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Somsen, H.

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European Court of Justice: Case Reports

*Han Somsen,
School of Law, University of Warwick*

Case C-274/93: Commission of the European Communities v Grand Duchy of Luxembourg (Failure by a Member State to Fulfil Obligations: Failure to implement Council Directive 86/609/EEC – Protection of animals used for experimental and other scientific purposes); 25 April 1996 (not yet reported)

Background

By application lodged at the Court on 12 May 1993 the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by not adopting within the prescribed period the measures necessary to comply with Council Directive 86/609/EEC of 24 November 1986 on the approximation of the laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes (OJ 1986 L 358/1), and/or by not communicating those measures to the Commission, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 25 of the Directive and under Articles 5 and 189 of the EC Treaty.

Article 1 of Council Directive 86/609/EEC provides that the aim of the Directive is to ensure that the relevant provisions laid down by law, regulation or administrative action in the Member States are approximated so as to avoid affecting the establishment and functioning of the common market, in particular by distortions of competition or barriers to trade. Under Article 25 of that same Directive, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 24 November 1989 and to inform the Commission thereof forthwith by communicating to it the provisions of national law that they had adopted in the field covered by the Directive.

The Commission did not receive any communication informing it of measures adopted; nor did it have any other information enabling it to conclude that the Grand Duchy of Luxembourg had complied with its obligations under Directive 86/609/EEC, and on 4 September 1990 it sent to the Grand Duchy a letter of formal notice. As no reply to the letter was received, the Commission issued, on 20 May 1992, a reasoned opinion, to which no reply was received either. In those circumstances the Commission made this application for a declaration that the Grand Duchy of Luxembourg had failed to fulfil its obligations under Article 25 of Directive 86/609/EEC and under Articles 5 and 189 of the EC Treaty.

Arguments of the Defendant

The Grand Duchy, upon whom notice of the proceedings

had been properly served, did not produce a statement of case within the prescribed period. Then, on 28 May 1993, the Grand Duchy sent a letter to the Commission's Legal Service in which it communicated to the Commission the text of the law of 15 March 1983 on the protection of the life and well-being of animals (Memorial A, No 15, 19 March 1983, p 306; "the Luxembourg law").

Arguments of the Applicant

By letter dated 8 December 1994 the Commission requested the Court to give judgment by default under Article 94(1) of the Rules of Procedure. It now sought a declaration that: ". . . by not adopting within the prescribed period all the measures necessary to comply with Council Directive 86/609/EEC of 24 November 1986 on the approximation of the laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 25 of that directive and under Articles 5 and 189 of the EC Treaty".

In support of this position the Commission relied on a number of provisions in the Directive which, in its view, had not been implemented by the Luxembourg law.

Judgment of the Court

As a result of the circumstances described above, the Court gave judgment by default. In accordance with Article 94(2) of the Rules of Procedure, it had to examine whether the application initiating the procedure was admissible and whether it appeared well-founded.

As regards the question of admissibility, the Court observed that the Commission was requesting the Court to hold, upon examination of the Luxembourg law, that transposition of the Directive was incomplete and therefore defective, whereas in its application, which was based on the reasoned opinion in accordance with Article 169 of the EC Treaty, the Commission alleged failure to implement and to communicate implementing measures.

On this point the Court stressed that it had consistently held (see its judgment in Case C-296/92, *Commission v Italy* [1994] ECR I-1, para 11) that the scope for an action brought under Article 169 of the EC Treaty is delimited by the pre-litigation procedure provided for by that article. The possibility that the State concerned might be able to submit its own observations constituted a fundamental guarantee under the Treaty and an essential requirement for the proper conduct of the procedure for establishing a Member State's breach of obligations. Consequently, the Court recalled, an Article 169 action could not be founded on grounds other than those set out in the reasoned opinion (see also the judgment in Case C-157/91, *Commission v The Netherlands* [1992] ECR I-5899, para 17 and Case C-306/91, *Commission v Italy* [1993] ECR I-2133, para 22).

The Court noted that, after having lodged its application, the Commission, referring to certain provisions not implemented by the Luxembourg law, was asking the Court to declare that Luxembourg had not adopted all the measures necessary to comply with the Directive. However, the Court concluded, before it could make such a declaration, the Court would have to carry out a detailed examination of the

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Luxembourg law to establish which provisions of the Directive had not properly been implemented. This situation was not therefore comparable to the situation in which a Member State had adopted some implementing measures after the pre-litigation procedure without, however, implementing the Directive in its entirety, and the Commission had therefore limited its action to those provisions which unquestionably had not yet been implemented (see, in particular, the judgment of 14 December 1995 in Case C-132/94, *Commission v Ireland*, not yet reported in the ECR).

