

JUDGMENT OF THE COURT (Third Chamber)

10 April 2008^{*}

In Case C-265/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 16 June 2006,

Commission of the European Communities, represented by A. Caeiros, P. Guerra e Andrade and M. Patakia, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes, acting as Agent, and by A. Duarte de Almeida, advogado,

defendant,

^{*} Language of the case: Portuguese.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Löhmus, J. Klučka, P. Lindh (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: V. Trstenjak,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 November 2007,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2007,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities seeks a declaration that, by prohibiting in Article 2(1) of Decree-Law No 40/2003 of 11 March 2003 (*Díario da República* I, Series A, No 59, of 11 March 2003) the affixing of tinted film to the windows of motor vehicles, the Portuguese Republic has failed to fulfil its obligations under Articles 28 EC and 30 EC and Articles 11 and 13 of the Agreement of 2 May 1992 on the European Economic Area (OJ 1994 L 1, p. 3) ('the EEA Agreement').

Legal background

Community law

- 2 The Community legislature has not adopted legislation on tinted film designed to be affixed to the windows of motor vehicles.

- 3 However, Community legislation exists in relation to type-approval of safety glazing which is fitted from the outset to motor vehicles, in other words before those vehicles are put into circulation, in particular as regards the colouring of the glazing material. That legislation includes Council Directive 92/22/EEC of 31 March 1992 on safety glazing and glazing materials on motor vehicles and their trailers (OJ 1992 L 129, p. 11), as amended by Commission Directive 2001/92/EC of 30 October 2001 (OJ 2001 L 291, p. 24) ('Directive 92/22').

- 4 The third recital in the preamble and Annex II B to Directive 2001/92 refer to Regulation No 43 of the United Nations Economic Commission for Europe, entitled 'Uniform provisions concerning the approval of safety glazing materials and their installation on vehicles' ('Regulation No 43').

- 5 Article 4 of Regulation No 43 provides that, as regards windscreens, the regular light transmittance must not be less than 75%. As regards safety glazing other than the windscreens located within the driver's forward field of view, the light transmittance

must be at least 70%. With respect to safety glazing located within the driver's rearward field of view, the light transmittance may be less than 70% if the vehicle is fitted with two exterior rear-view mirrors.

National law

- 6 Article 2(1) of Decree-Law No 40/2003 provides that 'the affixing of tinted film to the windows of passenger or goods vehicles shall be prohibited with the exception of lawful stickers and dark, non-reflective film to the goods compartment of goods vehicles'.

Pre-litigation procedure

- 7 On 1 April 2004, the Commission sent a letter of formal notice to the Portuguese Republic in which it stated that, by prohibiting in Article 2(1) of Decree-Law No 40/2003 the affixing of tinted film to the windows of passenger or goods vehicles, with the exception of lawful stickers and dark non-reflective film to the goods compartment of goods vehicles, and by failing to communicate to the Commission

the text of the draft decree-law, the Portuguese Republic has failed to fulfil its obligations under Articles 28 EC and 30 EC and Articles 11 and 13 of the EEA Agreement, together with Article 8 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37).

8 By letter of 28 June 2004 the Portuguese Republic replied to the letter of formal notice.

9 Since it was not satisfied with that reply, on 22 December 2004 the Commission sent a reasoned opinion to the Portuguese Republic calling on it to comply with the opinion within two months of its notification.

10 In response to the reasoned opinion the Portuguese Republic stated, by letter of 22 July 2005, that it intended to repeal the provision which prohibits tinted film being affixed to the windows of motor vehicles, that is to say, Article 2(1) of Decree-Law No 40/2003.

11 It also informed the Commission that, as far as concerns the affixing of tinted film to the windows of motor vehicles, draft technical rules to be included in a legislative instrument were being prepared. In December 2005, a draft decree laying down those rules was notified to the Commission pursuant to Directive 98/34.

- 12 Taking account of that notification, the Commission decided to withdraw the complaint concerning the failure to notify Article 2(1) of Decree-Law No 40/2003 in its draft form.
- 13 However, the Commission did maintain the complaint relating to the incompatibility of that provision with Articles 28 EC and 30 EC and Articles 11 and 13 of the EEA Agreement and brought the present action on 16 June 2006.

The action

Arguments of the parties

- 14 The Commission takes the view that in practice Article 2(1) of Decree-Law No 40/2003, which prohibits the affixing of any type of tinted film designed to filter light to the windscreen and the windows alongside the passenger seats in motor vehicles, prevents tinted film lawfully manufactured and/or marketed in another Member State or in a State party to the EEA Agreement from being marketed in Portugal, contrary to Articles 28 EC and 30 EC and Articles 11 and 13 of the EEA Agreement.
- 15 The Commission claims that any potential customers, traders or individuals will not buy such film, since they know that they cannot affix it to the windows of motor vehicles.

