JUDGMENT OF THE COURT
20 March 1997 *

In Case C-57/95,

French Republic, represented by Edwige Belliard, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Claude Chavance, Secretary in that directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

applicant,

supported by

Kingdom of Spain, represented by Alberto José Navarro González, Director General of Community Legal and Institutional Affairs, and Rosario Silva de Lapuerta, Abogado del Estado, of the Community Litigation Service, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard E. Servais,

intervener,

v

Commission of the European Communities, represented by Dimitrios Gouloussis, 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,

defendant,

* Language of the case: French.

APPLICATION for annulment of Commission Communication 94/C 360/08 on an internal market for pension funds (OJ 1994 C 360, p. 7),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, J. C. Moitinho de Almeida, J. L. Murray and L. Sevón (Presidents of Chambers), C. N. Kakouris, P. J. G. Kapteyn (Rapporteur), C. Gulmann, G. Hirsch, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 5 November 1996, at which the French Republic was represented by Claude Chavance, the Kingdom of Spain by Gloria Calvos Díaz, Abogado del Estado, acting as Agent, and the Commission by Dimitrios Gouloussis,

after hearing the Opinion of the Advocate General at the sitting on 16 January 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 4 March 1995, the French Republic brought an action under the first paragraph of Article 173 of the EC Treaty for annulment of an act adopted by the Commission entitled 'Commission Communication on an Internal Market for Pension Funds' (94/C 360/08) (OJ 1994 C 360, p. 7; hereinafter 'the Communication').

2 By order of the President of the Court of 20 September 1995, the Kingdom of Spain was given leave to intervene in support of the form of order sought by the applicant.

3 On 21 October 1991 the Commission submitted to the Council a proposal for a directive relating to the freedom of management and investment of funds held by institutions for retirement provision (OJ 1991 C 312, p. 3; the 'proposal for a directive'), which was based on Article 57(2) and Article 66 of the EEC Treaty. On 6 December 1994, following failure to reach agreement in the Council, the Commission withdrew that proposal. On 17 December 1994, the Commission published the Communication in the *Official Journal*.

4 In the first part of the Communication, entitled 'Introduction and general considerations', the Commission stresses the economic and social importance of pension funds from the point of view of the single market, mentions the restrictions which may be imposed by Member States on prudential grounds and sets out certain principles of prudential investment to be applied by all institutions for retirement provision. The second part of the Communication, entitled 'Specific interpretation', defines the terms 'institution for retirement provision', 'retirement benefits', 'participating undertaking', 'participating body', 'affiliated undertakings' and 'associated undertakings' (Point 2.1.) before going on to outline the scope of the Communication (Point 2.2.).

5 Points 2.3. and 2.4. of the Communication are worded as follows:

'2.3. *Investment management and custody services:*

2.3.1. The effective exercise of the right of free provision of services laid down by the Treaty, in this case the service of investment management, requires not only that the providers of a service are free to offer their services throughout the

Community, but also that those requiring a service are free to select a provider who is not established in their own Member State. Whilst other Community legislation deals with the authorization and the activity of the providers of the service of investment management, there is a need to make plain the freedom of institutions for retirement provision to choose freely from amongst those authorized to provide it.

Therefore, pension institutions which are authorized to use the services of an external manager for the management of their investments shall not be restricted from choosing an investment manager, for parts or the whole of their assets, who is established in another Member State and duly authorized for this activity, according to Council Directive 89/646/EEC, Council Directive 92/96/EEC, or Council Directive 93/22/EEC.

2.3.2. In the same way, pension institutions which are authorized to use the services of an external body for safekeeping and administration of assets such as referred to in point 12 of the Annex to Directive 89/646/EEC and point C.1 of the Annex to Directive 93/22/EEC shall not be restricted from choosing, for the provision of those services, credit institutions or investment undertakings established in other Member States and duly authorized in accordance with the Directives in question.

2.3.3. It is necessary that the supervisory authority responsible for the pension institution may be able effectively to perform its supervisory duties in a case where the institution itself is unable or unwilling to furnish information reasonably required or to take action in respect of those assets outside the supervisor's immediate jurisdiction.

Therefore, without prejudice to the other provisions of this communication and for the purposes of prudential supervision of the institution, it is desirable that Member States should require that any contract concluded between an institution for retirement provision and the providers of services referred to in paragraphs 1 and 2 includes provisions under which such providers of services are obliged to supply the competent authority responsible for the supervision of the institution for retirement provision with the information necessary for that authority to gain

a full knowledge of the institution's assets, or to execute any request by that authority to prohibit the free disposal of those assets, where those objectives cannot be achieved through direct intervention by that authority with the institution for retirement provision where that information or prohibition is necessary to the proper performance of the competent authority's duties of prudential supervision.

