JUDGMENT OF THE COURT
2 July 1996 *

In Case C-173/94,

Commission of the European Communities, represented by Dimitrios Gouloussis, Legal Adviser, acting as Agent, 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

Kingdom of Belgium, represented by Patrick Duray, Deputy Adviser in the Legal Department of the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

defendant,

APPLICATION for a declaration that, by maintaining a nationality requirement in relation to workers who are nationals of other Member States as regards access to employment as officials or public employees of the public bodies responsible for the distribution of water, gas and electricity (for example, Compagnie Intercommunale Bruxelloise des Eaux, Vlaamse Maatschappij voor Watervoorziening, Unerg, Sibelgaz etc.), the Kingdom of Belgium has failed to fulfil its obligations

* Language of the case: French.

under Article 48 of the EEC Treaty and Articles 1 and 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475),

THE COURT,

composed of: G. C. Rodríguez Iglesias (President), C. N. Kakouris, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann, J. L. Murray, P. Jann (Rapporteur), H. Ragnemalm, L. Sevón and M. Wathelet, Judges,

Advocate General: P. Léger,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 23 January 1996,

after hearing the Opinion of the Advocate General at the sitting on 5 March 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 22 June 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by maintaining a nationality requirement in relation to

workers who are nationals of other Member States as regards access to employment as officials or public employees of the public bodies responsible for the distribution of water, gas and electricity (for example, Compagnie Intercommunale Bruxelloise des Eaux, Vlaamse Maatschappij voor Watervoorziening, Unerg, Sibelgaz, etc.), the Kingdom of Belgium had failed to fulfil its obligations under Article 48 of the EEC Treaty and Articles 1 and 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 Article 48(1) to (3) of the EEC Treaty, which is now the EC Treaty, lays down the principle of the free movement of workers and the abolition of all discrimination based on nationality between workers of the Member States. Article 48(4) of the Treaty provides that the provisions of this article are not to apply to employment in the public service. According to the case-law of the Court, Article 48(4) covers posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities and thus presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality. On the other hand, the Article 48(4) exception does not cover posts which, whilst coming under the State or other organizations governed by public law, still do not involve any association with tasks belonging to the public service properly so called (judgment in Case 149/79 *Commission* v *Belgium* [1980] ECR 3881, paragraphs 10 and 11).

3 As regards Articles 1 and 7 of Regulation No 1612/68, these provisions lay down the rule of equal treatment in access to employment, on the one hand, and in its exercise, on the other.

4 On 23 April 1991, the Commission, having found that in Belgium posts in the water, gas and electricity distribution services were generally restricted to Belgian nationals, sent the Belgian Government a letter giving it notice that this practice was not allowed under the derogation provided for in Article 48(4) of the Treaty

and was therefore incompatible with paragraphs (1) to (3) of that article. It therefore requested the Belgian Government to abolish all discrimination on grounds of nationality in this area and to let it have its observations within a period of six months.

5 In response to that letter, on 12 December 1991 the Belgian Government informed the Commission that a recommendation had been addressed by the competent Minister of the Flemish Executive to the persons in charge of the public bodies running the Flemish Community's water, gas and electricity distribution services in order to bring the relevant staff regulations into line with the applicable Community rules.

6 Not satisfied with that reply, the Commission, on 6 August 1992, addressed a reasoned opinion to the Belgian Government requesting it to take the measures necessary to comply with its Community obligations within a period of four months. When it received no reply to that reasoned opinion the Commission brought these proceedings.

7 It appears from the documents before the Court that in Belgium water, gas and electricity is generally distributed by legal entities governed by public law in association, in very many cases, with private companies. The public legal entities include, first, the *sociétés intercommunales*, such as Sibelgaz and Compagnie Intercommunale Bruxelloise des Eaux ('CIBE') and, second, the distribution companies subject to the public authorities, such as Vlaamse Maatschappij voor Watervoorziening ('VMW').

8 The *sociétés intercommunales* are associations of communes created for the pursuit of commercial or public service activities and are subject to supervision by the regional governments. They are 'pure' when they consist exclusively of public authorities; their staff then comes directly under the *société intercommunale*, a legal person governed by public law.

9 They are 'mixed' when formed of both communes and private companies. Such is the case of Sibelgaz, whose objects, namely the distribution of gas, are carried out by a private undertaking, a partner in the *société intercommunale*. Sibelgaz does not have any staff of its own, all of its functions being carried out by the staff of the private undertaking who are therefore subordinate to that private employer alone.

10 At the end of the four-month period set in the reasoned opinion of 6 August 1992, the staff regulations of all the *sociétés intercommunales* were modelled on those applicable to servants of the Federal State, laid down by Royal Decree of 22 November 1991 laying down the general principles governing the administrative and pecuniary status of State servants applicable to the staff of the Executives and the public legal entities subordinate to them. Article 50(2) of that decree made public servant status subject to a nationality condition. CIBE, with which the Commission's action is particularly concerned, also expressly incorporated the nationality condition in its staff regulations.

