

JUDGMENT OF THE COURT (First Chamber)

24 June 2004^{*}

In Case C-350/02,

Commission of the European Communities, represented by M. Shotter and W. Wils, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by S. Terstal, acting as Agent,

defendant,

APPLICATION for a declaration that, by failing to adopt all the laws, regulations and administrative provisions necessary to transpose into national law Articles 6 and 9 of Directive 97/66/EC of the European Parliament and of the Council of 15

^{*} Language of the case: Dutch.

December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1) or, at least, by not communicating those provisions to the Commission, the Kingdom of the Netherlands has failed to fulfil its obligations under the EC Treaty,

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, A. La Pergola, S. von Bahr, R. Silva de Lapuerta and K. Lenaerts (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M.-F. Contet, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 13 November 2003 at which the Commission was represented by W. Wils, assisted by P. Gerard, expert, and the Kingdom of the Netherlands, by C. Wissels, acting as Agent, assisted by R.J. I. Dielemans, expert,

after hearing the Opinion of the Advocate General at the sitting on 29 January 2004,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 1 October 2002, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to adopt all the laws, regulations and administrative provisions necessary to transpose into national law Articles 6 and 9 of Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1) or, at least, by not communicating those provisions to the Commission, the Kingdom of the Netherlands has failed to fulfil its obligations under the EC Treaty.

Legal framework

Community provisions

- 2 Under Article 1(1) thereof, Directive 97/66, which was in force at the material time, provided for 'the harmonisation of the provisions of the Member States required to

ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the telecommunications sector and to ensure the free movement of such data and of telecommunications equipment and services in the Community’.

3 Article 6 of Directive 97/66 provided:

‘1. Traffic data relating to subscribers and users processed to establish calls and stored by the provider of a public telecommunications network and/or publicly available telecommunications service must be erased or made anonymous upon termination of the call without prejudice to the provisions of paragraphs 2, 3 and 4.

2. For the purpose of subscriber billing and interconnection payments, data indicated in the Annex may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment may be pursued.

3. For the purpose of marketing its own telecommunications services, the provider of a publicly available telecommunications service may process the data referred to in paragraph 2, if the subscriber has given his consent.

4. Processing of traffic and billing data must be restricted to persons acting under the authority of providers of the public telecommunications networks and/or publicly available telecommunications services handling billing or traffic management, customer enquiries, fraud detection and marketing the provider's own telecommunications services and it must be restricted to what is necessary for the purposes of such activities.

5. Paragraphs 1, 2, 3 and 4 shall apply without prejudice to the possibility for competent authorities to be informed of billing or traffic data in conformity with applicable legislation in view of settling disputes, in particular interconnection or billing disputes.'

4 Article 9 of Directive 97/66 was worded as follows:

'Member States shall ensure that there are transparent procedures governing the way in which a provider of a public telecommunications network and/or a publicly available telecommunications service may override the elimination of the presentation of calling line identification:

(a) on a temporary basis, upon application of a subscriber requesting the tracing of malicious or nuisance calls; in this case, in accordance with national law, the

data containing the identification of the calling subscriber will be stored and be made available by the provider of a public telecommunications network and/or publicly available telecommunications service;

(b) on a per-line basis for organisations dealing with emergency calls and recognised as such by a Member State, including law enforcement agencies, ambulance services and fire brigades, for the purpose of answering such calls.'

5 The annex to Directive 97/66 stated:

'For the purpose referred to in Article 6(2) the following data may be processed:

Data containing the:

- number or identification of the subscriber station,

- address of the subscriber and the type of station,

- total number of units to be charged for the accounting period,

- called subscriber number,

- type, starting time and duration of the calls made and/or the data volume transmitted,

- date of the call/service,

- other information concerning payments such as advance payment, payments by instalments, disconnection and reminders.’

6 Under the first subparagraph of Article 15(1) of Directive 97/66 the Member States were to bring into force the laws, regulations and administrative provisions necessary for them to comply with this directive not later than 24 October 1998. Under Article 15(4) thereof, the Member States were to communicate to the Commission the text of the provisions of national law adopted by them in the field governed by the directive.

National provisions

7 The Wet houdende regels inzake de telecommunicatie (law governing the telecommunications sector, hereinafter the ‘Telecommunicatiewet’), promulgated on 19 October 1998 (*Staatsblad* 1998, p. 610), contains a Chapter 11 seeking to transpose Directive 97/66.

8 Article 11(5) of the Telecommunicatiewet, which concerns the transposition of Article 6 of Directive 97/66, is worded as follows:

'1. In order to safeguard personal and private data, providers of a public telecommunications network and providers of a public telecommunications network shall ensure that, upon termination of a communication, traffic data processed concerning subscribers and users, as may be determined by general administrative measure, are to be subject to erasure or anonymity.

