Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

16 January 2014*

(Failure of a Member State to fulfil obligations — Directive 2002/91/EC — Energy performance of buildings — Articles 3, 7 and 8 — Incomplete transposition)

In Case C-67/12,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 9 February 2012,

European Commission, represented by K. Herrmann and I. Galindo Martin, acting as Agents,

applicant,

v

Kingdom of Spain, represented by A. Rubio González and S. Centeno Huerta, acting as Agents,

defendant,

THE COURT (Tenth Chamber),

composed of E. Juhász, President of the Chamber, D. Šváby (Rapporteur) and C. Vajda, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

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

gives the following

Judgment

1 By its application, the European Commission asks the Court to declare that, by failing to adopt all the laws, regulations and administrative provisions necessary to ensure compliance with Articles 3, 7 and 8 of Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings (OJ 2003 L 1, p. 65), or, in any event, by failing to notify the Commission of those measures, the Kingdom of Spain has failed to fulfil its obligations under the

* Language of the case: Spanish.

combined provisions of those articles and Article 29 of Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (OJ 2010 L 153, p. 13).

Legal context

European Union law

2 Article 3 of Directive 2002/91 provides as follows:

'Member States shall apply a methodology, at national or regional level, of calculation of the energy performance of buildings on the basis of the general framework set out in the Annex. Parts 1 and 2 of this framework shall be adapted to technical progress in accordance with the procedure referred to in Article 14(2), taking into account standards or norms applied in Member State legislation. …'

3 Article 7 of Directive 2002/91, which is entitled 'Energy performance certificate', provides in its paragraph 1:

'Member States shall ensure that, when buildings are constructed, sold or rented out, an energy performance certificate is made available to the owner or by the owner to the prospective buyer or tenant, as the case might be. The validity of the certificate shall not exceed 10 years.

…'

4 Article 8 of Directive 2002/91, which is entitled 'Inspection of boilers', provides:

'With regard to reducing energy consumption and limiting carbon dioxide emissions, Member States shall either:

(a) lay down the necessary measures to establish a regular inspection of boilers fired by non-renewable liquid or solid fuel of an effective rated output of 20 kW to 100 kW. Such inspection may also be applied to boilers using other fuels.

Boilers of an effective rated output of more than 100 kW shall be inspected at least every two years. For gas boilers, this period may be extended to four years.

For heating installations with boilers of an effective rated output of more than 20 kW which are older than 15 years, Member States shall lay down the necessary measures to establish a one-off inspection of the whole heating installation. On the basis of this inspection, which shall include an assessment of the boiler efficiency and the boiler sizing compared to the heating requirements of the building, the experts shall provide advice to the users on the replacement of the boilers, other modifications to the heating system and on alternative solutions; or

(b) take steps to ensure the provision of advice to the users on the replacement of boilers, other modifications to the heating system and on alternative solutions which may include inspections to assess the efficiency and appropriate size of the boiler. The overall impact of this approach should be broadly equivalent to that arising from the provisions set out in (a). Member States that choose this option shall submit a report on the equivalence of their approach to the Commission every two years.'

5 In accordance with Article 15(1) of Directive 2002/91, the Member States were required to bring into force the laws, regulations and administrative provisions necessary to ensure compliance with that directive by 4 January 2006 at the latest and forthwith to inform the Commission thereof. Directive 2010/31 repealed Directive 2002/91 with effect from 1 February 2012, without prejudice, however, to the obligations of the Member States relating to the time-limit for transposition into national law and application of Directive 2002/91.

Spanish law

6 Recital 8 in the preamble to Royal Decree 1027/2007 of 20 July 2007 approving the rules relating to heating installations in buildings (RITE) reads as follows:

'The rule approved in the present decree transposes in part Directive 2002/91 …, laying down the minimum energy performance requirements for heating installations in new and existing buildings and requiring regular inspections of boilers and air-conditioning systems.'

7 Technical Instruction 3.4.4 of Royal Decree 1027/2007 provides:

'1. The maintenance company shall advise the owner and shall recommend to him any improvements or modifications to be made as regards installation, operation and functioning that will provide for greater energy efficiency.

