JUDGMENT OF THE COURT (Fourth Chamber)
6 March 2003 *

In Case C-211/02,

Commission of the European Communities, represented by C. Schmidt, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Grand Duchy of Luxembourg, represented by N. Mackel, acting as Agent,

defendant,

* Language of the case: French.

APPLICATION for a declaration that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1), the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive,

THE COURT (Fourth Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, D.A.O. Edward (Rapporteur) and A. La Pergola, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 10 December 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 4 June 2002, the Commission of the European Communities brought an action under Article 226 EC seeking a declaration that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1) ('the Directive'), the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive.

Legal framework

2 The Directive seeks to guarantee an equivalent level of protection of fundamental rights and freedoms, in particular the right to privacy, in all Member States with respect to the processing of personal data in the telecommunications sector and to ensure the free movement of such data and of telecommunications equipment and services in the Community.

3 Article 15 of the Directive required Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the provisions of the Directive, with the exception of Article 5 thereof, not later than 24 October 1998 and to bring into force the laws, regulations and administrative provisions necessary to comply with Article 5 of the Directive not later than 24 October 2000, and to inform the Commission accordingly.

Pre-litigation procedure

4 In accordance with the procedure set out in Article 226 EC, having given the Grand Duchy of Luxembourg an opportunity to submit its observations, the Commission, by letters of 23 July 1999 and 25 July 2001, addressed two reasoned opinions to that Member State, requesting it to adopt, within two months of notification of each of those opinions, the measures necessary to comply with its obligations under the Directive, with the exception of Article 5 thereof, and with its obligations under Article 5 respectively. In the absence of any reply to those reasoned opinions by the Grand Duchy of Luxembourg, the Commission brought the present action.

The failure to fulfil obligations

5 The Luxembourg Government does not deny that it failed to transpose the provisions of the Directive within the periods prescribed therein. It points out that transposition is at present under way and sets out the reasons for that delay.

6 Suffice it in this regard to note that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, *inter alia*, Case C-173/01 *Commission* v *Greece* [2002] ECR I-6129, paragraph 7).

7 Likewise, it follows from settled case-law that a Member State may not plead provisions, practices or circumstances existing in its internal legal order in order to justify a failure to comply with the obligations and time-limits laid down in a directive (see, *inter alia*, Case C-286/01 *Commission* v *France* [2002] ECR I-5463, paragraph 13).

8 It must accordingly be held that, by failing, within the prescribed periods, to adopt the laws, regulations and administrative provisions necessary to comply with the Directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations thereunder.

Costs

9 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. As the Commission has applied for costs to be awarded against the Grand Duchy of Luxembourg and as the latter has been unsuccessful, the Grand Duchy of Luxembourg must be ordered to pay the costs.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

1. **Declares that, by failing, within the prescribed periods, to adopt the laws, regulations and administrative provisions necessary to comply with Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive;**

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

Timmermans Edward La Pergola

Delivered in open court in Luxembourg on 6 March 2003.

R. Grass

Registrar

C.W.A. Timmermans

President of the Fourth Chamber