2. By way of exception to paragraph 1 above, traffic data may be processed only if and in so far as is necessary:

(a) to calculate the bill of a subscriber or of the person who has undertaken in law to the provider to pay that bill, or for the purpose of payments for interconnection or other forms of access;

(b) to enable the provider to undertake market research or to market its own telecommunications services, if the subscriber has given his consent thereto;

(c) to examine disputes or determine them under Article 12(1) or to define the rules under Article 6(3),

(d) to manage traffic,

(e) to provide customers with traffic data provided such data relates to such customers,

(f) to detect fraud; or

(g) it is lawful by or under a law.

3. Measures implementing this article shall be adopted by general administrative measure. Such provisions may relate only to data which may be processed in conjunction with traffic data, to the purposes for which processing may take place, to the period within which processing is lawful, and to the persons who may be entrusted with processing.'

Pre-litigation procedure

- 9 By letter of 7 January 1999 the Kingdom of the Netherlands communicated to the Commission the text of the Telecommunicatiewet, stating that it should be regarded as constituting the transposition into national law of Directive 97/66.

- 10 In accordance with Article 226 EC, the Commission, taking the view that the Telecommunicatiewet did not correctly transpose Articles 6, 9, 11 and 12 of Directive 97/66, put the Kingdom of the Netherlands on formal notice to submit its observations.

- 11 By letter of 8 January 2001 the Netherlands Government replied to that letter of formal notice, stating in particular that legislative measures were being drawn up which would fully satisfy its obligations under Directive 97/66.

- 12 On 18 July 2001 the Commission sent the Kingdom of the Netherlands a reasoned opinion in which it submitted that, upon examination of the national provisions at issue and the legislative measures being drawn up, it was of the view that the Netherlands had failed to fulfil its obligations under Articles 6 and 9 of Directive 97/66. The Kingdom of the Netherlands was requested to comply with that reasoned opinion within a period of two months of its notification.

- 13 The Kingdom of the Netherlands replied to the reasoned opinion by letter of 29 October 2001. Since it was not satisfied by that reply, the Commission decided to bring this action.

The action

Admissibility

- 14 In support of its application, the Commission raised four grounds of complaint concerning the Netherlands legislation transposing directive 97/66. Three of them relate to Article 6 of the directive and the fourth to Article 9 thereof.
- 15 One of the grounds of complaint relating to Article 6 of Directive 97/66 alleges the incorrect transposition in Article 11(5)(2) of the Telecommunicatiewet of Article 6 (2) to (5) of the directive. The Commission maintains that the provision of Netherlands law is not in conformity with Directive 97/66 inasmuch as it provides for a greater number of derogations from the principle laid down in Article 6(1) of the directive than are permitted under the terms thereof.
- 16 The Kingdom of the Netherlands argues that that ground of complaint was not mentioned in the reasoned opinion and is therefore inadmissible.
- 17 At the hearing the Commission submitted that the reasoned opinion had to be read in the light of the letter of formal notice which expressly mentioned the ground of complaint at issue.
- 18 In that regard it should be pointed out that in an action for failure to fulfil obligations the purpose of the pre-litigation procedure is to give the Member State

concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the charges formulated by the Commission (see, in particular, Case 293/85 *Commission v Belgium* [1988] ECR 305, paragraph 13; Case C-96/95 *Commission v Germany* [1997] ECR I-1653, paragraph 22; and Case C-439/99 *Commission v Italy* [2002] ECR I-305, paragraph 10).

19 The proper conduct of that procedure constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (see Case C-1/00 *Commission v France* [2001] ECR I-9989, paragraph 53, and Case C-287/00 *Commission v Germany* [2002] ECR I-5811, paragraph 17).

20 It follows that the subject-matter of proceedings under Article 226 EC is delimited by the pre-litigation procedure governed by that provision. The Commission's reasoned opinion and the application must be based on the same grounds and pleas, with the result that the Court cannot examine a ground of complaint which was not formulated in the reasoned opinion (Case 76/86 *Commission v Germany* [1989] ECR 1021, paragraph 8), which for its part must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the Treaty (see, in particular, *Commission v Italy*, paragraph 12, and Case C-287/00 *Commission v Germany*, paragraph 19).

21 It should also be emphasised that, whilst the formal letter of notice which comprises an initial succinct résumé of the alleged infringement, may be useful in construing the reasoned opinion, the Commission is none the less obliged to specify precisely in that opinion the grounds of complaint which it already raised more generally in the

letter of formal notice and alleges against the Member State concerned, after taking cognizance of any observations submitted by it under the first paragraph of Article 226 EC. That requirement is essential in order to delimit the subject-matter of the dispute prior to any initiation of the contentious procedure provided for in the second paragraph of Article 226 and in order to ensure that the Member State in question is accurately apprised of the grounds of complaint maintained against it by the Commission and can thus bring an end to the alleged infringements or put forward its arguments in defence prior to any application to the Court by the Commission.