2. In addition, for installations with a rated heat output of more than 70 kW, the maintenance company shall, on a regular basis, monitor the course of energy and water consumption of the heating installation in order to detect any irregularities and to take appropriate corrective action. This information shall be stored for at least 5 years.'

8 Technical Instruction 4.3.1 of Royal Decree 1027/2007, which is entitled 'Frequency of inspections of heat generators', provides:

'1. Heat generators brought into service after the date of entry into force of the present RITE with a total rated thermal output equal to or exceeding 20 kW shall be inspected in accordance with the frequencies set out in Table 4.3.1.

Table 4.3.1 Frequency of inspections of heat generators

Rated heat output (kW)	Type of fuel	Frequency of inspection
$20 \leq P \leq 70$	Gas and renewable fuels	Every 5 years
	Other fuels	Every 5 years
$P > 70$	Gas and renewable fuels	Every 4 years
	Other fuels	Every 2 years

2. Installations with heat generators existing when the present RITE entered into force must undergo their first inspection in accordance with the timetable provided by the competent authority of an Autonomous Community on the basis of their output, type of fuel and age.'

Pre-litigation procedure

9 By letter of 24 February 2009, the Commission criticised the Kingdom of Spain on the ground that it had failed to transpose, so far as existing buildings were concerned, Articles 3 and 4 of Directive 2002/91.

10 By letter of 7 April 2009, the Kingdom of Spain acknowledged that, with regard to the energy performance certification of existing buildings, that directive was awaiting transposition.

11 On 29 January 2010, the Commission sent an additional letter of formal notice to the Kingdom of Spain in which it stated that it had not yet received notification of measures transposing Articles 7 and 8 of Directive 2002/91. In respect of Article 8 of that directive, the Commission noted that Royal Decree 1027/2007 set out the frequency of boiler inspections only in respect of boilers brought into service after the date on which that decree had entered into force and that it left it to the Autonomous Communities to establish the timetable for inspections of boilers which had already been installed. The Commission therefore took the view that, further to the formal notice of 24 February 2009, the Kingdom of Spain had failed to fulfil its obligations under Articles 7 and 8(a) of Directive 2002/91.

12 By letter of 22 July 2010, the Kingdom of Spain explained the reasons for the delay in the adoption of the draft Royal Decree on the certification of existing buildings and stated, with regard to the transposition of Article 8 of Directive 2002/91, that three Autonomous Communities had already published the decrees setting the rules governing the application of Royal Decree 1027/2007 in their respective territories and that the other decrees were in the process of being adopted.

13 On 25 November 2010 the Commission delivered a reasoned opinion in which it concluded that, by not transposing in full Articles 3, 7(1) and 8(a) of Directive 2002/91 into Spanish law, the Kingdom of Spain had failed to fulfil its obligations under that directive and called on that Member State to take the necessary measures within two months of its notification.

14 In its letter of 31 January 2011, the Kingdom of Spain replied that the adoption of the draft Royal Decree on the certification of existing buildings would complete the transposition of Articles 3 and 7 of Directive 2002/91. So far as Article 8 of that directive was concerned, the Kingdom of Spain stated that the Autonomous Communities were not required to notify the Commission of the timetables for boiler inspections. It added, moreover, that it had decided to have recourse to the two options provided for in Article 8 of that directive.

15 By letter of 29 April 2011, the Kingdom of Spain once again notified the Commission of a draft Royal Decree on the certification of existing buildings.

16 As it took the view that the Kingdom of Spain was still in default of its obligations when the period laid down in the reasoned opinion had expired, the Commission brought the present action.

The action

17 By a separate document of 20 April 2012, the Kingdom of Spain raised a plea of inadmissibility by which it asks the Court to declare the action inadmissible so far as concerns the alleged failure to fulfil obligations relating to Article 8 of Directive 2002/91 as a whole and, in the alternative, to declare the action inadmissible with regard to the alleged failure to fulfil obligations under Article 8(b) of that directive.

18 By decision of 16 October 2012, the decision on the plea of inadmissibility was reserved for final judgment and the Kingdom of Spain was requested to submit a defence.

