



Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 22 September 2015¹

Case C-398/14

Commission

v

Portuguese Republic

(Action for failure to fulfil obligations brought by the Commission against the Portuguese Republic) —
(Failure of a Member State to fulfil obligations — Directive 91/271/EEC — Urban waste water —
Treatment — Relevant time for compliance with the obligation imposed by Article 4(1) of Directive
91/271/EEC — Annex I.D to Directive 91/271/EEC — Quality control procedure for treated water)

1. By the present action, the Commission complains that the Portuguese Republic has failed to fulfil its obligations under Article 4 of Directive 91/271/EEC,² maintaining, *inter alia*, that for the purposes of compliance with that provision it is not sufficient merely to install treatment plants but that it is also necessary to perform satisfactorily the checks laid down in Annex I.D to the directive. The action thus affords the Court an opportunity of explicitly examining the issue of the relationship between Article 4 of the directive and Annex I.D thereto, beyond any isolated decisions that may have been given by it.
2. Throughout the pre-litigation procedure and in their written observations to the Court, the Commission and the Portuguese Republic focused the debate on the identification of the specific agglomerations which, it is alleged, have not satisfied the condition for compliance with Article 4 of Directive 91/271 advanced by the Commission.
3. However, under Article 61(1) of the Rules of Procedure, the Court requested the parties to express their views at the hearing on the conditions for compliance with that provision; in particular, on whether there was an obligation to wait until the time when the plant started to operate or whether, under Annex I.D to Directive 91/271 — which requires Member States to ensure that a method of monitoring the quality of discharges is applied — it was necessary for one year to have passed since the entry into operation of the plant, raising the question of the possible link between Annex I.D and Article 4(1) and (3) of Directive 91/271.

¹ — Original language: Spanish.

² — Council Directive of 21 May 1991 concerning urban waste-water treatment (OJ 1991 L 135, p. 40); ‘Directive 91/271’.

I – Legislative framework

A – EU law

4. The first, third, fourth and eighth recitals of Directive 91/271 are worded as follows:

‘Whereas the Council Resolution of 28 June 1988 [³] on the protection of the North Sea and of other waters in the Community invited the Commission to submit proposals for measures required at Community level for the treatment of urban waste water;

...

Whereas to prevent the environment from being adversely affected by the disposal of insufficiently-treated urban waste water, there is a general need for secondary treatment of urban waste water;

Whereas it is necessary in sensitive areas to require more stringent treatment; whereas in some less sensitive areas a primary treatment could be considered appropriate;

...

Whereas it is necessary to monitor treatment plants, receiving waters and the disposal of sludge to ensure that the environment is protected from the adverse effects of the discharge of waste waters;

...’

5. Article 1 of Directive 91/271 provides as follows:

‘This Directive concerns the collection, treatment and discharge of urban waste water and the treatment and discharge of waste water from certain industrial sectors.

The objective of the Directive is to protect the environment from the adverse effects of the abovementioned waste water discharges.’

6. Article 2 of the directive provides that, for the purposes of the directive:

‘1. “urban waste water” means domestic waste water or the mixture of domestic waste water with industrial waste water and/or run-off rain water;

...

5. “collecting system” means a system of conduits which collects and conducts urban waste water;

6. “1 p.e. (population equivalent)” means the organic biodegradable load having a five-day biochemical oxygen demand (BOD₅) of 60 g of oxygen per day;

...

8. “secondary treatment” means treatment of urban waste water by a process generally involving biological treatment with a secondary settlement or other process in which the requirements established in Table 1 of Annex I are respected;

3 — OJ 1988 C 209, p. 3.

...'

7. Pursuant to Article 3(1) of Directive 91/271:

'Member States shall ensure that all agglomerations are provided with collecting systems for urban waste water:

- at the latest by 31 December 2000 for those with a population equivalent (p.e.) of more than 15 000, and
- at the latest by 31 December 2005 for those with a p.e. of between 2 000 and 15 000.

