



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 5 September 2019<sup>1</sup>

**Case C-642/18**

**European Commission**

**v**

**Kingdom of Spain**

(Action for failure to fulfil obligations — Environment — Directive 2008/98/EC — Waste — Waste management plans — Evaluation and revision — Time limit — Notification of the Commission — Autonomous Communities of Balearic Islands and Canary Islands)

### **I. Introduction**

1. The Waste Directive<sup>2</sup> provides for the development of waste management plans and the regular evaluation and revision thereof. The issue to be resolved in the present proceedings is whether Spain has carried out this revision in a timely manner in two regions. In particular, the question is whether the revision is required to be completed within a certain time period. The relevant provision was newly introduced in the Waste Directive and its wording is, unfortunately, not especially clear on this point.

### **II. Legal framework**

2. Article 28 of the Waste Directive requires Member States to draw up waste management plans and contains requirements with respect to the content of such plans:

‘1. Member States shall ensure that their competent authorities establish, in accordance with Articles 1, 4, 13 and 16, one or more waste management plans.

...

2. The waste management plans shall set out an analysis of the current waste management situation in the geographical entity concerned, as well as the measures to be taken to improve environmentally sound preparing for re-use, recycling, recovery and disposal of waste and an evaluation of how the plan will support the implementation of the objectives and provisions of this Directive.

3. ...’

<sup>1</sup> Original language: German.

<sup>2</sup> Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3) as amended by Commission Directive (EU) 2015/1127 of 10 July 2015 (OJ 2015 L 184, p. 13).

3. Article 30(1) of the Waste Directive governs the evaluation and revision of the plans:

‘Member States shall ensure that the waste management plans and waste prevention programmes are evaluated at least every sixth year and revised as appropriate and, where relevant, in accordance with Articles 9 and 11.’

4. Articles 9 and 11 of the Waste Directive contain specific targets in respect of waste prevention and re-use and recycling.

5. Under Article 33(1) of the Waste Directive, the Commission is to be informed:

‘Member States shall inform the Commission of the waste management plans and waste prevention programmes referred to in Articles 28 and 29, once adopted, and of any substantial revisions to the plans and programmes.’

6. Article 40(1) of the Waste Directive contains the period for transposition:

‘Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 12 December 2010.

...’

### **III. Preliminary proceedings and form of order sought by the applicant**

7. On 18 November 2016, the Commission invited Spain to submit observations on, inter alia, the allegation that waste management plans in certain Spanish regions have not been revised within the time limit. After receiving Spain’s reply, on 14 July 2017 the Commission sent a reasoned opinion to that Member State, in which it specified a final period of up to 14 September 2017 to remedy the failure to fulfil obligations under the Waste Directive, which the Commission considered there to have been. On 12 October 2018, the Commission filed the present action.

8. After it withdrew parts of its original action, the Commission now requests that the Court should:

- declare, in accordance with the first paragraph of Article 258 TFEU, that the Kingdom of Spain has
  - failed to fulfil its obligations under Article 30(1) of the Waste Directive by not revising the waste management plans provided for in that directive in respect of the Autonomous Communities of the Balearic Islands and the Canary Islands,
  - failed to fulfil its obligations under Article 33(1) of the Waste Directive by not officially informing the Commission of the revision of the waste management plans concerning the Autonomous Communities of the Balearic Islands and the Canary Islands;
- order the Kingdom of Spain to pay the costs.

9. In its rejoinder the Kingdom of Spain requests

- that the action is dismissed as inadmissible or, in the alternative, as unfounded, and
- that the European Commission is ordered to pay the costs.

10. The parties have submitted written observations.

#### IV. Legal assessment

11. In my view, the action is inadmissible since, as I will explain presently, the Commission asked Spain too soon to submit its observations on the allegation that waste management plans had been revised too late. I will therefore then only give my opinion in the alternative as to whether the action would be well founded if it were to be admitted by the Court nonetheless.

##### A. Admissibility

12. Although in its rejoinder Spain requests that the action be dismissed as inadmissible, no reasons are given for that request.

13. Furthermore, it would be out of time under Article 127 of the Rules of Procedure. According to that provision, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. Such matters are not apparent, however.

