



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

15 November 2012*

(Failure of a Member State to fulfil obligations — Pollution control — Limit values for concentrations of PM₁₀ in ambient air)

In Case C-34/11,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 21 January 2011,

European Commission, represented by P. Guerra e Andrade, A. Alcover San Pedro and S. Petrova, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Inez Fernandes and M.J. Lois, acting as Agents,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Ilešič, E. Levits, M. Safjan and M. Berger (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 January 2012,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By its action, the European Commission requests the Court to declare that, by having failed to ensure that the concentrations of PM₁₀ in ambient air do not exceed the limit values required under Article 13 of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient

* Language of the case: Portuguese.

air quality and cleaner air for Europe (OJ 2008 L 152, p. 1), the Portuguese Republic has failed to fulfil its obligations under Article 13 in relation to the zones and agglomerations of Braga, Porto Litoral, Área Metropolitana de Lisboa Norte and Área Metropolitana de Lisboa Sul.

Legal context

Directive 96/62/EC

- 2 Under Article 11 of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55), Member States are required to submit annual reports on compliance with the limit values applicable to PM₁₀ concentrations.

Directive 1999/30/EC

- 3 Under Article 5(1) of Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air (OJ 1999 L 163, p. 41):

‘Member States shall take the measures necessary to ensure that concentrations of PM₁₀ in ambient air, as assessed in accordance with Article 7, do not exceed the limit values laid down in Section I of Annex III as from the dates specified therein.

...’

- 4 Under Article 5(4) of this directive, where those limit values are exceeded owing to concentrations of PM₁₀ in ambient air due to natural events, which are significantly in excess of normal background levels from natural sources, the Member State concerned is to inform the Commission, providing the necessary justification.
- 5 Annex III to the directive sets two types of limits for PM₁₀ particulate matter whilst distinguishing two stages, each of which is itself divided into two periods. In relation to the periods of stage 1, which runs from 1 January 2005 to 31 December 2009, on the one hand the daily value of 50 µg/m³ must not be exceeded more than 35 times per calendar year and, on the other, the annual value not to be exceeded is 40 µg/m³. In relation to the periods of stage 2, which runs from 1 January 2010, on the one hand the daily value not to be exceeded more than 7 times per calendar year is 50 µg/m³ and, on the other hand, the annual value is 20 µg/m³.
- 6 For the purposes of the assessment provided for in Article 7 of the directive, it is necessary to make the distinction between ‘zone’ and ‘agglomeration’.
- 7 Under Article 2(8) of Directive 1999/30, ‘zone’ means ‘part of their territory delimited by the Member States’.
- 8 Article 2(9) of the directive defines an agglomeration as ‘a zone with a population concentration in excess of 250 000 inhabitants or, where the population concentration is 250 000 inhabitants or less, a population density per km² which for the Member States justifies the need for ambient air quality to be assessed and managed’.

Directive 2008/50

9 Directive 2008/50, which entered into force on 11 June 2008, is a codification of the five legislative measures relating to the assessment and management of ambient air quality, in particular Directives 96/62 and 1999/30.

10 These directives were repealed by Article 31 of Directive 2008/50, with effect from 11 June 2010, without prejudice to the Member States' obligations as regards the time-limits for transposition and application of the directives.

11 Article 13 of Directive 2008/50, headed 'Limit values and alert thresholds for the protection of human health', provides in paragraph 1:

'Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM₁₀, lead, and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI.

...

Compliance with these requirements shall be assessed in accordance with Annex III.

The margins of tolerance laid down in Annex XI shall apply in accordance with Article 22(3) and Article 23(1).'

12 It should be noted that Annex XI to Directive 2008/50 has not amended the limit values set for PM₁₀ by Annex III to Directive 1999/30.

13 However, in Article 22, Directive 2008/50 lays down special rules concerning postponement of the deadlines for attaining the limit values and, in particular, sets the conditions for exemption from the requirement to apply these values.

14 Under Article 22(2) and (4) of this directive:

'2. Where, in a given zone or agglomeration, conformity with the limit values for PM₁₀ as specified in Annex XI cannot be achieved because of site-specific dispersion characteristics, adverse climatic conditions or transboundary contributions, a Member State shall be exempt from the obligation to apply those limit values until 11 June 2011 provided that the conditions laid down in paragraph 1 are fulfilled and that the Member State shows that all appropriate measures have been taken at national, regional and local level to meet the deadlines.