...'

8. Article 4 of the directive provides as follows:

'1. Member States shall ensure that urban waste water entering collecting systems shall before discharge be subject to secondary treatment or an equivalent treatment as follows:

- at the latest by 31 December 2000 for all discharges from agglomerations of more than 15 000 p.e.;
- at the latest by 31 December 2005 for all discharges from agglomerations of between 10 000 and 15 000 p.e.;
- at the latest by 31 December 2005 for discharges to fresh-water and estuaries from agglomerations of between 2 000 and 10 000 p.e.

...

3. Discharges from urban waste water treatment plants described in paragraphs 1 and 2 shall satisfy the relevant requirements of Annex I.B. ...

4. The load expressed in p.e. shall be calculated on the basis of the maximum average weekly load entering the treatment plant during the year, excluding unusual situations such as those due to heavy rain.'

9. In accordance with Article 15(1) of the directive:

'Competent authorities or appropriate bodies shall monitor:

- discharges from urban waste water treatment plants to verify compliance with the requirements of Annex I.B in accordance with the control procedures laid down in Annex I.D;

...'

10. Annex I to Directive 91/271, entitled 'Requirements for urban waste water', is divided into the following four sections: A. Collecting systems; B. Discharge from urban waste water treatment plants to receiving waters; C. Industrial waste water; D. Reference methods for monitoring and evaluation of results.

11. In accordance with Annex I.B:1. Waste water treatment plants shall be designed or modified so that representative samples of the incoming waste water and of treated effluent can be obtained before discharge to receiving waters.

2. Discharges from urban waste water treatment plants subject to treatment in accordance with Articles 4 and 5 shall meet the requirements shown in Table 1.

...'

12. Annex I.D to the directive provides:

'1. Member States shall ensure that a monitoring method is applied which corresponds at least with the level of requirements described below.

Alternative methods to those mentioned in paragraphs 2, 3 and 4 may be used provided that it can be demonstrated that equivalent results are obtained.

Member States shall provide the Commission with all relevant information concerning the applied method. If the Commission considers that the conditions set out in paragraphs 2, 3 and 4 are not met, it will submit an appropriate proposal to the Council.

2. Flow-proportional or time-based 24-hour samples shall be collected at the same well-defined point in the outlet and if necessary in the inlet of the treatment plant in order to monitor compliance with the requirements for discharged waste water laid down in this Directive.

Good international laboratory practices aiming at minimizing the degradation of samples between collection and analysis shall be applied.

3. The minimum annual number of samples shall be determined according to the size of the treatment plant and be collected at regular intervals during the year:

– 2 000 to 9 999 p.e.: 12 samples during the first year

four samples in subsequent years, if it can be shown that the water during the first year complies with the provisions of the Directive; if one sample of the four fails, 12 samples must be taken in the year that follows

– 10 000 to 49 999 p.e.: 12 samples

– 50 000 p.e. or over: 24 samples.

...'

13. Table 1 of Annex I to Directive 91/271 contains the 'Requirements for discharges from urban waste water treatment plants subject to Articles 4 and 5 of the Directive ...'

B – National law

14. Directive 91/271 was transposed into Portuguese law by Decree-Law No 152/97 of 19 June 1997.⁴

⁴ — Portuguese Official Journal, Series I-A, No 139, p. 2959.

15. Article 5(2) of Decree-Law No 152/97 lays down certain time limits for the entities referred to in Article 4 thereof to adopt the methods necessary to ensure that current waste or projected waste as at the date of its entry into force undergoes secondary treatment. In particular, 31 December 2005 is set as the date for agglomerations of between 10 000 and 15 000 p.e. and for agglomerations of between 2 000 and 10 000 p.e. in the case of discharges to fresh water or estuaries.