16 The Commission points out that, according to Regulation No 43, which applies by virtue of Directive 92/22, the windscreen and the windows located in the driver's forward field of view in front of a point designated as the 'B-pillar' must have regular light transmittance of at least 75% and 70% respectively. Such windows may therefore be tinted if they comply with those requirements.

17 Furthermore, the Commission submits that, as regards windows behind the B-pillar, no minimum value of light transmittance is prescribed when they are not essential to the driver's vision. In practice that means that the rear of a motor vehicle may be fitted with tinted windows with a regular light transmittance which is very weak, so long as the vehicle has two exterior rear-view mirrors.

18 The Commission therefore criticises the Portuguese Republic for prohibiting the affixing of any tinted film to the windscreen and to the windows alongside the passenger seats in passenger and goods vehicles, even where those films allow the regular light transmittance to correspond with the minimum values laid down by Regulation No 43.

19 The Commission submits that, in the absence of harmonising provisions at Community level, the Member States may indeed define the level of road safety that they deem appropriate on their territory and adopt measures aiming to protect public safety. However, in the Commission's view the Portuguese Republic has not produced

any evidence to show that the use of tinted film, of whatever colour and characteristics, in particular with respect to light transmittance, presents a risk for public safety and/or road safety. The contested provision is neither necessary nor proportionate to the objectives pursued.

20 The Portuguese Republic does not dispute the facts set out in the application. However, it disagrees as to the interpretation, the value and the significance of certain facts.

21 First of all, the Portuguese Republic submits that there was no need for the Commission to bring an action against it since it had indicated during the pre-litigation procedure that it was amending its legislation in the manner recommended by the Commission. The draft amendment which was notified to the Commission means that it had lifted the ban in Article 2(1) of Decree-Law No 40/2003.

22 Next, while acknowledging that that provision constitutes a restriction on the free movement of goods, the Portuguese Republic argues that in any event it is justified by the objectives of road safety and public safety.

23 Thus, the Portuguese Republic points out that the ban is intended to enable the competent authorities to make a rapid external inspection of the interior of motor vehicles without the need to immobilise them, first, in order to ensure that the vehicle's occupants are wearing seat belts and, second, to identify potential criminals for the purpose of combating crime.

24 Finally, the Portuguese Republic does not believe that there are measures that are less restrictive which ensure that the road safety and public safety objectives it has set are achieved. It observes, in that regard, that the ban on affixing tinted film to the windows of vehicles is not total but partial, as it does not apply either to the goods compartments of goods vehicles or to non-wheeled vehicles such as ships.

Findings of the Court

25 It must be recalled that, according to settled case-law, in proceedings under Article 226 EC the question whether a Member State had failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see Case C-423/00 *Commission v Belgium* [2002] ECR I-593, paragraph 14, and Case C-254/05 *Commission v Belgium* [2007] ECR I-4269, paragraph 39).

26 In this case, it is common ground that on the expiry of the two-month period prescribed in the reasoned opinion the Portuguese Republic had not repealed Article 2(1) of Decree-Law No 40/2003 prohibiting the affixing of tinted film to the windows of motor vehicles. The fact that that Member State subsequently notified draft regulations which do not contain the contested provision has no bearing on the existence of that provision at the relevant time.

27 Therefore, it is appropriate, as stated in paragraph 6 of this judgment, to examine whether Article 2(1) of Decree-Law No 40/2003 is compatible with Community law and the law of the European Economic Area referred to by the Commission.

28 It must be observed that Directive 92/22 does not regulate tinted film designed to be affixed to the windows of motor vehicles, but only windows originally fitted to those vehicles, namely tinted windows.

29 In the absence of Community harmonisation, Article 2(1) of Decree-Law No 40/2003 must therefore be examined by reference to the provisions of the EC Treaty relating to the free movement of goods and the corresponding provisions of the EEA Agreement.

30 Since the provisions of the EEA Agreement were drafted in terms almost identical to those of the Treaty, the following considerations relating to Articles 28 EC and 30 EC must be understood as applying to the corresponding provisions of the EEA Agreement, namely Articles 11 and 13 thereof.

— The existence of a restriction on the free movement of goods

31 According to settled case-law, all rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are

to be considered as measures having an effect equivalent to quantitative restrictions, prohibited by Article 28 EC (see, inter alia, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Case C-420/01 *Commission v Italy* [2003] ECR I-6445, paragraph 25; and Case C-143/06 *Ludwigs-Apotheke* [2007] ECR I-9623, paragraph 25).

32 In this case, the Portuguese Republic acknowledges that the ban provided for in Article 2(1) of Decree-Law No 40/2003, which concerns the affixing of tinted film to the windscreen and windows alongside passenger seats in motor vehicles, restricts the marketing of those products in Portugal.