The complaint alleging failure to transpose Articles 3 and 7 of Directive 2002/91

Arguments of the parties

19 The Commission submits that the Kingdom of Spain has failed to adopt all the measures necessary to ensure compliance with Articles 3 and 7 of Directive 2002/91 and, in any event, failed to notify it of those measures, in so far as Royal Decree 1027/2007 includes rules on the general framework for a methodology for calculating the energy performance of buildings only in respect of new buildings and does not cover existing buildings. The Commission emphasises that, in its reply to the reasoned opinion, the Kingdom of Spain acknowledged, essentially, that full transposition into Spanish law has not yet been completed and that it merely stated that full transposition would occur when the draft Royal Decree on the certification of existing buildings is adopted.

20 The Commission submits that the Kingdom of Spain has withdrawn its defence so far as concerns the failure to fulfil obligations under Articles 3 and 7 of Directive 2002/91 and that the observations submitted in that regard in the defence and rejoinder were lodged out of time, since the plea of partial inadmissibility of the action lodged by a separate document does not relate to the failure to fulfil obligations under Articles 3 and 7 of Directive 2002/91.

21 The Kingdom of Spain denies that it has withdrawn its defence in respect of Articles 3 and 7 of Directive 2002/91. It states that Article 91 of the Court's Rules of Procedure provides that a plea of inadmissibility must be lodged by a separate document and makes no distinction according to whether the plea of inadmissibility relates to the action in its entirety or to part of the action only. A plea of partial inadmissibility may therefore, it submits, be lodged by a separate document without any negative consequences following as a result.

Findings of the Court

22 As the Kingdom of Spain has raised, by a separate document, a plea of inadmissibility relating only to the complaint concerning Article 8 of Directive 2002/91, without submitting any arguments at the present stage on the admissibility or substance of the complaint relating to Articles 3 and 7 of that directive, the question arises as to whether the Kingdom of Spain is to be regarded as being precluded from submitting a defence in respect of the latter complaint.

23 It should be borne in mind, in this regard, that, in accordance with Article 40 of the Rules of Procedure, in the version in force at the date of commencement of the present action, the defendant must lodge a defence within one month after the application has been served on him. Article 91 of the Rules of Procedure provides, however, for the possibility to apply to the Court, by a separate document, for a decision on a preliminary objection or other preliminary plea not going to the substance of the case.

24 The plea of inadmissibility makes it possible, for reasons of economy of procedure, to confine the debate and examination, at an early stage in the proceedings, to the question whether the action at issue is admissible. Thus, it is possible, as a result of the preliminary issue, to avoid a situation in which the parties' pleadings and the Court's examination go into the substance of the case, even though the action is inadmissible (see Case C-197/09 RX-II *Review of M* v *EMEA* [2009] ECR I-12033, paragraph 48).

25 On the other hand, where the action is declared admissible because the plea of inadmissibility is rejected or where a decision on that plea is reserved for the final judgment, there must be an exchange of arguments on the substance of the application at a subsequent stage. Indeed, the

provisions referred to above expressly provide that the President is to prescribe new time-limits for further steps in the proceedings if an application for a ruling on a plea of inadmissibility is rejected or the decision on that application is reserved (see *Review of M* v *EMEA*, paragraph 49).

26 It follows from Article 40 of the Rules of Procedure, read in conjunction with Article 91 thereof, in the version in force at the date of commencement of the present action, that further examination of the substance can relate only to the part of the action covered by the plea of inadmissibility, in so far as the defendant failed to lodge an additional defence within the period of one month laid down by that Article 40.

27 Even if a plea of inadmissibility concerning only part of the action is well founded, it cannot lead to dismissal of that action in its entirety and there can therefore be no justification for the defendant's failure to submit its defence arguments relating to the part of the action not covered by the plea of inadmissibility within the period laid down in Article 40 of the Rules of Procedure.

28 If the defendant takes the view that only part of the action is inadmissible, it must therefore either challenge the admissibility of that part of the action in its defence or, within the period set for responding to the application, raise a plea of partial inadmissibility and submit a statement as to the substance in respect of the part of the action which is not covered by that plea of inadmissibility, failing which the defendant will be precluded from raising that matter.