14. Nevertheless, the Court may examine doubts concerning the admissibility of the action of its own motion.<sup>3</sup> In the present case, such doubts arise from the date of sending the letter of 18 November 2016 in which the Commission invited Spain, in accordance with Article 258 TFEU, to submit its observations on the allegations at issue in connection with the revision of waste management plans.

15. As the Court has held, in order for a letter of formal notice to be issued, the Commission must allege a prior failure by the Member State concerned to fulfil an obligation incumbent upon it.<sup>4</sup> Even if that Member State does not consider it necessary to avail itself of the opportunity to submit its observations, such an opportunity constitutes an essential guarantee required by the TFEU and amounts to an essential procedural requirement in proceedings relating to the finding of a failure on the part of a Member State. The letter of formal notice cannot therefore relate in particular to failure to transpose a directive in respect of which the time limit for implementation had not yet expired.<sup>5</sup> The same applies where the Commission alleges the breach of some other kind of obligation which must be fulfilled within a particular period.<sup>6</sup> If the Commission sends the letter of formal notice to a Member State before the expiry of that period, it is ineffective. An action based on such a premature letter of formal notice under Article 258 TFEU would be inadmissible due to an incorrect preliminary procedure.<sup>7</sup>

16. Article 28(1) of the Waste Directive requires Member States to draw up waste management plans. In accordance with Article 40, Member States must bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 12 December 2010. In addition, under Article 30(1) of the Waste Directive, Member States must ensure that the waste management plans and waste prevention programmes are evaluated at least every sixth year and revised as appropriate.

3 Judgments of 31 March 1992, *Commission v Italy* (C-362/90, EU:C:1992:158, paragraph 8); of 14 January 2010, *Commission v Czech Republic* (C-343/08, EU:C:2010:14); and of 22 September 2016, *Commission v Czech Republic* (C-525/14, EU:C:2016:714, paragraph 14).

4 Order of 13 September 2000, *Commission v Netherlands* (C-341/97, EU:C:2000:434, paragraph 18), and judgments of 15 February 2001, *Commission v France* (C-230/99, EU:C:2001:100, paragraph 32); of 27 October 2005, *Commission v Luxembourg* (C-23/05, EU:C:2005:660, paragraph 7); and of 21 July 2016, *Commission v Romania* (C-104/15, not published, EU:C:2016:581, paragraph 35).

5 Judgments of 27 October 2005, *Commission v Luxembourg* (C-23/05, EU:C:2005:660, paragraph 7), and of 21 July 2016, *Commission v Romania* (C-104/15, not published, EU:C:2016:581, paragraph 35).

6 See to that effect judgment of 21 July 2016, *Commission v Romania* (C-104/15, not published, EU:C:2016:581, paragraph 36).

7 Judgment of 27 October 2005, *Commission v Luxembourg* (C-23/05, EU:C:2005:660, paragraph 8).

17. Consequently, the waste management plans were required to be drawn up for the first time by 12 December 2010. The period laid down in Article 30(1) of the Waste Directive, which the Commission alleges has not been observed, therefore ended (at the earliest<sup>8</sup>) 6 years later, on 12 December 2016.

18. However, the Commission had already invited Spain a few weeks prior to that, on 18 November 2016, to submit its observations on the allegation that waste management plans in certain Spanish regions had not been revised on time.

19. It is true that the period prescribed by the Commission for submitting observations did not end until after 12 December 2016, namely on 18 January 2017.<sup>9</sup> However, the preliminary procedure under Article 258 TFEU presupposes that the Member State has already failed to fulfil an obligation under the Treaties. The Commission therefore cannot, as it were, invite that Member State to submit its observations in advance, in anticipation of a future infringement. Moreover, it could not be ruled out that such an advance request could adversely affect the Member State's rights of defence and lead to confusion as regards compliance with the procedural requirements.

20. Consequently, the action cannot be based on the letter of formal notice of 18 November 2016. Nor is it apparent that, after the expiry of the period laid down in Article 30(1) of the Waste Directive, the Commission asked Spain again to submit its observations.

21. The action is therefore inadmissible.

22. It cannot, however, be ruled out that the Court may not share my view regarding the admissibility of the action, or at least may not adopt it, for example because the parties have not commented on the premature invitation to submit observations.