16. Under Article 14 of Decree-Law No 152/97, non-compliance with Article 15(2) is an infringement liable to a fine.

II – The pre-litigation procedure

17. The procedure prior to the present action began in 2009 and was concerned with the possible failure of the Portuguese Republic to fulfil its obligations under Articles 3, 4 and 10 of Directive 91/271 in relation to 186 agglomerations.

18. During the pre-litigation procedure, the Portuguese Republic complied in part with the Commission's requests, with the result that the latter's action is concerned with the Portuguese Republic's failure to fulfil Article 4 of Directive 91/271 in relation to 52 agglomerations.

III – The action brought by the Commission and proceedings before the Court

19. In its application, the Commission argued that in order to comply with the provision referred to, it is not sufficient to install treatment plants (obligation imposed by Article 3 of Directive 91/271) and that instead the plants must operate and must do so in such a way that the treated water meets the requirements laid down in Annex I to that directive.

20. The Commission submits that in order to determine whether treated water complies with the requirements of Annex I, it must be monitored in accordance with Annex I.D during the first year.

21. The Portuguese Government does not dispute that submission in its defence, which focuses on the arguments that the number of agglomerations concerned is in fact 26 and that the work necessary to comply with the requirement is at a very advanced stage.

22. As has been stated above, the Court asked the parties to state their views on the conditions for compliance with Article 4 of Directive 91/271, inviting them to take a position on the specific question of whether it was sufficient for the plant to have commenced operations or whether it is also necessary, under Annex I.D to the directive, which requires Member States to ensure that a method of monitoring the quality of discharges is applied, for such checks to be satisfactorily carried out throughout the first year of operation.

23. At the hearing, the Commission argued that the construction of a treatment plant is not sufficient and that instead it is necessary for that plant to operate correctly, since the aim of Directive 91/271 is to ensure the quality of treated water, not merely the construction of treatment plants. The Commission submitted that it is only possible to establish whether a plant is operating correctly by carrying out the checks provided for in Annex I.D to Directive 91/271, for which a minimum number of samples per year is required according to the size of the treatment plant, in particular during the first year of operation.

24. For its part, the Portuguese Republic submits that the relevant time for the purposes of compliance with Article 4 of the directive is the time when the plant commences operations; more specifically, the time when, following the entry into operation of the plant, the first quality control check of the discharge is carried out.

IV – Assessment

A – Preliminary observation

25. As we know, the fact that a Member State does not dispute the breach of obligations alleged by the Commission does not preclude the Court from examining whether the interpretation of EU law which led the Commission to bring its action is correct. In the words of the judgment in *Commission v Sweden*, ‘in an action for failure to fulfil obligations, it is for the Court to determine whether or not the alleged breach of obligations exists, even if the State concerned does not deny the breach’.⁵

26. In the present case, the Portuguese Republic initially disputed, in its written observations, the Commission’s assessment regarding the breach of Article 4 of Directive 91/271 in relation to a number of agglomerations, but it did not call into question the interpretation of that provision on which the Commission relied to support its submission that the Portuguese Republic had failed to fulfil one of the obligations incumbent on it under the Treaties (Article 258 TFEU).

27. Since, regardless of the defence adopted by the Portuguese Republic, ‘it is for the Court to determine whether or not the alleged breach of obligations exists’, the parties, as stated above, were invited to submit their views on the interpretation of Article 4 of Directive 91/271, read in conjunction with Annex I.D to the directive. For that reason, at the hearing, the Portuguese Republic disputed the interpretation of that provision advanced by the Commission, arguing that there may be deemed to be a breach of obligations only if a treatment plant has not commenced operations on the date stipulated therein, there being no need for the period necessary for the carrying out of the checks laid down in Annex I.D. to have expired.

28. Accordingly, it is necessary to determine whether or not the interpretation of Article 4 of Directive 91/271 adopted by the Commission is lawful, since the existence of the failure to fulfil obligations complained of in the action giving rise to these proceedings will ultimately depend on that point.

