JUDGMENT OF THE COURT
12 OCTOBER 1982 [1]

Commission of the European Communities v Kingdom of Belgium

(Failure to implement Directive 77/91/EEC)

Case 148/81

Member States — Obligations — Implementation of directives — Failure to comply with time-limits for their implementation — Justification for failure — Not possible
(EEC Treaty, Art. 169)

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 Community directives.

Since the governments of the Member States participate in the preparatory work for directives they must be in a position to prepare, within the period prescribed, the draft legislative provisions necessary for their implementation.

In Case 148/81

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Anthony McClellan, acting as Agent, assisted by Jacques Delmoly, a member of its Legal Department, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

1 — Language of the Case: French

KINGDOM OF BELGIUM, represented by Robert Hoebaer, director at the Ministry of Foreign Affairs, Foreign Trade and Cooperation with the Developing Countries, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy,

defendant,

APPLICATION for a declaration that by not adopting, within the prescribed period, the provisions needed to comply with Directive 77/91, the Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, the Kingdom of Belgium has failed to fulfil one of its obligations under the EEC Treaty,

THE COURT,

composed of: J. Mertens de Wilmars, President, A. O'Keeffe, U. Everling and A. Chloros (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart and T. Koopmans, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

I — Summary of the facts

Article 54 (3) (g) of the EEC Treaty provides that the Council and the

Commission are to carry out the duties devolving upon them regarding the right of establishment, in particular by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 (companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making) with a view to making such safeguards equivalent throughout the Community.

On 18 December 1961 the Council drew up a General Programme for the abolition of restrictions on freedom of establishment (Official Journal, English Special Edition, Second Series, IX, p. 7). In Title VI of that programme it is stated that the safeguards required by Member States of companies and firms for the protection of the interests of members and others should, to the extent necessary and with a view to making such safeguards equivalent, be co-ordinated before the end of the second year of the second stage of the transitional period.

To give effect to those provisions, the Council, after issuing a first directive, Directive 68/151 of 9 March 1968, adopted a second directive on 13 December 1976, Directive 77/91, on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (Official Journal 1977, L 26, p. 1).

Directive 77/91 was notified to the Member States on 16 December 1976. In accordance with Article 43 thereof, the Member States were required to bring into force the laws, regulations and administrative provisions needed in order to comply with the directive within two years of its notification, that is to say by 16 December 1978, and forthwith to inform the Commission that they had done so.

Since it appeared that the Kingdom of Belgium had not, within the prescribed period, adopted the necessary measures for implementation of the directive and that in any case the Commission had been given no information with regard thereto, the Commission, by letter of 8 January 1980, commenced the procedure provided for in Article 169 of the EEC Treaty against Belgium.

In its letter the Commission stated that by failing to adopt the measures necessary to incorporate the directive into its national law, the Kingdom of Belgium had failed to fulfil its obligations and invited the Belgian Government to submit its observations within a period of two months.

By letters of 29 February and 17 March 1980 the Permanent Representation of Belgium to the Communities notified the Commission that the adaptation of Belgian law to the directive was a matter of such complexity and involved such technical difficulties that it had given rise to much argument and had created certain problems. The preliminary draft of a bill adapting national law to the directive was submitted for the opinion of the Conseil d'Etat [State Council] on 5 October 1978; it was amended on the basis of the opinion delivered on 29 January 1979 by the Conseil d'Etat; the

bill could not be approved by the Conseil des Ministres [Council of Ministers] before 9 November 1979 because of the government crisis, elections in the month of December 1978 and the period required for setting up the government; the bill amending the laws, consolidated on 30 November 1935, on commercial companies was laid before the Chamber of Representatives on 5 December 1979.

The Commission, pursuant to the first paragraph of Article 169 of the EEC Treaty, issued a reasoned opinion on 29 September 1980, which was notified on 8 October 1980, recording the failure of the Kingdom of Belgium to fulfil its obligations and inviting it to adopt, within a period of two months from notification of the opinion, the measures needed to implement the directive.

On 29 January 1981 the Permanent Representation of Belgium informed the Commission that the Commission Spéciale [Special Commission] of the Chamber of Representatives had begun discussion of the bill and that the government would emphasize the urgent need for the work on the bill to be pursued and a vote taken.

II — Written procedure

By application lodged on 12 June 1981, the Commission, pursuant to the second paragraph of Article 169 of the EEC Treaty, brought before the Court the matter of the alleged failure of the Kingdom of Belgium to fulfil one of its obligations by not giving effect to Directive 77/91.

The written procedure followed the normal course; the Commission waived its right to submit a reply.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it invited the Belgian Government to state, in writing, the exact date on which it had commenced the legislative procedure with a view to implementation of the directive; that invitation was complied with within the prescribed period.

III — Conclusions of the parties

The *Commission* claims that the Court should:

(a) Declare that the Kingdom of Belgium, by not adopting within the prescribed period the provisions necessary to conform with the second Council Directive 77/91/EEC, of 13 December 1976, has failed to fulfil one of its obligations under the Treaty;

(b) Order the Kingdom of Belgium to pay the costs.

The *Government of the Kingdom of Belgium* refrains from submitting any formal conclusions.

