Quality required of shellfish waters

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Case C-225/96: Commission of the European Communities v Italian Republic (Failure to Fulfil Obligations; Failure to Transpose Directive 79/923/EEC – Quality Required of Shellfish Waters), 4 December 1997 (not yet reported)

Judgment

By application lodged at the Court Registry on 28 June 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that,

by failing to designate waters needing protection or improvement in order to support shellfish life and growth in accordance with Article 4 of Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters (OJ 1979 L 281, p 47 hereafter "the directive") and/or to notify such designation to the Commission in accordance with Article 13 of the directive;

by failing to establish programmes in order to reduce pollution in accordance with Article 5 of the directive, and

by failing to set values for the parameters listed at points 8 and 9 of the Annex to the directive other than for mercury and lead, in accordance with Article 3 of the directive, the Italian Republic has failed to fulfil its obligations under the EC Treaty.

According to the first and second recitals of the directive its aim is to protect waters, including shellfish waters, against pollution and to safeguard certain shellfish populations from various harmful consequences resulting from the discharge of pollutant substances into the sea.

Article 1 of the directive states that it "concerns the quality of shellfish waters and applies to those coastal and brackish waters designated by the Member States as needing protection or improvement in order to support shellfish (bivalve and gasteropod molluses) life and growth . . .".

Article 4(1) and (2) provides that initially within a two-year period following the notification of the directive Member States are to designate shellfish waters and may subsequently make additional designations.

Article 3 provides that for the designated waters Member States are to set values for the parameters listed in the Annex, and comply with the comments contained therein.

Article 5 provides that Member States are to establish programmes in order to reduce pollution and to ensure that designated waters conform, within six years, to both the values set in accordance with Article 3 and the comments contained in the Annex.

Under Article 13 of the directive Member States are to provide the Commission with information concerning the waters designated in accordance with Article 4(1) and (2).

Article 15(1) provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within two years of its notification and forthwith inform the Commission thereof. As the directive was notified on 5 November 1979, the period expired on 5 November 1981.

As the Commission considered that the Ministerial Decree of 27 April 1978 (GURI Ordinary Supplement No 125 of 8 May 1978) which the Italian authorities sent to it on 15 December 1981 did not meet the conditions laid down by the directive, particularly as regards the parameters to be monitored and the frequency of such monitoring, by letter of 9 September 1985 it asked those authorities to provide it with detailed information concerning the designation of shellfish waters.

By letter of 24 April 1989, the Commission asked the Italian authorities to designate shellfish waters throughout the Italian territory, in accordance with Article 4 of the directive, to inform it of the procedure and the objective criteria used in the selection of waters to be designated, to forward to it the list of waters selected for designation and a topographical map indicating the position of those waters, to set the values for the parameters applicable to the designated waters in accordance with Articles 3 and 4 of the directive and to inform it of them, to establish programmes in accordance with Article 5 of the directive and inform it of them, to monitor the waters in accordance with the provisions of Article 7 and state by reference to a topographical map, the position of sampling points set up in accordance with Article 7(4) of the directive, to inform it of provisions relating to new parameters pursuant to Article 9 of the directive and, finally, to inform it of derogations pursuant to Article 11 of the directive.

As it was not notified of any designation and none of the information requested was sent to it, the Commission gave the Italian Republic formal notice on 5 August 1991 to submit its observations within two months.

On 27 January 1992 the Italian Republic adopted Legislative Decree No 131, implementing the directive (GURI Ordinary Supplement No 41, of 19 February 1992).

However, the Commission takes the view that, although that Legislative Decree largely transposes the directive into national law, the transposition is not complete because Article 4 refers to measures to be taken by the regions where designation is concerned.

Noting that it had been informed of no regional designation measures in accordance with Article 13 of the directive, which meant that the competent authorities had not designated shellfish waters and had not drawn up programmes to reduce pollution pursuant to Article 5 of the directive, and believing that the authorities had not set values for the parameters given in points 8 and 9 of the Annex to the directive, apart from those concerning mercury and lead, in accordance with Article 3 of the directive, the Commission sent the Italian Republic a reasoned opinion on 7 July 1993 calling on it to take the measures necessary to transpose the directive within two months.

