JUDGMENT OF THE COURT
20 March 1986 *

In Case 72/85

Commission of the European Communities, represented by Auke Haagsma, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georges Kremlis, also a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Kingdom of the Netherlands, represented by D. J. Keur, of the Ministry of Foreign Affairs, The Hague, with an address for service in Luxembourg at the Embassy of the Kingdom of the Netherlands, 5 rue C.-M.-Spoo,

defendant,

APPLICATION for a declaration that, by failing to take all the necessary measures to ensure the implementation of Article 11 of Annex VIII to the Staff Regulations, the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty and under Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting the special measures temporarily applicable to officials of the Commission (Official Journal, English Special Edition 1968 (I), p. 30),

THE COURT

composed of: U. Everling, President of Chamber, acting as President, T. Koopmans and K. Bahlmann (Presidents of Chambers), O. Due, Y. Galmot, C. Kakouris and T. F. O'Higgins, Judges,

Advocate General: G. F. Mancini

Registrar: D. Louterman, Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 3 December 1985,

gives the following

* Language of the Case: Dutch.

JUDGMENT

(The account of the fact and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an application lodged at the Court Registry on 13 March 1985 the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that, by failing to take all the measures necessary to ensure the implementation of Article 11 (2) of Annex VIII of Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Comunities and instituting special measures temporarily applicable to officials of the Commission (Official Journal, English Special Edition 1968 (I), p. 30) (hereinafter referred to as the 'Staff Regulations'), the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty.

2 According to that provision, 'An official who enters the service of the Communities after leaving the service of a government administration or of a national or international organization or of an undertaking shall have the right on becoming established with that Community, to pay to it either:

(i) the actuarial equivalent of retirement pension rights acquired by him in the government administration, national or international organization or undertaking; or

(ii) the sums repaid to him from the pension fund of the government administration, organization or undertaking at the date of his leaving its service.

(iii) In such case the institution in which the official serves shall, taking into account his grade on establishment, determine the number of years of

pensionable service with which he shall be credited under its own pension scheme in respect of the former period of service, on the basis of the amount of the actuarial equivalent or sums repaid as aforesaid.'

3 Towards the end of 1977 the Commission ascertained that the Kingdom of Belgium and the Kingdom of the Netherlands had not yet adopted measures allowing the transfer of the rights in question. It therefore decided to initiate with regard to those two Member States the procedure for infringement provided for in Article 169 of the Treaty.

4 As far as the Kingdom of Belgium is concerned, that procedure, which was initiated on 18 July 1979, reached its conclusion in the judgment of the Court of 20 October 1981 (Case 137/80 *Commission* v *Kingdom of Belgium* [1981] ECR 2393), in which it was found that the Kingdom of Belgium had failed to fulfil its obligations under the EEC Treaty.

5 In the case of the Kingdom of the Netherlands, following a letter dated 31 July 1979 from the Member of the Commission, Mr Tugendhat, in which he gave notice of his intention to propose that the Commission should bring the matter before the Court, a number of additional discussions took place between officials of the Netherlands Governmment and of the Comission with a view to settling the differences of opinion existing between them.

6 Following the bringing of the action against the Kingdom of Belgium (Case 137/80), the procedure for infringement against the Kingdom of the Netherlands was suspended until judgment had been given in that case. After judgment was delivered the Commission resumed discussions, but without result. In 1983 the Commission therefore decided to re-open the procedure against the Kingdom of the Netherlands and again invited the Netherlands Government to submit its observations. Since it was not satisfied with the explanations given by the Netherlands Government, the Commission sent a reasoned opinion to that government by a letter dated 14 August 1984 requesting that it take the necessary measures to comply with that opinion within two months of its notification.

7 By a letter dated 12 October 1984 the Netherlands Government confirmed that it was prepared to take the necessary measures to implement the provision in question but maintained that that could be achieved only be means of a formal law regulating at national level all the problems relating to transfers of pension rights. The government indicated that in view of the difficulties involved and of the necessity of ensuring that the Netherlands executive bodies participated in the legislative process, the law in question could not be adopted by the Netherlands legislature before 1985.

8 There was no further communication from the Netherlands Government and therefore, by an application dated 8 March 1985 which was received at the Court on 13 March 1985, the Commission brought the present action.

9 Since the Commission waived its right to submit a reply, the written procedure was closed with the submission of the defence.

10 The Commission points out that the Staff Regulations were laid down by a regulation within the meaning of the second paragraph of Article 189 of the EEC Treaty and are therefore binding in their entirety and directly applicable in all the Member States. Consequently, in addition to the effects which they produce in the internal order of the Community administration, they also require the Member States, by virtue of Article 5 of the Treaty, to cooperate to the extent necessary for their implementation.

11 According to the Commission, the Kingdom of the Netherlands is therefore in the same situation as that described by the Court in its above-mentioned judgment, with the result that it is bound to select and put into effect specific measures which will make possible the exercise of the right granted to officials in Article 11 (2) of Annex VIII to the Staff Regulations. In the Commission's view, even if that provision were applied directly, the Kingdom of the Netherlands would not thereby be released from the duty to adopt the necessary implementing measures. By failing to take such measures, the Kingdom of the Netherlands has failed to fulfil its obligations under the Treaty and under the Staff Regulations.