B – The rulings of the Court on the relationship between Article 4 of and Annex I.D to Directive 91/271

29. Article 4(1) of Directive 91/271 provides that ‘Member States shall ensure that urban waste water entering collecting systems shall before discharge be subject to secondary treatment or an equivalent treatment’. That obligation should have been complied with by 31 December 2000 or 31 December 2005, depending on the type of agglomeration.

30. Further, in accordance with Article 4(3), ‘discharges from urban waste water treatment plants described in paragraphs 1 and 2 shall satisfy the relevant requirements of Annex I.B. ...’

31. For its part, paragraph 1 of Annex I.B provides that ‘waste water treatment plants shall be designed or modified so that representative samples of the incoming waste water and of treated effluent can be obtained before discharge to receiving waters’, while paragraph 2 provides that ‘discharges from urban waste water treatment plants subject to treatment in accordance with Articles 4 and 5 shall meet the requirements shown in Table 1’.

32. However, Article 4 of Directive 91/271 does not refer to Annex I.D, paragraph 1 of which provides that ‘Member States shall ensure that a monitoring method is applied which corresponds at least with the level of requirements described below’. In addition, paragraph 2 of Annex I.D provides for the obligation to collect ‘flow-proportional or time-based 24-hour samples ... at the same well-defined

⁵ — C-438/07, EU:C:2009:613, paragraph 53.

point in the outlet and if necessary in the inlet of the treatment plant in order to monitor compliance with the requirements for discharged waste water laid down in this Directive'. Further, paragraph 3 provides for a 'minimum annual number of samples ... according to the size of the treatment plant' and for the obligation to collect them 'at regular intervals during the year'.

33. The Court has previously had occasion to rule on the question of any relationship which may exist between Article 4 and Annex I.D to Directive 91/271. Thus, in *Commission v Italy*,⁶ the Court accepted the relationship alleged by the Commission between Article 4 and Annex I.D to Directive 91/271, holding that implementation of Article 4 of the directive was dependent on compliance with the procedure for taking samples laid down in Annex I.D to Directive 91/271.

34. In *Commission v Belgium*,⁷ the Belgian Government argued that it is not necessary to observe the procedure in Annex I.D to Directive 91/271 if the first results after the entry into operation of the treatment plant meet the quality requirements laid down in Table 1 of Annex I. The Commission submits that the Court rejected that approach when it ruled on the substance of the case. However, in *Commission v Belgium*, the Court did not actually have the opportunity to rule on that specific point since in that case the decisive fact was that the Belgian Government had acknowledged that the two agglomerations concerned did not even have treatment plants,⁸ which is why the latter judgment cannot be said to have confirmed the test adopted in *Commission v Italy*.⁹

35. That being so, it may be concluded that, in reality, there has been only one occasion on which the Court has had the opportunity of ruling on the relationship between Article 4 of and Annex I.D to Directive 91/271, and that only incidentally. That explains why the Court asked the parties to state their views on that issue in the present case.

C – Interpretation of Article 4 in the scheme of Directive 91/271

36. On an initial analysis of Directive 91/271 as a whole, it becomes apparent that the relationship between Article 4 and Annex I.D leads to a conflict with Article 3 of the directive.

37. If, in order to comply with Article 4, it is necessary to observe the procedure provided for in Annex I.D, it follows that the treatment plants should have been installed one year before the date set in Article 3 for the treatment of urban waste water because, according to the Commission, the procedure in Annex I.D must be carried out for one year.

38. However, the dates, laid down in Article 3 of the directive, by which all urban agglomerations must have collecting systems are the same as those laid down in Article 4(1) for the application of treatment under the conditions required by Article 4(3). An interpretation of Article 4 in the terms proposed by the Commission — and accepted by the Court in *Commission v Italy* —¹⁰ would inevitably deprive Article 3 of all practical effect.