29 As the Kingdom of Spain's observations relating to Articles 3 and 7 of Directive 2002/91 were submitted on 26 December 2012 – that is to say, more than eight months after the expiry of the period, as extended, set for the submission of observations in response to the application – it follows that they were lodged out of time and therefore cannot be taken into consideration.

30 Nevertheless, it is for the Court, in any event, to determine whether or not the alleged breach of obligations exists, even if the Member State concerned does not deny the breach (see Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 20, and Case C-438/07 *Commission* v *Sweden* [2009] ECR I-9517, paragraph 53).

31 In that regard, it should be borne in mind that, according to settled case-law, 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, and that the Court cannot take account of any subsequent changes (see, inter alia, Case C-473/10 *Commission* v *Hungary* [2013] ECR, paragraph 96 and the case-law cited).

32 In the present case, suffice it to note that it is apparent from the pre-litigation procedure and from the application that the Kingdom of Spain acknowledges, in essence, that, so far as concerns existing buildings, which alone are covered by the complaint raised by the Commission, full transposition of Articles 3 and 7 of Directive 2002/91 into Spanish law will be completed only after a draft Royal Decree has been adopted.

33 That, however, had not happened by the date on which the period set in the reasoned opinion expired, that is to say, 25 January 2011.

34 It follows that the complaint alleging failure to transpose Articles 3 and 7 of Directive 2002/91 is well founded.

The complaint alleging failure to transpose Article 8 of Directive 2002/91

Admissibility

– Arguments of the parties

35 The Kingdom of Spain claims, primarily, that the action is inadmissible in this regard in that it is inconsistent and breaches Article 38 of the Rules of Procedure in so far as, during the pre-litigation procedure, the Commission alleged merely that it had failed to fulfil its obligations under Article 8(a) of Directive 2002/91, even though Article 8(b) of that directive provides for another option by which to achieve the objective which it sets. According to the Kingdom of Spain, in order to claim that it failed to fulfil its obligations under Article 8, the Commission ought to have satisfied itself that the Kingdom of Spain had failed to transpose Directive 2002/91 by means of either the first or the second option.

36 In the alternative, the Kingdom of Spain claims that the action is inadmissible, so far as concerns Article 8(b) of Directive 2002/91, in that that provision was not referred to in the reasoned opinion.

37 As regards the main plea of inadmissibility, while the Commission does not dispute the fact that Member States may transpose one or other of the options referred to in Article 8 of Directive 2002/91, it does point out that, when the additional letter of formal notice was sent, the Kingdom of Spain had already notified it of certain national measures which constituted a partial transposition of Article 8(a) of that directive.

38 In that context, the Commission claims that the Kingdom of Spain understood perfectly the extent of the alleged failure to fulfil obligations and that there is no error of reasoning with regard to the fact that that Member State is alleged to have failed to transpose in full the option provided for in Article 8(a) of Directive 2002/91, without mentioning that that Member State omitted to communicate any measure relating to the option provided for in Article 8(b).

39 So far as concerns the plea of inadmissibility raised in the alternative, the Commission takes the view that the arguments put forward in the application relating to Article 8(b) of Directive 2002/91 do not alter the subject-matter of the failure to fulfil obligations as set out during the pre-litigation procedure.

– Findings of the Court

40 The Kingdom of Spain claims, primarily, that the complaint alleging failure to transpose Article 8 of Directive 2002/91 is inconsistent and breaches Article 38 of the Rules of Procedure, in the version in force at the date of commencement of the present action, in that, during the pre-litigation procedure and in the reasoned opinion, the Commission alleged merely that the Kingdom of Spain had failed to transpose in full Article 8(a) of that directive, even though that provision sets out only one of the two options made available to Member States to attain the objective pursued by that article, that is to say, to reduce energy consumption.

