JUDGMENT OF THE COURT (Fifth Chamber)
18 December 1997 *

In Case C-263/96,

Commission of the European Communities, represented by Hendrik van Lier, 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 Jan Devadder, General Adviser at 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 not adopting the laws, regulations and administrative provisions necessary to comply with Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (OJ 1989 L 40, p. 12), the Kingdom of Belgium has failed to fulfil its obligations under that directive,

* Language of the case: Dutch.

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, J. C. Moitinho de Almeida, D. A. O. Edward, J.-P. Puissochet and L. Sevón (Rapporteur), Judges,

Advocate General: G. Tesauro,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 25 September 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 26 July 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by not adopting the laws, regulations and administrative provisions necessary to comply with Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (OJ 1989 L 40, p. 12, hereinafter 'the directive'), the Kingdom of Belgium has failed to fulfil its obligations under the directive.

2 The directive seeks to eliminate obstacles to the free movement of construction products arising from divergences in national legislation as regards the essential requirements with which construction works must comply, the technical standards

applicable to products for the purpose of ensuring compliance with those essential requirements, and testing and procedures for approval of those products.

3 Under Article 22 of the directive the Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with it within 30 months of its notification and forthwith to inform the Commission thereof.

4 The directive was notified on 27 December 1988; therefore, the period allowed for its transposition expired on 27 June 1991.

5 Since it had received no notification of any measures to transpose the directive into Belgian law and there was no other information available to it to suggest that the Kingdom of Belgium had adopted the requisite provisions, the Commission put the Belgian Government on formal notice, by letter of 20 May 1992, to submit its observations on this point within two months.

6 When it had received no reply to that letter, the Commission sent the Belgian Government a reasoned opinion on 18 June 1993 requesting it to adopt the measures needed to comply with it within two months of its notification.

7 By letter of 3 September 1993 the Belgian Government replied that draft bills of a law and a Royal decree transposing the directive were about to be submitted to the Council of Ministers and the Council of State. Those bills were forwarded to the Commission on 23 December 1993.

8 On 2 May 1995 the Ministry for Communications and Infrastructure informed the Commission that the draft law had been approved by the Council of State and the Council of Ministers and that it would be brought before Parliament immediately after the elections.

9 By communication of 1 July 1996 the Belgian authorities informed the Commission that the law implementing the directive had been enacted on 25 March 1996 (*Moniteur Belge*, 21 May 1996, p. 12884).

10 Under Article 2 of that law:

'The King, by decree deliberated on by the Council of Ministers, shall adopt all measures necessary to ensure performance of the obligations arising out of Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products, as amended by the Council Directive of 22 July 1993, such measures to include the possibility of repealing and amending statutory provisions.'

11 Article 3 of that law goes on to state that:

'The basic norms necessary for implementing the essential requirements and technical specifications and other provisions in existing and future rules shall be promulgated by the King by decree deliberated on by the Council of Ministers, after consultation with the regions and communities.'

12 Finally, Articles 4, 5, and 6 lay down penalties for infringement of the provisions provided for under the Law.

13 In its application the Commission alleges that the Kingdom of Belgium did not adopt, within the period prescribed, that is to say by not later than 27 June 1991, the provisions necessary to transpose the directive into domestic law.

14 The Commission adds that the Law of 25 March 1996 cannot be deemed to constitute performance of the obligations under the directive. Article 3 thereof merely enables the King to adopt implementing measures, but contains no substantive provision concerning construction products. Furthermore, the Belgian authorities have not stated when the implementing decrees may be expected or when the transposition procedure will be completed.

15 In its defence the Belgian Government states, first, that a draft Royal decree has now been drawn up but that a number of problems concerning recognition and supervision, notification of bodies and the creation of a fund in accordance with Article 7 of the Law of 25 March 1996 remain to be resolved. In that connection a working group bringing together representatives of the Ministry of Economic Affairs and of the Ministry of Transport and Infrastructure is in the process of being set up and the measures necessary for the transposition of the directive should be adopted within six months.

16 Secondly, the Belgian Government emphasizes that the directive has still not been implemented at Community level. It refers in that connection to certain documents. First, a report drawn up by the group of experts on legislative and administrative simplification (Molitor Group) indicates that, seven years after adoption of the directive, the construction sector is still not in a position to use the EC trade mark for construction products. Moreover, in a report on the directive submitted

on 15 May 1996 under Article 23 thereof, the Commission itself acknowledged that there were still obstacles to the practical implementation of the directive and concluded that for a large number of products harmonized standards would not be available for five years. In the same vein the Economic and Social Committee in its opinion on 'Technical standards and mutual recognition' (OJ 1996 C 212, p. 7) cited the poor operation of the directive and the lack of harmonized standards. Finally, the Council has supported the setting up of the pilot project known as SLIM (simpler legislation for the single market) whose objective is to examine whether the obligations and burdens weighing on undertakings and which constitute an impediment on account of their overcomplexity may be eased by simplifying legislative or administrative provisions.

17 The Belgian Government concludes that the delay in the transposition of the directive has had no ill consequences on the process of achieving the single market or on the process of implementing the directive.

18 The Commission objects that, even though there has been a delay in the application of the directive, that does not prevent its transposition. Referring to the judgment in Case C-182/94 *Commission* v *Italy* [1995] ECR I-1465, it also emphasizes the fact that the possibility of an amendment to a directive in the near future cannot justify the failure to transpose.

