

JUDGMENT OF THE COURT
28 November 1991 *

In Case C-198/90,

Commission of the European Communities, represented initially by Marie Wolfcarius and René Barents, and subsequently by Marie Wolfcarius and Berend Jan Drijber, all members of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of the Netherlands, represented by J. W. de Zwaan and T. Heukels, Deputy Legal Advisers in the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5, Rue C. M. Spoo,

defendant,

APPLICATION for a declaration that, by refusing to pay child benefit to employed persons who have taken early retirement and reside outside the national territory, though subject to Netherlands law pursuant to Articles 73 and 75 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (amended and consolidated version: Official Journal 1983 L 230, p. 6), the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty,

* Language of the case: Dutch.

THE COURT,

composed of: O. Due, President, Sir Gordon Slynn, R. Joliet, F. Grévisse and P. J. G. Kapteyn, Presidents of Chambers, C. N. Kakouris, J. C. Moitinho de Almeida, M. Díez de Velasco and M. Zuleeg, Judges,

Advocate General: W. Van Gerven,
Registrar: J. A. Pompe, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 June 1991,

after hearing the Opinion of the Advocate General at the sitting on 17 September 1991,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 28 June 1990, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by refusing to pay child benefit to employed persons who have taken early retirement and reside outside the national territory, though subject to Netherlands legislation pursuant to Articles 73 and 75 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (amended and consolidated version: Official Journal 1983 L 230, p. 6), the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty.

- 2 The refusal by the Netherlands authorities to grant child benefit to persons in receipt of early-retirement benefit, where they do not reside in the Netherlands, is based on the one hand on Article 6(1) of the Algemene Kinderbijslagwet (Netherlands General Law on Child Benefit, *Staatsblad* No 1 of 17 January 1980), and on the other hand on the fact that Regulation No 1408/71 contains no provisions, such as those for employed persons (Article 73), unemployed persons (Article 74) and pensioners (Article 77), entitling persons who have taken early retirement and reside in another Member State to family benefits.

- 3 According to Article 6(1) of the General Law on Child Benefit:

‘For the purposes of this Law insured persons are:

(a) Netherlands residents;

(b) persons who though not resident in the Netherlands are nevertheless subject to income tax by reason of employment in the Netherlands.’

- 4 The Commission considers that Articles 73 and 75 of Regulation No 1408/71 are applicable to employed persons coming under an early-retirement scheme and that, in any event, the residence requirement laid down in Article 6 of the General Law on Child Benefit cannot be relied on as against persons falling within the scope of Regulation No 1408/71.

- 5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Application of Articles 73 and 75 of Regulation no 1408/71 to employed persons participating in an early-retirement scheme

- 6 The Commission argues that persons who have taken early retirement satisfy the definition of 'employed person' within the meaning of Article 1(a) of Regulation No 1408/71 and that, inasmuch as they must be regarded as active workers, they come under Article 13(2)(a) of that regulation, according to which a person employed in the territory of one Member State is subject to the legislation of that State even if he resides in the territory of another Member State. Therefore, it maintains, Netherlands legislation is applicable to them and, consequently, they are entitled under Article 73(1) to receive family benefits for members of their families not residing in the Netherlands.

- 7 In that connection the Commission adds that the fact that persons who have taken early retirement are compulsorily insured under the Ziekenfondswet (Law on Sickness Funds) proves that Netherlands legislation continues to be applied to them.

- 8 According to Article 73 of Regulation No 1408/71, as amended by Council Regulation (EEC) No 3427/89 of 30 October 1989 (Official Journal L 331, p. 1):

'An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State.'

- 9 It should be recalled that that provision goes together with the conflict rules laid down in Articles 13 to 17 of that regulation (see judgment in Case 104/80 *Beeck v Bundesanstalt für Arbeit* [1981] ECR 503, paragraph 7).

- 10 Contrary to the Commission's assertion, Article 13(2)(a) is not applicable to employed persons who have taken early retirement. In fact, as the Court has already held, that provision is designed to resolve conflicts of legislation which may arise where, over the same period, the place of residence and the place of employment are not situated in the same Member State. Such conflicts can no longer arise in the case of workers who have definitively ceased all occupational activity (see the judgment in Case C-140/88 *Noij v Staatssecretaris van Financiën* [1991] ECR I-387, paragraphs 9 and 10).
- 11 Accordingly, although the employed persons in early retirement who are the subject of this application continue to be insured under the Law on Sickness Funds, that law does not apply by operation of the conflict rule laid down in Article 13(2)(a) of Regulation No 1408/71.
- 12 It follows that Article 73 does not apply to such employed persons. Since Article 75 is merely complementary to the two provisions preceding it, the complaint alleging infringement of Articles 73 and 75 must be rejected.

The complaint alleging that Article 6 of the General Law on Child Benefit cannot be relied upon

- 13 In the alternative, the Commission argues that, as the Court has consistently held, it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme, which include the conditions governing the cessation of affiliation, provided always that in that connection there is no discrimination between nationals of the host state and nationals of the other

Member States (see, *inter alia*, the judgment in Case C-245/88 *Daalmeijer v Bestuur van de Sociale Verzekeringsbank* [1991] ECR I-555). The residence requirement imposed by the General Law on Child Benefit is, in its view, indirectly discriminatory since it is likely to operate to the detriment of nationals of the other Member States and, accordingly, cannot be relied on as against them.

- 14 It should be observed that that complaint appears neither in the formal letter before action nor in the reasoned opinion, which merely plead an infringement of Articles 73 and 75 of Regulation No 1408/71, without referring, directly or indirectly, to an infringement of the principle of equal treatment.

- 15 As the Court has consistently held, (see, *inter alia*, the judgment in Case 166/82 *Commission v Italy* [1984] ECR 459, paragraph 16), the scope of an action brought under Article 169 of the Treaty is delimited both by the preliminary administrative procedure provided for by that article and by the form of order sought in the application and by the Commission's reasoned opinion and the application must be founded on the same grounds and submissions.

- 16 It follows that this complaint is not susceptible of review by the Court and that, consequently, the application must be dismissed in its entirety.

Costs

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

On those grounds,

THE COURT

hereby:

- 1. Dismisses the application;**
- 2. Orders the Commission to pay the costs.**

Due

Slynn

Joliet

Grévisse

Kapteyn

Kakouris

Moitinho de Almeida

Díez de Velasco

Zuleeg

Delivered in open court in Luxembourg on 28 November 1991.

J.-G. Giraud

Registrar

O. Due

President