22 In the present case it must be stated that in the letter of formal notice of 6 November 2000 the Commission set out three specific grounds of complaint concerning the transposition into Netherlands law of Article 6 of Directive 97/66. The first ground of complaint concerns the transposition of Article 6(1) of Directive 97/66 by Article 11(5)(1) of the Telecommunicatiewet. The second ground of complaint relates to the non-conformity of Article 11(5)(2) of the Telecommunicatiewet with Article 6(2) to (5) of Directive 97/66 and alleges that the Netherlands provision includes more derogations than those permitted by those paragraphs of Article 6. The third ground of complaint alleges a failure to notify the implementing provisions mentioned at Article 11(5)(3) of the Telecommunicatiewet.

23 In its reply of 8 January 2001 to the letter of formal notice, the Netherlands Government acknowledged that the grounds of complaint concerning transposition of Article 6(1) of Directive 97/66 and the failure to notify the implementing provisions mentioned in Article 11(5)(3) of the Telecommunicatiewet were well founded, at the same time pointing out that legislative measures were being drawn up in order to correct those deficiencies. Conversely, the Netherlands Government denied that Article 11(5)(2) of the Telecommunicatiewet provides for more derogations than those permitted by Article 6(2) to (5) of that directive.

- 24 It cannot but be noted that the Commission did not reproduce in its reasoned opinion of 18 July 2001 the ground of complaint based on the incorrect transposition of Article 6(2) to (5) of Directive 97/66 by Article 11(5)(2) of the Telecommunicatiewet. Furthermore, that reasoned opinion does not include any assessment concerning the objections formulated concerning that ground of complaint by the Netherlands authorities in their reply to the letter of formal notice.
- 25 In the reasoned opinion the Commission relies solely on the incompleteness of the transposition of Article 6 of Directive 97/66 owing to the fact the legislative measures mentioned in the reply by the Netherlands Government to the letter of formal notice were not communicated to it. Unlike the letter of formal notice, the reasoned opinion gives no indication such as to convey that Article 11(5)(2) of the Telecommunicatiewet is not in conformity with the provisions of Article 6(2) to (5) of that directive. Although the reasoned opinion refers to Article 6(1) thereof, and to the implementing provisions mentioned in Article 11(5)(3) of the Telecommunicatiewet, conversely it refers neither to paragraphs 2 to 5 of that article nor to paragraph 2 of Article 11(5).
- 26 In its reasoned opinion, the Commission accordingly clearly gave the impression that, unlike the two other grounds of complaint concerning Article 6 of Directive 97/66 mentioned in the letter of formal notice, the ground of complaint based on the incorrect transposition of paragraphs 2 to 5 of that provision by Article 11(5)(2) of the Telecommunicatiewet had been abandoned, in the same way as the grounds of complaint concerning transposition of Articles 11 and 12 of that directive. Thus, in their reply of 29 October 2001 to that reasoned opinion, the Netherlands authorities merely gave an account of progress in the enactment of the legislation mentioned in their letter of 8 January 2001 without expressing a view on the ground of complaint at issue.

- 27 The general reference to the letter of formal notice in the reasoned opinion in regard to Article 6 of Directive 97/66 cannot in that context be regarded as a sufficient indication enabling the Kingdom of the Netherlands to understand that the Commission had maintained against it the ground of complaint alleging incorrect transposition of Article 6(2) to (5) of that directive.
- 28 Under those circumstances the ground of complaint alleged in the Commission's application concerning the incorrect transposition of Article 6(2) to (5) of Directive 97/66 by Article 11(5)(2) of the Telecommunicatiewet must be regarded as irregular inasmuch as, on the one hand, it constitutes an extension of the subject-matter of the dispute as opposed to its extent as specified in the reasoned opinion and inasmuch as, on the other, the Kingdom of the Netherlands was deprived, owing to the failure to mention that ground of complaint in that opinion, of the opportunity of bringing an end to the infringement of which it was accused or of explaining itself in that regard prior to an application to the Court by the Commission.
- 29 Accordingly, the action must be declared inadmissible in so far as it concerns the ground of complaint alleging incorrect transposition of Article 6(2) to (5) of Directive 97/66 by Article 11(5)(2) of the Telecommunicatiewet.

Substance

- 30 The three other grounds of complaint formulated in the application are based, in the case of the first two, on the incomplete transposition of Article 6 of Directive 97/66 and, in the case of the third, on the incomplete transposition of Article 9 of that directive.