By note No 488 of 14 March 1994, the Italian authorities informed the Commission of the commitment of the State and regions conference to comply with the Community legislation.

The Commission accordingly lodged this application.

By order of the President of the Court of 22 November 1996 the United Kingdom was given leave to intervene in support of the forms of order sought by the Italian Republic.

By letter lodged at the Court Registry on 21 January 1997, the United Kingdom withdrew its intervention in this case.

By order of the President of the Court of 10 March 1997, the United Kingdom was removed from the record as an intervener in the case.

In this application, the Commission first observes that the Italian Republic has not yet designated shellfish waters, at least not for the whole of Italy, or the designated waters have not yet been notified to it. It goes on to note that, with few exceptions, the Italian authorities have not established programmes to reduce water pollution. Finally, it is clear from Article 4(4)(c), read in conjunction with points 8 and 9 of Annex I to Legislative Decree No 131, that the setting of limit values for the parameters referred to in points 8 and 9 of the Annex to the directive, except for mercury and lead, has been deferred to a later ministerial decree. The Commission has been notified of no such decree or other implementing measure.

The Italian Government contends that regional measures implementing the directive relating to the designation of waters and the establishment of programmes to reduce pollution of designated waters were adopted by twelve of the fifteen coastal regions and notified to the Commission, and that those measures constituted sufficient implementation of the directive. As for the setting of the parameters given in points 8 and 9 of the Annex to the directive, the Italian Government states that the procedure for approving the decree relating to this should shortly be completed.

In its rejoinder the Commission notes that rather than the twelve regions mentioned by the Italian Republic, only eleven of Italy's twenty regions have made an initial designation of shellfish waters. As all the shellfish waters designated and notified represent little more than 50 per cent of the national territory this cannot be considered proper implementation of the directive.

In that connection, the Italian Republic points out that only regions with access to the sea can designate shellfish waters and that there are fifteen such regions. Furthermore, in the absence of specific criteria for the adoption of designation measures, the Italian Republic takes the view that the designation of waters in number and surface area reasonably proportionate to the total coastal and brackish waters and the value of shellfish farming therein constitutes proper implementation of the directive. The fact that designations for which three regions are responsible have not yet been made is not sufficient to constitute failure to fulfil the obligation imposed by Article 4 of the directive. Article 4(2) permits designation to be gradual, since it envisages the possibility of subsequent designations in addition to those necessary to meet the requirement of transposition within the time set in paragraph 1 of the

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article. The Italian Republic therefore claims that the first ground of the application should be rejected.

Article 4 of the directive provides that Member States are to designate shellfish waters, that is to say, the coastal and brackish waters they consider to need protection or improvement in order to support shellfish (bivalve and gasteropod molluses) life and growth and thus to contribute to the high quality of shellfish products directly edible by man (Article 11).

Member States do have a certain discretion in ascertaining that those conditions (the need for protection or improvement) obtain, within the parameters set in the Annex to the directive.

However, contrary to the claims made by the Italian Government, waters must be designated if those conditions obtain. There is nothing in the wording of the directive to support an interpretation which would allow Member States not to designate all shellfish waters; that would, moreover, be contrary to its purpose, which is the protection of the environment and the abolition of unequal conditions of competition (see the first and fourth recitals of the directive).

Nor is there any support in the wording of Article 4 for the argument of the Italian Government that that article permits the designation of shellfish waters provided for therein to be gradual. Member States may, of course, make additional designations (paragraph 2), but that option does not imply that they are not obliged to do so when the conditions laid down by the directive are met.

Accordingly, it must be held that the Italian Republic has not designated shellfish waters. It follows that the form of order sought by the Commission must be granted.

As for the other heads of the Commission's action, the Italian Republic does not deny that it has failed to fulfil its obligations and states that implementing measures will be notified shortly. The Commission's action is thus well founded in that respect.

Consequently:

by failing to designate waters needing protection or improvement in order to support shellfish life and growth in accordance with Article 4 of the directive;

by failing to establish programmes in order to reduce pollution in accordance with Article 5 of the directive, and

by failing to set values for the parameters listed at points 8 and 9 of the Annex to the directive other than for mercury and lead, in accordance with Article 3 of the directive,

the Italian Republic has failed to fulfil its obligations under the directive.