41 It should be borne in mind, in this regard, that it is clear from Article 38(1)(c) of the Rules of Procedure and from the case-law relating to that provision that an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, and that that statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It follows that the essential points of law and of fact on which an action is based must be indicated coherently and intelligibly in the application itself and that the heads of claim must be set out unambiguously so that the Court does not rule *ultra*

petita or indeed fail to rule on a complaint (see, inter alia, judgment of 12 February 2009 in Case C-475/07 *Commission* v *Poland*, paragraph 43, and Case C-165/08 *Commission* v *Poland* [2009] ECR I-6843, paragraph 42).

42 The Court has also held that, where an action is brought under Article 258 TFEU, the application must set out the complaints coherently and precisely, so that the Member State and the Court can know exactly the full extent of the alleged infringement of European Union law, a condition which must be satisfied if the Member State is to be able to present an effective defence and the Court to determine whether there has been a breach of obligations, as alleged (see, inter alia, Case C-165/08 *Commission* v *Poland*, paragraph 43).

43 In the present case, in both the additional letter of formal notice of 29 January 2010 and the reasoned opinion, the Commission stated clearly that Article 8 of Directive 2002/91 leaves it to the Member States to decide between the two options provided for in that provision. The Commission subsequently stated that, while Royal Decree 1027/2007, notified by the Kingdom of Spain, sets out the frequency of boiler inspections in respect of boilers brought into service after the date on which that decree entered into force and transposes the option provided for in Article 8(a), it leaves it to the Autonomous Communities to establish the timetable for inspections of existing boilers.

44 In that context, the fact that the Commission concluded, in the reasoned opinion, that there had been a breach only of Article 8(a) of Directive 2002/91, rather than of Article 8 as a whole, does not constitute either an inconsistency or an error of reasoning. In view of the fact that the Kingdom of Spain had already communicated transposition measures in respect of Article 8(a) of Directive 2002/91, which the Commission, however, considered to be insufficient, the Commission concluded that the option provided for in that provision had not been transposed in full.

45 Moreover, it is apparent from the documents before the Court that the Kingdom of Spain was in a position to understand the full extent of the alleged failure to fulfil obligations and was able fully to exercise its rights of defence as from the pre-litigation procedure.

46 Thus, in its reply of 22 July 2010 to the additional letter of formal notice, the Kingdom of Spain merely replied that three Autonomous Communities had already published the decrees setting the rules governing the application of Royal Decree 1027/2007 on the basis of their respective powers and that the other decrees were undergoing administrative processing. The Kingdom of Spain therefore did not challenge the Commission's assessment of its intention to limit the transposition of Article 8 of Directive 2002/91 to Article 8(a) thereof.

47 In the light of the foregoing, the Commission did not breach Article 38 of the Rules of Procedure, in the version in force at the date of commencement of the present action, by alleging that the Kingdom of Spain had failed to transpose in full the option provided for in Article 8(a) of Directive 2002/91, without mentioning that that Member State had omitted to communicate any measures relating to the option provided for in Article 8(b) thereof.

48 The main plea of inadmissibility must therefore be rejected.

49 The alternative plea of inadmissibility, submitting that the complaint is inadmissible in so far as Article 8(b) of Directive 2002/91 is concerned, must also be rejected.

50 On the one hand, the Commission claims, in the reasoned opinion, that the Kingdom of Spain failed to adopt the measures necessary to ensure compliance with Article 8 of Directive 2002/91, by focusing on point (a) of that provision, on the ground that that Member State had already notified it of transposition measures relating to the option provided for in that provision.

51 On the other hand, as the Kingdom of Spain subsequently claimed, in reply to the reasoned opinion, that it had chosen to transpose the obligations under Article 8 of Directive 2002/91 by having recourse to the two options set out in Article 8(a) and (b), the Commission was required to examine, in its application, whether the measures taken by the Kingdom of Spain constituted full transposition of Article 8 in the light of both Article 8(a) and (b).

52 It is settled case-law that the letter of formal notice from the Commission to the Member State concerned and then the reasoned opinion issued by it delimit the subject-matter of the dispute, with the result that that subject-matter cannot subsequently be extended. Consequently, the reasoned opinion and the application must be based on the same complaints (see, inter alia, Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 55, and Case C-139/00 *Commission* v *Spain* [2002] ECR I-6407, paragraph 18).