39. To my mind, a literal interpretation of Articles 3 and 4 of Directive 91/271 makes it possible to avoid the conflict indicated and reach a solution consistent with the scheme of the directive.

6 — C-565/10, EU:C:2012:476, paragraphs 37 to 39.

7 — C-395/13, EU:C:2014:2347.

8 — C-395/13, EU:C:2014:2347, paragraph 48.

9 — C-565/10, EU:C:2012:476.

10 — C-565/10, EU:C:2012:476, paragraphs 37 to 39.

40. In that regard, it should be noted, first, that Article 4 does not refer to Annex I.D at any point. Annex I is referred to explicitly only in Article 4(3), which provides that ‘discharges ... described in paragraphs 1 and 2 shall satisfy the relevant requirements of Annex I.B’. Those requirements concern the quality of discharges.

41. For its part, Annex I.D concerns the ‘reference methods for monitoring and evaluation of results’. In other words, it concerns the procedures to be followed in order to confirm that discharges subsequently comply with the quality requirements laid down by the directive.

42. Those ‘reference methods for monitoring and evaluation’ must be applied while plants are operational, that is, indefinitely. Article 15(1) of Directive 91/271 provides that the authorities must monitor discharges ‘to verify *compliance with the requirements of Annex I.B* in accordance with the *control procedures laid down in Annex I.D*’.¹¹

43. It is clear, therefore, that Annex I.D refers to a continuing obligation aimed at ensuring that discharges satisfy *over time* the quality requirements which they must have satisfied *since the entry into operation* of the plant. I do not find persuasive the view that a plant may start operating for the purposes of Article 4 of Directive 91/271 only if its discharges have achieved a certain quality over the course of one year — which is the position maintained by the Commission when it argues that Article 4 is complied with only if the procedure in Annex I.D has been followed.

44. The fact that (as the Commission maintained at the hearing) experience demonstrates that cases are not unusual of treatment plants which start operating in conditions which do not make it possible to ensure the quality levels required by Directive 91/271 cannot justify the practice of considering that plants constructed within the time limits laid down in Article 3 of the directive have become operational only when it is established that the samples examined over the course of one year in accordance with the procedure laid down in Annex I.D satisfy the levels laid down in Annex I.B. In the face of that possible situation, the correct approach is, rather, to establish from the outset whether the plant satisfies the necessary conditions to start operating, that is, whether it complies at that time with the requirements of Annex I.B. To establish that point, it is not necessary to complete the sampling procedure laid down in Annex I.D, the rationale for which, as I have already stated, is to ensure that the quality of treated water is always at the level which should have been guaranteed from the very time when the plant first started to operate.

D – The application of the proposed interpretation of Article 4 of Directive 91/271 to the circumstances of the case

45. On that basis, the action brought by the Commission may succeed only in relation to the agglomerations which, on the date laid down in Article 4 of Directive 91/271, did not have an operational collecting system meeting the requirements prescribed in Annex I.B to the directive. However, the action must be dismissed as regards the agglomerations which had, on that date, an operational collecting system meeting the conditions of Annex I.B, there being no need for the checks laid down in Annex I.D for the first year of operation to have been successfully completed.

V – Costs

46. Pursuant to Article 138(1) of the Rules of Procedure, I propose that the Court order the parties to bear their own costs.

¹¹ — Emphasis added.

VI – Conclusion

47. In the light of the considerations set out, I propose that the Court should:

- (1) Declare that the Portuguese Republic has failed to fulfil its obligations under Article 4 of Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment as regards the agglomerations which, on the date laid down in that article, did not have an operational collecting system meeting the requirements prescribed in Annex I.B to the directive.
- (2) Dismiss the action in relation to the agglomerations which had, on that date, an operational collecting system meeting the conditions of Annex I.B, there being no need for the checks laid down in Annex I.D for the first year of operation to have been successfully completed.
- (3) Order the parties to bear their own costs.