Costs

Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Italian Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby declares:

1. By failing to designate waters needing protection or improvement in order to support shellfish life and growth in accordance with Article 4 of Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters;

by failing to establish programmes in order to reduce pollution in accordance with Article 5 of Directive 79/923, and

by failing to set values for the parameters listed at points 8 and 9 of the Annex to Directive 79/923 other than for mercury and lead, in accordance with Article 3 of Directive 79/923,

the Italian Republic has failed to fulfil its obligations under Directive 79/923.

2. The Italian Republic is ordered to pay the costs.

Comment

For a number of reasons, it appears appropriate to deal with Case C-92/96 involving the implementation of the bathing water directive, and case C-225/96 (protection of shellfish waters) in tandem. Most important amongst these is that both directives are designed to protect the aquatic environment and pursue the so-called "quality approach". Thus, waters which perform a given use (in this case bathing and/or the support of shellfish) first need to be designated by the competent national authorities, which then must ensure that the quality objectives – specified in the directives and intended to allow those waters to perform those functions properly – are respected. This technique of environmental standard-setting has been subject to critical scientific and legal debate.

The scientific debate focuses on the question whether the quality approach pursued by the Community in respect of a limited number of uses for which quality standards have been elaborated (drinking, swimming, the support of fish life, use in the brewing industry) can ever lead to the satisfactory protection of the whole of the Community's aquatic environment as long as the Community has not adopted generic (ecological) quality standards applicable to all Community waters. Since many waters do not serve any of the above purposes, the answer to this question obviously being in the negative, the Community has indeed begun to pursue a different course, which was promulgated in the communication of 21 February 1996 on "European Community Water Policy". The IPPC directive, too, should be seen in the light of this desire to apply one standard to the environment as a whole. As is well known, in the context of the protection of the aquatic environment against dangerous substances (toxic, persistent and accumulative) the use of quality objectives – which, it should be recalled, relate to the quality of the receiving environment – has been even more controversial, chiefly because they are widely regarded as not sufficiently preventive in character to control substances the presence of which will be felt for generations to come, quite irrespective of the hydrological nature of the receiving environment. For these substances, it is widely argued, emission standards which control the quality of the emission (hence at source) are more appropriate.

The legal debate, on the other hand, relates, first, to the discretion which quality objectives leave to Member States to decide whether or not a given stretch of water serves a certain use (in other words, to what extent the Community directive should be deemed to be applicable in the first place); and, second, once waters have been designated, how

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their application can be enforced in practice by the Community. As for the discretion in deciding whether or not to designate a given stretch of water, this will of course depend on the wording of the quality directive at issue. In this regard, there would appear to be a significant difference between the two directives at stake here. Whereas the bathing water contains an objective definition of bathing waters (albeit an extremely ambiguous one), such guidelines are conspicuous by their absence from the shellfish water directive (and freshwater directive). Thus, the bathing water directive applies to:

all running or still fresh waters or parts thereof and sea water in which:

bathing is expressly authorised by the competent authorities of each Member State, or

bathing is not prohibited and is traditionally practised by a large number of bathers.

Where, as in many Member States, such as the United Kingdom, a system of express authorisation exists, the scope of application of the directive therefore revolves around the interpretation of the second limb of the definition. As pointed out by the Spanish Government, the directive remains silent on the question of what constitutes "a large number of bathers" (is this a national or a Community concept?). Considerable national variety in the interpretation of this concept is therefore likely, in turn undermining the directive's stated objective of creating fair conditions for competition. In case C-56/90, *Commission v United Kingdom*, [1993] ECR I-4109, the Court therefore felt compelled to reject absolute numerical thresholds as constituting a satisfactory interpretation of the notion of "a large number of bathers". Instead, more objective factors such as the presence of changing huts, life-guards etc, should guide the national authorities in assessing whether or not a given stretch of water should be regarded as "bathing water" for the purpose of the directive. As a result, Member States with long coast-lines, such as the United Kingdom, Spain and Greece – for which the financial implications of the directive compared with other Member States may seem excessive – are not therefore in a position to control the practical impact of the directive simply by fixing high numerical values for the purpose of what constitutes "a large number of bathers".