23. Consequently, in the alternative I will examine the merits of the action below.

## **B. In the alternative: Merits of the action**

24. The Commission takes the view that, by not revising the waste management plans concerning the Autonomous Communities of the Balearic Islands and the Canary Islands in accordance with the requirements of the Waste Directive, that is to say within 6 years of expiry of the period for transposition, and by not communicating that revision to the Commission, Spain has failed to fulfil its obligations under Article 30(1) and Article 33(1) of that directive.

### ***1. Revision of waste management plans***

25. In accordance with Article 30(1) of the Waste Directive, Member States must ensure that the waste management plans are evaluated at least every sixth year and revised as appropriate.

26. The Commission and Spain agree that the Autonomous Communities of the Balearic Islands and the Canary Islands are in fact revising their waste management plans, but have not yet completed these procedures by the end of the written procedure.

<sup>8</sup> See in this respect below point 31 et seq.

<sup>9</sup> p. 8 of the letter of formal notice, Annex I to the action.

**(a) *The need for revision***

27. Spain recognises that waste management plans are required to be evaluated every 6 years. However, it considers that it is only necessary to amend the plans if the existing plans no longer meet the requirements. That is not the case, however.

28. The Commission rightly objects to Spain's argument that, under Article 28(2) of the Waste Directive, the waste management plans must contain an analysis of the waste management situation. With the exception of the French version, all language versions of the directive expressly provide that the analysis is to be of the *current* situation. The obligation to evaluate the plans *at least* every sixth year shows that analyses dating back 6 years simply cannot be considered to be current. Even if the evaluation were to show that the situation has not altered, that would still need to be explicitly stated. That finding should at least be attached to the waste management plan in such a way that when reading the plan it is clear that the analysis continues to be current. The Member States may decide whether to do this by explicitly amending the plan or by some other means, for example by attaching an evaluation report to the plan. Nevertheless, this is the minimum revision of the plan which is necessary in every case.

29. In the present case, Spain also already informed the Commission in the preliminary proceedings that the waste management plans for the Balearic Islands are in the process of being revised<sup>10</sup> and that the Canary Islands are drawing up a waste management plan.<sup>11</sup> Spain maintained this submission in the course of the proceedings.

30. As it cannot be assumed that these regions would change their plans even if this was not necessary, Spain has at least implicitly admitted that the waste management plans for these two regions do need to be revised.

**(b) *The deadline for the revision***

31. In the rejoinder, however, Spain adds to its legal argument that, although the plans should be evaluated after 6 years, there is no deadline for the completion of that evaluation and making any amendments.

32. It should firstly be noted that that argument is late because Spain introduced it for the first time in the rejoinder.<sup>12</sup> Conversely, in its defence, Spain still assumed that the deadline also applied to the revision.<sup>13</sup>

33. In any case, the argument is ultimately not convincing on the merits either.

**(i) *Wording***

34. It is true that according to some language versions of Article 30(1) of the Waste Directive it may actually be suggested that the six-year period relates exclusively to the evaluation, whereas the revision is not necessarily subject to that period. This follows, grammatically, from the order of the terms for example in French ('que les programmes de prévention des déchets soient évalués au moins tous les six ans et révisés, s'il y a lieu'), English ('the waste management plans and waste prevention

<sup>10</sup> See Annex II to the application initiating proceedings, p. 23 et seq.

<sup>11</sup> See Annex II to the application initiating proceedings, p. 30 et seq.

<sup>12</sup> See above, point 13.

<sup>13</sup> Point 19.

programmes are evaluated at least every sixth year and revised as appropriate'), Italian ('i piani di gestione e i programmi di prevenzione dei rifiuti siano valutati almeno ogni sei anni e, se opportuno, riesaminati') and Spanish ('los planes de gestión de residuos y los programas de prevención de residuos se evalúen, como mínimo, cada seis años y se revisen en la forma apropiada').

35. These versions could be understood in particular as meaning that a revision has to take place when *and as soon as* it is necessary. Both the necessity and the time of the revision would then have to be assessed on a case-by-case basis according to the results of the evaluation.