53 However, that requirement cannot be stretched so far as to mean that in every case the statement of the complaints set out in the letter of formal notice, the wording of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings, as defined in the reasoned opinion, has not been extended or altered (see, inter alia, *Commission* v *Germany*, paragraph 56, and *Commission* v *Spain*, paragraph 19).

54 In the present case, it must be held, in the light of the entire pre-litigation procedure, that the failure to fulfil obligations alleged by the Commission concerned Article 8 of Directive 2002/91 as a whole. Consequently, while the Commission replied expressly only to the arguments concerning the transposition of Article 8(a) of that directive, it is clear that the reasoned opinion is based also on an implicit finding that Article 8(b) of that directive was not transposed.

55 The Commission's complaints relating to Article 8(b) of Directive 2002/91 did not therefore extend the subject-matter of the dispute.

56 It follows that the complaint relating to the non-transposition of Article 8 of Directive 2002/91 is admissible.

Substance

– Arguments of the parties

57 The Commission takes the view, first, that Royal Decree 1027/2007 constitutes merely an incomplete transposition of Article 8(a) of Directive 2002/91 because it directly sets out the measures for regular inspections of boilers only in respect of boilers brought into service after that decree had entered into force and leaves it to the Autonomous Communities to establish the timetable for inspections of boilers in already existing installations.

58 As regards, second, the Kingdom of Spain's argument that it chose to transpose Article 8 of Directive 2002/91 by having recourse to both options set out in that provision, the Commission claims, first of all, that those two options are alternative solutions.

59 The Commission states, next, that the Kingdom of Spain had not previously claimed to have chosen that combined method for transposing Article 8 of Directive 2002/91 into national law and that it is apparent, moreover, from recital 8 in the preamble to Royal Decree 1027/2007 that the objective of the latter was to transpose the option provided for in Article 8(a) of that directive. The Commission points out that, in its reply of 22 July 2010 to the additional letter of formal notice, the Kingdom of Spain referred solely to decrees of the Autonomous Communities – some of which were being processed – concerning the inspection of boilers, despite the fact that the provisions intended to transpose Article 8(b) of the directive into Spanish law were already in force on that date.

60 Lastly, with regard to the alleged transposition measures in respect of Article 8(b) of Directive 2002/91, the Commission observes that the Kingdom of Spain no longer invokes the 'action plan' referred to in its reply to the reasoned opinion and that that plan was not notified. The Commission also states that the duty to provide energy advice set out in Technical Instruction 3.4.4 of Royal Decree 1027/2007 is a very general obligation which cannot be regarded as constituting transposition of Article 8(b) of Directive 2002/91.

61 The Kingdom of Spain submits, first, that Article 8 of Directive 2002/91 was transposed by means of Royal Decree 1027/2007.

62 The Kingdom of Spain claims, in this regard, that Directive 2002/91 imposes solely the obligation to take 'the necessary measures to establish a regular inspection of boilers', but not the obligation to communicate the timetables established for that purpose. However, Royal Decree 1027/2007 not only imposes the specific obligation to undertake regular inspections but also determines the frequency on the basis of the output of the boiler and the type of fuel used, with the only power delegated to the Autonomous Communities being to determine, specifically, the first inspection of existing installations.

63 The Kingdom of Spain claims, second, that it has carried out its duty under Article 8 of Directive 2002/91, in so far as Royal Decree 1027/2007 lays down the obligation to undertake regular inspections and sets out a series of measures designed to reduce energy consumption and to limit carbon dioxide emissions. It refers, in that regard, to Technical Instruction 3, which imposes an obligation to carry out an annual inspection and to provide advice to owners on any improvements or modifications to be made to the installations in question.

64 In its rejoinder, the Kingdom of Spain refers to the forthcoming adoption of a draft Royal Decree amending certain articles and technical instructions in the rules relating to heating installations in buildings approved by Royal Decree 1027/2007, according to which the frequency of inspections of heating and hot-water installations is no longer established by the Autonomous Communities but for the whole of the national territory.

