Commission's account, regardless of the reason for the delay. Accordingly, the fact that the United Kingdom was not satisfied that the invitations made by the Commission pursuant to Article 10 (2) were binding cannot expunge the failure to comply with Article 11 with which it is charged by the Commission.

38 As regards the rate applied by the Commission, it must be held that the interest due pursuant to Article 11 is in the nature of default interest, for which a flat rate is set with regard to all the Member States at a level which cannot be varied according to the particular circumstances of each individual case.

39 The United Kingdom further contends that the default interest should be calculated on the basis of the amount which should have been credited pursuant to the Commission's invitation, that is to say the amount of own resources in respect of April 1983 determined on the basis of the information available to the United Kingdom on 15 May 1983. The Commission in fact calculated the interest on the basis of the higher amount of the own resources which were actually paid in June 1983.

40 In that regard it must be held that, as the Commission acknowledged in its reply, the United Kingdom's argument is well founded.

41 In the light of the foregoing it must be held that, by refusing to pay the interest provided for in Article 11 of Regulation No 2891/77 in respect of the delay with which it credited to the Commission's account the own resources for the month of April 1983 determined on the basis of the information available to the United Kingdom of Great Britain and Northern Ireland on 15 May 1983, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that article.

Costs

42 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the United Kingdom of Great Britain and Northern Ireland has failed in its main submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under the first subparagraph of Article 10 (2) of Council Regulation No 2891/77 of 19 December 1977 (Official Journal 1977, L 336, p. 1) by not complying with the invitation addressed to it pursuant to that provision by the Commission by telex message of 28 April 1983;

(2) Declares that, by refusing to pay the interest provided for in Article 11 of Regulation No 2891/77 in respect of the delay with which it credited to the Commission's account the own resources for the month of April 1983 determined on the basis of the information available to the United Kingdom of Great Britain and Northern Ireland on 15 May 1983, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that article;

(3) Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.

Mackenzie Stuart Galmot Kakouris Schockweiler

Bosco Koopmans Everling Joliet Rodríguez Iglesias

Delivered in open court in Luxembourg on 18 December 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President