JUDGMENT OF THE COURT (Sixth Chamber)
25 April 1996 *

In Case C-274/93,

Commission of the European Communities, represented by Xavier Lewis, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the said Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Grand Duchy of Luxembourg,

defendant,

APPLICATION for a declaration that, by not adopting within the prescribed period all the measures necessary to comply with Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States relating to the protection of animals used for experimental and other scientific purposes, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 25 of that directive and under Articles 5 and 189 of the EEC Treaty,

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, G. Hirsch (Rapporteur), F. A. Schockweiler, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the Commission at the hearing on 12 October 1995 at which it was represented by Rolf Wägenbauer, Principal Legal Adviser, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 23 November 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 12 May 1993 the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by not adopting within the prescribed period the measures necessary to comply with Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes (OJ 1986 L 358, p. 1, hereinafter 'the Directive') and/or by not communicating those measures to the Commission, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 25 of the Directive and under Articles 5 and 189 of the EEC Treaty.

2 Article 1 of the Directive provides that the aim of the Directive is to ensure that the relevant provisions laid down by law, regulation or administrative action in the Member States are approximated so as to avoid affecting the establishment and functioning of the common market, in particular by distortions of competition or barriers to trade.

3 Under Article 25 of the Directive, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 24 November 1989 and to inform the Commission thereof forthwith by communicating to it the provisions of national law that they had adopted in the field covered by the Directive.

4 As the Commission had not received any communication informing it of measures adopted and did not have any other information enabling it to conclude that the Grand Duchy of Luxembourg had complied with its obligations under the Directive, on 4 September 1990 it sent to it a letter of formal notice. As no reply was received to this letter, the Commission issued on 20 May 1992 a reasoned opinion to which no reply was received either. In those circumstances the Commission made this application.

5 The Grand Duchy of Luxembourg, upon whom notice of proceedings had been properly served, did not produce a statement of case within the prescribed period.

6 On 28 May 1993 Luxembourg sent a letter to the Commission's Legal Service in which it communicated to the Commission the text of the Law of 15 March 1983 on the protection of the life and well-being of animals (*Mémorial* A, No 15, 19 March 1983, p. 306, hereinafter 'the Luxembourg Law').

7 By letter dated 8 December 1994 the Commission requested the Court to give judgment by default, under Article 94(1) of the Rules of Procedure. It now sought a declaration that:

'... by not adopting within the prescribed period all the measures necessary to comply with Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 25 of that directive and under Articles 5 and 189 of the EEC Treaty'.

8 In support of this position the Commission relies on a number of provisions in the Directive which, in its view, have not been implemented by the Luxembourg Law.

9 In this case, the Court is giving judgment by default. In accordance with Article 94(2) of the Rules of Procedure, it must therefore examine whether the application initiating the proceedings is admissible and whether it appears well founded.

10 As regards the question of admissibility, it should be noted that the Commission is requesting the Court to hold, upon examination of the Luxembourg Law, that transposition of the Directive was incomplete and therefore defective, whereas in its application, which was based on the reasoned opinion in accordance with Article 169 of the EEC Treaty, the Commission alleged failure to implement and to communicate implementing measures.

11 On this point, it should be noted that the Court has consistently held (see, in particular, its judgment in Case C-296/92 *Commission* v *Italy* [1994] ECR I-1, paragraph 11) that the scope of an action brought under Article 169 of the EEC Treaty is delimited by the pre-litigation procedure provided for by that article. The possibility for the State concerned to be able to submit its observations constitutes a fundamental guarantee under the Treaty and an essential requirement for the proper conduct of the procedure for establishing a Member State's breach of obligations. Consequently, an Article 169 action may not be founded on grounds other than those set out in the reasoned opinion (see also the judgments in Case C-157/91 *Commission* v *Netherlands* [1992] ECR I-5899, paragraph 17, and Case C-306/91 *Commission* v *Italy* [1993] ECR I-2133, paragraph 22).

12 After having lodged its application, the Commission, referring to certain provisions not implemented by the Luxembourg Law, is now asking the Court to declare that Luxembourg has not adopted all the measures necessary to comply with the Directive. However, before it could make such a declaration, the Court would have to carry out a detailed examination of the Luxembourg Law to establish which provisions of the Directive have not been properly implemented. This situation is not therefore comparable to the situation in which a Member State has adopted some implementing measures after the pre-litigation procedure without, however, implementing the directive in its entirety and the Commission has therefore limited its action to those provisions which unquestionably have not yet been implemented (see, in particular, the judgment of 14 December 1995 in C-132/94 *Commission* v *Ireland* [1995] ECR I-4789).

13 The Court could carry out such an examination only on the basis of a pre-litigation procedure that allowed the defendant Member State to address the Commission's claims relating to the defective transposition of specific provisions of the Directive. As the case stands, neither the Luxembourg Law nor those claims were ever considered in the pre-litigation procedure.

14 The Commission's action must accordingly be dismissed as inadmissible.

Costs

15 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Although the applicant has been unsuccessful as regards the subject-matter of the proceedings as defined by its pleadings, it lodged the application, as amended by its pleadings, because of the defendant's lack of cooperation. Consequently, in accordance with the second sentence of Article 69(3) of the Rules of Procedure, the defendant must be ordered to pay all of the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the application as inadmissible;

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

Kakouris Hirsch Schockweiler

Kapteyn Murray

Delivered in open court in Luxembourg on 25 April 1996.

R. Grass C. N. Kakouris

Registrar President of the Sixth Chamber