36. However, these language versions do not preclude the six-year period from also applying to the revision. The provision can also be understood as requiring Member States to evaluate the plans at least every sixth year and — if necessary — also to revise them within that period.<sup>14</sup> Such an interpretation would only be excluded if a different period had been explicitly specified for any revision.<sup>15</sup>

37. The German version of Article 30(1) of the Waste Directive is in fact more in line with this second interpretation. In the German version the deadline comes before both steps ('die Abfallwirtschaftspläne und Abfallvermeidungsprogramme [werden] mindestens alle sechs Jahre bewertet und gegebenenfalls — ... — überarbeitet'). However, this relationship is also not worded in a grammatically conclusive manner. It would also be possible to relate the deadline only to the first step.

38. Consequently, for the interpretation of this provision, the real intention of its author must be identified,<sup>16</sup> in particular by examining its context and purpose<sup>17</sup> as well as its development.<sup>18</sup>

#### *(ii) Development of the provision*

39. The development of Article 30(1) of the Waste Directive shows above all that the Member States wanted to avoid an obligation to revise waste management plans regularly and independently of actual needs.

40. The Commission had proposed that the waste management plans be revised at least every 5 years.<sup>19</sup> The Council supplemented this proposal with the evaluation and the clarification that the plans would only have to be revised where necessary. In so doing, the period was extended to 6 years.<sup>20</sup>

41. It cannot be ruled out that at the same time the Council intended to exempt a possible revision from any time limit, but that also cannot necessarily be established. It is likewise conceivable that the extension of the period to 6 years was aimed at allowing sufficient time for the implementation of *both* steps, namely the evaluation and the revision.

<sup>14</sup> Also according to Spain in paragraph 19 of the defence.

<sup>15</sup> Illustrative judgment of 2 May 2002, *Commission v France* (C-292/99, EU:C:2002:276, paragraph 41).

<sup>16</sup> Judgments of 12 November 1969, *Stauder* (29/69, EU:C:1969:57, paragraph 3); of 3 October 2013, *Confédération paysanne* (C-298/12, EU:C:2013:630, paragraph 22); and of 4 February 2016, *C & J Clark International and Puma* (C-659/13 and C-34/14, EU:C:2016:74, paragraph 122).

<sup>17</sup> Judgments of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraph 14); of 23 November 2016, *Bayer CropScience and Stichting De Bijenstichting* (C-442/14, EU:C:2016:890, paragraph 84); and of 8 June 2017, *Sharda Europe* (C-293/16, EU:C:2017:430, paragraph 21).

<sup>18</sup> Judgments of 22 October 2009, *Zurita García and Choque Cabrera* (C-261/08 and C-348/08, EU:C:2009:648, paragraph 57), and of 3 October 2013, *Confédération paysanne* (C-298/12, EU:C:2013:630, paragraph 27).

<sup>19</sup> Article 26(1) of the Proposal for a Directive of the European Parliament and of the Council on waste (COM(2005) 667 final).

<sup>20</sup> Article 27 of Common Position (EC) No 4/2008 of 20 December 2007 adopted by the Council with a view to the adoption of Directive 2008/.../EC of the European Parliament and of the Council of ... on waste and repealing certain Directives (OJ 2008 C 71E, p. 16). See Article 26b of the draft of 11 May 2007 (Council document 9475/07, p. 32).



(iii) *Context and purpose*

42. Both the context and the purpose of the revision of waste management plans suggest that the stated period of 6 years should also relate to the revision.

43. At least the evaluation is intended to take place *at least* every 6 years. This implies that the plans must also be evaluated at shorter intervals if this proves to be necessary. The deadline therefore constitutes the outer limit for the evaluation that is not to be exceeded, in particular, by starting the evaluation within the period but only completing it later, as Spain argues.

44. If, however, the need for a revision then arises from the evaluation, it would not make sense to impose no time limit. Without a time limit, there would be a risk that a revision that is in principle necessary would not be carried out at all or would only be carried out with a delay. The practical effect of Article 30(1) of the Waste Directive and the high level of environmental protection within the meaning of Article 3(3) TEU, Article 37 of the Charter of Fundamental Rights of the European Union and Article 191(2) TFEU would no longer be ensured.