11 As regards the rules applicable to staff of the distribution companies subject to the public authorities, these were laid down by the regional governments pursuant to Article 11(1) of the Law of 16 March 1954 on the supervision of certain bodies of public interest. The same occurred in particular in the case of VMW, which is expressly named in the Commission's application and whose staff are subject to the same regulations as State employees.

12 Where distribution services are provided exclusively by private companies, the public authorities exercise no supervision over those companies' conditions of recruitment and employment.

13 In its application, the Commission contends that, in the water, gas and electricity distribution sector, the functions involved in these posts are generally too remote from the specific activities of the public service in order for them to be covered in general by the derogation provided for by Article 48(4) of the Treaty. Consequently, the Kingdom of Belgium should not have subjected access to posts in this

sector to a nationality condition, particularly in the case of CIBE, VMW, Unerg and Sibelgaz. However, in rare, exceptional cases the Belgian Government may show that the post in question is related to the specific activities of the public service.

14 The Belgian Government does not deny that in principle it is guilty of the alleged breach of obligations. However, it rejects the Commission's objections concerning Unerg and Sibelgaz. In the case of Unerg, it would appear that the Commission is actually referring to the company Powerfin (formerly Unerg), a purely private company, over which the public authorities exercise no supervision. As for Sibelgaz, it is a mixed *société intercommunale* whose objects are to be carried out by the associated private company and therefore by that company's staff, over which the public authorities exercise no authority. No national, regional or local rules require those private companies to apply a nationality condition when recruiting their staff.

15 The Belgian Government also asks the Court to take into consideration significant amendments of regulations made after expiry of the period set out in the reasoned opinion and even after commencement of this action. It points out that, in the case of nearly all the bodies with which the Commission's action is concerned, the situation is now virtually in accordance with the requirements of Community law.

16 As for that argument, it must be observed that it is well established in case-law (see, in particular, the judgment in Case C-433/93 *Commission* v *Germany* [1995] ECR I-2303, paragraph 15) that amendments made to national legislation are irrelevant for the purpose of giving judgment on the subject-matter of an action for failure to fulfil obligations if they have not been implemented before the expiry of the period set by the reasoned opinion. Consequently, as the Advocate General also points out in paragraph 42 of his Opinion, the Belgian Government cannot rely on legislative amendments made after that date.

17 Moreover, it must be observed that, as the Belgian Government itself admits, in the water, gas and electricity distribution sectors, the generality of posts are remote from the specific activities of the public service since they involve no direct or indirect participation in the exercise of powers conferred by public law or duties designed to safeguard the general interests of the State or of other public authorities.

18 Consequently, the Member State may not generally make all posts in the areas concerned subject to a nationality condition without exceeding the limits of the derogation provided for by Article 48(4) of the Treaty.

19 The fact that some posts in those areas may, in some circumstances, be covered by Article 48(4) of the Treaty cannot justify such a general prohibition (see also the two judgments delivered on this same date in Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207 and Case C-290/94 *Commission* v *Greece* [1996] ECR I-3285).

20 In those circumstances, in order to give full effect to the principles of freedom of movement for workers and equal treatment in access to employment, the Kingdom of Belgium was obliged to open the areas in question to nationals of other Member States by restricting application of the nationality condition to only those posts which actually involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities.

21 By requiring public legal entities active in the water, gas and electricity distribution sectors to apply a general Belgian nationality clause, the Kingdom of Belgium has therefore failed to fulfil the obligations which it has under those principles.

22 As regards Unerg (or Powerfin), a private company, the Commission has not established that the public authorities may exercise authority over its staff. As regards Sibelgaz, a mixed *société intercommunale*, the Commission has not established that the activity of gas distribution is not carried out exclusively by staff who, in terms of both recruitment and conditions of employment, are subordinate to the private company associated with the communes forming Sibelgaz and over which that public legal entity has no authority. The application cannot therefore be upheld in regard to those entities.

23 As regards the basis of the action, it must be observed that Article 7 of Regulation No 1612/68 concerns conditions of exercise of employment and not access to employment. However, only access by nationals of other Member States to employment is at issue in this case. No breach of obligations can therefore be found on the basis of Article 7 of Regulation No 1612/68.

24 In view of the foregoing considerations, it must be declared that, in not restricting the requirement of Belgian nationality to access to posts which, in the public legal entities responsible for the distribution of water, gas and electricity, involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities, the Kingdom of Belgium has failed to fulfil its obligations under Article 48 of the Treaty and Article 1 of Regulation No 1612/68.

Costs

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

On those grounds,

THE COURT

hereby:

1. **Declares that, in not restricting the requirement of Belgian nationality to access to posts which, in the public legal entities responsible for the distribution of water, gas and electricity, involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities, the Kingdom of Belgium has failed to fulfil its obligations under Article 48 of the EEC Treaty and Article 1 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community;**

2. **Orders the Kingdom of Belgium to pay the costs.**

Rodríguez Iglesias Kakouris Edward

Puissochet Hirsch

Mancini Schockweiler Moitinho de Almeida

Kapteyn Gulmann

Murray Jann Ragnemalm

Sevón Wathelet

Delivered in open court in Luxembourg on 2 July 1996.

R. Grass
Registrar

G. C. Rodríguez Iglesias
President