– Findings of the Court

65 It should be borne in mind at the outset that it is common ground that Article 8 of Directive 2002/91 concerns both new buildings and existing buildings and that the Commission alleges only that the Kingdom of Spain failed to take, or in any event failed to communicate, the measures necessary in respect of existing buildings.

66 As regards, first, the Kingdom of Spain's assertion that Article 8 of Directive 2002/91 was transposed by means of Royal Decree 1027/2007, suffice it to note that that decree directly sets out measures for regular inspections of boilers only in respect of boilers brought into service after the date on which that decree entered into force and leaves it to the Autonomous Communities to establish the timetable for inspections of boilers in already existing installations.

67 In its reply to the additional letter of formal notice, the Kingdom of Spain claimed, in that regard, that three Autonomous Communities had already published decrees setting the rules governing the application of Royal Decree 1027/2007 in their respective territories and that the other decrees were in the process of being adopted.

68 Contrary to what the Kingdom of Spain claims in its defence, it is apparent from the wording of Technical Instruction 4.3.1 of Royal Decree 1027/2007 that it is for the Autonomous Communities to set not only the date of the first inspection but also the frequency of inspections on the basis of output, type of fuel and age of the boiler.

69 Likewise, the argument that the timetable and information relating to its enforcement need not be notified to the Commission cannot be accepted.

70 Directive 2002/91 provides for the regular inspection of all boilers and must be interpreted as meaning that, even with regard to boilers in respect of which that directive does not set the minimum frequency of inspections, the Member States are also required to set a specific frequency of inspections and to notify the Commission of the measures adopted in order that the Commission can verify that those measures make it possible to realise the objectives laid down in that directive.

71 So far as concerns, second, the Kingdom of Spain's argument that Article 8 of Directive 2002/91 has been transposed in full by Royal Decree 1027/2007 in conjunction with a series of measures set out in Technical Instruction 3.4.4 of Royal Decree 1027/2007, designed to reduce energy consumption, it should be observed that the two options provided for in Article 8(a) and (b) respectively are alternative options, with the result that Member States must transpose, in full, one or the other, and cannot merely transpose both options in part. The adoption of certain measures relating to Article 8(a) and of certain measures relating to Article 8(b) cannot therefore constitute a full transposition of Directive 2002/91.

72 Moreover, the duty to provide energy advice set out in Technical Instruction 3.4.4 of Royal Decree 1027/2007 is a very general obligation which cannot be regarded as constituting transposition of Article 8(b) of Directive 2002/91, as it does not refer specifically to a duty to provide advice on either the replacement of the boiler or other alternative solutions. Likewise, although the option provided for in Article 8(b) is subject to the condition that the overall impact of that approach should be broadly equivalent to that arising from the provisions set out in Article 8(a), the duty to provide advice set out in Technical Instruction 3.4.4 of Royal Decree 1027/2007 is imposed on maintenance companies, whereas Article 8(a) of Directive 2002/91, in conjunction with Article 10 thereof, requires regular inspections by independent experts.

73 Lastly, it must be noted that, in its rejoinder, the Kingdom of Spain acknowledges, essentially, the inadequacy of the measures adopted to date and merely claims that the procedure for the adoption of a draft Royal Decree amending Royal Decree 1027/2007 and setting out directly, for the whole of the national territory, the frequency of inspections of existing installations is still ongoing.

74 The complaint alleging a failure to transpose Article 8 of Directive 2002/91 in respect of existing buildings is therefore well founded.

75 It follows from all of the foregoing that the action is well founded.

76 It must consequently be held that, by failing to adopt, within the prescribed period, all the laws, regulations and administrative provisions necessary to ensure compliance with Articles 3, 7 and 8 of Directive 2002/91, the Kingdom of Spain has failed to fulfil its obligations under those provisions.

Costs

77 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has applied for costs and the Kingdom of Spain has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **Declares that, by failing to adopt, within the prescribed period, all the laws, regulations and administrative provisions necessary to ensure compliance with Articles 3, 7 and 8 of Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings, the Kingdom of Spain has failed to fulfil its obligations under those provisions;**

2. **Orders the Kingdom of Spain to pay the costs.**

[Signatures]