2.3.4. With a view to the achievement of the objectives outlined in paragraph 2.3.3. it is desirable that each Member State should designate a single competent authority having the responsibility for cooperation with their counterpart in each other Member State.

The Commission shall send to Member States a list of those authorities designated in accordance with this paragraph and which have been notified to it by the Member States.

2.4. *Freedom of investment of assets*

2.4.1. It is desirable that institutions for retirement provision established in a Member State should invest all assets held to cover expected future retirement benefit payments in accordance with the following principles:

(a) The assets should be invested in the interests of scheme participants and beneficiaries in a manner appropriate to the nature and the duration of the corresponding liabilities and the level of their funding, taking account of the requirements of security, quality, liquidity and profitability of the institution's portfolio as a whole.

(b) The assets should be sufficiently diversified in such a way as to avoid major accumulations of risk in the portfolio as a whole.

(c) Investment in a participating undertaking or undertakings, in affiliated or associated undertakings or in a participating body or bodies should be restricted to a prudent level.

In the application of these principles the extent of any insolvency insurance or State guarantees may be taken into account.

2.4.2. Member States may exclude from the scope of paragraph 2.4.1. assets invested in a participating undertaking or an associated undertaking or undertakings provided that:

(a) all members who pay or have paid contributions or in respect of whom contributions are or have been paid to the institution are, or have been:

— managers, directors or shareholders, not exceeding eleven in number, who have individually agreed to such investment, or

— self-employed persons who manage the undertaking or undertakings in partnership, or

(b) such investments were made before the adoption of this communication.

Member States should periodically examine matters excluded under this paragraph in order to ascertain whether maintenance of the exclusions concerned is justified.

2.4.3. Appropriate diversification of assets, including diversification into assets denominated in currencies other than that in which the liabilities of the institution are established, is an important factor in allowing the management of institutions to maximize the yield on those assets within an appropriate level of risk. In accordance with the provisions of the Treaty, Member States shall not require institutions for retirement provision to invest in or refrain from investing in particular categories of assets, nor to localize their assets in a particular Member State on other than duly justified prudential grounds. In particular they should not specify minimum or maximum investment requirements in certain asset categories where such requirements cannot be justified on prudential grounds, nor rules on localization of assets and on currency matching, which could otherwise have the effect of limiting the possibilities for cross-border investment. Any restrictions imposed on prudential grounds must also be proportional to the objectives they may legitimately pursue.

As a first step, Member States shall in no case require institutions for retirement provision to hold more than 60% of their assets in matching currencies, after taking account of the effect of any currency hedging instruments held by the institution, since this cannot be generally justified on prudential grounds.

Assets denominated in ecu shall be regarded as matching any particular currency in the Community.

2.4.4. Member States shall not subject the investment decisions of an institution for retirement provision or its investment manager to any kind of prior approval or systematic notification requirements.'

Admissibility of the application

6 The Commission has raised an objection of inadmissibility on the ground that the Communication does not constitute a challengeable act for the purposes of Article 173 of the Treaty. It maintains that the Communication is not intended to have legal effects and that it did not intend to impose obligations on Member States through the medium of the Communication. The Commission explains that, on grounds of consistency with its proposal for a directive, it had to embody in the Communication the main thrust of the proposal for a directive which it had been obliged to withdraw, in order not to give the impression that withdrawal of the proposal for a directive meant that it had abandoned the principles contained therein.

7 The Court has consistently held that an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (see Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42, and Case C-325/91 *France* v *Commission* [1993] ECR I-3283, paragraph 9).

8 What is at issue in this case is a communication which was adopted by the Commission and published in its entirety in the C Series of the *Official Journal*. As the documents before the Court show, that act is intended to make known the Commission's general approach with regard to the application of the fundamental principles of the Treaty to institutions for retirement provision.

9 In order to determine whether the Communication is designed to have new legal effects by comparison with those entailed by the application of the fundamental principles of the Treaty, its content must be considered.

10 Accordingly, the question whether the objection of inadmissibility is well founded must be determined together with the substantive issues raised by the dispute.

Substance

11 In support of its application, the French Republic, supported by the Kingdom of Spain, first raises pleas alleging want of competence on the part of the Commission and infringement of Article 190 of the EC Treaty and the principle of legal certainty. It further submits that the Communication is invalid on account of the unequal treatment which it engenders as between holders of pension funds and holders of life assurance policies.