The shellfish water directive, on the other hand, *prima facie* appears to leave Member States almost complete discretion in deciding the practical impact of the directive. Whereas waters either are or are not bathing waters on the basis of the (admittedly vague) definition, shellfish waters fall within the scope of the directive only when "they are designated by the Member States as needing protection or improvement in order to support shellfish life and growth". As to the question when this should be the case, unlike the bathing water directive, the shellfish directive provides no indications.

Apart from the legal issue of how designation should take place, compared to emission standards, enforcement of quality objectives is notoriously complicated. Thus, whereas the enforcement of emission standards merely requires monitoring a limited and known number of outlets, compliance with quality objectives involves the control of an altogether more complicated set of data, relating to the quality of the receiving environment, such as the health of organisms and the subsoil etc. This, combined with the often staggering discretion left to the national authorities as to how to carry out their inspections in practice, means that national data may be unreliable at worst and devoid of comparative value at best.

Since the legal issues in both cases partly coincide, it would have been useful to analyse whether the different techniques employed in the two directives have led to notably different outcomes. However, in the case against Spain, the Commission decided to drop its complaints in relation to the variation of the number of inland bathing waters designated and instead to focus on practical implementation of the inland waters actually designated. As will be seen, the Court did not deal with the issue brought up by the Spanish Government relating to the question how bathing waters, once designated, may subsequently lose that status, even though this is an important issue. The case against Spain hence serves to illustrate the extent to which derogations from Member States' obligation to comply in practice with the standards in a water directive are (im)possible, whereas the case against Italy focuses on issues of designation and formal implementation.

Commission v Spain

In summary, the Spanish Government put forward four justifications for its failure to comply with the directive's parameters in practice:

1) a prolonged drought lasting five years constituted "abnormal weather conditions" within the meaning of Article 5(2) of the directive and hence should justify derogations from the obligation to comply with the directive's standards in practice;
2) changes to the Community's water policy are being elaborated, under which the bathing water directive would not be maintained in its present form and content;
3) one of the bathing water directive's most important parameters (i.e. the micro-biological one relating to faecal coliforms) simultaneously is the most important standard of Directive 91/271 concerning urban waste water treatment. Since the latter directive allows Member States until 2005 to comply in practice, the Community should show similar leniency in respect of the practical implementation of Directive 76/160;
4) due to a change in "social habits", certain areas no longer served as bathing waters within the meaning of the directive.

As for the first justification (abnormal weather conditions), the likelihood of successful reliance on this ground is severely complicated by the burden of proof which, evidently, rests with Member States. Hence, where Article 5(2) constitutes a derogation from the general principle that Member States must take all necessary measures to comply with the directive's limit values (Article 4(1)), it is for the Member State to show that the conditions invoked are of such a nature as to make compliance with the limit values impossible. As Spain had failed to put forward any evidence that such was the case in the present case this defence was doomed to fail.

The first justification being the only one explicitly provided for in the directive, by this stage Spain had already effectively lost the case. Indeed, the Court proceeded to dismiss the remaining three defences without seriously entering into their substance. However, although the Court dismissed the Spanish arguments *in toto*, some of the issues

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put forward raise some points of more general interest; a few brief remarks appear appropriate.

The fact that Member States should not anticipate any planned changes to secondary environmental law by failing to comply with the regime currently in force needs little comment. It is true that the bathing and drinking water directives were targeted for change following the Edinburgh Council where subsidiarity, consolidation and transparency were high on the agenda. However, there is nothing in the subsequent communication on European Community Water Policy, nor indeed in the draft amendments to Directive 76/160, justifying non-compliance with the limit values, as the most important of these will remain unaffected by the proposed changes.

The third justification – the relationship with Directive 91/271 on urban waste water – is equally misguided. There are indeed many relationships between Directive 76/160 and other environmental directives (for example Directive 75/440 concerning the quality required of surface water intended for the abstraction of drinking water). However, and not surprisingly, the most stringent requirements will always apply to any given body of water, rather than the most lenient as suggested by the Spanish Government. By way of illustration, Annex I(B), relating to discharges from urban waste water treatment plants to receiving waters stipulates that "more stringent requirements than those shown in Table 1 and/or Table 2 shall be applied where required to ensure that the receiving waters satisfy any other relevant Directives." Similarly, Directive 75/440 must be taken into account in the identification of sensitive areas. More generally, earlier quality directives as a rule contained the principle of "non-degradation", to the effect that implementation of a directive should not lead to a deterioration in the quality of the waters. Whereas, deplorably, Directive 91/271 does not contain this principle, it is arguably sufficiently well established that it is now a principle implicit in any directive based on the quality approach. This means that the directive on urban waste water must not lead to deterioration of waters which have been or should have been previously designated in the context of Directive 76/160.