12 The Netherlands Government does not deny the existence of that obligation or the fact that the provisions necessary to fulfil that obligation have not yet come into force. However, it contends that the implementation of the provision in question in the Netherlands legal order requires the adoption of a formal law. Although it has already prepared a draft law in compliance with the above-mentioned judgment of the Court, the legislative process now under way is likely to be rather protracted in view of the extreme complexity of the matter in question.

13 Moreover, in order to ensure that, pending the conclusion of the legislative process, the obligations arising from the provision in question are actually enforced, it has requested the competent body in the Netherlands, the Algemeen Burgerlijk Pensioenfonds [General Civil Pension Fund], most recently by a letter from the Minister of Foreign Affairs of 11 May 1985, to deal with applications for the transfer of pension rights of Netherlands officials of the European Communities in accordance with the draft law, in anticipation of its final adoption, and to apply Article 11 (2) of Annex VIII to the Staff Regulations. According to the Government, the governing board of the Fund has agreed to comply with that request and has already begun to consider certain applications which had previously been rejected.

14 In the course of the oral proceedings, however, the Netherlands Government contended that the measures which it had taken already made it possible to give full effect to the obligations arising under the provision in question. The draft law which it had prepared indicated how the calculations necessary for the transfer of pension rights should be effected. On that basis the Fund had begun to reconsider applications for transfer from about 10 officials. The Kingdom of the Netherlands takes the view that it has complied with the obligation arising under the provision in question so that the action is no longer well founded. It has, however, conceded that the Fund has not so far granted any of the applications for transfer which have been submitted to it and that no transfer has been made in any of those cases.

15 As regards the legal nature of the instructions which it has given the Fund and the measures taken by that body following those instructions, the Netherlands Government explained, when asked to do so by the Court at the hearing, that under the Law on the General Civil Pension Fund, management of the Fund and the application of the Pensioenwet [Pensions Law] are the responsibility of the

governing board of the Fund and that law does not give the Netherlands Government power to issue binding instructions to that body. However, agreements exist between the Government and the Fund regarding the processing of applications for transfers of pension rights.

16 It should be noted that in the above-mentioned judgment of 20 October 1981 the Court held that the Member State concerned was bound 'to select and put into effect specific measures which will make possible the exercise of the right granted to officials to transfer rights acquired in national employment to the Communities' pension scheme'. It found that the refusal of a Member State to lay down rules for the transfer of pension rights to the Comunity scheme 'would have the effect of depriving officials of the Communities of the very right to exercise the option granted to them by the Staff Regulations', and 'when other Member States have already done so destroys the equality of Community officials from other Member States with those from' the Member State concerned.

17 Without its being necessary to determine what kind of measures are required to ensure that the obligations arising from the provision in question are fulfilled within the Netherlands legal order, the Court finds that the Kingdom of the Netherlands has not yet introduced rules providing for the actual transfer of pension rights to the pension scheme of the European Communities.

18 In that connection, it should be noted that until the hearing the Netherlands Government maintained that in order to implement the provision in question in the Netherlands the adoption of a formal law was required and it admitted that such a law had not yet been adopted.

19 As regards the Netherlands Government's argument that a considerable period of time was needed for the drafting and the adoption of that law in view of the requirements of the legislative process and the complexity of the matter in question, it should be observed that such difficulties cannot expunge the failure of the Netherlands to fulfil its obligations. According to well-established case-law a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations resulting from a Community regulation.

20 At the hearing the Netherlands Government pointed out that, by reason of their status as a regulation and by virtue of the second paragraph of Article 189 of the Treaty, the Staff Regulations are directly applicable in all the Member States. That fact does not, however, release the Kingdom of the Netherlands from its duty to fulfil the obligation placed upon it by the provision in question, since the right of individuals to rely upon the Staff Regulations before their national courts represents only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of that provision, which is intended to facilitate co-ordination of national schemes with the Community pension scheme.

21 As regards the claim of the Netherlands Government that the competent body has full authority to give effect to the provision in question itself, thus releasing the Kingdom of the Netherlands from its obligations under the provision, it must be stated that despite the fact that for some considerable time applications for transfers have been pending, no transfer within the meaning of the provision has as yet taken place.

22 It follows from the foregoing considerations that, by failing to apply specific measures enabling officials of the European Communities to exercise the right accorded to them by Article 11 (2) of Annex VIII to the Staff Regulations to have the actuarial equivalent of the retirement pension rights acquired by them under the Netherlands pension scheme, or the sums due to be repaid to them from that scheme, paid into the Community pension scheme, the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty.

Costs

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

On those grounds,

THE COURT

hereby:

(1) Declares that, by failing to apply specific measures enabling officials of the European Communities to exercise the right accorded to them by Article 11 (2) of Annex VII to the Staff Regulation to have the actuarial equivalent of retirement pension rights acquired by them under the Netherlands pension scheme, or the sums due to be repaid to them from that scheme, paid into the Community pension scheme, the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty;

(2) Orders the Kingdom of the Netherlands to pay the costs.

Everling Koopmans Bahlmann

Due Galmot Kakouris O'Higgins

Delivered in open court in Luxembourg on 20 March 1986.

P. Heim
Registrar

U. Everling
President of Chamber acting as President