45. Even the assumption of a tacit obligation to revise the plans within a reasonable period may not sufficiently ensure the effectiveness of Article 30(1) of the Waste Directive.<sup>21</sup> Such a ‘reasonable period’ would in fact be associated with considerable practical difficulties. Before a Court ruling on this matter, it would be unclear whether such a period exists at all and it would therefore have to be clarified in each individual case what period would be reasonable. Although the Court has already accepted such an unwritten time limit, that finding was a makeshift solution because no period at all was provided for.<sup>22</sup> In the present case, by contrast, it would be perfectly reconcilable with the wording of the provision for the stated period of 6 years to apply to the revision.<sup>23</sup>

46. Nor does the fact that the revision of a plan necessarily takes time militate against this. It is true that it is impossible to revise a plan when the period expires if the evaluation is only completed at that time. However, this problem can be addressed by carrying out the evaluation in good time, allowing sufficient time for any revision that may be required.

47. It should also be possible for the competent bodies to organise the application of Article 30(1) of the Waste Directive accordingly without any great difficulty. They should be able to anticipate to a relatively large extent the results of the evaluation and thus the need for revision on the basis of their practical experience in waste management. This is moreover also shown by the information communicated by Spain in relation to the situation in the two regions at issue. It seemed clear from the outset there that the evaluation would lead to a revision.<sup>24</sup>

48. Finally, the interpretation of Article 30(1) of the Waste Directive should take account of the fact that it does not concern obligations that apply directly with respect to private individuals. On the contrary, the Member States, which were involved in the Council’s adoption of the Waste Directive, must evaluate and revise the waste management plans. It is therefore justified to interpret an ambiguous provision in such a way that its practical effectiveness is ensured.

49. Consequently, contrary to the view taken by Spain, Article 30(1) of the Waste Directive must be interpreted as meaning that Member States must evaluate the plans at least every sixth year and — if necessary — also to revise them within that period. That has not happened in the present case.

21 See to that effect judgment of 26 June 2003, *Commission v France* (C-233/00, EU:C:2003:371, paragraphs 116 and 117).

22 Judgments of 2 June 2005, *Commission v Ireland* (C-282/02, EU:C:2005:334, paragraphs 31 and 33), and of 25 March 2010, *Commission v Spain* (C-392/08, EU:C:2010:164, paragraph 21).

23 cf. judgment of 26 June 2003, *Commission v France* (C-233/00, EU:C:2003:371, paragraph 118).

24 See the proof in footnotes 10 and 11.

50. If the Court deems the action to be admissible, the first head of claim must therefore be allowed.

## ***2. Communication of revised plans to the Commission***

51. Conversely, the second head of claim of the action, seeking a declaration that, by not officially informing the Commission of the revision of the waste management plans concerning the Autonomous Communities of the Balearic Islands and the Canary Islands, Spain has failed to fulfil its obligations under Article 33(1) of the Waste Directive, must be rejected. Spain rightly refers to the fact that in accordance with Article 33(1) of the Waste Directive it is required only to inform the Commission of substantial changes to the waste management plans. However, the Commission has not shown that the revision of the plans for these two regions necessarily leads to substantial changes.

## **V. Costs**

52. If the Court shares my view regarding the admissibility of the action, the Commission must bear the costs of the proceedings in accordance with Article 138(1) of the Rules of Procedure, as Spain has applied for costs in that regard.

53. By contrast, if the Court deems it to be admissible and agrees with the statements I have made in the alternative, the decision on costs would be more complicated. Both parties succeed on some heads and thus also fail on others. Insofar as the Commission has withdrawn the action, this is in part attributable to the fact that Spain has revised the waste management plans for certain regions late, but with regard to the originally alleged failure to fulfil the obligations of Article 28(1) of the Waste Directive also attributable to the fact that the Commission has not examined the content of the older waste management plans available to it. Both parties in that case should therefore bear their own costs in accordance with the first sentence of Article 138(3) of the Rules of Procedure.

## **VI. Conclusion**

54. I therefore propose that the Court give the following ruling:

- (1) The action is dismissed as inadmissible.
- (2) The European Commission is ordered to pay the costs of the proceedings.

55. However, if the Court declares the action to be admissible, it should allow it, at least in part:

- (1) By not revising the waste management plans concerning the Autonomous Communities of the Balearic Islands and the Canary Islands in accordance with the requirements of the Waste Directive, that is to say within 6 years of the expiry of the period for transposition, the Kingdom of Spain has failed to fulfil its obligations under Article 30(1) of that Directive.
- (2) The action is dismissed as to the remainder.
- (3) The European Commission and the Kingdom of Spain each bear their own costs.