As for the final argument, to the effect that certain bathing areas have ceased to perform that use, it is unfortunate that the Court did not pay any attention to the circumstances under which Member States may reduce the number of bathing areas. It would seem that where bathing areas are no longer used as such, hence are no longer frequented by "a large number of bathers", such waters fall outside the scope of the directive. There is nothing in the directive suggesting that the status of "bathing area" in the sense of Article 1(2)(b) is a permanent one. Member States are under an obligation annually to report on the state of their bathing waters and any change or reduction in the number of bathing waters will hence come to the attention of the Commission which, if it is not satisfied that the areas in question are indeed no longer bathing areas, can initiate infringement proceedings.

A significant issue, albeit dominated by national constitutional rather than Community law, is who is responsible for the designation of bathing waters. Although hence an issue of national law, it should be taken into account that, in Spain, competences on bathing waters are shared between the Ministry of Health and the Autonomous Communities. It is the latter which enjoy the jurisdiction to designate, for which there are obvious incentives such as tourism etc. The financial resources necessary to follow up designation by practical implementation are not sufficiently available in the Autonomous Communities, and it is not surprising that Central Government is not always prepared to foot the bill, which in turn may lead to proceedings such as in the present case.

Competences in relation to the urban waste water directive are again concurrent, this time shared between the Autonomous Communities and what used to be the Ministry of Public Works (now incorporated into the new Ministry of the Environment). It is perhaps almost inevitable that problems of co-ordination will occur as a result of the absence of an integrated authority dealing with all issues relating to the implementation of EC environmental law.

The case also serves to remind prospective members of the Union to negotiate a transitional period for the implementation of environmental directives involving compliance with quality objectives or emission standards. Even the original Member States find it exceedingly difficult to comply with these directives, so it is hardly surprising that the Member States which more recently joined the Community encounter difficulties with practical implementation.

Commission v Italy

As in the Spanish bathing water case, the fact that for the purpose of implementing the directive the co-operation of regional authorities is required appears to have given rise to complications.

In a line of reasoning inviting some comparison with the British bathing water case alluded to above and the subsequent cases involving the birds directive (in particular *Marismas de Santoño*) the Court has severely limited Member States' discretion in deciding which waters should be designated for the purpose of the shellfish water directive. Thus, the Court acknowledges that Member States do have a certain discretion in ascertaining which waters require protection or improvement; however, contrary to the claims by the Italian Government, waters must be designated if those conditions apply. The difference between the bathing and bird directives lies in the fact that, unlike those directives, the shellfish directive does not contain any guidelines as to the circumstances under which designation should take place. The Commission, in its letter to the Spanish Government, points out that it lacks "objective criteria used in the selection of waters to be designated".

It is hence the national authorities which should draw up those criteria, a system which is also in use as regards Annex II projects in the directive on environmental impact assessment. Obviously, the fact that Member States may designate additional waters for the purpose of the directive does not imply, *a contrario*, that they may also remove certain waters which satisfy the objective criteria from the scope of the directive. In *Kraaijeveld* (24 October 1996) the issue was the extent to which a national court should review the criteria developed by the competent authorities (in this instance for the application of Directive 85/337 on environmental impact assessment to Annex II projects) against the provisions of the directive. In that case the Court ruled that where national law requires or enables the national court to invoke a binding rule which has not been brought up by the

parties that court is required to review, *ex officio*, whether the national competent authorities have remained within the discretion left by the provision of the directive (in this case Articles 2(1) and 4(2) of Directive 85/337). It would appear that a similar obligation exists as regards Directive 79/923. Both in the areas not yet designated and in the areas already designated, improvement plans and values for the parameters in accordance with Articles 3 and 4 of the directive had not been fixed. The Italian Government did not deny this failure to comply with the directive, and the Court proceeded to hold that the Italian Government had failed to fulfil its obligations under the Treaty.