12 As to the Commission's want of competence, the French Republic maintains essentially that the Communication is a binding act on the ground that it is clear from the precision of its wording that it imposes new obligations on Member States; it ought therefore to have been founded on a specific legal basis in order to enable its legality to be reviewed. Comparison of the texts of the proposal for a directive and the Communication discloses parallels, in particular as regards the definitions, scope and content of those texts. The fact that the Communication was published after the proposal for a directive was withdrawn indicates that the Commission was seeking, by means of the Communication, to secure the application of rules identical or similar to those contained in the proposal for a directive.

13 It must therefore be considered whether the Communication is confined to giving expression to the provisions on freedom to provide services, freedom of establishment and free movement of capital which are applicable to institutions for retirement provision or whether it lays down specific obligations in relation to those provisions.

14 In that connection, the Commission maintains first that the Communication is not of a binding nature since the word 'shall' is always preceded by a verb which merely expresses an opinion. It goes on to contend that if the content of the

Communication is analysed, it is clear that it is an interpretative communication which merely points to the consequences of the direct application of the Treaty principles to institutions for retirement provision and adds no new obligations to those which arise directly out of the provisions of the Treaty. Moreover, the Communication is not officially addressed to the Member States and was not notified to them.

15 Referring, for a more detailed analysis of the relevant provisions of the Communication, to Sections 17, 18 and 19 of the Advocate General's Opinion, the Court finds first that, according to the first subparagraph of paragraph 2.4.2. of the Communication, 'Member States may exclude from the scope of paragraph 2.4.1. assets invested in a participating undertaking or an associated undertaking or undertakings', provided that the conditions laid down in the first subparagraph of paragraph 2.4.2. have been fulfilled.

16 Next, under the terms of the second subparagraph of paragraph 2.4.3. of the Communication, Member States, as a first step, 'shall in no case require institutions for retirement provision to hold more than 60% of their assets in matching currencies, after taking account of the effect of any currency hedging instruments held by the institution, since this cannot be generally justified on prudential grounds.'

17 Lastly, paragraph 2.4.4. of the Communication provides that 'Member States shall not subject the investment decisions of an institution for retirement provision or its investment manager to any kind of prior approval or systematic notification requirements.'

18 Accordingly, it must be observed in the first place that those provisions of the Communication are characterized by their imperative wording.

19 Secondly, the very content of paragraphs 2.4.2., 2.4.3. and 2.4.4. of the Communication shows that they cannot be regarded as being already inherent in the provisions of the EC Treaty on freedom to provide services, freedom of establishment and free movement of capital and as being intended simply to clarify their proper application.

20 In that regard, it should be noted that, whilst those provisions, which have direct effect, prohibit imposing unjustified restrictions on the freedoms concerned, they are not sufficient in themselves to ensure elimination of all obstacles to free movement of persons, services and capital, and that the directives provided for by the Treaty in this matter preserve an important scope in the field of measures intended to make easier the effective exercise of the rights arising out of those provisions (see, as far as freedom of establishment is concerned, Case 2/74 *Reyners* [1974] ECR 631, paragraphs 29, 30 and 31).

21 Yet it is precisely measures of that kind which are covered by the Communication and, moreover, constituted the subject-matter of the proposal for a directive which the Commission withdrew 'because of a deadlock in the negotiations with Member States in the Council' (paragraph 1.4. of the Communication).

22 As to the Commission's argument that the Communication was not notified to the Member States, suffice it to say that that fact cannot alter the binding nature of the Communication.

23 In those circumstances, it must be held that the Communication constitutes an act intended to have legal effects of its own, distinct from those already provided for by the Treaty provisions on freedom to provide services, freedom of establishment and free movement of capital, with the result that an action for annulment will lie against it.

24 As regards the Commission's competence to adopt an act imposing on Member States obligations not provided for in the abovementioned Treaty provisions, it should be emphasized that no such power is provided for in the Treaty and that, in any event, only the Council is empowered, under Article 57(2) and Article 66 of the Treaty, to issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.

25 It follows from the whole of the foregoing that the Communication constitutes an act adopted by an authority lacking the necessary competence, and it is unnecessary to rule on the other pleas raised by the French Republic.

26 Consequently, it must be held that the action brought by the French Republic for annulment of the Communication is both admissible and well founded.

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 been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Annuls the Commission Communication on an internal market for pension funds (94/C 360/08);

2. Orders the Commission to pay the costs.

Rodríguez Iglesias		Moitinho de Almeida	Murray
Sevón	Kakouris	Kaptyen	Gulmann
Hirsch	Jann	Ragnemalm	Wathelet

Delivered in open court in Luxembourg on 20 March 1997.

R. Grass — Registrar

G. C. Rodríguez Iglesias — President