ORDER OF THE COURT
11 July 1995 *

In Case C-266/94,

Commission of the European Communities, represented by Blanca Rodríguez Galindo, of its Legal Service, 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 Spain, represented by Alberto Navarro González, Director-General for Community Legal and Institutional Coordination, and by Miguel Bravo-Ferrer Delgado, Abogado del Estado, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

defendant,

APPLICATION for a declaration that, by failing to adopt all the measures necessary to comply with Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (OJ 1992 L 165, p. 27), the Kingdom of Spain has failed to fulfil its obligations under that directive,

* Language of the case: Spanish.

THE COURT,

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

Advocate General: M. B. Elmer,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By application lodged at the Court Registry on 23 September 1994, the Commission of the European Communities brought an action under the second paragraph of Article 169 of the EC Treaty for a declaration that, by failing to adopt all the measures necessary to comply with Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (OJ 1992 L 165, p. 27, 'the directive'), the Kingdom of Spain has failed to fulfil its obligations under that directive.

2 The first paragraph of Article 15(1) of the directive provides as follows:

'Member States shall take the measures necessary to comply with this Directive before 5 June 1993. They shall forthwith inform the Commission thereof.'

3 Since it had not received any communication from the Spanish Government informing it of the transposition measures taken, the Commission sent it a letter of formal notice on 9 August 1993 pursuant to Article 169 of the Treaty.

4 The Spanish Government replied to that letter of formal notice by two letters of 21 October and 22 December 1993 respectively. In the first, it announced the imminent adoption of a resolution of the Telecommunications Directorate-General intended to ensure, as a transitional measure, the fulfilment of the obligations imposed by the directive. In the second, it communicated two resolutions of the Director-General of Telecommunications, dated 28 and 29 October 1993 respectively, explaining that the resolutions assured, for a transitional period pending approval of the rules on the leasing of circuits, the fulfilment of its obligations under Articles 3, 4 and 7 of the directive.

5 The second letter, sent by registered mail, was received by the Commission on 17 January 1994.

6 On 7 February 1994 the Commission sent the Kingdom of Spain a reasoned opinion in which it stated that the letter of formal notice of 9 August 1993 '[had] still not received any official reply'.

7 The Spanish Government replied to the reasoned opinion of the Commission by letter of 4 March 1994, recalling the contents of its letter of 22 December 1993. It attached a fresh copy of the abovementioned resolutions, pointing out once again that those resolutions represented a transitional solution in order to fulfil its

obligations under Articles 3, 4 and 7 of the directive, pending approval of the rules on the leasing of circuits.

8 In its application, the Commission claims that the reasoned opinion made no reference to the letter from the Spanish Government of 22 December 1993, received by the Commission on 17 January 1994, because of communication problems.

9 In its defence, the Spanish Government contends first of all that the action is inadmissible on the ground that the Commission did not take account, in its reasoned opinion, of its observations in response to the Commission's letter of formal notice. Such an omission constitutes a breach of the rights of the defence. Instead of proceeding to lodge an application before the Court, the Commission should have explained, in a second reasoned opinion, the reasons why it considered the measures adopted by the Kingdom of Spain to be inadequate.

10 In its reply, the Commission counters by saying that, although it made no reference in its reasoned opinion to the provisions submitted by the Kingdom of Spain, it did so in its application. According to the Commission, there can be no question of a breach of the rights of the defence or of inadmissibility of the action since, in the body of the application, there was no mention in the subject-matter of the action of the provisions of the directive to which the Kingdom of Spain made reference in its reply to the letter of formal notice.

11 In its rejoinder, the Kingdom of Spain points out that the Commission determined the subject-matter of the dispute by delivering the reasoned opinion without taking account of the observations and the resolutions which had been communicated to it.

12 Next, it recalls that the reasoned opinion constitutes an essential element of the procedure laid down in Article 169 of the Treaty, which enables the Member State concerned not only to be aware of the definitive position adopted by the Commission as regards the alleged infringement but also to prepare its own defence, so that a Member State cannot defend itself if the reasoned opinion is vitiated by a defect. The Kingdom of Spain adds that if it had been aware of the objections of the Commission to its reply to the letter of formal notice its overall conduct would have been different.

13 Accordingly, it considers that Commission should have examined the observations and the resolutions communicated to it, irrespective of whether they were complete or limited, effective or unsuitable.

14 According to Article 92(1) of the Rules of Procedure of the Court of Justice, where the action is manifestly inadmissible, the Court may, by reasoned order, after hearing the Advocate General and without taking further steps in the proceedings, give a decision on the action.

15 The procedure laid down in Article 169 of the Treaty comprises two consecutive stages, the pre-litigation or administrative stage and the contentious stage before the Court.

16 The purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations under Community law or to avail itself of its right to defend itself against the complaints made by the Commission (see Case 293/85 *Commission* v *Belgium* [1988] ECR 305, paragraph 13).

17 The proper conduct of the pre-litigation procedure constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter.

18 It is only on the basis of a properly conducted pre-litigation procedure that the contentious procedure before the Court will enable the latter to judge whether the Member State has in fact failed to fulfil the specific obligations which the Commission alleges it has breached.

19 In the present case, the reasoned opinion wrongly stated that the letter of formal notice sent by the Commission had not yet elicited an official reply from the Kingdom of Spain.

20 The Commission therefore did not take account, at the stage of the reasoned opinion, of the resolutions submitted by the Kingdom of Spain in reply to its letter of formal notice, which, as the Commission moreover acknowledged, transposed some of the provisions of the directive.

21 The Commission attempted in its application to make good that omission by means of the following statement:

'Without there being any need to consider whether or not the transposition into Spanish law of Articles 3, 4 and 7 of Directive 92/44/EEC by way of a decision is appropriate, it is evident that no measure has been adopted to implement the other provisions of that directive.'

22 The result of its conduct however was that the parties only began to define with precision the nature and the scope of their dispute at the stage of the reply and the rejoinder.

23 That is not the procedure laid down in the Treaty.

24 In this case, although communication problems had given rise to a misunderstanding concerning the reasoned opinion, there was nothing to prevent the Commission withdrawing that opinion and examining the response of the Kingdom of Spain to the letter of formal notice. The Commission could then, if appropriate, have delivered a further reasoned opinion specifying the complaints which it intended to maintain.

25 It follows that one of the essential conditions for the admissibility of an action pursuant to Article 169 of the Treaty, the proper conduct of the pre-litigation procedure, is not satisfied in this case.

26 Accordingly, pursuant to Article 92(1) of the Rules of Procedure of the Court of Justice, the action must be dismissed as manifestly inadmissible.

Costs

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

On those grounds,

THE COURT

hereby orders:

1. The application is dismissed as inadmissible.

2. The Commission shall bear the costs.

Luxembourg, 11 July 1995.

R. Grass
Registrar

G. C. Rodríguez Iglesias
President