...

4. Member States shall notify the Commission where, in their view, paragraphs 1 or 2 are applicable, and shall communicate the air quality plan referred to in paragraph 1 including all relevant information necessary for the Commission to assess whether or not the relevant conditions are satisfied. In its assessment, the Commission shall take into account estimated effects on ambient air quality in the Member States, at present and in the future, of measures that have been taken by the Member States as well as estimated effects on ambient air quality of current Community measures and planned Community measures to be proposed by the Commission.

Where the Commission has raised no objections within nine months of receipt of that notification, the relevant conditions for the application of paragraphs 1 or 2 shall be deemed to be satisfied.

If objections are raised, the Commission may require Member States to adjust or provide new air quality plans.'

Pre-litigation procedure

- 15 Whilst analysing the annual reports prepared on the basis of Directives 96/62 and 1999/30 on compliance with the limit values applicable to the concentration of PM₁₀ which were submitted by the Portuguese Republic for the years 2005, 2006 and 2007, the Commission noted that, during this period, the values were exceeded in eight zones and agglomerations, namely Braga, Vale do Ave, Vale de Sousa, Porto Litoral, Zona de Influência de Estarreja, Área Metropolitana de Lisboa Norte, Área Metropolitana de Lisboa Sul and Setúbal.
- 16 Taking the view that the Portuguese Republic was therefore not complying with the requirements under Article 5(1) of Directive 1999/30, the Commission sent this Member State, on 2 February 2009, a letter of formal notice in which it further alleged that the breaches of the limit values observed indicated a long-term trend of non-compliance with these requirements.
- 17 The Commission set out in an annex those zones where the breaches of the PM₁₀ limit values had been recorded and invited the Portuguese authorities to put forward their observations within a period of two months.
- 18 In its response of 6 April 2009, the Portuguese Republic made clear that it had submitted on 5 March 2009 an application under Article 22 of Directive 2008/50 for a postponement of the deadline for attaining compliance with the limit values set in Annex XI to the directive, since it regarded the conditions for such a postponement as fulfilled in relation to the agglomerations of Vale do Ave, Vale de Sousa, Porto Litoral, Área Metropolitana de Lisboa Norte, Área Metropolitana de Lisboa Sul and Setúbal.
- 19 In relation to the agglomeration of Setúbal, the Portuguese authorities noted that they had previously explained, prior to the letter of formal notice, that the exceeding of the limit values was due to natural events such as those referred to in Article 5(4) of Directive 1999/30, and they provided the description of the method used to determine the importance of the influence of these natural events.
- 20 Likewise, in relation to the zones of Braga and Zona de Influência de Estarreja, the Portuguese Republic informed the Commission of the drawing-up of programmes for the improvement of air quality and asked for the deadline prescribed for attaining the set limit values to be postponed.
- 21 By decision of 26 November 2009, the Commission, objecting to the exemption requested by the Portuguese Republic on 5 March 2009 under Article 22 of Directive 2008/50, rejected this application.
- 22 On 22 March 2010, having regard to the objections set out in its decision of 26 November 2009 and the aforementioned annual reports, the Commission sent the Portuguese Republic a reasoned opinion.
- 23 In its response dated 9 June 2010, the Portuguese Republic invoked a series of measures in the process of being applied and made clear its willingness to continue the efforts undertaken with a view to fully complying with the limit values applicable to concentration of PM₁₀, whilst conceding that these values had been exceeded in the zones and the agglomerations of Aveiro/Ílhavo, Zona de Influência de Estarreja, Porto Litoral, Braga and Área Metropolitana de Lisboa Norte.
- 24 The Commission was not satisfied with that reply and accordingly decided to bring the present action.

The action

Arguments of the parties

- 25 The Commission, relying on the objections set out in its decision of 26 November 2009 and on the annual reports concerning compliance with the limit values applicable to the concentration of PM₁₀ which were submitted by the Portuguese Republic for the years 2005, 2006 and 2007, maintains that these limit values have been exceeded in the zones and the agglomerations of Braga, Porto Litoral, Área Metropolitana de Lisboa Norte and Área Metropolitana de Lisboa Sul.
- 26 According to the Commission, these reports state that the relevant limit values are still being exceeded in several zones and agglomerations and reveal in certain cases a long-term trend of the limit values being exceeded. This finding is confirmed by the report relating to 2009, submitted by the Portuguese Republic on 30 September 2010, so far as concerns the zones and agglomerations of Braga, Porto Litoral, Aveiro/Ílhavo, Área Metropolitana de Lisboa Norte and Área Metropolitana de Lisboa Sul. In this last agglomeration, limits are still being exceeded at certain sampling points though account is taken of natural events. In addition, the Commission notes that the zone of Aveiro/Ílhavo did not appear in the reports prior to the letter of formal notice and the reasoned opinion.
- 27 The Portuguese Republic disputes, firstly, that the instances of the limit values applicable to the concentration of PM₁₀ being exceeded reflect a long term trend in Portugal.
- 28 Additionally, it submits that the Commission, in its reasoned opinion, did not set out which were the zones and the agglomerations concerned by the complaint made against it.
- 29 Finally, after drawing attention to several measures taken by the Portuguese authorities which show a positive change in relation to reduction in the instances of limit values applicable to the concentration of PM₁₀ being exceeded, the Portuguese Republic, taking the data available from the report relating to 2009 as its basis, concedes that, for the zones and agglomerations which are the subject of these proceedings, the daily limit value for PM₁₀ was still being exceeded, but not the annual limit value, which has not been exceeded in any of these zones or agglomerations since 2008.
- 30 Therefore, the Portuguese Republic submits that the present application should be dismissed in relation to all of the disputed complaints.
- 31 In its reply, the Commission makes clear that, in accordance with the system put in place by Directives 96/62 and 2008/50, the administrative management of ambient air quality is incumbent upon Member States, which leads to, firstly, the latter's competence to define the zones and agglomerations, to draw up the lists of the zones and agglomerations where the levels of the pollutants concerned exceed the limit values applicable to these pollutants or are lower than them, to determine the places where it is appropriate to carry out certain measures and to decide which measures will be taken, as well as, secondly, the obligation to provide in good time information on any exceeding of the limit values in the form of a report.
- 32 As a consequence, monitoring compliance with the limit values applicable to the pollutants concerned can only be carried out by the Commission on the basis of the values communicated by the Member State itself, which, furthermore, are transmitted within nine months after the end of the relevant year. Thus, the Commission can only find instances of limit values applicable to the concentration of PM₁₀ being exceeded where they occurred during the period covered by the reports transmitted by the Portuguese Republic.

- 33 The fact that these limit values continued to be exceeded during several years in certain zones reveals, according to the Commission, a systemic problem of which the Member State concerned must be perfectly aware, given that it itself collected the data and concluded that these limit values were exceeded.
- 34 The Commission thus considers that the system of the directives concerning the assessment and management of ambient air quality enables it to verify whether any failure to fulfil obligations has occurred solely on the basis of the admissible evidence made available to it, namely the information provided by the Member States, and that it is for the Member State concerned, on the basis of more recent information capable of proving current compliance with the limit values applicable to the relevant pollutants, to contradict the findings of the Commission. In the absence of such a reaction by the Member State concerned, the Commission must consider that the failure to fulfil obligations persists and can ask the Court to declare accordingly.
- 35 In this case, the Commission submits that, in the course of the pre-litigation procedure, it always requested that the Portuguese Republic comply with the limit values set by Directive 2008/50. The form of order sought in these infringement proceedings therefore does not relate to past years, but rather relates to a current failure to fulfil obligations the persistence of which can only be contested by the Portuguese Republic by proving compliance with the directive within the period set in the reasoned opinion. Therefore, it is incumbent upon the Portuguese Republic to prove that the breach of obligations no longer exists by adducing new data capable of showing that it has ceased. Inasmuch as the Portuguese Republic does not adduce this data, it should be concluded that the breach of obligations is current.
- 36 Furthermore, the Commission notes that it has no legal interest in this case in seeking from the Court a ruling on past facts given that it would gain no advantage from a judgment making a finding in relation to a past situation. If the Court found that, from 2005 to 2007, the Portuguese Republic had not complied with a directive which, though in force at the time, subsequently ceased to be applicable, such a judgment would generally have no practical effect.
- 37 In relation to the argument put forward by the Portuguese Republic that it did not specify in the reasoned opinion the zones and agglomerations not covered, the Commission submits that, given that the Member State concerned is the sole source of information on the limit values applicable to the concentration of PM₁₀ being exceeded, the Portuguese Republic is aware of the places where these limit values are exceeded. Since the relevant zones were the subject of a request for a derogation giving rise to the decision of the Commission of 26 November 2009, this Member State is sufficiently informed of the subject-matter of the dispute, given that it did not dispute the facts and that, in its subsequent statements, it itself referred to the zones in which the limit values had been exceeded. In addition, the Commission submits that it set out the relevant zones in its letter of formal notice and that they did not change in the reasoned opinion.
- 38 Furthermore, given that the Portuguese Republic admits in its defence that according to the latest available data it still does not guarantee that the daily limit value for PM₁₀ is not exceeded in four zones or agglomerations, but that it has meanwhile succeeded in ensuring that the annual limit value for PM₁₀ is not exceeded, the sole purpose of this action at the time of the end of the oral procedure is to seek a declaration that the Portuguese Republic, by not having taken the required measures, remains in breach of obligations in relation to the daily limit value for PM₁₀ in these four zones or agglomerations.
- 39 In its rejoinder, the Portuguese Republic contends that according to the settled case law of the Court, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, *inter alia*, Case C-143/02 *Commission v Italy* [2003] ECR I-2877, paragraph 11, and Case C-446/01 *Commission v Spain* [2003] ECR I-6053, paragraph 15).

