

JUDGMENT OF THE COURT
12 OCTOBER 1982 ¹

**Commission of the European Communities
v Grand Duchy of Luxembourg**

(Failure to implement Directive 77/91/EEC)

Case 149/81

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 149/81

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

GRAND DUCHY OF LUXEMBOURG, represented by Eugène Müller, First Counsellor at the Ministry of Justice, acting as Agent, with an address for service in Luxembourg at the Ministry of Justice, 16 Boulevard Royal,

defendant,

¹ — Language of the Case: French.

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 Grand Duchy of Luxembourg has failed to fulfil one of its obligations under the EEC Treaty,

THE COURT,

composed of: J. Mertens de Wilmars, President, A. O'Keefe, 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 coordinated 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 Grand Duchy of Luxembourg had not, within the pre-

scribed 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 the Grand Duchy.

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

By a letter of 8 February the Permanent Representation of the Grand Duchy of Luxembourg to the Communities notified the Commission that a bill for the amendment of the Law of 10 October 1915 on commercial companies to bring it into line with Directive 77/91 had been approved by the cabinet on 1 February 1979 and transmitted on 9 February for the opinion of the Conseil d'État [State Council]; in July 1979 the Commission's Directorate General for the Internal Market and Industrial Affairs had delivered its opinion on the bill; the opinion had been transmitted, together with comments by the Commission d'Études Législatives [Committee for the Examination of Legislation], to the Conseil d'État; the latter had been reminded of the urgency of the matter.

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 Grand Duchy of Luxembourg 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 25 November 1980 the Permanent Representation of Luxembourg informed the Commission that the file was still with the Conseil d'État which had recently been reminded again of the urgency of the matter by the President of the government.

By a letter of 16 January 1981 the Permanent Representation of Luxembourg notified the Commission that the Conseil d'État had recently delivered the opinion required by the legislative procedure and that the bill had been the subject of an Arrêté Grand-Ducal [Grand Ducal Decree] laying it before the Chamber of Deputies on 10 January 1981; it was thus expected that the position would soon be regularized.

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 Grand Duchy of Luxembourg 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 Luxembourg 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 Grand Duchy of Luxembourg, 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 Grand Duchy of Luxembourg to pay the costs.

The *Government of the Grand Duchy of Luxembourg* leaves it to the Court to deliver judgment according to law.

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 circum-

stances 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 Grand Duchy of Luxembourg has incontestably failed to fulfil one of its obligations under the Treaty.

The *Government of the Grand Duchy of Luxembourg* states that it does not challenge the facts set out by the Commission and that it is not in a position to put forward valid legal arguments to refute those set out by the Commission: it has in fact not yet been possible to take the measures for introducing the provisions of Directive 77/91 into national law in the Grand Duchy.

That situation must not, however, be interpreted as arising from lack of good will, or negligence on the part of the competent Luxembourg authorities. The complexity of the subject-matter and the difficulties of harmonizing draft provisions for partial reform with even more extensive amendments to be foreseen for the future has appreciably delayed the draftsmen in the performance of their task; the need to take the steps prescribed as regards the legislative procedure constitutes another factor in the delay.

The bill amending the Law of 10 August 1915 on commercial companies, as sub-

sequently amended, to bring it into line with Directive 77/91 was approved on 19 December 1980 in an opinion of the Conseil d'État, subject to certain amendments suggested in the course of examination of its provisions; the government laid the bill before the Chamber of Deputies on 21 January 1981; the Commission Juridique [Legal Affairs Committee] of the Chamber appointed its rapporteur on 11 March 1981; on 25 June the Minister for Justice requested the President of the Chamber of Deputies to give priority to a vote on the bill; on 17 September 1981 the Commission Juridique of the Chamber of Deputies concluded its inquiry regarding the bill and the representative of the government emphasized on that occasion the need to dispose of the matter without delay.

The Luxembourg Government is continuing its endeavours so that within a short time the Grand Duchy may fulfil its obligations in this matter under the Treaty.

V — Oral procedure

At the sitting on 28 April 1982 brief oral argument was presented by Mr Delmoly for the *Commission* and by Mr Müller for the *Government of the Grand Duchy of Luxembourg*.

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 Grand Duchy of Luxembourg 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 Grand Duchy of Luxembourg on 16 December 1976 and the above-mentioned period accordingly expired on 16 December 1978.
- 3 The Luxembourg Government does not contest that it has not fulfilled that obligation. It nevertheless emphasizes that its failure to do so must not be interpreted as a result of negligence or as expressing a lack of good will on the part of the Luxembourg authorities but that it is due to the complexity of the subject-matter and the difficulty of harmonizing draft provisions for partial reform with more extensive amendments which may be foreseen for the future.
- 4 Those circumstances cannot expunge the failure to fulfil one of its obligations with which the Grand Duchy of Luxembourg 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 Luxembourg legislature 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 Grand Duchy of Luxembourg 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 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 Grand Duchy of Luxembourg has failed to fulfil one of its obligations under the EEC Treaty;
2. Orders the Grand Duchy of Luxembourg 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