19 Thirdly, the Belgian Government stresses that some of the problems connected with the transposition of the directive stem from Community law itself.

20 In its resolution of 21 December 1989 on a global approach to conformity assessment (OJ 1990 C 10, p. 1), for instance, the Council advocated systematic recourse to European standards (EN 45000) for the approval of certification and inspection

bodies and testing laboratories. That resolution led to the drawing up of a guide on the application of Community directives on technical harmonization drawn up on the basis of the provisions of the new approach and the global approach (first version — 1994) and the general procedures were laid down in the document on methods of coordination for procedures for notification and management of bodies notified. Effect was given to the Council resolution and the documents cited, as regards the directive, by means of the document 'Construct 95/149' of 3 November 1995, approved in December 1995 by the Standing Committee on Construction referred to in Article 19 of the directive.

21 According to the Belgian Government, since those documents had no binding force, the Community legal basis is insufficient to permit the directive to be transposed in such a way as to take account both of the Council Resolution of 21 December 1989 and of the technical approval guide of 3 November 1995. In those circumstances the directive needs to be amended.

22 Fourthly, the Belgian Government points out that the directive has already been modified by Council Directive 93/68/EEC of 22 July 1993 amending Directives 87/404/EEC (simple pressure vessels), 88/378/EEC (safety of toys), 89/106/EEC (construction products), 89/336/EEC (electromagnetic compatibility), 89/392/EEC (machinery), 89/686/EEC (personal protective equipment), 90/384/EEC (non-automatic weighing instruments), 90/385/EEC (active implantable medicinal devices), 90/396/EEC (appliances burning gaseous fuels), 91/263/EEC (telecommunications terminal equipment), 92/42/EEC (new hot-water boilers fired with liquid or gaseous fuels) and 73/23/EEC (electrical equipment designed for use within certain voltage limits) (OJ 1993 L 220, p. 1). Article 14 thereof required the Member States to transpose the directive by 1 July 1994.

23 Moreover, the Belgian Government observes that the SLIM report, submitted to the Council on 26 November 1996, could also result in an amendment to the directive.

24 It concludes that, under those conditions, the solution adopted by the Kingdom of Belgium, namely the adoption of an enabling law accompanied by a Royal decree, is the most appropriate method of transposition. Those legal instruments enable a swift and flexible response to changes in circumstances without the need for a cumbersome procedure of legislative amendment.

25 The Court notes that, after expiry of the period prescribed by the reasoned opinion, no provision had been adopted by the Kingdom of Belgium in order to meet its obligation to transpose the directive.

26 Although it is true, as the Kingdom of Belgium has pointed out, that a law was adopted on 25 March 1996 with that intention, it should be observed that, since it contains no substantive provision transposing the directive but merely empowers an authority subsequently to adopt the requisite substantive provisions, that law cannot be regarded as effecting a complete and accurate transposition of the directive.

27 With regard to the first argument relied on by the Belgian Government, the Court has consistently held that a Member State may not rely on circumstances in its internal legal system to justify its failure to comply with obligations and time-limits laid down in a directive (Cases C-109/94, C-207/94 and C-225/94 *Commission* v *Greece* [1995] ECR I-1791, paragraph 11).

28 As to the second argument, non-implementation of the directive at Community level cannot prevent the Kingdom of Belgium from adopting the laws and regulations necessary for transposition of the directive.

29 Furthermore, the binding force conferred on directives by the third paragraph of Article 189 of the Treaty precludes any calling in question by a Member State, for opportunistic reasons, of the period prescribed by any directive for its transposition.

30 Finally, where the finding of a failure by a Member State to fulfil its obligations is not bound up with a finding as to the damage flowing therefrom, a Member State may not rely on the argument that the failure to adopt measures to transpose a directive has had no adverse consequences for the functioning of the internal market or of that directive.

31 As to the third argument that the Council Resolution of 21 December 1989 and the technical approval guide of 3 November 1995 were without binding force, suffice it to state that the failure alleged against that State is constituted by the failure to transpose the directive. The fact that those documents are of no binding effect is therefore of no relevance to the alleged failure to fulfil obligations.

32 As to the fourth argument, concerning the various amendments made to the directive, Directive 93/68 neither amends nor abrogates the obligation to transpose it. The adoption of the latter directive therefore has no effect on the alleged failure to

fulfil obligations. The same is true *a fortiori* of the purely putative adoption of another amending directive.

33 As regards the choice of a framework law accompanied by a Royal decree, it should be recalled that, in regard to the implementation of directives, Article 189 of the Treaty leaves to the Member States the choice of forms and methods, provided that the result prescribed by the directive is achieved. However, in the present case, the framework law was not accompanied by any Royal decree, notwithstanding the flexibility afforded, according to the Belgian Government, by such a legal instrument.

34 It must therefore be concluded that the result prescribed by the directive was not achieved, since an essential component of its transposition is lacking.

35 Consequently, it must be held that, by not adopting all the laws, regulations and administrative provisions necessary to comply with the directive, the Kingdom of Belgium has failed to fulfil its obligations under that directive.

Costs

36 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. The Commission asked for an order on costs against the Belgian Government. Since that party has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by not adopting all the laws, regulations and administrative provisions necessary to comply with Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products, the Kingdom of Belgium has failed to fulfil its obligations under that directive;**

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

Gulmann Moitinho de Almeida Edward

Puissochet Sevón

Delivered in open court in Luxembourg on 18 December 1997.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber