Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 30 March 2017 [1]

Case C-320/15

European Commission
v

Hellenic Republic

(Failure of a Member State to fulfil obligations — Environment — Urban waste water treatment — Article 4(1) and (3) and Annex I.B and I.D to Directive 91/271/EEC — Representative samples)

I. Introduction

1. Council Directive 91/271/EEC concerning urban waste water treatment ('UWWTD') [2] aims at protecting the environment from the adverse effects of, inter alia, insufficiently treated urban waste water discharges. It sets out the obligations of the Member States to subject urban waste water to appropriate treatment. To show that the urban waste water complies with the applicable requirements, the Member States have to collect samples of the urban waste water that they have subjected to the prescribed treatment.

2. The Commission alleges that the Hellenic Republic has infringed its obligations under the UWWTD in respect of eight agglomerations. That Member State does not contest the alleged infringement for five of those agglomerations. Concerning the other three agglomerations, however, the Hellenic Republic and the Commission disagree as to whether the former provided the latter with sufficient samples of the treated water.

3. The issue of how many samples are required under the UWWTD is certainly not a novel one. However, it is perhaps fair to admit that in the past, the Court has not always approached it in perfect unity. In accordance with the request made by the Court, this Opinion therefore focuses on clarifying that specific issue.

II. Legal framework

4. The obligations set out under the UWWTD are determined in relation to a so-called population equivalent (the 'p.e.') of the agglomeration concerned. [3]

1 Original language: English.

2 Council Directive of 21 May 1991 (OJ 1991 L 135, p. 40).

3 That parameter is defined in Article 2(6) of the UWWTD as the organic biodegradable load having a five-day biochemical oxygen demand of 60 g of oxygen per day.

5. Pursuant to Article 3(1) of the UWWTD, the Member States had to have ensured, inter alia, that agglomerations with a p.e. between 2 000 and 15 000[4] were provided with collecting systems[5] for urban waste water by 31 December 2005 at the latest.

6. Under Article 4(1) of the UWWTD, the Member States had to have ensured, inter alia, that urban waste water entering collecting systems are subject to secondary or equivalent treatment before discharge. Agglomerations of between 10 000 and 15 000 p.e. and agglomerations of between 2 000 and 10 000 p.e. for discharges to freshwater and estuaries had to have complied with that provision by 31 December 2005 at the latest.

7. Pursuant to Article 4(3) of the UWWTD such discharges shall satisfy the relevant requirements of Annex I.B to the UWWTD.

8. Annex I.B details the requirements for discharge from an urban waste water treatment plant to receiving waters in the following way:

'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.

…'

9. Under Article 15(1), first subparagraph, of the UWWTD, the competent authorities or appropriate bodies shall monitor, inter alia, discharges from urban waste water treatment plants. This is to verify compliance with the requirements of Annex I.B in accordance with the control procedures laid down in Annex I.D.

10. Section D of Annex I of the UWWTD details reference methods for monitoring and evaluation of results. Point 3 specifies that 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. For treatment plants which are of a size between 2 000 and 9 999 p.e., the minimum number is 12 samples during the first year. In subsequent years four samples are required if the samples collected during the first year comply with the UWWTD. If one of the four samples fails, 12 more samples must be taken in the following year. For treatment plants which are of a size between 10 000 and 49 999 p.e., the minimum number is 12 samples.

III. Procedure

11. By letter dated 29 May 2007, the Commission requested that the Hellenic Republic provide data regarding the implementation of the UWWTD within a period of six months. More specifically, these data were requested so that the Commission could evaluate compliance with Article 4 of the UWWTD. The request concerned agglomerations with a p.e. of more than 2 000.

12. After examining the data provided by the Hellenic Republic for the year 2007, the Commission came to the conclusion that 62 agglomerations had infringed Article 4 of the UWWTD.

4 All the agglomerations concerned by the present case have a p.e. that is between 2 000 and 15 000 — the lowest p.e. is 2 024 (agglomeration of Desfina) and the highest one is 10 786 (agglomeration of Chaniotis).

5 A 'collecting system' is defined in Article 2(5) of the UWWTD as a system of conduits which collects and conducts urban waste water.

13. By letter dated 5 October 2010, the Commission asked the Hellenic Republic for clarifications. The Hellenic Republic responded to that letter on 21 December 2010 by providing further information.

14. On 17 June 2011, the Commission issued a letter of formal notice indicating that the Hellenic Republic had failed to respect the obligations laid down in the UWWTD. The Hellenic Republic replied to that letter on 11 August 2011, providing further information about the relevant agglomerations.

15. On 1 June 2012 the Commission addressed a reasoned opinion to the Hellenic Republic stating that that Member State continued to infringe the UWWTD.

16. Following a further exchange of information, the Commission sent a supplementary reasoned opinion to the Hellenic Republic on 21 February 2014. It maintained that eight agglomerations, namely Prosotsani, Doxato, Eleftheroupoli, Vagia, Desfina, Galatista, Polychrono and Chaniotis, continued to fail to comply with Article 4 of the UWWTD.

17. On 26 June 2015, the Commission launched an infringement action pursuant to Article 258 TFEU. It sought the declaration that the Hellenic Republic failed to comply with its obligations under Article 4(1) and (3) of the UWWTD.

18. Written observations were submitted by the Hellenic Republic and the Commission. Both parties also presented oral argument at the hearing held on 25 January 2017.

IV. Assessment

19. This Opinion is structured as follows: First, I will provide a concise overview of the previous case-law that has dealt, explicitly or implicitly, with the link between the provisions of the UWWTD and Sections B and D of its Annex I (A). Second, I will try to systemise that case-law with regard to two key elements central to this action: the internal logic and structure of the UWWTD and the relationship between its provisions and Annex I (B.1), and the correlating obligations of the Member States in terms of samples that need to be provided (B.2). The third part (C) deals with the present case, addressing first the agglomerations with regard to which the failure to provide samples is not contested (C.1), and then turning to the contested ones (C.2).

A. Extant case-law

20. The issue of providing samples under the UWWTD has two central elements: first, the specific nature of the link between Articles 4 and 15 of the UWWTD on one hand, and Annex I.B and I.D on the other. Flowing from that is the question of the quantity and quality of samples to be provided by the Member States under each of these provisions.

21. The Court has already had several opportunities to take a position on the link between the respective provisions of the UWWTD and its Annex I.B and I.D.

22. In *Commission* v *Italy*[6] the Court stated that the fact that the requirements under Annex I.D to the UWWTD were satisfied allowed for the conclusion that Article 4 of that directive had been complied with.

6 Judgment of 19 July 2012, *Commission* v *Italy* (C-565/10, not published, EU:C:2012:476, paragraph 37).

23. Whether the reverse inference is also true, namely that compliance with Article 4 can be established only if the concerned Member State provides the number of samples collected pursuant to the method described in Annex I.D, was subsequently contested in *Commission* v *Belgium*. Belgium argued that, 'pursuant to Article 4 and Annex I.B [of the UWWTD], once a treatment plant serving an agglomeration has been brought into operation and the first analysis results show that the effluent composition conforms to the standards listed in Table 1 of Annex I to the [UWWTD], the obligations under that directive are fulfilled'. [7]

24. The Court decided the case without taking an explicit position on that point. The Court noted with regard to the specific agglomerations concerned that, 'on the date on which the application was lodged, they did have treatment plants but, contrary to what is required by Annex I.D to the [UWWTD], 12 samples had not been taken over the course of the first year of their operation'. Nevertheless, the Court then added that 'on the expiry of the period prescribed in the reasoned opinion, the two agglomerations at issue did not have treatment plants and that, consequently, they were not in compliance with the requirements of Article 4 of the [UWWTD]'. [8]

25. In *Commission* v *Portugal* ('*Commission v Portugal No I*') the Commission argued that 'the obligations of Member States under Article 4 of [the UWWTD] entail performing the controls provided for in Annex I.D to that directive, for which it is necessary to collect, over a period of one year, a minimum number of samples ...'. [9]

26. In the same case, the link between Article 4 and Sections B and D of Annex I was lucidly explored in the Opinion of Advocate General Cruz Villalón. He concluded that for the assessment of the Member States' obligations under Article 4 of the UWWTD, the relevant provision is Annex I.B, not Annex I.D. He stressed that Annex I.D relates to Article 15 of the UWWTD. That provision concerns post-installation monitoring. This entails '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'. [10] In order to establish whether a given treatment plant satisfies the requirements of Annex I.B 'it is not necessary to complete the sampling procedure laid down in Annex I.D'. [11]

27. Furthermore, Advocate General Cruz Villalón noted that requiring samples collected over one year in order to assess compliance with Article 4 would mean that those samples have to be provided by the dates specified in Article 4. That would in fact mean that the deadline by which agglomerations have to be equipped with collecting systems, as set out in Article 3, would have to be read as referring to one year before the dates actually foreseen. [12]

28. In *Commission* v *Portugal No I*, the Court embraced the interpretation suggested by the Advocate General. In response to the Commission's argument that compliance with Article 4 must be evidenced by a method laid out in Annex I.D, the Court noted that Article 4 of the UWWTD makes no reference to Annex I.D. Referring to the Advocate General, the Court noted that Annex I.D related to a 'continuing obligation aimed at ensuring that discharges satisfy "over time"' the specified quality requirements' of Annex I.B. [13] By contrast, it does not require that samples be collected over the period of one year. The Court added that 'where a Member State is able *to submit a sample* meeting the requirements set out in Annex I.B to [the UWWTD], the obligations arising under Article 4 of that directive must be deemed to be satisfied'. [14]

7 Judgment of 6 November 2014, *Commission* v *Belgium* (C-395/13, EU:C:2014:2347, paragraph 22).

8 Judgment of 6 November 2014, *Commission* v *Belgium* (C-395/13, EU:C:2014:2347, paragraphs 46 and 48).

9 Judgment of 28 January 2016, *Commission* v *Portugal* (C-398/14, EU:C:2016:61, paragraph 33).

10 Opinion of Advocate General Cruz Villalón in *Commission* v *Portugal* (C-398/14, EU:C:2015:625, point 43).

11 Opinion of Advocate General Cruz Villalón in *Commission* v *Portugal* (C-398/14, EU:C:2015:625, point 44).

12 Opinion of Advocate General Cruz Villalón in *Commission* v *Portugal* (C-398/14, EU:C:2015:625, point 37).

13 Judgment of 28 January 2016, *Commission* v *Portugal* (C-398/14, EU:C:2016:61, paragraph 37).

14 Judgment of 28 January 2016, *Commission* v *Portugal* (C-398/14, EU:C:2016:61, paragraph 39). Emphasis added.

29. The same interpretation was also embraced by the Court in *Commission* v *Spain*.[15] In that judgment, the Court recalled that when a Member State is able to provide one sample that complies with the requirements of Annex I.B to the UWWTD, the obligations flowing from Article 4 have to be considered as respected. That is because that provision does not require sampling to be conducted over one year. The Court then applied the same solution regarding the assessment of obligations under Article 5 of the UWWTD.[16]

30. However, the position that one sample suffices does not seem to have been fully embraced in *Commission* v *Hellenic Republic*.[17] In that judgment, the Court based its conclusion on whether the Hellenic Republic had infringed Article 4(3) of the UWWTD on the fact that that Member State failed to provide evidence in compliance with Annex I.D.[18]

31. In a subsequent case also concerning Portugal ('*Commission* v *Portugal No II*'),[19] an action was brought under Article 260(2) TFEU.[20] The Commission again maintained that for compliance with Article 4 of the UWWTD to be shown, assessment of samples must be carried out over the course of a year pursuant to Annex I.D, which establishes the minimum annual number of samples.[21]

32. Advocate General Kokott considered, in her Opinion in that case,[22] that 'it must not be inferred from the [UWWTD] that the implementation of Article 4 in relation to a specific treatment plant is at all conditional upon sampling. Rather, the duty to undertake regular sampling exists independently alongside the duty to carry out effective secondary treatment'.[23] She considered that 'sampling constitutes appropriate *evidence* that a treatment plant satisfies the requirements of the [UWWTD]'.[24]

33. Without taking an explicit position on the submission of the Commission in *Commission* v *Portugal No II*, the Court noted that as Portugal had taken samples in respect of the concerned agglomeration at regular intervals over several months, the discharges at issue met the requirements of Article 4(3) of the UWWTD.[25]

34. To sum up: after some initial ambiguity about the precise legal bearing of Annex I.D in *Commission* v *Italy*[26] and *Commission* v *Belgium*,[27] the Court distinguished between a one-off obligation relating to putting an installation into operation under Article 4 and the obligation of continued post-installation monitoring under Article 15 of the UWWTD in *Commission* v *Portugal No I*. It stated that one sample is enough for a Member State to show compliance with Article 4 of the UWWTD.

15 Judgment of 10 March 2016, *Commission* v *Spain* (C-38/15, not published, EU:C:2016:156, paragraph 24).

16 Article 5 of the UWWTD concerns so-called sensitive areas. Article 5(3) also establishes a link to Annex I.B.

17 Judgment of 15 October 2015, *Commission* v *Hellenic Republic* (C-167/14, not published, EU:C:2015:684).

18 The Court observed, in substance, that the Hellenic Republic failed to show that it had collected samples at regular intervals, as required by Annex I.D. That precluded, according to the Court, the possibility to verify whether requirements of Article 4(3) of the UWWTD were met. Judgment of 15 October 2015, *Commission* v *Hellenic Republic* (C-167/14, not published, EU:C:2015:684, paragraph 48).

19 Judgment of 22 June 2016, *Commission* v *Portugal* (C-557/14, EU:C:2016:471).

20 This action concerned the implementation of a previous judgment of 7 May 2009, *Commission* v *Portugal* (C-530/07, not published, EU:C:2009:292).

21 Judgment of 22 June 2016, *Commission* v *Portugal* (C-557/14, EU:C:2016:471, paragraph 43).

22 Opinion of Advocate General Kokott in *Commission* v *Portugal* (C-557/14, EU:C:2016:119).

23 Opinion of Advocate General Kokott in *Commission* v *Portugal* (C-557/14, EU:C:2016:119, point 29).

24 Opinion of Advocate General Kokott in *Commission* v *Portugal* (C-557/14, EU:C:2016:119, point 30).

25 Judgment of 22 June 2016, *Commission* v *Portugal* (C-557/14, EU:C:2016:471, paragraph 63).

26 Judgment of 19 July 2012, *Commission* v *Italy* (C-565/10, not published, EU:C:2012:476).

27 Judgment of 6 November 2014, *Commission* v *Belgium* (C-395/13, EU:C:2014:2347).

B. Evidencing compliance with Article 4 of the UWWTD

35. In view of the summary above, there is no denying that the initial case-law was perhaps not a bastion of clarity. However, since *Commission* v *Portugal No I*, that issue has been clarified.

36. This section provides a concise restatement of the main elements of the relevant legal framework, focusing again on the two key elements: the internal structure and logic of the relevant provisions of the UWWTD (1) and then on the details of the Member States' sampling obligations (2).

1. Internal structure of the UWWTD

37. As set out in the previous section of this Opinion, a clear distinction between Article 4 and Annex I.B on one hand, and Article 15 and Annex I.D on the other hand was drawn by Advocate General Cruz Villalón in his Opinion in *Commission* v *Portugal No I*. This was subsequently confirmed by the Court.

38. The Commission previously argued and still argues in its written pleadings in the present case that the method foreseen by the EU legislature for the post-installation monitoring under Annex I.D has to be applied also to assess the compliance of the one-off obligation under Article 4.

39. However, such an approach goes against the internal structure and logic of the UWWTD.

40. It is to be recalled that Articles 4 and 15 of the UWWTD have different purposes. Article 4 aims at ensuring that the Member States subject urban waste water in specified agglomerations to secondary or equivalent treatment by certain dates. Article 15 aims at ensuring that the Member States continue to subject those urban waste waters to secondary or equivalent treatment throughout the entire operational life of a given treatment plant.

41. In accordance with these different purposes, each of those provisions refers to a different section of Annex I to the UWWTD. These sections lay down details of the Member States' sampling obligations. Their content is adapted to the different aims that Articles 4 and 15 follow.

42. Article 4(3) refers to Annex I.B. The latter sets out the specific values of the secondary or equivalent treatment that have to be met when the collecting system is *put into operation*.

43. Article 15 refers to Annex I.D. The latter lays down control procedures to monitor the *continuous* compliance with values set out in Annex I.B once the collecting system has been put into operation. These post-installation monitoring rules are designed to operate on an annual basis. The Member States are required to collect samples of the treated urban waste water throughout the year and at regular intervals.

44. In sum: the assessment of the obligations under Article 4 and Annex I.B logically focuses on one point in time: the moment when the collecting system in question is put into operation. The assessment of the obligations under Article 15 and Annex I.D is by definition an ongoing process of indeterminate duration. In addition, Annex I.B continues to set the relevant substantive requirements (values) that have to be complied with subsequently, throughout the entire operational life of the collecting system.

2. Sampling obligation under Article 4 of the UWWTD

45. The question as to the specific details of the sampling obligations logically follows from the internal structure of the UWWTD as described above.

46. It has already been clarified that the Commission cannot require the Member States to collect 12 samples in one year pursuant to Annex I.D in order to verify compliance with Article 4 of the UWWTD.

47. The requirement previously advanced for 12 samples has now apparently been abandoned by the Commission. However, at the hearing, the Commission focused on the argument that, nevertheless, the samples provided by the Member States have to be *representative*.

48. Indeed, point 1 of Annex I.B states 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'.[28]

49. The Commission is thus right in stating that the samples required under Article 4, read in conjunction with Annex I.B, ought to be representative. However, the text of Annex I.B (or the UWWTD as such) does not detail what the notion of representative samples entails.

50. What then are 'representative samples'? Two dimensions of that notion need to be clarified: quantitative and qualitative.

51. As far as the *quantitative* dimension is concerned, meaning the number of samples, three points should be stressed.

52. First, as noted above, the internal structure of the UWWTD distinguishes between Articles 4 and 15. They both refer to different sections of Annex I. The number of the samples that can be required under each of the provisions must therefore logically *differ*. Had the EU legislature intended to condition the possibility to prove compliance with Article 4(3) by a full year of sampling, it would have used the same procedural solution as the one employed in Annex I.D.

53. Second, the number of samples that are to be provided under Annex I.B must also be *inferior* to those that need to be provided under Annex I.D. That again follows from the different logic of both provisions: the requirement for the post-installation ongoing monitoring obligations, designed to be met on an annual basis, is necessarily more demanding than proving that, at a given point in time, the installation has been brought into operation and started making urban waste water subject to secondary treatment or equivalent.

54. The set of values 'less than 12' may be quite clear in the realm of arithmetic of natural numbers. It may require, however, further clarification in terms of the evidence to be presented by the Member States within the UWWTD.

55. Third, that is why the logic and purpose of Article 4 of the UWWTD are relevant. As already outlined in the previous section of this Opinion, Article 4 and Annex I.B essentially zoom in at one given point in time and the corresponding verification: the putting into operation of the required secondary treatment of urban waste water by the required dates. As this is, in contrast to any ongoing later monitoring carried out under Article 15 of the UWWTD, essentially a one-shot verification, concentrated in one point in time, one sample should be enough.

56. Thus, in *Commission* v *Portugal No I*, the Court expressly confirmed that as regards the specific number of those samples, *one sample* that complies with the values set out in Annex I.B is enough to demonstrate compliance with Article 4 of the UWWTD.

28 Emphasis added.

57. In the light of the above elements, it cannot but be repeated that naturally, the assessment of evidence is by nature case-dependent. It has to take into account the individual facts of each case. However, in general, for the purpose of confirming that a Member State's collecting system complies with the requirements set out in Article 4(3) and Annex I.B, one sample is enough.

58. Nevertheless, it ought to be recalled that the language of Annex I.B uses the plural. It refers to representative *samples*, not a representative *sample*.

59. This element connects, however — at first glance perhaps somewhat surprisingly — not to the quantity of samples, but rather the internal *quality* and composition of the sample required.

60. As the Commission helpfully explained at the hearing, the use of the plural in Annex I.B reflects the fact that the assessment of compliance with Annex I.B for the purposes of Article 4 of the UWWTD requires two distinct types of sample: one for incoming waste water and the other for the outgoing treated effluent.

61. The Commission hence established a distinction between the quality of samples and their quantity. It admits that, in the light of the judgment in *Commission* v *Portugal No I*[29] one sample is enough in terms of quantity of samples. It stresses, however, the necessary *quality* of the sample provided.

62. Without prejudice to whether such argument can be raised for the purposes of the present proceedings (to which I will turn in Section C.2 of this Opinion at point 84 et seq.) I consider that in general, such an approach is in line with the language of Annex I.B. Indeed, point 1 of Annex I.B refers to 'samples of the incoming waste water and of treated effluent'.

63. In sum: to demonstrate compliance with Article 4 of the UWWTD, the Member State is obliged to provide at least one representative sample. The Commission can, in principle, request that a Member State provides a pair of samples, one for the incoming urban waste water and one for the treated effluent, in line with the wording of point 1 of Annex I.B. However, following *Portugal* v *Commission No I*, both elements of this pair may be collected, to the extent that it is technically feasible, at the same point in time. The sample is 'plural' meaning that it is composed of the two elements referred to above and therefore representative, but may be 'singular' in terms of all its elements being collected at one point in time.

C. The present case

64. Pursuant to established case-law, in an action for failure to fulfil obligations brought by the Commission under Article 258 TFEU, the Commission bears the burden of proof. It must provide the Court with all the information necessary to establish that an obligation has not been fulfilled. Whether a Member State has 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.[30]

65. In the present case, as confirmed by the Commission at the hearing, that period expired on 21 April 2014.

29 Judgment of 28 January 2016, *Commission* v *Portugal* (C-398/14, EU:C:2016:61).

30 See judgment of 28 January 2016, *Commission* v *Portugal* (C-398/14, EU:C:2016:61, paragraphs 47 to 49 and the case-law cited).

1. The agglomerations of Prosotsani, Doxato, Eleftheroupoli, Vagia and Galatista

66. The Hellenic Republic has not opposed the allegation of infringement in relation to the agglomerations of Prosotsani, Doxato, Eleftheroupoli, Vagia and Galatista. The Hellenic Republic admits that the necessary works for the construction or amelioration of the collecting systems have not yet been completed. Concerning the agglomerations of Prosotsani, Doxato, Eleftheroupoli and Vagia, the Hellenic Republic concedes that the requirements of the UWWTD will be met only once the ongoing works have been accomplished. In respect of the agglomeration of Galatista, the Hellenic Republic agrees that the operation of the collecting system does not comply with the UWWTD and has to be replaced.

67. In a procedure under Article 258 TFEU, it is for the Court to determine whether or not the alleged breach of obligations exists [31] even when the Member State concerned does not contest the infringement.

68. In the present case, the Hellenic Republic admits that the collecting systems in the agglomerations referred to above have not been completed or need updating. That position was in principle maintained during the oral hearing. There is therefore nothing contradicting the evidence adduced by the Commission as to the infringement of Article 4 of the UWWTD to the extent that the urban waste water in those five agglomerations was not subject to secondary or equivalent treatment before being discharged.

2. The agglomerations of Polychrono, Chaniotis, and Desfina

69. The failure to comply with Article 4 is contested with regard to the following three agglomerations:

70. For *Polychrono*, the Hellenic Republic provided 12 samples for the year 2012 and 12 samples for the year 2013. The Commission states that four samples provided for the year 2012 exceed the prescribed values. It further states that three samples provided for the year 2013 also exceed those values. According to the Commission, that amounts to more non-compliant samples than is authorised under Table 3 of Annex I. The Commission considers that the samples provided cannot be considered as representative because they have not been collected pursuant to Annex I.D. More specifically, no samples have been provided for January to April 2012, and January to April, November and December 2013. The Commission's position that the Hellenic Republic failed to provide samples showing compliance has not in principle changed in the light of the 16 samples that that Member State submitted for 2013 within the written stage of the proceedings in its defence.

71. Concerning *Chaniotis*, 12 samples have been provided by the Hellenic Republic for 2012. According to the Commission only one sample did not comply with the prescribed values. However, according to the Commission, the samples provided cannot be viewed as representative and collected at regular intervals because no sample was collected between January and April 2012. In addition, initially no sample was provided for 2013. Concerning the samples that the Hellenic Republic provided at the written stage of the proceedings in its defence, the Commission considers that those for 2013 fail to respect the prescribed values, and that those for 2014 were not collected at regular intervals.

31 Judgments of 22 June 1993, *Commission* v *Denmark*, (C-243/89, EU:C:1993:257, paragraph 30); of 3 March 2005, *Commission* v *Germany*, (C-414/03, EU:C:2005:134, paragraph 9 and the case-law cited); and of 6 October 2009, *Commission* v *Sweden*, (C-438/07, EU:C:2009:613, paragraph 53 and the case-law cited).

72. As far as *Desfina* is concerned, the Hellenic Republic provided four samples for 2011, two samples for 2012 and eight samples for 2013. The Commission notes that under Annex I.D, 12 samples should have been collected during 2012 because one of the samples collected during 2011 did not comply with the prescribed values. Similarly, as one of the samples collected in 2012 was found not to be in compliance, the Hellenic Republic should have recollected 12 samples during the year 2013. Next, the collected samples could not be taken at regular intervals as their number was not sufficient. Furthermore, one of the parameters of one of the samples provided for in 2013 did not comply with values set out in point 4 of Annex I.D to the UWWTD.

73. In other terms, in its written submissions, the Commission claims that to make a reliable assessment possible under Article 4 of the UWWTD, the Hellenic Republic should have provided, in respect of each of the agglomerations concerned, satisfactory results for a period that corresponds at least to a year following the putting of the respective collecting system into operation, pursuant to the methods set out in Annex I.D.

74. In the light of the reasoning outlined in the previous section, the Commission is mistaken in its argument. In whatever way one looks at the samples provided with regard to these three agglomerations, they do comply, in quantitative terms, with the requirements of Article 4 read in conjunction with Annex I.B. A larger number than one sample was provided.

75. At the hearing, the Commission was invited to comment upon the Court's ruling in *Commission* v *Portugal No I*. In the light of that judgment, the Commission agreed that one sample can constitute sufficient evidence of compliance with Article 4 of the UWWTD.

76. Making that concession, however, the Commission argues that the samples provided in the present case are *not representative* in terms of their quality.

77. First, the Commission explains that for a sample to be considered as representative, its collection must occur at a specific moment in time which needs to be assessed on a case-by-case analysis and which must in principle reflect the strongest pollution likely to occur within the concerned agglomeration (summer for agglomerations close to the sea, a period following the wine harvest for wine regions, and winter for agglomerations in mountains).

78. Such inflation of the notion of 'representative' must be rejected. By that *fiat*, the Commission essentially tries to reinsert the monitoring requirements of Annex I.D — which is clearly not applicable to Member States' obligations under Article 4 of the UWWTD — into Annex I.B through the back door.

79. As previously noted, the provision of one sample that complies with the requirements of Annex I.B is sufficient to show compliance under Article 4 of the UWWTD. Article 4 and Annex I.B do not mention anything about the moment at which the sample must be collected. The internal structure of the UWWTD requires that one-off sampling shall occur when the collecting system is put into place.

80. It ought to be stressed that nothing prevents the Commission from asking the concerned Member State to provide it with evidence of compliance with the requirements detailed in Section D of Annex I. However, that must be demanded under Article 15 of the UWWTD and not under Article 4. As the Hellenic Republic correctly noted in the present case, the Commission only pleaded infringement of Article 4, not of Article 15.

81. Second, the Commission further stated at the hearing that in order to assess the representative nature of one sample, the Commission also has to dispose of elements that can be mutually compared, namely information concerning the incoming waters and treated effluent. Without that data the experts cannot, according to the Commission, evaluate the representative character of the provided sample.

82. As noted above in points 60 to 62 of this Opinion, such a position can in general be upheld in the light of the language of point 1 of Annex I.B. Indeed, the text of point 1 of Annex I.B refers to 'representative samples of the incoming waste water and of treated effluent'.

83. In the context of the present case, however, these arguments were first developed by the Commission during the oral hearing.

84. According to established case-law, the action under Article 258 TFEU cannot be founded on any objections other than those stated in the pre-litigation procedure. The Court repeatedly held that the reasoned opinion and the application must have the same subject matter and be founded on the same objections. This is because the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under EU law and, on the other, to avail itself of its right to defend itself against the objections of the Commission. [32]

85. One could certainly formally argue that the subject matter of the action remained the same, that is, the failure of the Hellenic Republic to comply with its obligations under Article 4(1) and (3) of the UWWTD. However, the reality is that advancing that the samples provided by the Hellenic Republic were not representative as to their quality is a completely new argument. Materially, it entirely departs from the reasoning developed by the Commission up until then, restated with regard to the three contentious agglomerations above in points 70 to 73.

86. It ought therefore to be rejected. The Court at this stage of procedure is not in a position to verify any of the arguments advanced by the Commission. Even more importantly, allowing the Commission to depart so significantly from the key pillar of its action would hamper the opportunity for the Member State concerned to submit its observations and effectively preserve its defence rights. As the Hellenic Republic noted at the hearing, not only could it not previously take a position on the argument advanced by the Commission: the Commission also did not request the elements of evidence pleaded during the hearing as regards the other agglomerations with which the Commission was initially concerned at the pre-litigation stage of the present case. [33]

87. In conclusion therefore, it should be reiterated that the Commission in principle admits that, as regards the agglomerations of Polychrono, Chaniotis and Desfina, the Hellenic Republic was able to provide, at the end of the period laid down in the reasoned opinion, at least one sample that was compliant with requirements of Annex I.B as previously understood by the Commission.

88. I therefore consider that in respect of those agglomerations, the Commission failed to establish the infringement of Article 4 of the UWWTD on the part of the Hellenic Republic. To this extent, the present action should be dismissed.

V. Costs

89. Since each party succeeded on some and failed on other heads of their claim, I suggest to the Court to rule pursuant to Article 138(3), first sentence, of the Rules of Procedure and to order the parties to bear their own costs.

32 Judgments of 24 November 1992, *Commission* v *Germany* (C-237/90, EU:C:1992:452, paragraph 20); of 22 September 2005, *Commission* v *Belgium* (C-221/03, EU:C:2005:573, paragraphs 36 to 38 and cited case-law); and of 11 September 2014, *Commission* v *Germany* (C-525/12, EU:C:2014:2202, paragraph 21).

33 At the pre-litigation stage, the Commission was initially concerned with 62 agglomerations (see point 12 of this Opinion).

VI. Conclusion

90. For the reasons outlined above, I propose that the Court should:

(a) Declare that the Hellenic Republic has failed to fulfil its obligations under Article 4(1) and (3) of Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment as regards the agglomerations of Prosotsani, Doxato, Eleftheroupoli, Vagia and Galatista. In respect of the aforementioned agglomerations, the Hellenic Republic did not ensure, at the end of the period laid down in the reasoned opinion, that discharges from urban waste water treatment plants were subject to an adequate level of treatment as required under Annex I.B to that directive;

(b) Dismiss the action in relation to the agglomerations of Polychrono, Chaniotis and Desfina;

(c) Order the parties to bear their own costs.