The Court noted that it could carry out an examination of the Luxembourg law only on the basis of a pre-litigation procedure that allowed the defendant to address the Commission's claims relating to the defective transposition of specific provisions of the Directive. It observed that, as the case stood, neither the Luxembourg law nor those claims were ever considered in the pre-litigation procedure. It therefore dismissed the Commission's action as inadmissible (para 14).

Costs

Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they had been applied for in the successful party's pleadings. The Court noted that, although the applicant had been unsuccessful as regards the subject-matter of the proceedings as defined by its pleadings, it had lodged the application, as amended by its pleadings, because of the defendant's lack of co-operation.

Consequently, in accordance with the second sentence of Article 69(3) of the Rules of Procedure, the defendant was ordered to pay all the costs.

Comment

In view of the Luxembourg Government's complete lack of co-operation, the outcome of this case may perhaps seem somewhat unsatisfactory. At the same time, however, irrespective of the attitude of the defendant Government, the Commission ought to have resisted the temptation to widen the scope of its initial complaints as contained in the reasoned opinion of 20 May 1992. Failure to provide the necessary information is in itself reason to start proceedings, yet does not justify the presumption that the Member State has not adopted the necessary measures. It remains incumbent upon the Commission to prove that (see, for example, Case 97/81, *Commission v Netherlands* [1982] ECR 1819).

The duty to provide information in respect of implementing legislation is normally enshrined explicitly in environmental directives (in this particular case in Article 25 of the Directive), but also follows more generally from the all-important Article 5 of the EC Treaty. As for the quality of the information to be provided by the Member State, it should be sufficiently specific for the Commission to carry out its tasks under Article 155 of the Treaty.

Although failure to provide the necessary information hence does not justify the presumption that the Member State in question has altogether failed to adopt the necessary provisions, the Court is of course entitled to draw conclusions from a Member State's failure to provide information. For example, the Court held in Case 291/84, concerning the implementation of the ground water Directive in the Netherlands:

"It appears from the statement of the Netherlands Government and also from its failure to supply any specific information on the measures adopted to cover those points that the relevant provisions of Directive 80/68/EEC have not been adopted" (Case 291/94, *Commission v Netherlands* [1987] ECR 3483 (emphasis added)).

Member States have been notably slow in fulfilling the obligation to provide information. Similarly, where environmental directives set up a reporting system (for example, in respect of derogations), this has also often not been properly implemented. In its Twelfth annual report on monitoring the application of Community law, covering the year 1994, the Commission indicates that the delays are mostly attributable to problems with administrative co-ordination within the Member States. A number of infringement proceedings have been initiated by the Commission against France, Greece, Denmark, the Netherlands, Italy, Spain and Portugal (OJ 1995 C 254/43).

Case C-133/94: *Commission of the European Communities v Belgium (Assessment of the effects of certain projects on the environment: Council Directive 85/337/EEC)*, 2 May 1996, not yet reported

Background

By application lodged at the Court on 6 May 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by not completely and correctly transposing into Belgian law Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175/40), Belgium had failed to fulfil its obligations under that Directive and under Articles 5 and 189 of the EC Treaty. Under Article 12(1) of the Directive, Member States had to take the measures necessary to comply with the Directive within three years of its notification. Since it was notified on 3 July 1985, this period ran out on 3 July 1988.

By letter dated 29 December 1989, the Commission informed Belgium, pursuant to Article 169 of the Treaty, that it considered that it had not completely and correctly implemented the Directive, and asked the Belgian government for its observations on this point. The Belgian Government reacted to that letter, giving formal notice on 25 May 1990, and sending the Commission additional information on 26 July 1991.

Considering that this response was unsatisfactory, the Commission delivered a reasoned opinion on 3 December 1991, in which it adhered to its complaints against Belgium and asked it to take remedial action within two months of notification of the opinion. By letters dated 9 December 1991, 3 February 1992 and 23 July 1992, the Belgian government notified to the Commission a number of measures and proposed measures designed to implement the Directive in Belgian law completely.

Considering, however, that the Directive had not been completely and correctly transposed, the Commission brought proceedings. In its application, the Commission made four complaints, alleging:

- firstly, that Article 2(1) and Article 4(1) of the