- 31 Before those complaints are examined, it should be recalled at the outset that, as the Court has repeatedly held, the question whether a Member State has failed to fulfil its obligations must be determined as at the end of the period laid down in the reasoned opinion (see, *inter alia*, Case C-384/97 *Commission v Greece* [2000] ECR I-3823, paragraph 35, and Case C-152/98 *Commission v Netherlands* [2001] ECR I-3463, paragraph 21).
- 32 Accordingly, the matters relied on by the Netherlands in its pleadings concerning, on the one hand, repeal of Directive 97/66 by Article 19 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37) with effect from 31 October 2003 and, on the other, the existence of a bill to transpose the latter directive into Netherlands law, cannot affect the assessment to be made of the obligations of the Kingdom of the Netherlands as at expiry of the period of two months laid down in the reasoned opinion.

Grounds of complaint concerning incomplete transposition of Article 6 of Directive 97/66

- 33 In the first place, the Commission maintains that Article 11(5)(1) of the Telecommunicatiewet derogates from the general principle set out in Article 6(1) of Directive 97/66. It stresses that for that national provision to be in conformity with that directive the general administrative measure envisaged should include an exhaustive list of information. Since no measure containing such a list was communicated to it, the Commission considers that Article 6 of Directive 97/66 was not completely transposed.

34 Since the Netherlands Government acknowledges that not all the provisions necessary for the transposition of Article 6(1) of Directive 97/66 have been adopted, the ground of complaint raised by the Commission must be regarded as well founded.

35 Secondly, the Commission submits that, although Article 11(5)(3) of the Telecommunicatiewet refers to implementing provisions, none of them have been communicated to it. Consequently, it is of the view that Article 6 of Directive 97/66 was not fully transposed.

36 The Netherlands authorities retort that, since those implementing provisions have not been adopted, they could not be communicated to the Commission.

37 None the less, it should be pointed out that the Netherlands Government does not dispute that, in light of the wording in force at that time of Article 11(5) of the Telecommunicatiewet, the adoption of the implementing provisions mentioned in paragraph 3 of that article was necessary in order to support a finding that Article 6 of Directive 97/66 had been fully transposed.

38 Given that, first, the Netherlands Government has acknowledged that, as at the expiry of the period laid down in the reasoned opinion, the implementing provisions at issue had not been communicated to the Commission and that, second, failure to

adopt those provisions by that date cannot reasonably be relied on to justify that infringement, it must be concluded that the ground of complaint raised by the Commission is well founded.

- 39 It follows from the foregoing that the Commission is legally entitled to take the view that Article 6 of Directive 97/66 has not been fully transposed into Netherlands law on the ground that, on the one hand, Article 11(5)(1) of the Telecommunicatiewet refers to a list of information to be determined by a general administrative measure which was not communicated to it and that, second, the implementing provisions mentioned in paragraph 3 of Article 11(5) aforesaid were not communicated to it.

Ground of complaint based on the incomplete transposition of Article 9 of Directive 97/66

- 40 The Commission alleges that Article 9(a) of Directive 97/66 has not been transposed into Netherlands law with the result that that article has not been fully transposed.

- 41 Since there have in fact been no Netherlands provisions transposing Article 9(a) of Directive 97/66, as the Netherlands Government has moreover acknowledged, the

Commission's ground of complaint alleging incomplete transposition of Article 9 aforesaid must be regarded as well founded.

- 42 It must therefore be held that, by incompletely transposing Article 6 of Directive 97/66, in that, first, Article 11(5)(1) of the Telecommunicatiewet refers to a general administrative measure which was not communicated to the Commission and in that, second, the implementing provisions mentioned in Article 11(5)(3) of the Telecommunicatiewet were not communicated to the Commission, and by incompletely transposing Article 9 of that directive, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive.

Costs

- 43 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Under Article 69(3) thereof, the Court may order that costs be shared or that the parties are to bear their own costs if each party succeeds on some and fails on other heads. Since the Kingdom of the Netherlands has been unsuccessful in respect of three of the four grounds of complaint raised by the Commission, it must, in accordance with the form of order sought by the Commission, be ordered to bear three quarters of the Commission's costs. Since the Kingdom of the Netherlands made no request concerning costs, as to the remainder the parties are to bear their own costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. Declares that, by incompletely transposing Article 6 of Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector; in that, first, Article 11(5)(1) of the *Wet houdende regels inzake de telecommunicatie (Telecommunicatiewet)* refers to a general administrative measure which was not communicated to the Commission of the European Communities and in that, second, the implementing provisions mentioned in Article 11(5)(3) of the *Telecommunicatiewet* were not communicated to the Commission, and by incompletely transposing Article 9 of that directive, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive;

2. Dismisses the remainder of the action;

3. Orders the Kingdom of the Netherlands to bear, in addition to its own costs, three quarters of the Commission's costs;

4. As to the remainder of the action orders the Commission to bear its own costs.

Jann

La Pergola

von Bahr

Silva de Lapuerta

Lenaerts

Delivered in open court in Luxembourg on 24 June 2004.

R. Grass

P. Jann

Registrar

President of the Chamber