40 Thus, on the expiry of this period, namely on 7 June 2010, the available data concerns the measures relating to 2009 and the zones and agglomerations mentioned by the Portuguese Republic in its response. The judgment of the Court should thus refer to this date, the observations made by the Commission relating to the moment to which the judgment must refer being without basis by virtue of the aforementioned case-law.

Findings of the Court

41 By its action, the Commission requests the Court to declare that the Portuguese Republic, by having failed to ensure that the concentrations of PM₁₀ in ambient air do not exceed the limit values required under Article 13 of Directive 2008/50, has failed to fulfil its obligations under this provision.

42 Even though the Portuguese Republic has not put forward a plea that this action is inadmissible, it should nevertheless be noted at the outset that the Court may of its own motion examine whether the conditions laid down in Article 258 TFEU for bringing an action for failure to fulfil obligations are satisfied (see, inter alia, Case C-362/90 *Commission v Italy* [1992] ECR I-2353, paragraph 8; judgment of 26 January 2012 in Case C-185/11 *Commission v Slovenia*, paragraph 28; and Case C-524/10 *Commission v Portugal* [2012] ECR, paragraph 64).

43 From that point of view, it should be examined whether the reasoned opinion and the action set out the complaints coherently and precisely in order that the Court may appreciate exactly the extent of the alleged infringement of European Union law, a condition which is necessary in order to enable the Court to determine whether there has been a breach of obligations as alleged (see, to this effect, Case C-199/04 *Commission v United Kingdom* [2007] ECR I-1221, paragraphs 20 and 21, and judgment of 24 March 2011 in Case C-365/10 *Commission v Slovenia*, paragraph 19).

44 Indeed, as follows in particular from Article 38(1)(c) of the Rules of Procedure of the Court of Justice and from the case-law relating to that provision, the application initiating proceedings must state the subject-matter of the dispute and a summary of the pleas in law on which the application is based and that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. It is therefore necessary for the essential points of law and fact on which a case is based to be indicated coherently and intelligibly in the application itself and for the form of order sought to be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a claim (see, inter alia, Case C-211/08 *Commission v Spain* [2010] ECR I-5267, paragraph 32; Case C-185/11 *Commission v Slovenia*, paragraph 29; and judgment of 19 April 2012 in Case C-141/10 *Commission v Netherlands*, paragraph 15).

45 In the present case, it follows from the form of order sought in the application that the action of the Commission relates only to the zones and agglomerations of Braga, Porto Litoral, Área Metropolitana de Lisboa Norte and Área Metropolitana de Lisboa Sul. Furthermore, in relation to the question as to which types of limit values set for PM₁₀ have been exceeded, the Commission has, in its reply, restricted the subject of its action to only the daily limit values for PM₁₀.

46 However, the Commission does not specify, either in the form of order sought in the application or in the grounds thereof, the years for which the breach of obligations is alleged. In invoking only Directive 2008/50, it merely alleges that there is a current breach of obligations and that the Court's decision must apply to the present and not the past, without however specifying the period referred to.