IV — Submissions and arguments of the parties during the written procedure

The *Commission* observes that according to the third paragraph of Article 189 of the EEC Treaty directives are binding, as to the results to be achieved, upon the Member States to which they are addressed, whilst leaving to the national authorities the choice of form and methods. The mandatory nature of directives imposes upon Member States

the obligation to observe the periods which they prescribe for the adoption of national implementing provisions.

Infringement of the Treaty by a Member State exists no matter which organ of the State it is whose act or omission is responsible for the failure. The Member State in question may not plead provisions or practices existing in its internal legal system or special circumstances at national level in order to justify its failure to fulfil an obligation.

Those principles are well established in the case-law of the court.

By failing to adopt within the prescribed periods the measures needed for implementation of Directive 77/91, the Kingdom of Belgium has incontestably failed to fulfil one of its obligations under the Treaty.

The *Government of the Kingdom of Belgium* observes that the implementation of the directive within the prescribed period entails particular difficulty by reason of the length of legislative procedures in Belgium; the political crisis which Belgium has undergone in recent years has further retarded the procedure.

Furthermore, in view of the complexity of the subject-matter of the directives concerning companies having a share capital and the repercussions both in civil law and commercial law, a special delegation of powers in favour of the executive was ruled out.

The periods prescribed by the directives on companies having a share capital are too short: the first Directive, of 9 March 1968, could not be adopted in Belgium before March 1973; the third Directive, of 9 October 1978 concerning mergers of public limited liability companies granted the Member States a period of three years within which to introduce these provisions into their national legal system. That tendency to extend the time-limits recurs thereafter in many draft directives which are under discussion within the EEC.

The delay also arises from the amendment of the consolidated laws on commercial companies in accordance with the fourth Directive, of 25 July 1978, on the annual accounts of certain types of companies. The adaptation of Belgian law to the fourth Directive is being effected by means of amendments to the bill adapting the law to the second Directive so that the two directives may be incorporated simultaneously into national law.

V — Oral procedure

At the sitting on 28 April 1982 brief oral argument was presented by Mr Delmoly for the *Commission* and by Mr Hoebaer for the *Government of the Kingdom of Belgium.*

The Advocate General delivered his opinion at the sitting on 22 June 1982.

Decision

1 By application received at the Court Registry on 5 June 1981 the Commission brought an action under Article 169 of the EEC Treaty for a declaration that by not adopting within the prescribed period the national provisions needed to comply with Directive 77/91/EEC, the second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, (Official Journal, 1977, L 26, p. 1), the Kingdom of Belgium had failed to fulfil one of its obligations under the EEC Treaty.

2 Pursuant to Article 43 of the directive, Member States were required to bring into force the laws, regulations and administrative provisions needed in order to comply with the directive within two years of its notification. It was notified to the Kingdom of Belgium on 16 December 1976 and the above-mentioned period accordingly expired on 16 December 1978.

3 The Belgian Government does not contest that it has not fulfilled that obligation. It nevertheless points out the special complexity of the directive in question, the length of the legislative procedures and the political crises which Belgium has undergone in recent years, which further retarded the legislative procedure. It observes in this connection that the periods prescribed by the directives on companies having a share capital are too short in view of the importance of the legislation required.

4 Those circumstances cannot expunge the failure to fulfil one of its obligations with which the Kingdom of Belgium is charged. According to well-established case-law of the Court, 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 and time-limits resulting from Community directives.

5 Attention should also be drawn to the fact that the governments of the Member States participate in the preparatory work for directives and must therefore be in a position to prepare, within the period prescribed, the draft legislative provisions necessary for their implementation. It appears, however, from information produced in the course of the proceedings that no draft law had yet been placed before the Belgian Parliament within the period prescribed for implementation of the directive.

6 It must therefore be declared that by failing to adopt within the prescribed period the provisions needed in order to comply with Council Directive 77/91 of 13 December 1976, the Kingdom of Belgium has failed to fulfil one of its obligations under the Treaty.

Costs

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

On those grounds,

THE COURT

hereby:

1. **Declares that, by not adopting within the prescribed period the provisions needed in order to comply with Council Directive 77/91/EEC, the second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Articles 58 of the Treaty, in respect of the formation of public limited liability**

companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, the Kingdom of Belgium has failed to fulfil one of its obligations under the EEC Treaty;

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

Mertens de Wilmars O'Keeffe Everling
Chloros Pescatore Mackenzie Stuart Koopmans

Delivered in open court in Luxembourg on 12 October 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 22 JUNE 1982

My Lords,

This is an application by the Commission pursuant to Article 169 of the EEC Treaty, for a declaration that the Kingdom of Belgium has failed to fulfil its obligations under the Treaty in that it has not brought into force the measures needed in order to comply with the second Council Directive on Company Law Harmonization (Directive 77/91 of December 13, 1976, OJ 1977, L 26 p. 1) within the period fixed for doing so by Article 43 of the latter. That period expired on 16 December, 1978, two years after the date on which the directive was notified to the Member States.

The Kingdom of Belgium has not denied, either in the written procedure or in its oral submissions, that it has failed to comply with the directive. It contends that its failure is due in part to the particular problems arising in Belgium by reason of its legislative procedures, coupled with its political crisis, and in part to the fact that the time-limits set in the directive were, in the view of the Belgian Government, too