33 It must be held that potential customers, traders or individuals have practically no interest in buying them in the knowledge that affixing such film to the windscreen and windows alongside passenger seats in motor vehicles is prohibited.

34 The only exception to the ban in Article 2(1) of Decree-Law No 40/2003 concerns affixing tinted film to the goods compartments of goods vehicles and to non-wheeled vehicles.

35 The contested provision therefore affects the marketing in Portugal of almost all tinted film legally manufactured and sold in other Member States or in States party to the EEA Agreement intended to be affixed to the windows of motor vehicles.

³⁶ It follows that the ban in Article 2(1) of Decree-Law No 40/2003 constitutes a measure having equivalent effect to quantitative restrictions within the meaning of Article 28 EC and Article 11 of the EEA Agreement. That provision is incompatible with the obligations arising from those provisions, unless it may be objectively justified.

— The existence of a justification

³⁷ According to settled case-law, a measure having an effect equivalent to a quantitative restriction on imports may be justified only by one of the public-interest reasons laid down in Article 30 EC or by one of the overriding requirements referred to in the judgments of the Court (see, in particular, Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649, paragraph 8), provided in each case that that measure is appropriate for securing the attainment of the objective pursued and does not go beyond what is necessary in order to attain it (Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 64; Case C-432/03 *Commission v Portugal* [2005] ECR I-9665, paragraph 42; and Case C-254/05 *Commission v Belgium*, paragraph 33).

³⁸ In this case, the justifications put forward by the Portuguese Republic relate, first, to the fight against crime in the context of public safety and, second, to ensuring that the obligation to wear seat belts is complied with, which comes within the sphere of road safety. The fight against crime and ensuring road safety may constitute overriding reasons in the public interest capable of justifying a hindrance to the free movement of goods (see, with regard to road safety, Case C-54/05 *Commission v Finland* [2007] ECR I-2473, paragraph 40 and the case-law cited).

39 However, it is for the Member States to show that their legislation is appropriate to ensure the attainment of such objectives and that it is in conformity with the principle of proportionality (see, to that effect, inter alia, Case C-297/05 *Commission v Netherlands* [2007] ECR I-7467, paragraph 76 and the case-law cited).

40 In that regard, the Portuguese Republic has produced only one argument in support of the contested measure, namely, that it enables the passenger compartment of motor vehicles to be immediately inspected by means of simple observation from outside the vehicle.

41 Although the ban in Article 2(1) of Decree-Law No 40/2003 does indeed appear to be likely to facilitate such inspection and, therefore, appropriate to attain the objectives of fighting crime and ensuring road safety, it does not follow that it is necessary to attain those objectives or that there are no other less restrictive means of doing so.

42 The visual inspection in question is only one means among others available to the competent authorities in order to fight crime and prevent offences relating to the obligation to wear seat belts.

43 The claim that the contested measure is necessary was further undermined when the Portuguese Republic admitted at the hearing that it allows the marketing on its territory of motor vehicles fitted from the outset with tinted windows within the limits laid down by Directive 92/22. Tinted windows, like the tinted film at issue, may prevent any external visual inspection of the interior of vehicles.

44 Therefore, unless it is accepted that, as regards motor vehicles fitted at the outset with tinted windows, the competent authorities have abandoned their campaign to fight crime and their efforts to enforce road safety, it is clear that they must use other methods to identify criminals and persons who may be breaking the rules concerning the wearing of seat belts.

45 Furthermore, the Portuguese Republic has not shown that the ban, in so far as it concerns all tinted film, is necessary to promote road safety and combat crime.

46 As stated by the Commission at the hearing, there is a wide range of tinted film, from transparent film to film which is almost opaque. That information, which was not challenged by the Portuguese Republic, means that at least some films, namely those with a sufficient degree of transparency, permit the desired visual inspection of the interior of motor vehicles.

47 It follows that that ban must be regarded as being excessive and, therefore, disproportionate with respect to the objectives pursued.

48 Having regard to the foregoing considerations, it must be held that, by prohibiting in Article 2(1) of Decree-Law No 40/2003 the affixing of tinted film to the windows of motor vehicles, the Portuguese Republic has failed to fulfil its obligations under Articles 28 EC and 30 EC and Articles 11 and 13 of the EEA Agreement.

Costs

⁴⁹ Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Portuguese Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

- 1. Declares that, by prohibiting in Article 2(1) of Decree-Law No 40/2003 of 11 March 2003 the affixing of tinted film to the windows of motor vehicles, the Portuguese Republic has failed to fulfil its obligations under Articles 28 EC and 30 EC and Articles 11 and 13 of the Agreement of 2 May 1992 on the European Economic Area;**
- 2. Orders the Portuguese Republic to pay the costs.**

[Signatures]