47 In those circumstances, it must be stated that the absence of an indispensable element from the content of the application initiating proceedings, such as the period during which the Portuguese Republic, according to the Commission's assertions, has infringed European Union law, does not satisfy the requirements of coherence, clarity and precision.

- 48 In addition, inasmuch as the Commission does not set out the exact period concerned by the alleged breach of obligations and fails, moreover, to provide pertinent evidence in laconically stating that it has no legal interest in this case in seeking from the Court a ruling on past facts given that it gains no advantage from a judgment making a finding in relation to a past situation, the Commission not only manifestly fails to have regard to the obligations, both for the Court and for itself, resulting from the case-law cited at paragraphs 43 and 44 of this judgment, but also fails to put the Court in a position to rule on these infringement proceedings.
- 49 It should however be noted that, as is apparent from the documents in the case, the verification of the annual reports relating to the years 2005, 2006 and 2007, submitted by the Portuguese Republic to the Commission, showed that daily limit values for PM₁₀ had been exceeded in several zones and agglomerations. On the basis of these reports, the Commission sent the Portuguese Republic a letter of formal notice, in which it considered that this Member State was not complying with the obligations laid down in Article 5(1) of Directive 1999/30. The Commission finally acknowledged, during the hearing, firstly, that the evidence on which it is basing its action is constituted by the data resulting from the annual reports relating to the years 2005, 2006 and 2007, and, secondly, given that there was no general and continuous breach of these obligations, that there was no systemic problem.
- 50 These conclusive indications demonstrate that the breach of the obligations imposed by Article 5(1) of Directive 1999/30 concerns, on any view, the daily limit values for PM₁₀ in ambient air being exceeded and covers the period from 2005 to 2007 in the zones and agglomerations of Braga, Porto Litoral, Área Metropolitana de Lisboa Norte and Área Metropolitana de Lisboa Sul.
- 51 Therefore, these infringement proceedings, within the limits thus defined, may be declared admissible.
- 52 In relation to the merits of this action, it need only be noted that the Portuguese Republic admits, in its observations, that the limit values applicable to the daily PM₁₀ concentrations in ambient air were exceeded within the limits noted at paragraph 50 of this judgment.
- 53 Consequently, the action should be upheld within these limits.
- 54 That said, it should be found that, in so far as the action covers the period subsequent to 2007, it does not satisfy the requirements of clarity and precision for the reasons set out at paragraphs 47 and 48 of this judgment and must accordingly be dismissed as inadmissible.
- 55 As a consequence, it is inappropriate, contrary to what the Commission appears to advance in the form of order sought in the application, to take into consideration Directive 2008/50. This directive is not in fact applicable to the facts complained of in relation to the Member State concerned, which are earlier in time than 11 June 2008, the date of its publication and entry into force.
- 56 Having regard to the preceding considerations, it must be held that, by having failed to ensure that, for the years 2005 to 2007, the daily concentrations of PM₁₀ in ambient air did not exceed the limit values set in Article 5(1) of Directive 1999/30 in the zones and agglomerations of Braga, Porto Litoral, Área Metropolitana de Lisboa Norte and Área Metropolitana de Lisboa Sul, the Portuguese Republic has failed to fulfil its obligations under this provision.

Costs

- 57 Under Article 138(1) 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. Under the first sentence of Article 138(3), the parties are to bear their own costs where each party succeeds on some and fails on other heads.

- 58 In the present case, account should be taken of the fact that the Commission's complaint in respect of non-compliance with the obligations resulting from Article 13 of Directive 2008/50, in relation to the period following 2007, has been declared inadmissible.
- 59 Accordingly, the Commission and the Portuguese Republic should each be ordered to bear their own costs.

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

1. **Declares that, by having failed to ensure that, for the years 2005 to 2007, the daily concentrations of PM₁₀ in ambient air did not exceed the limit values set in Article 5(1) of Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air, in the zones and agglomerations of Braga, Porto Litoral, Área Metropolitana de Lisboa Norte and Área Metropolitana de Lisboa Sul, the Portuguese Republic has failed to fulfil its obligations under this provision;**
2. **Dismisses the action as to the remainder;**
3. **Orders the European Commission and the Portuguese Republic to bear their own costs.**

[Signatures]